IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 2

Item No.7 - IA 731 of 2021
In
CP(IB) 248 of 2018

Proceedings under Section 60(5) IBC

IN THE MATTER OF:

Abhishek Nagori Liquidator of Osaka Pharmaceauticals Pvt Ltd **........Applicant**

V/s

Sachin Bhandari & Anr. **........Respondent**

Order delivered on 17/05/2023

Coram:

Mr. Deep Chandra Joshi, Hon'ble Member(J)
Mr. Ajai Das Mehrotra, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.

-SD-

AJAI DAS MEHROTRA
MEMBER (TECHNICAL)

-SD-

DEEP CHANDRA JOSHI
MEMBER (JUDICIAL)

NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
(COURT NO. II)

IA/731/2021
IN
CP (IB) 248/9/NCLT/AHM/2018

(Under Section 60(5)(c) of the Insolvency & Bankruptcy Code, 2016 read with Regulation 32(e) and 32A of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 and Rule 11 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the matter of:
Osaka Pharmaceutical Private Limited
through its Liquidator
Abhishek Nagori

…Applicant

Versus

Sachin Bhandari
Successful Bidder of
Osaka Pharmaceutical Private Limited&Ors.

…Respondents

In the matter of:
Mr. Nimesh Shah of Western Pharma

…Operational Creditor

Versus

Osaka Pharmaceutical Private Limited

…Corporate Debtor

Order Pronounced on: 17/05/2023

Coram:
DEEP CHANDRA JOSHI,
HON'BLE MEMBER (JUDICIAL)
AJAI DAS MEHROTRA,
HON'BLE MEMBER (TECHNICAL)

MEMO OF PARTIES

Osaka Pharmaceutical Private Limited
through its Liquidator
Abhishek Nagori
Having Address at:
330/348, 3rd Floor,
Tower-A, Atlantis-k-10,
Opp. Vadodara Central,
Sarabhai Main Road,
Vadodara, Gujarat-390007.

…Applicant

Versus

1. **Sachin Bhandari**
   Successful Bidder of
   Osaka Pharmaceutical Private Limited
   Having Address at:
   B-202, 203 Park Side 2 CHS Limited,
   Raheja Estate, Kulupadi Road,
   Borivali East, Mumbai-400066.

2. **Income Tax Department**
   Through Commissioner/Principal Commissioner
   Having Address at:
   Circle 2(1)(1), Vadodara,
   Aayakar Bhawan,
   Baroda.DCTT2.1.1
   Gujarat.

…Respondents

Present:

For the Applicant/Liquidator:	Mr. Vishal Dave, Adv. a/w. Mr. Mayur Jugtawat, Adv.
For the Respondent:	Mr. NipunSinghvi, Adv.

ORDER

1.1 The instant Interlocutory Application is filed under Section 60(5)(c) of the Insolvency & Bankruptcy Code, 2016 (for brevity 'Code') read with Regulation 32(e) and 32A of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 and Rule 11 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, by the Liquidator of corporate debtor i.e., M/s. Osaka Pharmaceutical Private Limited (for brevity 'Applicant') for seeking certain reliefs with regard to sale of the corporate debtor as 'going concern' in liquidation to the Successful bidder of the corporate debtor.

1.2 Earlier IA 156(AHM) 2021 was filed by the successful auction purchaser, claiming reliefs and concessions, vide order dated 21.09.2021, the said IA was disposed of with the following observation:

> *"This application is filed by the Successful auction bidder, which in our view, should be filed by the Liquidator as auction sale is complete. In this situation, we grant liberty to the liquidator to file an appropriate application. This application, is not maintainable.*
> *Accordingly, IA 156/2021 stands disposed of as it is not maintainable."*

Thereafter, the successful auction purchaser filed an appeal before Hon'ble NCLAT against the said order dated 21.09.2021. However, the applicant stated before Hon'ble NCLAT that they do not wish to prosecute their appeal as now the Liquidator himself has filed IA 731 of 2021 before

NCLT, Ahmedabad. The Hon'ble NCLAT accordingly dismissed the appeal with observation as under:

> *"...*
> *...*
> *...*
> *We have no doubt that the 'NCLT' shall proceed to dispose of the application filed by the Liquidator in accordance with law."*

2. The brief facts of the case are as under -:

   a) An Operational Creditor (Mr. Nimesh Shah of Western Pharma) had filed an application under section 9 of the Code for initiation of the Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") of M/s. Osaka Pharmaceutical Private Limited which was admitted vide order dated 10.10.2018, and Mr. Hiten M. Parikh was appointed as Interim Resolution Professional('IRP').

   b) IRP made a public announcement in Form A on 15.10.2018 and collated the claims received from the creditors and constituted the COC comprised of the secured creditors as per the report filed by the IRP with the Adjudicating Authority.

   c) In the 1st COC meeting held on 12.11.2018, the COC member approved the resolution for replacement of IRP and appointed Mr. Abhishek Nagori as the Resolution Professional of the corporate debtor. IA 27 of 2018 was filed for the replacement of IRP, which was allowed by the Adjudicating Authority vide order dated 11.01.2019.

d) The COC passed the resolution for publication of Form G which was published on 22.02.2019 and the last date for submission of Expression of Interest('EOI') was 09.03.2019. After, publication of Form-G on 22.02.2019, no EOI was received from any prospective resolution applicant. The COC in its 2nd meeting held on 20.02.2019, passed the resolution for seeking extension of the CIRP for further 90 days as 180 days of CIRP period was expiring on 07.04.2019. In the pursuant of said resolution, the Resolution Professional filed an IA 190 of 2019 for extension of CIRP period for further 90 days from 07.04.2019, which was allowed by the Adjudicating Authority vide order dated 05.04.2019.

e) The COC in its 4rd meeting held on 09.05.2019passed the resolution for the publication of Form-G. For the second time, Form-G was published on 10.05.2019 and last date of receipt of EOIs was specified as 25.05.2019 and the last date for submission of resolution plan was fixed as 03.07.2019. Even after publication of Form-G for the second time, no EOI was received from any prospective resolution applicant by the Resolution Professional.

f) In the 6th COC meeting held on 06.07.2019, COC passed resolution for liquidation of the corporate debtor due to non-receipt of EOI from any prospective resolution applicant, and also passed the resolution to appoint Resolution Professional as liquidator of the corporate debtor.

g) In pursuance of the 6th COC meeting, the Resolution Professional filed IA 439 of 2019 for liquidation of the corporate debtor and appointment of Resolution Professional as liquidator. The adjudicating authority disposed IA 439 of 2019 on 30.09.2019 approving liquidation and with the directions to first try sale of CD as a "going concern". Through the said order, Resolution Professional was appointed as the liquidator of the corporate debtor.

3. The Liquidator gave necessary public announcements as required under Regulation 12 of the Liquidation Regulation, 2016 in the leading newspaper on 05.10.2019, inter alia, inviting claims from all stakeholders and Creditors of the Corporate Debtor.

4. The liquidator constituted the stakeholders' consultation committee (SCC) as per Regulation 29 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

5. The SCC in its 4th meeting held on 29.09.2020, resolved to 'sale the corporate debtor as going concern' or 'set of assets collectively' at reserve price of Rs. 12.32 cr. and try to dispose of the assets of the corporate debtor. The copy of the minutes of the said meeting were annexed with the application.

6. In pursuance of the 4th SCC meeting, the liquidator made the 8th public announcement on 30.10.2020, and e-auction was conducted on 26.11.2020 and the said e-auction was extended by applicant through

issuance of 'Corrigendum to E-auction Sale Notice-Change in Dates' vide letter dated 24.11.2020 and the said e-auction was extended by 16.12.2020.

7. The applicant submits that the applicant issued the public announcement, E-auction Sale Notice, and e-auction process information document on 30.10.2020 and fixed the Earnest Money Deposit ('EMD') of Rs. 1,23,20,000/- for the Sale of the corporate debtor as going concern along with all its assets and also fixed the Earnest Money Deposit of Rs. 1,23,20,000/- for Sale of the set of assets, collectively. Subsequently, the applicant conducted the E-auction process, to sell the corporate debtor as a going concern or Sale of set of assets collectively as the options stipulated under Regulation 32 of the Liquidation Regulations on an "as is where is basis", "as is what is basis", "whatever there is basis" and "no recourse basis" as per the Sale Notice.

8. It is submitted by the applicant that the successful bidder (Sachin Bhandari) participated in the 8th e-auction and the successful bidder deposited the EMD of Rs. 1,23,20,000/- for the Sale of the corporate debtor as going concern along with all its assets.

9. The applicant submits that the applicant issued letter of Intent and confirmation of sale on 22.12.2020 for the respondent successful bidder and also requested to deposit the remaining amount of Rs.

11,08,80,000/- within 90 days i.e., 21.03.2021, provided that payment made after 30 days i.e., 20.01.2021 shall attract interest @12% per annum. The Successful bidder has paid remaining said amount on 09.03.2021. Copy of Letter of Intent was annexed with the application.

10. As the liquidation period was expiring on 13.12.2020, the applicant filed IA 848 of 2020 for the extension of liquidation period upto 365 days from the 13.12.2020, which was allowed by the Adjudicating Authority vide order dated 10.02.2021.

11. This application is filed on 20.10.2021 and vide order dated 29.10.2021, this Adjudicating Authority had issued the notice to the Income Tax Department.

12. IA 195 of 2022 was filed by the liquidator for extension of the liquidation period from 10.02.2022, six months extension of liquidation, period from 11.02.2022 was allowed by the Adjudicating Authority vide order dated 07.03.2022.

13. Due to pendency of this application, the liquidator filed IA 687 of 2022 for further extension of liquidation period, which was allowed by the Adjudicating Authority vide order dated 22.08.2022. Further 1 year extension of liquidation period was sought by application filed by the liquidator through IA 312 of 2023, which was allowed by the Adjudicating Authority vide order dated 16.03.2023.

14. The Income Tax Department has filed its report on 11.04.2022, which was issued on 25.11.2021, stating that following outstanding demands for various year are pending against the corporate debtor:

S. No.	A.Y.	Outstanding Demand	Demand u/s
1	2007-08	3052	220(2)
2	2011-12	6,18,000	271(1) (c)
3	2015-16	8,10,410	143(3)
4	2007-08	20,016	220(2)

15. In compliance of order dated 18.02.2022, the respondent successful bidder filed an affidavit on 04.05.2022 and stated as follows:

i) That successful bidder has purchased the Corporate Debtor as going concern vide e-auction dated 16.12.2020.

ii) That since the reliefs and concessions sought in the present application are in consonance with IA 156 of 2021, successful bidder has no objection as to Liquidator pursuing present application for the reliefs and concessions sought therein, and requested the Adjudicating Authority to consider the reliefs and concessions and pass appropriate orders so that the entire process can be conducted smoothly.

iii) That Upon the acquisition of the Corporate Debtor as a going concern, the accounting treatment of the Corporate Debtor would be carried out in accordance with Section 133 of Companies Act, 2013 and other applicable laws, if any, after the appropriate order passed by Adjudicating Authority.

16. In compliance of order dated 21.06.2022, the respondent successful bidder filed on 06.07.2022 a short note with respect to the prayers sought in this application.

17. Learned counsel for the applicant relied upon various Orders passed by the co-ordinate Benches, judgement passed by the Hon'ble NCLAT and also relied on judgement passed by the Hon'ble Supreme Court with respect to reliefs and concessions sought by the Liquidator/successful bidder during liquidation of the corporate debtor as going concern basis.

18. Heard submissions and perused documents placed on record. Applicant placed arguments that successful bidder would run the businesses of the corporate debtor and if the liabilities are also transferred during sale as going concern basis,and if the bidder isburdened with the liabilities of the corporate debtor prior to sale, then it will amount to unfair treatment vis-à-vis the successful resolution applicant, who when takes over corporate debtor under resolution plan is getting the control of corporate debtor as a clean slate, as decided by the Hon'ble Supreme Courtin Ghanashyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited and Ors. (Civil Appeal No. 8129 of 2019).The relevant part of this judgement is reproduced hereinbelow:

> *"86. ………The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the*

resolution applicant submits its plans, would go haywire and the plan would be unworkable.

87. We have no hesitation to say, that the word "other stakeholders" would squarely cover the Central Government, any State Government or any local authorities. The legislature, noticing that on account of obvious omission, certain tax authorities were not abiding by the mandate of I&B Code and continuing with the proceedings, has brought out the 2019 amendment so as to cure the said mischief....."

It is seen that in respect of reliefs and concessions, various coordinate Benches have made it clear that only such reliefs would be granted which the Adjudicating Authority is empowered.

19. We also refer to the Judgement dated 25.02.2022 of Hon'ble NCLAT in M/s Shiv Shakti Inter Globe Exports Pvt. Ltd. Versus M/s. KTC Foods Pvt. Ltd. Through Liquidator Mr. Anup Kumar Singh and Anr. (Company Appeal(AT)(Insolvency) No. 650 of 2020). On reading the Order, we found following paras relevant to this case to decide the issue beforeus:

"21. ... The scope and objective of the Code is to extinguish all claims specifically the ones which were not even made during the CIRP or in the Liquidation stage, to aid the purchaser of the Company as a 'going concern' to start on a 'clean slate'....

22. It is no longer Res Integra that while approving a 'Corporate Debtor' sale as a 'going concern' in Liquidation Proceedings without its dissolution in terms of Regulation 32(e) of the Liquidation Process Regulations, 2016, it is essential to see that the 'Corporate Debtor' is not burdened by any past or remaining unpaid outstanding liabilities prior to the sale of the Company as a 'going concern' and after *payment of the sale proceeds distributed in accordance with Section 53 of the Code. The Impugned Order in I.A. 889 of 2020 is modified to the extent that the sale of the first Respondent as a 'going concern' is upheld and the direction sought for in prayer (c) & (e) in CA No. 1189 of 2019 seeking extinguishment of past/remaining unpaid outstanding liabilities including contingent liabilities, prior to the sale as a 'going concern', after payment of sale proceeds distributed in accordance with Section 53 of the Code, is allowed."*

20.During the hearing, concise explanation was sought about various prayers of reliefs and concessions, which was filed as revised chart of concise explanation of all prayers.After considering the facts and judgements deciding the issue herein, we allow the following reliefs and concessions, with attendant directions:

SL. NO.	RELIEF / CONCESSION SOUGHT FOR	ORDERS THEREON
1.	That the successful bidder shall be allowed to be given all licenses, consents, approvals, benefits, rights, entitlements and privileges such as but not limited to the manufacturing license, GPCB license, factorylicense issued by Directorate Industrial Safety & Health Gujarat state of the Corporate Debtor, whether under the law, lease, contract shall be granted in favour of the corporate debtor to which the company shall be entitled notwithstanding any provision to contrary in their terms, to be deemed to be continued without any disruption for the benefit of the company.	Contracts relevant to running of the corporate debtor as a going concern, entered by the corporate debtor prior to the transfer date, may be reviewed subject to the Provisions of the Code and other applicable laws.

	Direction to be issued that the corporate debtor be allowed to review and terminate any contract that was entered prior to the date of liquidation.	
2.	All claims or demands made or all prior period liabilities and obligations owed or payable by the past management whether financial creditors or operational creditors or any other parties (including government dues, statutory dues such as Income Tax, GST, TDS, Custom Duty, PF, ESIC etc.) whether known or unknown, crystallized or otherwise prior to the auction date of corporate debtor, to be considered settled as per the NCLT order and the balance amounts to be written off in full by the successful bidder and shall stand permanently extinguished and the sale proceeds shall be distributed in accordance to Section 53 of the Code.	Granted in terms of the Judgement of the Hon'ble Supreme Court in Ghanashyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited and Ors. (Civil Appeal No. 8129 of 2019)
3.	The relevant Governmental Authorities shall not initiate any investigations/actions or proceedings in relation to any non-compliance with Applicable Law by the Company during the period prior to the NCLT order date. Neither shall the successful bidder, nor the Company nor their respective directors, officers and employees appointed on and as of NCLT order date be liable for any violation, liabilities, penalties or fines with respect to or pursuant to the	Granted in terms of the Judgement of the Hon'ble Supreme Court in Ghanashyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited and Ors. (Civil Appeal No. 8129 of 2019) for actions done prior to the transfer date by the past management.

	Company not having in place the requisite licenses and approvals required to undertake its business as per Applicable Law, or any non-compliances of Applicable Law by the Company. Further, the relevant Governmental Authorities will provide a reasonable period of time after the NCLT order date, for the successful bidder to assess the status of any non-compliances under the Applicable Laws including and to procure that the Company regularizes such compliances under the Applicable Law existing prior to the NCLT order date. From the NCLT Approval Date, all inquiries, investigations and proceedings, whether civil or criminal, suits, claims, disputes, proceedings in connection with the Company or affairs of the Company, including proceedings before Debt Recovery Tribunal and consumer courts or any other court, pending or threatened,present or future in relation to any period prior to the NCLT order date, or arising on account of implementation of this Plan shall stand withdrawn and dismissed and all liabilities and obligations therefore, whether or not set out in the balance sheets of the Company or the profit and loss account statements of the Company will be deemed to have been written off fully, and permanently extinguished and no adverse orders passed in the said matters should apply to the Company or the successful bidder. Upon approval of this auction	

	sale, all new inquiries, investigations, notices, suits, claims, disputes, litigations, arbitrations or other judicial, regulatory or administrative proceedings will be deemed to be barred and will not be initiated or admitted against the Company in relation to any period prior to the NCLT order date.	
4.	That all the existing shares of the Corporate Debtor shall stand extinguished and the existing shareholders will become claimants from liquidation proceeds u/s 53 of the Code. That the successful bidder shall be allotted 100% shareholding of the corporate debtor pursuant to the NCLT order and such shares will be issued on face value and the requirement of Sec. 56(2)(vii)(b) of Income Tax Act 1961 shall be excused and such allotment shall be deemed to have been made in accordance with the law. Direction to be issued that upon payment of the entire bid amount, the corporate debtor, without requirement any further act, deed or thing, be allowed to issue fresh equity shares in accordance with Companies Act, 2013.	Granted, Subject to the Provisions of the Code read with applicable provisions of the Companies Act, 2013 and other applicable laws.
5.	That the exiting directors of the corporate debtor shall be required to vacate the office and newly appointed directors: by the successful bidder will be appointed by the company. Direction to be issued that upon payment of the entire bid amount, that a new Board of directors with two	As per applicable provisions of the Companies Act, 2013, the Board of Directors may be reconstituted.

	directors appointed by the successful bidder to be constituted as per Companies Act and that the following individuals be permitted to act as Directors of the corporate debtor: a) Sachin Bhandari: DIN- 05102989 b) Monika Bhandari: DIN- 09039109	
6.	Direction to be re-state the ROC status as "active" from the status of 'liquidation. Waiver of late fee, penalty etc. for non-compliance of filing of forms with ROC till the date of appointment of new directors.	Granted, Subject to compliance of applicable provisions of the Companies Act, 2013 r.w. I&B Code, 2016.
7.	A direction be issued to exempt the corporate debtor from any payment of registration fees, stamp duties and other local levies of taxes, duties with respect to transfer of bid amount.	Appropriate authorities may consider as per applicable provisions of law.
8.	A direction be issued that upon completion of sale of the corporate debtor under liquidation as a going concern, all the assets of the company shall continue to be vest with the successful bidder. The successful bidder shall be allowed to use all the patents, trademarks and other intangible assets of the Corporate Debtor, post NCLT order. Permission seeking right to recover from the debtors of the corporate debtor.(as mentioned in the information memorandum)	Granted, as per Provisions of the Code and other applicable laws.

9.	All the company documents/ property papers taken as a charge by the lender shall be returned back to the Corporate Debtor pursuant to the NCLT order. Also pursuant to NCLT order all charges outstanding in Registrar of Companies shall stand cancelled and will deemed to be duly satisfied. The company's status shall be reinstated and normalized bythe financial creditors pursuant to the NCLT order.	Granted, Subject to compliance of applicable provisions of the Companies Act, 2013 r.w. I&B Code, 2016.
10.	Since the process of "Acquisition of the corporate debtor under liquidation as a Going Concern" is a significant event, the Corporate Debtor shall be allowed to treat all the unpaid liabilities in the books after settlement u/s 53 of IBC to be Capital in Nature. as Consecutively, the entire write offs to be considered as a Capital Reserve pursuant to the NCLT order.	The books of accounts may be re-stated to give effect to sale as a going concern as per applicable accounting standards and as per applicable provisions of the Companies Act, 2013.
11.	The relevant Governmental Authority in relation to tax shall waive any tax, interest or penalty and shall not initiate any penal proceedings in case of non-fulfilment of any obligations of the Company in relation to which benefit has been claimed by the Company prior to the NCLT order date, including in relation to non- fulfilment of export obligation in respect of customs incentive including but not limited to imports under specific import licenses or schemes, non- submission of forms for concessional duty rates, non-fulfilment of conditions relating to grant of state incentives, etc. The company will be given the benefit	Appropriate authorities to consider as per the provisions of tax laws and IBC, 2016.

	of Section 79 of Income Tax Act 1961 pertaining to carry forward of business losses and unabsorbed depreciationPertaining to previous assessment years.	
12.	All non-compliances, breaches and defaults of the Company for the period prior to the NCLT order date (including but not limited to those relating to tax), shall be deemed to be waived by the concerned Governmental Authorities: Immunity shall be deemed to have been granted to the Company from all proceedings. and penalties under all Applicable Laws for any non-compliance for the period prior to the NCLT Approval Date and no interest/ penal implications shall arise due to such non- compliance/ default/ breach prior to the NCLT Approval Date. This includes, without limitation, waiver/ extinguishment of: a) Any liability, fees, penalties of any kind payable to any Governmental Authority by the Company for any non- compliance default, or breach, violation prior to the NCLT Approval Date, under Foreign Exchange Management Act, 1999, Foreign Trade Policy of the Government of India, 100% Export Oriented Unit related regulations, Companies Act, 1956 and Companies Act, 2013. b) Liability under on-going/ pending tax proceedings before Assessing	Appropriate authorities to consider as per their respective laws and provisions of IBC, 2016 regarding defaults committed by past management prior to transfer date.

	Officer and/ or before Appellate Authorities shall stand extinguished as on NCLT Approval Date.	
13.	As the claim is settled pursuant to section 53 of IBC, the Company's name will be removed from the 'Denied Entity List' by DGFT pursuant to the NCLT Order.	Granted, Subject to the provisions of the Code and other applicable laws.

21. The application is allowed in terms of above order and disposed of. Registry is directed to communicate a copy of this order to the parties.

-Sd-
AJAI DAS MEHROTRA
MEMBER (TECHNICAL)

-Sd-
DEEP CHANDRA JOSHI
MEMBER (JUDICIAL)

Abhishek Singh
LRA