

NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III

4. I.A. 1253/2021

IN

C.P.(IB)-2521(MB)/2018

CORAM: SHRI. H.V.SUBBA RAO, MEMBER (J)
SHRI CHANDRA BHAN SINGH, MEMBER (T)

ORDER SHEET OF THE HEARING OF MUMBAI BENCH OF THE NATIONAL
COMPANY LAW TRIBUNAL ON **06.05.2022**

NAME OF THE PARTIES: Harsh Vinimay Pvt Ltd

V/s

Maa Mahamaya Steels Pvt Ltd

SECTION 9 OF INSOLVENCY AND BANKRUPTCY CODE, 2016

ORDER

Mr. Nausher Kohli, counsel appearing for the Applicant is present through virtual hearing.

Order pronounced in the open court vide separate order. In the result, the above I.A. is dismissed.

Sd/-
CHANDRA BHAN SINGH
Member (Technical)

SKS

Sd/-
H.V.SUBBA RAO
Member (Judicial)

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

I.A. 1253/2021

IN

C.P. No. (IB) 2521/MB/2018

Under Section 60(5) of Insolvency & Bankruptcy Code, 2016 read
with Regulation 32A of Insolvency and Bankruptcy Board of India
(Liquidation Process) Regulations, 2016

In the matter between

Gaurav Agarwal

Ward No. - 13, 01, Near Railway Station,
Post Bilha, Bilaspur, Chhattisgarh - 495224

...Applicant/Successful Bidder

Vs.

CA Devang P Sampat

No. 615, Shivani Plaza, Plot No. 78/A,
Marol Cooperative Industrial Estate,
Off: Andheri Kurla Road, Marol Andheri (E),
Times Square, Mumbai - 400059

...Respondent/Liquidator

In the matter of

Harsh Vinimay Pvt. Ltd.,

...Financial Creditor

Versus

Gajanan Industries Limited,

...Corporate Debtor

Order delivered on: 06.05.2022

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)
Hon'ble Shri Chandra Bhan Singh, Member (Technical)

Appearance:

For the Applicant: Adv. Nausher Kohli, Adv. Amey Hadwale
and Adv. Geeta Lundwani

For the Respondents: Adv. Rohaan Cama, Adv. Kunal Mehta
and Adv. Gauri Joshi

Per: Shri H.V. Subba Rao, Member (J)

ORDER

1. The above I.A. 1253/2021 is filed by one Mr. Gaurav Agarwal who is the successful auction purchaser in respect of auction dated 03.03.2021 conducted by the Liquidator claiming several among the following relief claimed in terms of prayer clause 'ii' of the Application:
 - ii. *The Applicant shall not be responsible for any other claims/ liabilities/ obligations etc. payable by the Corporate Debtor as on this date to the Creditors or any other stakeholders including Government dues. All the liabilities of the Corporate Debtor as on the date stand extinguished, as far as the Applicant is concerned.*
2. The brief facts leading to filing the above Application by the Applicant are as follows:
 - i. The Liquidation order was passed by this Tribunal on 06.11.2019 wherein C.A. Devang P Sampat was appointed

as the Liquidator of the Corporate Debtor to complete the Liquidation Process.

- ii. On 26.02.2021 the Applicant submitted an EDM of Rs. 50,00,000/- as per the requirements for participating in the e-auction which was scheduled on 03.03.2021. The Applicant was declared as the highest bidder of the Corporate Debtor under Liquidation as a going concern with a bid amount of Rs. 4,65,00,000/-, whereby he was declared as the successful bidder by the Liquidator. Further, a letter of intent was issued to the Applicant on 19.05.2021 by the Liquidator as per the requirements of the banker and on the request of the Applicant.
- iii. On 31.05.2021 in order to complete the sale the Applicant paid the entire remaining consideration of Rs. 4,15,00,000/- along with an interest of Rs. 10,09,000/-. The same was acknowledged by the Liquidator in his email dated 01.06.2021.
- iv. The Applicant submits that he wanted to make full consideration along with interest by 26.05.2021 which was duly accepted by the Liquidator. The Liquidator confirmed the amount of interest and also communicated to the effect that ***“On the payment of the full amount, the sale shall stand completed, the liquidator shall execute certificate of sale or sale deed to transfer such asset and the assets shall be delivered to him in the manner specified in terms of sale”.***
- v. Further, the Applicant approached the Liquidator to know about the process to be followed for the completion of deal and to clarify certain issues, to which the Liquidator used

to reply in the same manner ***“procedure shall be followed as per the law”***, which was not satisfactory in the view of the Applicant and indicated the Applicant to take entire liability of the Corporate Debtor. The Liquidator indicated that the successful bidder needs to take on the liability of the Corporate Debtor in accordance with Regulation 32A of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, to which the Applicant state that it can't be legally assigned the liability of the Corporate Debtor as the e-auction process documents does not mention anything about the liabilities of the Corporate Debtor. Therefore, it is totally inappropriate on the part of the Liquidator to force the successful bidder to take over the liabilities of the Corporate Debtor. Even the Regulation 32A of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 requires the Liquidator to specifically identify and group the assets and liabilities. The Liquidator has however preferred only to group the assets of the Corporate Debtor to which under such circumstances the successful bidder cannot be forced to take the liabilities of the Corporate Debtor.

- vi. Further, the Applicant again sent a letter to the Liquidator clarifying the position as to requirement of Regulation 32A of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 read with E-auction bid process to show that the successful bidder is not required to take any type of liabilities of the Corporate Debtor but the learned Liquidator failed to appreciate the point and remained non-committal. According to him the going

concern sale is intricately linked with purchase of assets and liabilities, however, it must be appreciated that the Liquidator can not deviate from the e-auction process document on the basis of which successful bidder have relied.

- vii. The Applicant relied upon the matter of Topworth Pipes and Tubes Pvt. Ltd. as per which the Hon'ble NCLT, Mumbai granted various concessions/ benefits to the Applicant, when the Liquidator has no objection in granting the said benefit. Whereby the Applicant has requested the Liquidator through letter for grant of certain benefits and concessions which will ensure smooth functioning of business of Corporate Debtor to which Liquidator never replied.
 - viii. Therefore, this Application is preferred by the Applicant to grant certain benefits and concessions to ensure smooth running of business of Corporate Debtor as going concern.
3. The Learned Liquidator/Respondent opposed the above Application by raising the following contentions in his reply:
- i. The Liquidator in Miscellaneous Application No. 2644 of 2019 approached the Tribunal for seeking directions for Liquidation which was approved by the Tribunal on 06.12.2019.
 - ii. The Liquidator had filed Interlocutory Application 1315 of 2021 for seeking directions for completion of liquidation process in respect of Corporate Debtor since the applicant had made payment under protest. The Liquidator states that the applicant is not following the terms e-auction and

also process document which on record and also taking possession factory premises without following the due process of law and also applicant is trying to mislead this tribunal.

- iii. The Applicant under present application seeking and attempting to go beyond the e-auction terms in as much as the present application is nothing short seeking modification of the e-auction terms.
- iv. The Applicant cannot seek to rewrite the contract/agreement which stood concluded on receipt of the entire consideration on 31.05.2021.
- v. The e-auction notice was published on 13.02.2021 for Liquidation as going concern of the Corporate Debtor. The e-auction was fixed on 03.03.2021 in which the Applicant stood as the highest bidder, the applicant on 02.04.2021 forwarded the digitally signed e-auction document and draft letter informing that the applicant would by the assets of the Corporate Debtor without liability.
- vi. The Applicant by an email dated 20.05.2021 forwarded Draft of Agreement viz., (1) Deed of Assignment in respect of leasehold Land and Building which is attached to the land and (2) Deed of Transfer in respect of entire assets of the Corporate Debtor, as per para 2.7 of Deed of Transfer drafted by the Applicant contemplated that as entire sale has slump sale and further the Draft Agreement contemplates that the Applicant is purchasing the assets of the Corporate Debtor and not as on going concern sale of the Corporate Debtor.

- vii. The Applicant via an email dated 25.05.2021 raised frivolous queries after the applicant request was rejected for the Draft Agreement and only sale certificate is enough for completing the say and threaten that the applicant wants reply in definite words and the Applicant do not want anything remain unclear so that unwanted litigation does not take place, else the applicant will have to approach NCLT/IBBI for the purpose of seeking needful clarification in the matter. The Liquidator through an email dated 30.05.2021 replied to the queries raised by the applicant stating that the applicant requisitions /queries and benefits demands are clear violations of the process documents and power of the respondents. The entire e-auction was as per provision of the Code including but not limited to the regulation 32A of the Insolvency and Bankruptcy Board of India (Liquidation) Regulations, 2016.
- viii. The Applicant by an email dated 31.05.2021 accused the liquidator that he is trying to impose the clause of liability, which was not mentioned anywhere in e-auction document and further referred that as per the Regulation 32A of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016 and in order to qualify the acquisition of liability, the act specifically and mandatorily requires the liquidator to identify all such liability which is not found anywhere in e-auction process documents. Replying to the same the Liquidator via an email dated 01.06.2021 reply to the allegations of the applicant and the respondents has been repeatedly informed the liquidation as a going concern of the Corporate Debtor is in accordance

with the process documents and code. The Applicant has misread or have self-assumed his so-called query which is not tenable for which the Liquidator cannot say anything for the same and the Liquidator cannot go beyond the terms of e-auction documents. The Applicant consistent attempt to misrepresent contents of process documents is also on record including negating the base of document and process.

- ix. The Applicant falsely stated that the Liquidator indicated to take the liability of the Corporate Debtor. The applicant must have misread or have self-assumed his query which is not tenable and as Liquidator, the Liquidator cannot go beyond the terms of the e-auction documents. Further, all local taxes/ maintenance fee/ electricity expenses/ water charges etc., outstanding as on date or yet to fall in due respect of the relevant asset should be ascertained by the E-Auction process and would be borne by the Applicant.
4. In the light of the above pleadings, and the rival contentions of both sides, the only issue that needs to be decided by this Bench in the above Interlocutory Application is:

Whether the sale of the Corporate Debtor as a going concern under the Code and the Regulations includes both assets and liabilities or assets alone without any liabilities?

5. Before deciding the above issue, it is appropriate to mention here that the learned counsel appearing for the Petitioner during the course of the final arguments fairly conceded that the Petitioner is not pressing the other reliefs except the above relief claimed in terms of prayer clause (‘ii’) in relation to the liabilities

6. The main grievance of the Applicant through the above application is that the present Applicant being an auction purchaser who purchased the Corporate Debtor Company as a going concern is not bound by any of its liabilities. The above issue whether the sale of the Corporate Debtor as a going concern includes assets and liabilities or assets alone is no longer res-integra. The Hon'ble NCLAT vide its order dated 11.01.2022 in *M/s Visisth Services Limited VS. S.V. Ramani* in Company Appeal (At) (Insolvency) No. 896 of 2020 in the similar circumstances of the present case on hand at para 9 held as follows:

“...9. It can be seen from the afore-noted discussion as well as Regulation 32 A of the IBBI (Liquidation Process) Regulations, 2016 that Sale as a ‘Going Concern’ means sale of assets as well as liabilities and not assets sans liabilities. Paragraphs 3.2.1 and 4.2.1 of the afore-noted discussion paper amply specified that all assets and liabilities, which constitute an integral business of the Corporate Debtor Company would be transferred together and the consideration paid must be for the business of the Corporate Debtor. We conclude that Sale of a Company as a ‘Going Concern’ means sale of both assets and liabilities, if it is stated on ‘as is where is’ basis...”

7. Similarly, the coordinate bench of NCLAT, Chennai Bench in its order dated 15.02.2022 in I.A./1215/CHE/2021 in CP/699/IB/2017 in *M.S. Viswanathan Vs. Pixtronic Global Technologies Pvt. Ltd* by relying on the above judgement of the Hon'ble NCLAT in *M/s Visisth Services Limited VS. S.V. Ramani* in Company Appeal (At) (Insolvency) No. 896 of 2020 clearly held

that the Sale of Corporate Debtor as a 'Going Concern 'as is where is' basis under Regulation 32 A of the IBBI (Liquidation Process) Regulations, 2016 and the Code means sale of assets as well as liabilities and not assets sans liabilities.

8. However, the learned counsel appearing for the Petitioner relied on the judgment of the Hon'ble NCLAT in *M/s Shiv Shakti Inter Globe Exports Pvt. Ltd. Vs. M/s KTC Foods Private Limited and others in Company Appeal (AT) (Insolvency) No. 650 of 2020* which is later in point of time and argued that as per the judgment in *M/s Shiv Shakti Inter Globe Exports Pvt. Ltd. Vs. M/s KTC Foods Private Limited and others* the sale does not include liabilities and the above decision being the later decision will prevail over the earlier decision. Therefore, the only issue is which judgement of the Hon'ble NCLAT is a ratio.
9. In order to examine the above issue, it is important to mention here the background and scope of the appeal in *M/s Shiv Shakti Inter Globe Exports Pvt. Ltd. Vs. M/s KTC Foods Private Limited and others* as narrated in the first para of the order is as follows:

"...This Appeal has been preferred by the Appellant – 'M/s Shiv Shakti Inter Globe Exports (P) Ltd.' limited being aggrieved by the order dated 18.05.2020 passed by the Ld. Adjudicating Authority in CA No. 1189/2019 in C.P. No. IB-136/Chd/Hry/2018 whereby and where under the Ld. Adjudicating Authority was pleased to partially allow CA No. 1189/2019 filed by the Liquidator. The Ld. Adjudicating Authority, while partially allowing the said CA 1189/2019 had inter alia directed closure of liquidation process of the Corporate Debtor K.T.C. Foods Private Limited without dissolution of K.T.C. Foods Private Limited. The Appellant is aggrieved by the

impugned order as much as the Ld. Adjudicating Authority has denied the sale of the Corporate Debtor as a going concern to the Appellant without any liabilities including contingent liabilities and with immunity from existing litigations, if any, against the Corporate Debtor. The Ld. Adjudicating Authority has also denied the extinguishment of the remaining unpaid liabilities of the Corporate Debtor after distribution of the proceeds of the sale of Corporate debtor as a going concern as per the order of priority provided in Section 53 of the Insolvency and Bankruptcy Code, 2016 (for short IBC) as well as waiver from all the past non-compliances of the Corporate Debtor under applicable laws for the period prior to the e-auction...”

10. It is important to mention here that various prayers sought by the liquidator in the impugned application that are extracted below as mentioned in page 6 of the order as follows:

- a. “That the Hon’ble Tribunal may graciously be pleased to approve the closure of Liquidation Process of the Corporate Debtor under Regulation 53 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 and sale of Corporate Debtor as a going concern to M/s Shiv Shakti Inter Globe Exports Private Limited, the highest bidder without any liabilities including contingent liabilities and with immunity from existing litigations, if any, against the Corporate Debtor by way of E-Auction at a total consideration of INR 18,45,86,646/- (Rupees Eighteen Crores Forty Five Lacs Eighty Six Thousand Six Hundred and Forty Six only);

- b. That the Hon'ble Tribunal may graciously be pleased to approve the aforesaid sale of Corporate Debtor without its dissolution;*
- c. That the order be passed that after distribution of the proceeds of the Sale of Corporate Debtor as a Going Concern as per order of priority provided in Section 53 of the Insolvency and Bankruptcy Code, 2016, the remaining unpaid outstanding liabilities of the Corporate Debtor shall be extinguished; 7 Company Appeal (AT) (Insolvency) No. 650 of 2020*
- d. Extinguishment of ownership of the equity shares of the existing equity shareholders and allotment of fresh shares of the Corporate Debtor in favour of M/s Shiv Shakti Inter Globe Exports Private Limited, the Successful Bidder;*
- e. All consequences of past non-compliances of the Corporate Debtor under applicable laws for the period prior to this E-Auction shall be waived..."*

11. Therefore, it is very clear from the above order in *M/s Shiv Shakti Inter Globe Exports Pvt. Ltd. Vs. M/s KTC Foods Private Limited and others* that the above Appeal was filed by the auction purchaser against the rejection of reliefs claimed in terms of prayer clause 'c' and 'e' in the above application filed by the liquidator. It is very clear from the order that the findings of the Hon'ble NCLAT in the above order was while dealing a situation after distribution of the proceeds of the sale of Corporate Debtor as a going concern as per the order on priority provided Section 53 of the Code. Therefore in those circumstances, the Hon'ble

NCLAT held that the remaining unpaid outstanding liabilities of the Corporate Debtor extinguished and all consequences of past non-compliance of the Corporate Debtor under applicable laws in the period prior to e-auction shall be waived.

12. Thus, it is very clear that the Hon'ble NCLAT in the above appeal has made its observations in the Application filed by the liquidator which is not the circumstance of the present case. It is also worthwhile to note that the sale proceeds have already been distributed as per the order of priority provided in Section 53 of the Code in the above case which is not the same in the present case. In the present case on hand, the application is filed by auction purchaser himself seeking the declaration without distribution of the liquidation proceeds to the creditors and before issuing sale certificate and possession of the Corporate Debtor. In addition to this, the liquidator in this case clearly put the Applicant on notice that sale of the Corporate Debtor as going concern as is where is' basis and the Applicant is duty bound to make due diligence with regard to the local taxes/maintenance fees /electricity expenses/water charges etc., outstanding as on date or yet to fall due in respect of the relevant asset should be ascertained by the E-Auction process applicant and would be borne by the successful bidder.

13. It was also made it very clear to the auction purchaser in the bid documents that the liquidator does not take or assume any responsibility for any dues, statutory or otherwise, of the Company, including such dues, if any, which may affect transfer of the liquidation assets in the name of the Successful Bidder and such dues, if any, will have to be borne/paid by the Successful Bidder.

14. Similarly, the liquidator also put the Applicant notice that the bidders prior to submitting the bid should make their independent inquiries regarding the encumbrances, title of property claims/right/dues/affecting the property, inspect the property at their own expenses and satisfy themselves. The date and time of inspection of the property will be any time at site email Mr. CA Devnag P. Sampat-dpsampat@sampatassoicates.in.
15. Therefore, it is very clear from the above facts that the auction purchaser was put on notice regarding all the above liabilities. The Hon'ble NCLAT in *M/s Visisth Services Limited VS. S.V. Ramani*, after discussing paragraphs 3.2, 3.2.1, 3.2.2, 4.2 and 4.2.1 of the IBBI discussion paper of Corporate Liquidation Process along with approved Regulations dated 27.04.2019 and various rulings of the Hon'ble Supreme Court held that sale of the Corporate Debtor as going concern includes both assets and liabilities not assets sans liabilities.
16. It is also important to observe here that both the above orders of the Hon'ble NCLAT were passed by the same Bench comprising of Hon'ble Justice Anant Bijay Singh, Member (Judicial) and Ms. Shreesha Merla, Member (Technical). It is also very important to observe here that the same Bench having observed that the sale of Corporate Debtor as a going concern under the Regulations includes assets and liabilities, not assets alone sans liabilities in their earlier order cannot re-write their order in a different way. Therefore, this Bench has no hesitation in holding that the order passed by the same Bench of the Hon'ble NCLAT in *M/s Shiv Shakti Inter Globe Exports Pvt. Ltd.*

Vs. M/s KTC Foods Private Limited and others is distinguishable from the facts of the present case on hand and also from logic.

17. It is also very clear from the plain reading of Clause 3 of Regulation 32A of the Liquidation Process Regulations, 2016 which is extracted hereinbelow:

“3. Where the committee of creditors has not identified the assets and liabilities under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall identify and group the assets and liabilities to be sold as a going concern, in consultation with the consultation committee.”

It is very clear from the above Clause that in fact a duty is cast upon the stakeholders committee as well as the liquidator is find out the liabilities of the Corporate Debtor.

18. In view of the above observations and the law laid down by the Hon'ble NCLAT in *M/s Visisth Services Limited VS. S.V. Ramani*, this Bench has no hesitation in holding that the Applicant is not entitled for the relief sought in prayer clause (‘ii’) in the above Application and the above Application deserves to be dismissed. Accordingly, the above Application is dismissed. It is once again hereby clarified at the cost of repetition that since the Applicant has given up the other reliefs other than the relief in prayer clause (‘ii’) no discussion nor any finding needs to be given by this Bench in respect of the other reliefs.

Sd/-

CHANDRA BHAN SINGH
MEMBER (TECHNICAL)

Sd/-

H.V. SUBBA RAO
MEMBER (JUDICIAL)