NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)
I.A. NO. 4427 of 2023
IN
COMPANY PETITION NO. (IB)-1106(ND)/2018

IN THE MATTER OF:

Panipat Texo Fabs Private Limited **... Operational Creditor**

Versus

Exclusive Overseas Private Limited **... Corporate Debtor**

AND IN THE MATTER OF IA. NO 4427 of 2023:

(Akash Shinghal)
Liquidator
G-8 & 9, Hans Bhawan, 1,
Bahadur Shah Zafar Marg,
ITO, New Delhi-110002 **... Applicant/ Liquidator**

Versus

Consortium of Mr. Narahari Vijay Sagar Reddy,
Mr. Kakkirala Ramesh & Mr. Aellanki Srivastava
Through its Lead Member
Mr. Narahari Vijay Sagar Reddy
2-10-1686/A, Chaithanyapuri Colony,
Karimnagar, Rampur, Telengana-505001 **... Successful Bidder/ Respondent**

Order Delivered on: 22.03.2024

Under Section: Regulation 45 (3)(a) r/w Regulation 32(e) of IBBI (Liquidation Process) Regulations, 2016

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)
SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)

PRESENT:

For the Respondent : Mr. Gautam Singhal, Adv in IA-4427/2023
For the Liquidator : Adv R K Gupta and Adv Ms Swaralipi Deb Roy for the Liquidator Shri Akash Shinghal in person

ORDER

The present I.A. No. 4427/2023 has been preferred by the Liquidator qua the Corporate Debtor, (hereinafter referred to as, the 'Applicant') under Regulation 45(3)(a) r/w Regulation 32(e) of IBBI (Liquidation Process) Regulations, 2016. The reliefs sought by the Applicant reads thus:

> *"(a) To approve the sale of Corporate Debtor as going concern in accordance with the relief as sought and set out in Para 50-51 of the application;*
>
> *(b) To close the Liquidation Process as the Corporate Debtor stood sold as 'Going Concern' in terms of provisions of Regulation 32(e) of IBBI (Liquidation Process) Regulations, 2016;*
>
> *(c) pass such other order(s) as may be deemed fit and proper in the facts and circumstances of the present case"*

2. Stating succinctly, the underlying main Petition CP (IB)-1106/ND/2018 was filed by Panipat Texo Fabs Private Limited against the Corporate Debtor namely, M/s Exclusive Overseas Private Limited under Section 9 of IBC, 2016, which was admitted in terms of the Order dated 26.10.2018 passed by this Adjudicating Authority. The CIRP could culminate in terms of the order dated 20.12.2022, whereby the CD was ordered to be liquidated. Currently, the Corporate Debtor is represented by Mr. Akash Singhal the Liquidator qua it.

3. As far as the prayer contained in Prayer clause 1 of the Application is concerned, this Tribunal in the matter of Mr. Surinder Manchanda, Sole Proprietor Sonu Trading Company Vs Nolsar International Limited, IA. NO. 6280/ND/2022 in Company Petition No. (IB)-1031(ND)/2018 has already decided the issue **"Whether there is any bar in selling the Corporate Debtor as a going concern after the first auction and whether the Liquidator is required to seek any permission of this Adjudicating Authority for such a sale**. The relevant excerpts of the order read thus:-

> *"13. From the conjoint reading of the provisions under Regulation 32A(4) and Regulation 32(e), it can be inferred that the Corporate Debtor can be sold as going concern in the first auction. However, as regards to the word "exclusively" mentioned in the Regulation 32A(4), we are of the view that whereas the liquidator may sell the assets of the corporate debtor under clause (e) of regulation 32 exclusively only at the first auction, we find no such bar in selling the assets of the Corporate Debtor in the subsequent auctions, where the Liquidator has all other options of sale as stipulated under Regulation 32A, available including selling of the Corporate Debtor as going concern.*
>
> *14. As seen from the record, in the instant case, sale of assets through more than one auction has already taken place, therefore, in our considered view, the Liquidator has the entire basket of options available for the sale of assets as stipulated under Regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 and we find no legal disability for the Liquidator in exercising any of the methods of sale stipulated under Regulation 32 including the sale of the Corporate Debtor as going concern.*
>
> *15. Accordingly, **when the Regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 itself provides requisite flexibility in choosing the methods of sale during the auctions subsequent to the first***

auction, <u>and there being no requirement in law seeking permission of this Adjudicating Authority, we are not inclined to grant the payer of the Liquidator.</u>

(Emphasis added)

4. Even otherwise also, as can be seen from Regulation 32A of the IBBI (Liquidation Process Regulations) 2016, the decision regarding Sale of CD as a going concern need to be taken either by CoC in terms of the provisions of sub regulation 2 of Regulation 39C of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 read with Regulation 32A (1&2) of the IBBI (Liquidation Process) Regulations 2016. None of the Regulations provide for requirement of post facto approval of sale by this Adjudicating Authority. Though the Section 35 IBC, 2016 provides that the duties required to be performed by the Liquidator in terms of the provisions of said Section are subject to direction of this Adjudicating Authority. Nevertheless, at the first place, the duties mentioned in Section 35(1) do not include the one to Sell the CD as a Going Concern and secondly the "subject to Directions" would mean that unless there are direction to the contrary and the expression cannot be constituted as the requirement of approval of the act already performed. We could have appreciated if the Liquidator could have approached us for the Directions before the CD as going on concern and had sought to act as per our direction before performing the sale. Once the Liquidator has already acted on his own, of course at the strength of Regulation 32A (supra), he cannot ask us to accord our approval to his act, particularly when the law has no such provision in this regard. Where the code intents that the act of CoC would require our approval, a well codified mechanism and the criteria for approval has been outlined. The expression subject to direction cannot be

understood as approval. When the Regulation 33 of (IBBI Liquidation Process) Regulation 2016 intends that the permission of this Adjudicating Authority for sale, is required it specifically provides so. The Regulation 33 reads thus:-

*"**33. Mode of sale.***

(1) The liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I.

(2) The liquidator may sell the assets of the corporate debtor by means of [private sale only after prior consultation with the consultation committee under regulation 31A, in the manner specified in Schedule I when]-

(a) the asset is perishable;

(b) the asset is likely to deteriorate in value significantly if not sold immediately; [or]

(c) the prior permission of the Adjudicating Authority has been obtained for such sale:

Provided that the liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to-

(a) a related party of the corporate debtor;

(b) his related party; or

(c) any professional appointed by him.

(3) 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."

5. If the emphasis of Liquidator on the requirement of approval of Sale as Going Concern is appreciated then like Resolution Plan, without our approval the sale could not have taken place. In the present case in the application filed by him, the Liquidator has averred that the sale of CD as Going Concern has taken place and Sale Certificate has been issued. The relevant excerpts of the para reads thus:-

> *"37. The successful bidder made the payment of balance 75% of Sale Consideration i.e the bid value to purchase the CD as going concern on 12th July, 2023 alongwith an Interest amounting to Rs.19,33,151/- on account of delay in payment beyond 30 days in terms of the LoI. Upon receipt of such payment, the Liquidator issued a Sale Certificate dated 13.07.2023 to the successful bidder for Sale of Corporate Debtor as going concern on "As is where is", "As is what is basis" "Whatever there is basis" and "No Recourse basis". In terms of the E-Auction Process Documents issued in this regard, the assets including fixed and movable/current assets of the unit/company are sold along with the transfer of employees and workmen who are engaged currently in the running of the unit or division as well as transfer of licenses, to the extent permissible under the Applicable laws. However, it does not include the preferential, undervalued, extortionate credit and fraudulent transactions referred to in section 43 to 51 and section 66 of the code, in application filed by the IRP/RP/Liquidator of the Corporate Debtor before Hon'ble NCLT. The copy of Sale Certificate dated 13.07.2023 is marked and annexed herewith as* ***Annexure-A-9*** *of this application."*

6. It is not gains said that before selling the CD as Going Concern, in terms of the provision of Section 35(1) of IBC, 2016, our direction could be sought. Had such procedure been resorted to, we could have, require the Liquidator to carry the proper diligence and exercise such as the valuation of the Assets and Liabilities of the CD to our satisfaction. Having sold the CD as going

concern the Liquidator cannot expect us to put our stamp on his act blindly. When we say so, it is not intended to prosper that the sale by Liquidator as going concern would amount to automatic closure of Liquidation. As can be seen from Regulation 45(3)(a) of IBBI (Liquidation Process) Regulations 2016, The Liquidator need to submit an application before tis Adjudicating Authority with final report and compliance Certificate in Form-H for closure of the Liquidation Process. The Regulation 45 reads thus:-

> ***"45. Final report prior to dissolution.***
>
> *(1) When the corporate debtor is liquidated, the liquidator shall make an account of the liquidation, showing how it has been conducted and how the corporate debtor's assets have been liquidated.*
>
> *(2) If the liquidation cost exceeds the estimated liquidation cost provided in the Preliminary Report, the liquidator shall explain the reasons for the same.*
>
> *(3) [The liquidator shall submit an application along with the final report and the compliance certificate in form H to the Adjudicating Authority for –*
>
> *(a) closure of the liquidation process of the corporate debtor where the corporate debtor is sold as a going concern; or*
>
> *(b) for the dissolution of the corporate debtor, in cases not covered under clause (a).]"*

7. As the law does not envisage any approval of Sale of CD as going concern by this Adjudicating Authority, we would not be advised to resort to such practice. It is stare decisis that the proceedings should be held in the manner, the law provides.

8. Nevertheless, the Applicant has also prayed for closure of Liquidation Process in terms of Regulation 45 (3)(a) of the IBBI (Liquidation Process) Regulations, 2016, with certain Reliefs and Concessions mention in Paras 50-51 of the Application.

9. Now we would like to examine the prayer of the Applicant with respect to closure of Liquidation. In this context it would not be out of place to refer to Regulation 45(3(a) of Liquidation Process Regulations, 2016. The contents of which reads thus:-

> ***"45. Final report prior to dissolution.—***
> *.....*
> *3. The liquidator shall submit an application along with the final report and the compliance certificate in form H to the Adjudicating Authority for–*
>
> *(a) closure of the liquidation process of the corporate debtor where the corporate debtor is sold as a going concern; or*

10. From a perusal of the Application we find that the Applicant has annexed Form-H which is at Page 166 to 170 of the Application, but no Final Report as referred to in Regulation 45 of IBBI (Liquidation Process) Regulations, 2016 has been enclosed with the application, though the Applicant has stated that Final Report has been filed with the Application. Thus, the requirements of Regulation 45(3)(a) are not met/satisfied. Therefore, we have no other option but to reject the Application.

11. The applicant would be at liberty to resort to the appropriate proceedings in accordance with the law.

12. As the applicant has been accorded liberty to resort to fresh proceeding after removal of defects, the issues of closure of liquidation proceedings and consideration of reliefs as sought would be taken up at the appropriate stage.

13. **In the result, this Application is dismissed as above.**

Sd/-
(SUBRATA KUMAR DASH)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)