

**NATIONAL COMPANY LAW TRIBUNAL  
GUWAHATI BENCH  
GUWAHATI**

**ORDER SHEET OF THE HEARING ON 12<sup>th</sup> APRIL, 2024, 10:30 A.M.**

**IA (IBC)/29/GB/2024  
In CP (IB)/19/GB/2022**

**Present: 1. Hon'ble Member (Judicial), Shri H.V. Subba Rao  
2. Hon'ble Member (Technical), Shri Satya Ranjan Prasad**

<b>IN THE MATTER OF</b>	Meena Sureka, Liquidator
<b>UNDER SECTION</b>	U/s 60(5) of IBC, 2016

For Petitioner (s) : Mr. Saurav Jain, Adv. For Liquidator.

For Respondent (s) :

**ORDER**

Order Pronounced through VC *vide* separate sheets.

Sd/-

**Satya Ranjan Prasad  
Member (Technical)**

Sd/-

**H.V. Subba Rao  
Member (Judicial)**

**NATIONAL COMPANY LAW TRIBUNAL  
GUWAHATI BENCH  
GUWAHATI**

**IA(IBC)/29/GB/2024  
in  
CP(IB)/19/GB/2022**

***In the matter of:***

An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016;

-And-

***In the matter of:***

Meena Sureka, an Insolvency Professional having registration number IBBI/IPA-OO 1 /IP-PO 1422/2018-2019/ 12163 and office at Central Plaza, 6th Floor, Room No. H, 41, B. B. Ganguly Street, Kolkata – 700012. **....Applicant/Liquidator**

***Coram:***

Shri H. V. Subba Rao : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

***Appearances (through video conferencing):***

For Petitioner : Mr. S. Jain (Adv.)

**Order pronounced on: 12.04.2024**

**ORDER**

1. This Interlocutory Application (**IA**) has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 by Ms. Meena Sureka, by occupation a Chartered Accountant in whole-time practice and an Insolvency Professional having registration number IBBI/IPA-00I/IP-POI422/2018-2019/12163, working for gain at Central Plaza, 6th Floor, Room No. H, 41, B. B. Ganguly Street, Kolkata-700012, appointed as Resolution Professional initially and thereafter as Liquidator in the

liquidation process of Brahmaputra Iron & Steel Company Pvt. Ltd *vide* an order dated 13.10.2023 by the NCLT, Guwahati Bench, praying the following reliefs:

- a) *The Tribunal to confirm the sale of the Corporate Debtor as going concern to Ms Sarika Bothra, the Successful Bidder;*
  - b) *The Tribunal to consider / grant / approve the reliefs and concessions enumerated under the acquisition plan submitted by the successful bidder in the interest of justice; and*
  - c) *Such further and/or other order or orders be passed, direction or directions be given as may deem, fit and proper.*
2. CIRP under Section 10 of IBC read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 was initiated against Brahmaputra Iron & Steel Company Pvt. Ltd, a Private Limited Company, incorporated under the provisions of the Companies Act, 1956 having CIN U27101AS1987PTC002686 having its registered office at Room No 19, 2nd floor Vrindavan market, S J road, Athgaon Guwahati-781001, by itself *vide* order dated 28.10.2022 passed by the National Company Law Tribunal, Guwahati Bench. The applicant, *i.e.*, Mrs. Meena Sureka was then appointed to act as the Resolution Professional of the Corporate Debtor herein *vide* order dated 10.02.2023 passed by this Tribunal.
3. Thereafter, the applicant had filed an application under Section 33(2) of IBC, 2016 seeking direction for the initiation of the liquidation against the CD being numbered as IA 40/GB/2023 before NCLT, Guwahati on 13.10.2023. This Bench, passed an order directing the liquidation of the CD and appointed Mrs. Meena Sureka as the Liquidator of the CD. As stated, the applicant has made a Public Announcement in Form B and pursuant to this, the applicant had received several claims from the stakeholders in the different Forms as prescribed in the provisions of the Liquidation Regulations. After due verification of the same, the applicant had duly prepared the list of stakeholders under regulation 31 (1) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 and also submitted the same before the NCLT, Guwahati Bench through e-filing on 12.12.2023.

4. The applicant states that the liquidator had further updated the progress of the liquidation process by filing the Progress Report before the Tribunal. The applicant further states that she had placed an agenda before the 1<sup>st</sup> SCC meeting held on 19.10.2023 emphasizing on the decision taken by members of the then CoC in the 5<sup>th</sup> CoC meeting held on 23.03.2023 to explore the sale of the CD as going concern during the liquidation process under Clause 'e' of Regulation 32 of Liquidation Regulations, 2016.
5. Thereafter, the applicant made a public announcement on 21.11.2023 for invitation for bids for E-Auction Process for Sale of Brahmaputra Iron and Steel Company Private Limited (in Liquidation) as a Going Concern under the provisions of Insolvency and Bankruptcy Code, 2016 (Code) and the Regulations made thereunder. Subsequent to which, EOIs were received from the prospective bidders and the prospective bidders were declared as qualified bidders.
6. Accordingly, auction was held on 22.12.2023 wherein Sarika Bothra placed the bid for the company to purchase the CD as a going concern at a reserve price of Rs.1,68,085.18 and she was declared as the successful bidder. The successful bidder also paid full payment to the applicant. Post payment, the applicant had received an email from the successful bidder on 05.01.2024 enclosing an acquisition plan seeking certain relief and concessions to run the CD as going concern and further requested to submit the same to the Tribunal.
7. The applicant specifically stated her intention through an e-mail dated 10.01.2024 that such acquisition plan cannot become part for seeking approval of sale of the corporate debtor as going concern from the Tribunal. Although, the process documents and E-Auction notice has made very clear that the notice has been published to sale the corporate debtor as going concern on "*As is Where is, As What is, Whatever There is, and Without Recourse There Is*". Thereafter, several emails were exchanged between the applicant and the successful bidder, wherein considering the request and for the interest of justice, the applicant agreed to place the same before the Tribunal, however also clarified that the same will be filed without any pre-

conditions. It was specifically made clear to the successful bidder, any order regarding allowance or disallowance of any reliefs or concessions shall not affect the sale proceeds in any manner whatsoever.

8. The applicant submits that in terms of the process documents approved by the SCC, only after an application seeking approval of the Tribunal for sale of the corporate debtor as a going concern and all sale process may be completed. Accordingly, the applicant is filing the instant application seeking approval of this Tribunal to confirm the sale as going concern of the CD to the successful bidder since the sale has been successfully conducted and the entire sale consideration amount has also been received from the successful bidder. The entire facts and discussions regarding the same have also been made before the members of the SCC in 3<sup>rd</sup> SCC meeting held on 17.01.2024.
9. The Applicant further submits that no prejudice would be caused to either the Corporate Debtor or any of the creditors in the facts and circumstances of the case. On the contrary, the orders prayed for herein will facilitate a positive outcome for the creditors of the Corporate Debtor.
10. Heard the submissions made by the Learned Counsel for the Liquidator. It is seen that the Liquidator has already sold the Corporate Debtor as a going concern to the Respondent herein and has filed this application seeking confirmation/approval of the same.
11. With regards to Prayer (a), it is pertinent to note that “*sale of CD as going concern*” was neither contemplated under the Code nor under the Regulations at the time of their original framing. It was only through *In re Gujarat NRE Coke Limited CP (IB) No. 182/KB/2017* that the same was executed by Hon’ble Bench after relying on Section 32(b)(i) of the Code to derive its power. However, *IBBI (Liquidation Process) (Amendment) Regulations, 2018 (27.03.2018)* and *IBBI (Liquidation Process) (Second Amendment) Regulations, 2018 (22.10.2020)* introduced and respectively substituted a new sub-clause (c) in Regulation 32, which now allows the liquidator to “*sell the corporate debtor as a going concern*” under Clause (e).

12. “*Sale as a going concern*” refers to all of the assets and liabilities that together make up the business or the CD, which are to be transferred together. It is also to be noted that consideration should be for the business or the CD. The buyer of the assets and liabilities should be able to run the business successfully without any disruption.
13. The primary goal of a going concern sale is to preserve the enterprise's value, especially its intangible assets. Key reasons for the “*going concern sale*” are:
- i) Seamless transition will occur for the purchaser of the undertaking because it integrates nicely with the existing template.
  - ii) Every business has a large number of soft and intangible assets like contracts, trademarks, licences, concessions, leases, registrations, and vendor registrations and if the entity is placed into liquidation, the value of each of these turns zero. Conversely, in case of “*going concern sale*” the value of the aforementioned intangibles are retained since the legal company survives.
  - iii) As the assets are sold as a going concern, more synergy is achieved because the total value of the assets—which are taken with the intention of generating possible returns in the future—is more than the salvage value of the assets sold separately.
14. Regulation 32 of the IBBI (Liquidation Process) Regulations, 2016 lays down two kinds of “*going concern sales*”. Firstly, “*Corporate Debtor as a going concern*” under Regulation 32(e) and secondly, “*Business of the Corporate Debtor as a going concern*” under Regulation 32(f). In the first type of going concern sale *i.e.*, “*Corporate Debtor as a going concern*”, the entire business, assets and liabilities, including all contracts, licenses, concessions, agreements, benefits, privileges, rights or interests of the CD will be transferred to the acquirer and since, the shares of the CD are not transferred and extinguished, therefore, the CD does not get dissolved. However, in the “*Business of the Corporate Debtor as a going concern*”, the CD gets dissolved as the entire business along with the assets and liabilities including all intangibles get transferred as a going concern to the acquirer, without transfer of the CD. The remaining assets, other than those which are already sold as a part of business gets sold and the proceeds are used to meet the claims under Section 53 of the IBC, 2016.

15. Hon'ble NCLAT in *M/s. Visisth Services Ltd. v. Mr. S. V. Ramani, Liquidator of United Chloro-Paraffins Pvt. Ltd. Company Appeal (AT) (Ins) No. 896 of 2020* clarified that as per Regulation 32A of the IBBI (Liquidation Process) Regulations, 2016 the sale as a "going concern" means sale of assets as well as liabilities and not assets without the liabilities. We conclude that the 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".
16. Hon'ble Supreme Court reiterated the meaning of the expression "as is where is basis" in respect of sale of property in an auction in the matter of *K C Ninan vs Kerala State Electricity Board & Ors. Civil Appeal No 2109-2110 of 2004* along with a batch of other connected Appeals, where the Hon'ble Apex Court observed that:
- "As Is Where Is Basis' / 'As Is What Is Basis' / 'As Is Where Is, Whatever There Is And Without Recourse Basis' is as follows:*
- (i) every intending bidder is put on notice that the seller does not undertake any responsibility to procure permission in respect of the property offered for sale or any liability for the payment of dues, like water/service charges, electricity dues for power connection and taxes of the local authorities, among others".*
- (ii) "a sale on "as is where is basis" postulates that the purchaser would be acquiring the asset with all its existing rights, obligations and liabilities. When a property is sold on an "as is where is" basis, encumbrances on the property stand transferred to the purchaser upon the sale."*
17. Hence, the application filed by the Liquidator for sale of "CD as a going concern" stands **Allowed**. The Liquidator, after distributing the proceeds to the stakeholders as per Section 53 of IBC, 2016 may file an Application under Regulation 45(3) of the IBBI (Liquidation Process) Regulations, 2016 for closure of liquidation process.
18. With regards to Prayer (b), though the Petitioner has also sought the relief of granting/considering/approving the reliefs and concessions enumerated under the acquisition plan submitted by the successful bidder, the Petitioner has not mentioned anywhere either in his application/pleadings or in during the hearing, the reliefs and concessions that he wishes to pray for.

19. However, in *Sauria Construction v. Kohinoor Pulp & Paper Private Limited I.A. (I.B.C.) 1055/KB/2023 In CP(IB) No. 511/KB/2019*, Hon'ble Kolkata Bench laid down:  
*"It is to be noted that the primary goal of a resolution plan as well as the sale of a Corporate Debtor as a going concern remains the same i.e. revival of the Corporate Debtor's business. The struggles faced by the purchaser during the sale of a Corporate Debtor as a 'going concern' and that of the Successful Resolution Applicant are similar, if not the same. As such, comparable reliefs and concessions ought to be granted in both cases. As such, the law laid down in Ghanashyam Mishra (Supra) ought to be made applicable to cases in which the Corporate Debtor has been sold as 'going concern'."*
20. Nevertheless, in *Jasamrit Designers Pvt. Ltd. vs. Mr. Gian Chand Narang & Anr Company Appeal (AT) (Insolvency) No. 258 of 2023*, Hon'ble NCLAT, allowed the filing of application before the Adjudicating Authority for the purpose of claiming relief/concessions/direction which "may be necessary for operationalization of the Corporate Debtor as per terms and conditions of the process document" and that such prayers should not be *"too elaborate and general"*.
21. Therefore, we grant liberty to the Applicant and/or Successful Bidder to make a fresh Application containing prayers which may be commensurate and in accord with terms and conditions of the process document of e-auction process document. They may also submit a fresh application praying for specific reliefs, concessions and directions as laid down by the Hon'ble Supreme Court in *Ghanashyam Mishra and Sons Pvt. Ltd. vs. Edelweiss Asset Reconstruction Company Ltd. 2021 SCC OnLine SC 313*, which may be considered and decided by the Adjudicating Authority in accordance with law.
22. Further, since, this is a 'going concern sale', the Successful Bidder shall make necessary applications to the concerned regulatory or statutory authorities for renewal of business permits and supply of essential services, if required, and all necessary forms along with filing fees etc. and such authority shall also consider



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granting the same keeping in mind the objectives of the Code which is intended to resolving the insolvency of the Corporate Debtor.

23. Hence, with the aforementioned observations, this Bench allows Prayer (a) thereby confirming the sale of the Corporate Debtor as going concern to Ms Sarika Bothra, the Successful Bidder and accordingly IA (IBC)/29/GB/2024 in CP (IB) No. 19/GB/2022 is disposed of.
24. The Registry is directed to send e-mail copies of the order forthwith to all the parties inclusive of the Counsels.
25. Urgent certified copy of this order, if applied for, be issued upon compliance with all requisite formalities.
26. File be consigned to records.

Sd/-

**Satya Ranjan Prasad  
Member (Technical)**

Sd/-

**H.V. Subba Rao  
Member (Judicial)**

*Signed this on 12<sup>th</sup> day of April 2024*