REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 7667 of 2021

SUNDARESH BHATT,
LIQUIDATOR OF ABG SHIPYARD **...APPELLANT(S)**

VERSUS

CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS **...RESPONDENT(S)**

JUDGMENT

N.V. RAMANA, CJI

1 The present Civil Appeal under Section 62(1) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") arises out of the impugned judgment dated 22.11.2021 passed by the National Company Law Appellate Tribunal, New Delhi ("**NCLAT**") in Company Appeal (AT) (Insolvency) No. 236 of 2021. *Vide* the impugned judgment, the NCLAT has allowed the appeal filed by the respondent against the order of the National Company Law Tribunal, Ahmedabad **("NCLT")** /Adjudicating Authority whereby the Adjudicating Authority directed the release of certain goods lying in the Customs Bonded Warehouses without payment of custom duty

and other levies.

2 A conspectus of the facts necessary for the disposal of the present appeal is as follows: ABG Shipyard ("**Corporate Debtor**") was in the business of shipbuilding prior to the initiation of corporate insolvency proceedings against it. As a part of its business enterprise, it used to regularly import various materials for the purpose of constructing ships which were to be exported on completion. Some of these goods were stored by the Corporate Debtor in Custom Bonded Warehouses in Gujarat and Container Freight Stations in Maharashtra. Bills of entry for warehousing were submitted at the relevant time. The Corporate Debtor also took the benefit of an Export Promotion Capital Goods Scheme ("**EPCG Scheme**") and was granted a license under the said scheme ("**EPCG License**") with respect to the said warehoused goods.

3 On 01.08.2017, the National Company Law Tribunal, Ahmedabad ("**NCLT**") passed an order commencing the Corporate Insolvency Resolution Process ("**CIRP**") against the Corporate Debtor, and the appellant was appointed as the Interim Resolution Professional. In the same order, the NCLT also declared a moratorium under Section 13(1)(a) of the IBC.

4 On 21.08.2017, the appellant informed the respondent of the

initiation of CIRP and sought custody of the warehoused goods and requested the respondent not to dispose of or auction the same. On 29.03.2019, the respondent for the first time, issued a notice to the Corporate Debtor regarding non-fulfilment of export obligations in terms of the EPCG license demanding customs duty of Rs. 17,13,989/- with interest. From 02.04.2019 to 07.04.2019, the respondent issued five different demand notices to the Corporate Debtor regarding non-fulfillment of export obligations under different EPCG licenses for various amounts. The details of the demand notices issued by the Respondent for non-fulfilment of EPCG License conditions by the Corporate Debtor are tabulated herein for ease of reference:

S. No.	Date	Details of Demand Notice	Demanded Amount (plus interest as applicable)
1.	29.03.2019	EPCG License No. 5230007265 dated 16.07.2010	Rs. 17,13,989
2.	02.04.2019	EPCG License No. 5230008206 dated 16.11.2010	Rs. 96,20,325
3.	04.04.2019	EPCG License No. 5230007016 dated 17.05.2010	Rs. 53,29,072
4.	05.04.2019	EPCG License No. 5230007082 dated 03.06.2010	Rs. 2,05,73,402
5.	05.04.2019	EPCG License No. 5230006881 dated 31.03.2010	Rs. 6,64,646

6.	07.04.2019	EPCG License No. 5L32206936 dated 20.04.2010	Rs. 12,04,09,501

5 On 25.04.2019, the NCLT passed an order commencing liquidation against the Corporate Debtor under Section 33(2) of the IBC. *Vide* the said order, the NCLT declared that the earlier moratorium imposed under Section 13(1)(a) of the IBC shall cease to have effect by the operation of Section 14(4) of the IBC. However, a fresh direction was passed under Section 33(5) of the IBC barring the institution of any suit or legal proceeding by or against the Corporate Debtor. Further, the NCLT also appointed the appellant as the liquidator *vide* the same order.

6 Thereafter, the respondent filed claims before the appellant for goods warehoused in both Gujarat and Maharashtra on 20.05.2019, 27.05.2019 and 29.05.2019 under the IBC. On 27.06.2019, the appellant informed the respondent through its officers that liquidation proceedings had commenced against the Corporate Debtor and that the goods were to be released to the appellant.

7 Due to inaction by the respondent, the appellant filed I.A. No. 474 of 2019 before the NCLT under Section 60(5) of the IBC seeking a direction against the Respondent to release the warehoused goods belonging to the Corporate Debtor on 01.07.2019.

8 At this juncture, for the first time on 11.07.2019, the respondent

issued a notice to the Corporate Debtor under Section 72(1) of the Customs Act for custom dues amounting to Rs. 763,12,72,645/- on 2531 Bills of entries. The respondent filed a concurrent claim for the said amount before the appellant under the IBC. Details of the amount claimed by the respondent before the appellant are as follows:

S. No.	Date	Details of Claims filed by Respondent Before Appellant under Form C	Claimed Amount (plus interest as applicable)
1.	20.05.2019	Non-fulfilment of obligations under 11 EPCG Licenses	Rs. 37,92,29,749
2.	27.05.2019	Non-fulfilment of obligations under 37 EPCG Licenses	Rs. 151,33,06,859
3.	29.05.2019	Non clearing of imported goods from Jawaharlal Nehru Port Trust, Nhava Sheva, Maharashtra	Rs. 22,70,50,898
4.	18.09.2019	Dues for all cargo in custom bounded warehouses in Gujarat	Rs. 763,12,72,645

9 On 25.02.2020, the NCLT allowed I.A. No. 474 of 2019 filed by the appellant and passed the following directions:

> "14) Therefore, the present IA deserves to be allowed. Accordingly, it is allowed in terms of its prayer clause as well as with following directions.
>
> i) The Respondents are directed to allow the applicant-liquidator to remove the Material, which is lying in the Customs Bonded Warehouses without any condition, demur and/ or payment of Customs Duty.
>
> ii) The Respondents are at liberty to lodge its

claim with the Applicant-Liquidator with regard to the Customs Duty charges payable on the release of material, which form part of the assets of the Corporate Debtor company (in liquidation), before the Liquidator under the provisions of Insolvency and Bankruptcy Code, 2016 and in accordance with law.

iii) The Customs Department shall allow removal of goods/material within two weeks, from the date of receipt of an authentic copy of this order from the Liquidator.

iv) Meanwhile, the Respondents shall not proceed for auctioning, selling or appropriating the Materials owned by the Corporate Debtor company, for the purpose of recovery of its Customs Duty, which may tantamount to violation of the I&B Code and put the applicant/liquidator of the Corporate Debtor company (under liquidation) in disadvantageous position."

10 The NCLT considered Section 238 of the IBC and held that the *non-obstante* clause in the IBC, being part of a subsequent law, shall have overriding effect on proceedings under the Customs Act. Further, looking to the waterfall mechanism under Section 53 of the IBC, the NCLT held that distribution of proceedings from sale of liquidation of assets shall also prevail over the Customs Act provisions. The NCLT held that, as Government

dues, the claims by the respondent would have to be dealt with in accordance with Section 53 of the IBC. Apart from the above, the NCLT also placed reliance on a circular issued by the Central Board of Excise and Custom, being Circular No. 1053/02/2017-CX dated 10.03.2017 relating to Section 11E of the Central Excise Act, 1944. The abovementioned circular clarifies that dues under the Central Excise Act would have first charge only after the dues under the provisions of the IBC are recovered. As Section 142A of the Customs Act is *pari materia* with Section 11E of the Central Excise Act,1944, the NCLT applied the same rationale to interpret the said section in holding that the provisions of the IBC have priority.

11 Subsequent to the above judgment, the appellant sold the goods warehoused in Surat for a consideration of Rs. 169.11 crores. The sales process with respect to the goods warehoused in Dahej, Gujarat is currently ongoing, and is challenged before this Court in C.A. No. 7722 of 2021 and C.A. No. 7731 of 2021.

12 On 04.03.2021, the respondent filed an appeal before NCLAT challenging the order dated 25.02.2020 passed by the NCLT. On 22.11.2021, the NCLAT passed the impugned order, whereby it allowed the appeal filed by the respondent and set aside the directions of the NCLT requiring the respondent to release the

warehoused goods to the possession of the appellant without seeking the custom dues. The NCLAT rather directed that the warehoused goods can be "*released or disposed of as per Applicable Provisions of Customs Act by the Proper Officer*".

13 The NCLAT, in allowing the appeal of the respondent, held that the goods lying in the customs bonded warehouse were not the Corporate Debtor's assets as they were neither claimed by the Corporate Debtor after their import, nor were the bills of entry cleared for some of the said goods. By not filing the said bills of entry, the NCLAT held that the importer, *i.e.*, the Corporate Debtor, had relinquished his title to the imported goods. The NCLAT held that the Corporate Debtor is deemed to have lost his title to the imported goods by action of Sections 48 and 72 of the Customs Act. As such, the respondent is empowered to sell the goods and recover the government dues.

14 The NCLAT held that 'imported goods', which are subject to levy of Customs, stand on a different footing as payment of customs duty is a consequence of importing the goods rather than a liability on the Corporate Debtor to pay it. The appellant cannot stand at a better footing than the Corporate Debtor that he represents and cannot take possession of assets which the Corporate Debtor itself could not have obtained. Customs duty

therefore needs to be paid for the release of the warehoused goods.

15 The NCLAT held that the Customs Act is a complete Code which provides that warehoused goods cannot be released until the import duties are paid. Mere filing of claims under 'Form C' by the respondent before the appellant cannot be taken to signify the relinquishment of the right of the respondent over the warehoused goods.

16 On the issue of priority of IBC over the Customs Act, the NCLAT held that the issue did not arise in the present case, as the goods in question were imported prior in time to the initiation of the CIRP. While the containers were imported between 2012 to 2015, the CIRP was initiated only in 2017 and the Corporate Debtor went into liquidation in 2019. By not paying the import duties, the Corporate Debtor had lost the right to the warehoused goods prior to the initiation of the CIRP. The NCLAT held that these warehoused goods stand on a different footing and cannot be considered assets of the Corporate Debtor which were subject to the IBC provisions.

17 Aggrieved by the above judgment passed by the NCLAT, the appellant has filed the present Civil Appeal against the impugned judgment.

18 Mr. Arvind Datar, learned Senior Counsel appearing on behalf of the appellant, submitted as follows:

i. The Corporate Debtor is the owner of the goods. The learned Senior Counsel referred to Section 48 of the Customs Act and stated that it only applies to goods which are neither cleared nor warehoused by the importer. This Section, however, is not applicable to the present case as the notice issued and Form C filed by the respondent are in relation to warehoused goods. Thus, the notice issued by the respondent under Section 72 of the Customs Act and the consequent Form C does not in any manner attract Section 48 of the Customs Act.

ii. The Corporate Debtor has not lost ownership of the goods as alleged by the respondent. The respondent, by issuing notice under Section 72 of the Customs Act and filing its claim with the liquidator, has admitted that the Corporate Debtor is the owner. Neither Sections 72 nor 48 of the Customs Act signifies any transfer to the respondent. The Corporate Debtor has also never relinquished title to the goods and no communication regarding the same has been made to the respondent.

iii. By submitting claims under Section 38 of the IBC, the respondent has elected to subject its dues to be governed by IBC, and more specifically, to the distribution matrix provided Section 53 of the IBC. The claims made by the respondent before the appellant are based solely on the Corporate Debtor's ownership of the goods. The respondent cannot blow hot and cold at the same time by again

claiming before this Court that the Corporate Debtor has lost ownership of the said goods.

iv. The respondent could not have exercised its right under the Customs Act, as the statutory charge of the respondent under Section 142A of the Customs Act is expressly subordinate to the IBC.

v. The respondent's custody of the Corporate Debtor's goods is in violation of Sections 14 and 33 of the IBC. Section 14(1)(a) of the IBC expressly prohibits the institution or continuation of proceedings against the Corporate Debtor during the moratorium period. Further, Section 14(1)(c) states that foreclosure, recovery, or enforcement of any security interest against the Corporate Debtor is prohibited.

19 Mr. K.M. Nataraj, learned Additional Solicitor General of India appearing for the respondent, submitted as under:

i. The goods left in the Custom Bonded Warehouse are not the assets of the Corporate Debtor. This is because these goods were never claimed after being imported. As per the record, the goods were imported between the years 2012 and 2015, and the Corporate Debtor started the liquidation process in 2019. In this span of 4 years, the Corporate Debtor never cleared bills of entry for part of the goods and abandoned all the material lying in the Custom Bonded Warehouse. Despite receipt of various demand notices by the respondent, the Corporate Debtor did not clear the goods and hence the same are liable to be sold by the respondent under the Customs Act.

ii. The liquidator can take into his possession only the assets of the Corporate Debtor as under Section 35(1)(b) of the IBC. However, in the present case, the warehoused goods cannot be termed as

assets of the Corporate Debtor, until and unless the same are legally cleared from the warehouses upon payment of relevant dues and duties. The Corporate Debtor herein has not even paid the bill of entry for part of the goods.

iii. Section 45 of the Customs Act lays down restrictions on custody and removal of imported goods. It stipulates that all imported goods unloaded in the customs area shall remain in the custody of such person approved by the commissioner till the time the same are cleared for home consumption or are warehoused or transshipped. Further, it provides that if such goods are not cleared as per the criteria mentioned above, they can be sold after permission from the proper officer. Section 71 of the Customs Act further states that no goods shall be taken out of the warehouse except as provided under by the Customs Act. Hence, the goods cannot be removed without payment of import duties and charges.

iv. The Corporate Debtor has abandoned the imported goods for several years, refused to pay the import duties and other charges, and has not taken any effort to take possession of the goods for several years. Consequently, the Corporate Debtor has lost its right to the warehoused goods, and hence under Section 72 of the Customs Act, the government authorities are fully authorized to recover the dues. In such a circumstance, where the Corporate Debtor's title to the goods has been deemed to have been relinquished, the liquidator does not have the authority to take possession of them.

v. Customs duty is an incidence or consequence of import. Even before the CIRP was initiated, the Corporate Debtor could not have secured the possession of the warehoused goods without paying the due charges. Hence, the liquidator, who is

representing the Corporate Debtor, cannot stand on a better footing than the Corporate Debtor itself.

vi. It is further submitted that merely because the respondent had filed its claim before the liquidator, it cannot be said that the respondent had relinquished its rights over the warehoused goods. The claim was filed by the respondent only to realize its dues, and hence cannot be viewed as a relinquishment or abandonment of its rights.

20 In light of the arguments advanced and the documents submitted before this Court, we are called upon to answer two important questions which arise for our consideration:

a) Whether the provisions of the IBC would prevail over the Customs Act, and if so, to what extent?

b) Whether the respondent could claim title over the goods and issue notice to sell the goods in terms of the Customs Act when the liquidation process has been initiated?

ANALYSIS

21 It must be noted that this question assumes significance as the warehoused goods belonging to the Corporate Debtor which is under liquidation, are sought to be sold by the Customs Authorities in lieu of custom dues. The respondent has relied on certain provisions of the Customs Act to assume such power. This has been vehemently opposed by the appellant herein, who has argued that once the insolvency process has been initiated against the Corporate Debtor, the IBC becomes squarely

applicable and overrides any other enactment giving priority to the charges on the property.

22 The NCLAT has not directly answered this question of law. Rather, it has entered into the facts of the case to distinguish the applicability of the IBC as compared to the Customs Act. The NCLAT held that the Corporate Debtor had abandoned the goods much before the insolvency process was initiated, and thereby the title of the goods had passed to the Customs Authority. The NCLAT held as under:

> "7.16 Thus, it is clear that NCLT and NCLAT cannot usurp the legitimate jurisdiction of other Courts, Tribunals and fora when the dispute does not arise solely from or relating to the Insolvency of the Corporate Debtor. In the instant case, the Corporate Debtor had abandoned the imported goods in the Customs warehouses for several years and failed to pay the import duty and other charges and had not taken any steps to take possession of those goods for several years. Therefore the importer had lost his right to the imported goods. Consequently, the Customs Authorities are fully empowered under Section 72 of the Act to sell those goods to recover the government dues. The Liquidator has no right to take into possession over those goods for which the Corporate Debtor's title is deemed relinquished by implication of law. Even before initiating the Corporate Insolvency Resolution Process, the Corporate Debtor Company could not have secured the possession of the imported goods except by paying the customs duty. The Resolution Professional/Liquidator, who virtually represents the Company, cannot stand on a better footing than the Corporate Debtor

itself.

…

7.20 In the instant case, the Appellant has filed its Claim before the Liquidator in response to the Notice issued by the Liquidator. Given the law laid down by the Hon'ble Supreme Court in the above-mentioned case, it is clear that by submission of Claim in response to the Notice issued by the Liquidator, it can not be presumed that the Appellant had relinquished its right over the property and submitted to the jurisdiction of the Liquidator. The Claim is filed in an effort to realise its dues. Still, it will not amount to relinquishment of its right over the Warehoused goods under its custody for which Appellant has every right to sell those goods for the realisation of the Government goods.

…

7.23 We are not convinced with the argument advanced by the Respondent because the goods imported by the Corporate Debtor were imported much before the initiation of the Corporate Insolvency Resolution Process, and the Corporate Debtor never claimed them after import. Undisputedly the containers were imported between 2012 to 2015. The CIRP was initiated against the Corporate Debtor in 2017, and the liquidation order was passed on April 25 2019.

7.24 Therefore, the Corporate Debtor's assets because the Corporate Debtor never made any effort for clearing the goods by paying Customs Duty and other applicable charges before the initiation of Liquidation proceeding after importing them. Undisputedly the containers were imported between 2012 to 2015. The CIRP was initiated against the Corporate Debtor in 2017, and the liquidation order was passed in April 25, 2019. Therefore the assets lying in the Customs bonded warehouses cannot be considered assets of the Corporate Debtor. The Liquidator intends to possess the uncleared

> goods from the customs warehouses without upfront payment of Customs duty, which is against the statutory provisions of the Customs Act, 1962. Therefore, the imported goods subject to levy of Customs stand on a different footing than the goods /assets, not in the Corporate Debtor's possession. Therefore, the assets lying in the Customs bonded warehouses cannot be considered assets of the Corporate Debtor.

23 In the above context, this Court is required to analyze whether the NCLAT's treatment of the facts is correct or if a fresh look is required. Before we enter into a detailed discussion and analysis of the case at hand, it would be beneficial to analyze certain provisions of the Customs Act which may be relevant to this case.

24 When goods are imported/exported from India, such goods may be subjected to custom duty as indicated under Section 12 of the Customs Act. There are many objectives behind such exaction – some of it is to maintain trade balance, control imports and exports, protection of domestic industry, prevention of smuggling, conservation and augmentation of foreign exchange, and so on.

25 When goods are imported, it can be either for home consumption or for transshipment. An importer can either choose to pay the duty and utilize the goods immediately for domestic usage or execute a bond so as to warehouse the said goods. Accordingly, an importer has to submit a bill of entry either for home consumption or for warehousing in terms of Section 46 of the

Customs Act, in the prescribed format.

26 When a person chooses to warehouse the goods, he ought to execute a bond in terms of Section 59 of the Customs Act. Such warehoused goods can subsequently be either cleared for home consumption or can be exported.

27 Section 61 of the Customs Act mandates the time period allowed for warehousing. For example, in the case of capital goods intended for a 100% export-oriented undertaking, warehousing is permitted till such goods are cleared from the warehouse. In case of goods not intended for such export-oriented purpose, a time period of one year is prescribed in terms of Section 61(1)(c) of the Customs Act. The provision also provides for an extension which could be granted by the appropriate authority, for a period of not more than one year. Under Section 61(2) of the Customs Act, provision is made to charge interest on those goods which are warehoused beyond the period granted.

28 Section 71 of the Customs Act provides that no warehoused goods shall be taken out of the warehouse, except on clearance for home consumption or export or for removal to another warehouse, or as provided by the Act.

29 Section 72 of the Customs Act deals with the issue of when the goods can be said to have been improperly removed from the

warehouse. As this provision is of some relevance to the present case, it is extracted below:

> "72. **Goods improperly removed from warehouse, etc**.—(1) In any of the following cases, that is to say,—
>
> (a) where any warehoused goods are removed from a warehouse in contravention of section 71;
>
> (b) where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted under section 61 to remain in a warehouse;
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> * * * * *
>
> (d) where any goods in respect of which a bond has been executed under section 59 and which have not been cleared for home consumption or export or are not duly accounted for to the satisfaction of the proper officer, the proper officer may demand, and the owner of such goods shall forthwith pay, the full amount of duty chargeable on account of such goods together with interest, fine and penalties payable in respect of such goods
>
> (2) If any owner fails to pay any amount demanded under sub-section (1), the proper officer may, without prejudice to any other remedy, cause to be detained and sold, after notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of his goods, if any, in the warehouse, as the said officer may deem fit."

From the aforesaid, it can be noted that when goods are warehoused and the importer has not taken sufficient steps to take the goods out for domestic consumption or for transshipment, within the required time period, then the proper

office has to take steps in terms of Section 72(2) of the Customs Act. The aforesaid provision mandate that it is only after the determination of dues by the proper officer that goods may be sold, in the event that the demanded amount relating to custom duty, interest, fines, and other penalties have not been paid. In that case alone, after such determination, a sufficient portion of goods may be sold.

30 In order to complete the discussion on the Customs Act, it may be necessary to take note of Section 142A extracted below:

> **142A. Liability under Act to be first charge**.— Notwithstanding anything to the contrary contained in any Central Act or State Act, any amount of duty, penalty, interest or any other sum payable by an assessee or any other person under this Act, shall, save as otherwise provided in section 529A of the Companies Act, 1956 (1 of 1956), the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 (51 of 1993), and the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002 (54 of 2002) and the Insolvency and Bankruptcy Code, 2016 (31 of 2016) be the first charge on the property of the assessee or the person, as the case may be..

31 In the present case, the Corporate Debtor as part of its business used to regularly import and warehoused goods in the custom bonded warehouses from at least 2011. As has already been mentioned above, the CIRP process commenced against the Corporate Debtor on 01.08.2017 by the order of the NCLT. It

appears from the record that no notices were issued by the respondent against the Corporate Debtor with respect to the warehoused goods prior to initiation of the CIRP. In fact, all the duty demand notices issued by the respondent were from March 2019 onwards. It is in this context that it is necessary for us to ascertain whether the IBC overrides the Customs Act or vice-versa.

32 Insolvency and Bankruptcy Code came into force in India from 28.05.2016 to combine provisions relating to insolvency found across different statutes into a single comprehensive instrument. Under the earlier legal regime, different statutes were resulting in multiple parallel proceedings, which inevitably resulted in uncertainty for the creditors over their recovery. One of the objectives behind the enactment of the IBC was to end the conflict between different statutes.

33 The purpose behind insolvency law has been captured in Halsbury's Laws of England (para 8, vol. III, 4th edition) in the following manner:

> "A man has a perfect right, so long as he is solvent, to continue a losing business; but the moment he becomes insolvent he does so at the risk of his creditors. As soon as he finds that he cannot pay loop in the pound, although he may nevertheless think that if he goes on he may be able to retrieve his position, he ought to call together his creditors, who will have to bear the loss in case his calculations are wrong, and leave them to determine whether the business shall be

> continued or not. Moreover, it is not enough to consult only the largest creditors. There is no insolvency within the meaning of this offence if a careful, prudent, and unhurried realization of the assets would produce enough to pay loop in the pound on the amount of liabilities."

34 It may be relevant to capture a brief outlook as to various stages involved in the corporate insolvency process in India:

(i) When a financial default occurs, either the borrower (Corporate Debtor under Section 10 read with Section 11 of the IBC) or the lender (creditors – financial creditor under Section 7 or operational creditor under Section 9 of the IBC) can approach the NCLT for initiating the resolution process. Operational creditors need to give a notice of 10 days to the Corporate Debtor before approaching the NCLT. If the Corporate Debtor fails to repay dues to the operational creditor, or fails to show any existing dispute or arbitration, then the operational creditor can approach the NCLT.

(ii) Upon admission of an application by the NCLT, the claims of the creditor will be frozen for 180 days, during which time, the NCLT will hear proposals for revival of the Corporate Debtor and decide on future course of action. During this period, a moratorium is imposed to ensure no coercive proceedings are launched or continued against the Corporate Debtor in any other

forum or under any other law, until approval of the resolution plan or initiation of the liquidation process.

(iii) The NCLT first appoints an interim insolvency professional. The interim insolvency professional is to hold office until a resolution professional is appointed. He further takes control of the Corporate Debtor's operations and collects its financial information from information utilities. The NCLT must also ensure public announcement of the initiation of corporate insolvency process and call for submission of claims.

(iv) The Corporate insolvency process must normally be completed within 180 days of admission of the application by the NCLT. The Committee of Creditors has to then take decisions regarding insolvency resolution as provided by law.

35 In this context, we may note that when the insolvency process commences, the adjudicating authority is mandated to declare a moratorium on continuation or initiation of any coercive legal action against the Corporate Debtor. Section 14 of the IBC reads as under:

> **14. Moratorium.**—(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

> (2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.
>
> (3) The provisions of sub-section (1) shall not apply to —
>
> (a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;
>
> (b) a surety in a contract of guarantee to a corporate debtor.
>
> (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:
>
> Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

36 Section 14 of the IBC prescribes a moratorium on the initiation of CIRP proceedings and its effects. One of the purposes of the moratorium is to keep the assets of the Corporate Debtor together during the insolvency resolution process and to facilitate orderly

completion of the processes envisaged under the statute. Such measures ensure the curtailing of parallel proceedings and reduce the possibility of conflicting outcomes in the process. In this context, it is relevant to quote the February 2020 Report of the Insolvency Law Committee, which notes as under:

> "8.2 The moratorium under Section 14 is intended to keep "the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default." Keeping the corporate debtor running as a going concern during the CIRP helps in achieving resolution as a going concern as well, which is likely to maximize value for all stakeholders. In other jurisdictions too, a moratorium may be put in place on the advent of formal insolvency proceedings, including liquidation and reorganization proceedings. The UNCITRAL Guide notes that a moratorium is critical during reorganization proceedings since it "facilitates the continued operation of the business and allows the debtor a breathing space to organize its affairs, time for preparation and approval of a reorganization plan and for other steps such as shedding unprofitable activities and onerous contracts, where appropriate."

From the above, it can be seen that one of the motivations of imposing a moratorium is for Section 14(1)(a), (b), and (c) of the IBC to form a shield that protects pecuniary attacks against the Corporate Debtor. This is done in order to provide the Corporate

Debtor with breathing space, to allow it to continue as a going concern and rehabilitate itself. Any contrary interpretation would crack this shield and would have adverse consequences on the objective sought to be achieved.

37 Even if a company goes into liquidation, a moratorium continues in terms of Section 33(5) of the IBC which reads as under:

> **33 (5)** - Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:
>
> Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

38 We may note that the IBC, being the more recent statute, clearly overrides the Customs Act. This is clearly made out by a reading of Section 142A of the Customs Act. The aforesaid provision notes that the Custom Authorities would have first charge on the assets of an assessee under the Customs Act, except with respect to cases under Section 529A of Companies Act 1956, Recovery of Debts Due to Banks and Financial Institutions Act 1993, Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the IBC, 2016. Accordingly, such an exception created under the Customs Act is duly acknowledged under Section 238 of the IBC as well.

Additionally, we may note that Section 238 of the IBC clearly overrides any provision of law which is inconsistent with the IBC.

Section 238 of IBC provides as under:

> **238. Provisions of this Code to override other laws-**
> The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

39 The NCLAT, while playing down the effect of Section 142A of the Customs Act and Section 238 of the IBC, has held that the Customs Act is a complete code in itself and no person can seek removal of goods from the warehouse without paying customs duty. The NCLAT relies on the judgment in ***Collector of Customs v. Dytron (India) Ltd.***, 1999 ELT 342 Cal., by the High Court of Calcutta, which laid down that customs duty carry first charge even during the insolvency process under Section 529 and 530 of Companies Act, 1956. However, reliance on the said precedent is not appropriate as the NCLAT has failed to notice that such interpretation has been legislatively overruled by the inclusion of Section 142A under the Customs Act, through Section 51 of the Finance Act of 2011.

40 From the above, it is to be noted that the Customs Act and the IBC act in their own spheres. In case of any conflict, the IBC overrides the Customs Act. In present context, this Court has to

ascertain as to whether there is a conflict in the operation of two different statutes in the given circumstances. As the first effort, this Court is mandated to harmoniously read the two legislations, unless this Court finds a clear conflict in its operation.

41 At the cost of repetition, we may note that the demand notices issued by the respondent are plainly in the teeth of Section 14 of the IBC as they were issued after the initiation of the CIRP proceedings. Moratorium under Section 14 of the IBC was imposed when insolvency proceedings were initiated on 01.08.2017. The first notice sent by the respondent authority was on 29.03.2019. Further, when insolvency resolution failed and the liquidation process began, the NCLT passed an order on 25.04.2019 imposing moratorium under Section 33(5) of the IBC. It is only after this order that the respondent issued a notice under Section 72 of the Customs Act against the Corporate Debtor. The various demand notices have therefore clearly been issued by the respondent after the initiation of the insolvency proceedings, with some notices issued even after the liquidation moratorium was imposed.

42 We are of the clear opinion that the demand notices to seek enforcement of custom dues during the moratorium period would clearly violate the provisions of Sections 14 or 33(5) of the IBC, as the case may be. This is because the demand notices are an

initiation of legal proceedings against the Corporate Debtor. However, the above analysis would not be complete unless this Court examines the extent of powers which the respondent authority can exercise during the moratorium period under the IBC.

43 In the above context, the judgment of this Court in ***S.V. Kondaskar v. V.M. Deshpande,*** AIR 1972 SC 878, is extremely relevant. In that case, this Court, while expounding the interplay of Section 446 of the Companies Act 1956 (bankruptcy provision) with the Income Tax Act,1961, held as follows:

> **"7.** …Looking at the legislative history and the scheme of the Indian Companies Act, particularly the language of Section 446, read as a whole, it appears to us that the expression "other legal proceeding" in sub-section (1) and the expression "legal proceeding" in sub-section (2) convey the same sense and the proceedings in both the sub-sections must be such as can appropriately be dealt with by the winding up court. The Income Tax Act is, in our opinion, a complete code and it is particularly so with respect to the assessment and re-assessment of income tax with which alone we are concerned in the present case. The fact that after the amount of tax payable by an assessee has been determined or quantified its realisation from a company in liquidation is governed by the Act because the income tax payable also being a debt has to rank pari passu with other debts due from the company does not mean that the assessment proceedings for computing the amount of tax must be held to be such other legal proceedings as can only be started or continued with the leave of the liquidation court under Section 446 of the Act. The liquidation court, in our opinion, cannot perform the functions of Income Tax Officers while assessing

the amount of tax payable by the assessees even if the assessee be the company which is being wound up by the Court. The orders made by the Income Tax Officer in the course of assessment or re-assessment proceedings are subject to appeal to the higher hierarchy under the Income Tax Act. There are also provisions for reference to the High Court and for appeals from the decisions of the High Court to the Supreme Court and then there are provisions for revision by the Commissioner of Income Tax. It would lead to anomalous consequences if the winding up court were to be held empowered to transfer the assessment proceedings to itself and assess the company to income tax. The argument on behalf of the appellant by Shri Desai is that the winding up court is empowered in its discretion to decline to transfer the assessment proceedings in a given case but the power on the plain language of Section 446 of the Act must be held to vest in that court to be exercised only if considered expedient. We are not impressed by this argument. The language of Section 446 must be so construed as to eliminate such startling consequences as investing the winding up court with the powers of an Income Tax Officer conferred on him by the Income Tax Act, because in our view the legislature could not have intended such a result.

8. The argument that the proceedings for assessment or re-assessment of a company which is being wound up can only be started or continued with the leave of the liquidation court is also, on the scheme both of the Act and of the Income Tax Act, unacceptable. We have not been shown any principle on which the liquidation court should be vested with the power to stop assessment proceedings for determining the amount of tax payable by the company which is being wound up. The liquidation court would have full power to scrutinise the claim of the revenue after income tax has been determined and its payment demanded from the liquidator. It would be open to the liquidation court then to decide how far under the law the amount of income tax determined by the Department should be accepted as a lawful liability

> on the funds of the company in liquidation. At that stage the winding up court can fully safeguard the interests of the company and its creditors under the Act. Incidentally, it may be pointed out that at the Bar no English decision was brought to our notice under which the assessment proceedings were held to be controlled by the winding up court. On the view that we have taken, the decisions in the case of *Seth Spinning Mills Ltd.*, (*In Liquidation*) (1962) 46 ITR 193 (Punj) (Supra) and the *Mysore Spun Silk Mills Ltd.*, (*In Liquidation*) (1968) 68 ITR 295 (Mys) (supra) do not seem to lay down the correct rule of law that the Income Tax Officers must obtain leave of the winding up court for commencing or continuing assessment or re-assessment proceedings."

44 Therefore, this Court held that the authorities can only take steps to determine the tax, interest, fines or any penalty which is due. However, the authority cannot enforce a claim for recovery or levy of interest on the tax due during the period of moratorium. We are of the opinion that the above *ratio* squarely applies to the interplay between the IBC and the Customs Act in this context.

45 From the above discussion, we hold that the respondent could only initiate assessment or re-assessment of the duties and other levies. They cannot transgress such boundary and proceed to initiate recovery in violation of Sections 14 or 33(5) of the IBC. The interim resolution professional, resolution professional or the liquidator, as the case may be, has an obligation to ensure that assessment is legal and he has been provided with sufficient power to question any assessment, if he finds the same to be

excessive.

46 There is another aspect of this case that needs to be highlighted to portray the inconsistency of the Customs Act *vis-à-vis* the IBC during the moratorium period. In the present case, the demand notice dated 11.07.2019 was issued by the respondent under Section 72 of the Customs Act, in clear breach of the moratorium imposed under Section 33(5) of the IBC. Issuing a notice under Section 72 of the Customs Act for non-payment of customs duty falls squarely within the ambit of initiating legal proceedings against a Corporate Debtor. Even under the liquidation process, the liquidator is given the responsibility to secure assets and goods of the Corporate Debtor under Section 35(1)(b) of IBC.

47 As laid down earlier, the Customs Act and IBC can be read in a harmonious manner wherein authorities under the Customs Act have a limited jurisdiction to determine the quantum of operational debt – in this case, the customs duty – in order to stake claim in terms of Section 53 of the IBC before the liquidator. However, the respondent does not have the power to execute its claim beyond the ambit of Section 53 of the IBC. Such harmonious construction would be in line with the ruling in ***Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta***, (2021) 7 SCC 209, wherein a balance was struck by this Court between the jurisdiction of the NCLT under the IBC and the potential

encroachment on the legitimate jurisdiction of other authorities.

48 However, it appears to us that in the impugned order, the NCLAT has misinterpreted the aforesaid judgment of this Court in ***Gujrat Urja Vikas Nigam Case*** (*supra*) and held as follows:

> "7.16 Thus, it is clear that NCLT and NCLAT cannot usurp the legitimate jurisdiction of other Courts, Tribunals and fora when the dispute does not arise solely from or relating to the insolvency of the corporate debtor. In the instant case, the Corporate Debtor had abandoned the imported goods in the Customs warehouses for several years and failed to pay the import duty and other charges and had not taken any steps to take possession of those goods for several years. Therefore, the importer had lost his right to the imported goods. Consequently, Customs Authorities are fully empowered under Section 72 of the Act to sell those goods to recover the Government dues. Liquidator has no right to take into possession over those goods for which the Corporate Debtors title is deemed relinquished by implication of law. Even before initiating the Corporate Insolvency Resolution Process, the Corporate Debtor company could not have secured the possession of the imported goods except by paying the Customs duty. Resolution Professional/liquidator, who virtually represents the company, cannot stand on a better footing than the Corporate Debtor itself."

49 Such interpretation clearly ignores the fact that there was no "abandonment of goods" which would authorize the Customs Authorities to initiate the adjudicatory process to transfer title to themselves. Before any goods can be declared to have been "abandoned", the same must be adjudged by some authority after due notice. The position cannot be assumed or deemed. In the

case at hand, no such adjudication or notice has been placed on record to suggest that such abandonment of the warehoused goods had taken place prior to the imposition of the moratorium.

50 The NCLAT, by deciding the question of passing of title from the Corporate Debtor to the respondent authority, has clearly ignored the mandate of Section 72(2) of the Customs Act relating to sale. This interpretation of the NCLAT clearly ignores the effects of the moratorium under Sections 14 and 33(5) of the IBC. The fact is that the duty demand notice and notice under Section 72(2) of the Customs Act, were issued during the moratorium period, which has been completely ignored by NCLAT and has resulted in rendering the moratorium *otiose*.

51 The interpretation provided by the NCLAT, regarding the deemed transfer of title of the goods from the assessee to the Customs Authority under Section 72 of the Customs Act, would fly in the face of Section 14 of the IBC, read with Sections 25 and 33(5). Moreover, such deemed transfer cannot be countenanced in law as the same would be in breach of Article 300A of the Constitution, as properties are deemed to be transferred to the Customs Authority without there being adequate hearing or any adjudication of any form. Such an interpretation cannot be accepted by this court.

52 Interestingly, in the present case, on 20.05.2019, 27.05.2019, 29.05.2019 & 18.09.2019 the Customs Authorities filed Form C under Regulation 17 of IBBI Liquidation Process Regulation 2016 before the appellant/liquidator in order to stake claims for distribution of proceeds of sale in consonance with Section 53 of the IBC. The respondent authority, does a U-turn on filing such claims and instead, unilaterally decides to initiate recovery proceedings under Section 72(2) of the Customs Act. Further, the Customs Authority bypasses even the notice and adjudicatory requirements contemplated under Section 72(2) of the Customs Act and takes the position that there is a deemed transfer of title with respect to the assets as customs duty and other levies were not duly paid. Such a change in stance is clearly an afterthought, without there being any basis in law to by-pass the specialized procedure laid down under the IBC.

53 For the sake of clarity following questions, may be answered as under:

a) Whether the provisions of the IBC would prevail over the Customs Act, and if so, to what extent?

The IBC would prevail over The Customs Act, to the extent that once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the respondent authority only has

a limited jurisdiction to assess/determine the quantum of customs duty and other levies. The respondent authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act.

b) Whether the respondent could claim title over the goods and issue notice to sell the goods in terms of the Customs Act when the liquidation process has been initiated?
answered in negative.

54 On the basis of the above discussions, following are our conclusions:

i) Once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the respondent authority only has a limited jurisdiction to assess/determine the quantum of customs duty and other levies. The respondent authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act.

ii) After such assessment, the respondent authority has to submit its claims (concerning customs dues/operational debt) in terms of the procedure laid down, in strict compliance of the time periods prescribed under the IBC, before the adjudicating

authority.

iii) In any case, the IRP/RP/liquidator can immediately secure goods from the respondent authority to be dealt with appropriately, in terms of the IBC.

55 Resultantly, we allow the appeal and set aside the impugned order and judgment of the NCLAT. There shall be no orders as to costs.

.....CJI.
(N.V. RAMANA)

.....J.
(J.K. MAHESHWARI)

.....J.
(HIMA KOHLI)

NEW DELHI;
AUGUST 26, 2022.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7722 OF 2021

M/S. R.K. INDUSTRIES (UNIT-II) LLP .... APPELLANT

Versus

M/S. H.R. COMMERCIALS PRIVATE LIMITED AND OTHER .....RESPONDENTS

AND
CIVIL APPEAL NO. 7731 OF 2021

WELSPUN STEEL RESOURCES PRIVATE LIMITED .... APPELLANT

Versus

M/S R.K. INDUSTRIES (UNIT II) LLP AND OTHERS .....RESPONDENTS

J U D G M E N T

HIMA KOHLI, J.

1. By this common judgment, we propose to decide both the appeals one filed by M/s. R.K. Industries (Unit-II) LLP (appellant in Civil Appeal No.7722 of 2021 and respondent No.1 in Civil Appeal No.7731 of 2021) and Welspun Steel Resources Private Limited[1] (appellant in Civil Appeal No.7731 of 2021 and respondent No.7 in Appeal No.7722/2021) against the judgment dated 10th December, 2021 passed by

1 For short 'Welspun'

the Appellate Authority, National Company Law Appellate Tribunal, Principal Bench, New Delhi[2] in Company Appeal (AT) (Ins.)No.690 of 2021 filed by R.K. Industries under Section 61 of the Insolvency and Bankruptcy Code, 2016[3], assailing the order dated 16th August, 2021 passed by the Adjudicating Authority, (National Company Law Tribunal, Ahmedabad)[4] in Interlocutory Application No.273 of 2021 (filed by the respondent No.1 - H.R. Commercial Private Limited, in IA No.698 of 2020 (filed by Liquidator) in Company Petition (IB) No.53 of 2017. For the sake of convenience, we propose to refer to the facts narrated in Civil Appeal No.7722 of 2021.

FACTS OF THE CASE

2. The facts of the case necessary to decide the present appeals are as follows.

2.1 *Vide* Agreement dated 26th February, 2008, Gujarat Maritime Board[5] leased out a parcel of land to ABG Shipyard Limited[6] for a period of thirty years. On 1st August, 2017, ICICI Bank Limited moved an application for initiation of Corporate Insolvency Resolution Process[7] against the Corporate Debtor under Section 7 of the IBC read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules[8], 2016 before the Adjudicating Authority, NCLT, Ahmedabad [CP(IB)

2 For short 'NCLAT'
3 For short 'IBC'
4 For short 'NCLT'
5 For short 'GMB'
6 For short 'Corporate Debtor'
7 For short 'CIRP'
8 For short 'IBC Rules'

No.53/NCLT/AHM/2017] wherein, Mr. Sundaresh Bhat was appointed as an Interim Resolution Professional[9]. As no Resolution Plan was approved during the CIRP, an application was moved by the IRP for initiating liquidation proceedings. *Vide* order dated 25th April, 2019, the Adjudicating Authority ordered liquidation of the Corporate Debtor and appointed Mr. Sundaresh Bhat as the Liquidator. The respondent No.2 - Liquidator made efforts to sell the assets of the Corporate Debtor through an e-auction process, as contemplated in Sections 33 and 35 of the IBC read with Schedule-I of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016[10]. Five e-auctions were conducted by the respondent No.2 - Liquidator to sell the consolidated assets of the Corporate Debtor on 17th September, 2019; 27th September, 2019; 22nd October, 2019; 11th November, 2019 and 5th August, 2020. When the first four e-auctions were unsuccessful, in the fifth e-auction, the respondent No.2 - Liquidator offered sale of the assets on a stand-alone basis or singly or in smaller lots, besides compositely. Except for the sale of two residential assets, no purchasers stepped forward to purchase the other assets.

2.2. Faced with the above situation, the respondent No.2 - Liquidator moved an application (IA No.698 of 2020) before the NCLT for permission to sell the assets of the Corporate Debtor through Private Sale, in terms of Regulation 33(2)(d) of the Liquidation Regulations, which was duly allowed. On receiving offers from potential

9 For short 'IRP'
10 For short 'Liquidation Regulations'

buyers, the respondent No.2 - Liquidator approached the Stakeholders, who in the Meeting conducted on 28th January, 2021, took a decision to go in for the sale of the Dahej Material and Scrap[11] at amounts higher than the reserve price of the Dahej Material fixed at ₹516 crores in the fifth round of the e-auction. The Stakeholders' Consultative Committee[12] resolved that the prospective bidders, who proposed to participate in the Private Sale, ought to be encouraged to participate in the Swiss Challenge Process. As a result, the Swiss Challenge Process was adopted for sale of the assets of the Corporate Debtor through Private Sale.

2.3. The first Swiss Challenge Process that commenced on 12th March, 2021, was unsuccessful as the highest offeror failed to deposit the earnest money amount of 10% of the reserve price. The SCC decided to conduct a second Swiss Challenge Process at a base price of ₹460 crores (being lower than the earlier calculated reserve price of ₹516 crores) as some assets from the Dahej Material were kept reserved for a potential buyer. The second Swiss Challenge Process was initiated on 22nd March, 2021 and at the Anchor Bid stage, the respondent No.2 - Liquidator received bids from R.K. Industries, appellant in Civil Appeal No.7731/2021, respondent No.4 - V.K. Industrial Corporation Limited and respondent No.5 – M/s Ankit International.

11 For short 'Dahej Material'
12 For short 'SCC'

2.4. On 23rd March, 2021, the appellant submitted its bid of ₹431 crores along with Expression of Interest and deposited a sum of ₹1.00 crore in terms of the bid requirement. Though the last date for submitting the Earnest Money Deposit[13] in terms of the Process Document was as 24th March, 2021, the appellant deposited the EMD of ₹43.10 crores with the respondent No.2 – Liquidator for selection as an Anchor Bidder on 26th March, 2021 along with an affidavit stating *inter alia* that it agreed to be bound by the terms of the Swiss Challenge Process.

2.5. The second stage of the Swiss Challenge Process commenced on 27th March, 2021 when the respondent No.2 - Liquidator published an advertisement inviting bidders to participate in the Swiss Challenge Process and submit their bids against the Anchor Bid. In response thereto, the appellant, respondents No.1, 3, 4, 5 and 6 submitted their bids. On 2nd April, 2021, the respondent No.1 – HR Commercials Private Limited proposed to bid in a consortium comprising of itself and the respondents No.3 to 6. The said consortium also submitted an EMD in the second stage of the Swiss Challenge Process.

COMMENCEMENT OF LITIGATION

ORDER OF THE ADJUDICATING AUTHORITY (NCLT)

3. On 6th April, 2021, respondent No.1 – HR Commercials Private Limited filed an application before the Adjudicating Authority (NCLT), being IA No.273 of 2021,

13 For short 'EMD'

challenging the bid process in the second Swiss Challenge Process wherein, the appellant was selected as the Anchor Bidder. The NCLT passed an interim order on the aforesaid application on 7th April, 2021 directing the respondent No.2 - Liquidator to complete the second Swiss Challenge Process only upto the stage of announcement of the highest bidder and for deferring the rest of the process to a date after 12th April, 2021. The said interim order dated 7th April, 2021 was subsequently extended by the NCLT on 27th April, 2021 and 3rd May, 2021.

4. Aggrieved by the aforesaid orders, the appellant – R.K. Industries filed an appeal before the Appellate Authority/NCLAT, which was disposed of, *vide* order dated 18th June, 2021 with a direction issued to the NCLT to expeditiously decide IA No.273 of 2021, moved by the respondent No.1 – HR Commercials Private Limited. [In the meantime, respondent No.7 – Welspun sent an e-mail dated 19th May, 2021 to the respondent No.2 – Liquidator expressing its interest in the Dahej Material as well as the land that was leased out by GMB to the Corporate Debtor]. A series of e-mails were exchanged between the respondent No.2–Liquidator and the respondent No.7–Welspun on its offer to acquire the consolidated assets of the Corporate Debtor at a price of ₹627.50 crores. When the request of the respondent No.7–Welspun for permission to inspect the Dahej Material at the site was turned down by the respondent No.2 - Liquidator on the ground that the matter was *sub judice* and the material was not available for bidding, it filed an application before the NCLT (IA

No.445 of 2021) for issuing directions to the respondent No.2 – Liquidator to consider and accept its offer for buying the consolidated assets of the Corporate Debtor. Around the same time, the respondent No.8 – Kanter Steel India Private Limited also moved an application (IA No.379 of 2021) before the NCLT for quashing of the second Swiss Challenge Process.

5. On 5th July, 2021, the NCLT directed the respondent No.2 – Liquidator to permit the respondent No.7 – Welspun to inspect the assets of the Corporate Debtor. After the said inspection, vide letter dated 2nd August, 2021, the respondent No.7 – Welspun hiked its offer for the consolidated assets from ₹627.50 crores to ₹650 crores on an 'as is where is basis'; 'as is what is basis' and 'wherever there is basis'.

6. On 6th August, 2021, a Meeting of the SCC was convened wherein, the respondent No.2– Liquidator appraised the stakeholders of the further developments that had taken place and the offer letter dated 2nd August, 2021 issued by the respondent No.7–Welspun bidding for the consolidated assets of the Corporate Debtor. The SCC advised the respondent No.2–0Liquidator to place the relevant facts and the bid received from the respondent No.7–Welspun before the NCLT. It is the stand of the respondent No.2–Liquidator that in the hearing conducted on 9th August, 2021, the NCLT had orally directed him to place the offer made by the respondent No.7-Welspun before the stakeholders.

7. Pursuant to the aforesaid direction, a Meeting of the SCC was conducted on 13th August, 2021 and it was decided that it would be beneficial if the Dahej Material and the Shipyard are sold as composite assets to maximize realization to the stakeholders in the shortest possible time and for quick disposal of the assets. In other words, the stakeholders were of the view that a composite sale of the Dahej Material and the Shipyard would be more beneficial vis-à-vis the sale of the Dahej Material alone, subject matter of the second Swiss Challenge Process.

8. On 16th August, 2021, the respondent No.7–Welspun sent an e-mail to the respondent No.2–Liquidator once again increasing its offer for the consolidated assets of the Corporate Debtor from ₹650 crores to ₹675 crores. It also offered to pay a sum of ₹67.50 crores as EMD with an assurance that full payment would be made on or before 30th September, 2021. On the very same day, when the matter was listed before the NCLT, the respondent No.2–Liquidator apprised the NCLT of the recommendations made by the SCC for entertaining the consolidated offer received from the respondent No.7–Welspun. Noting the aforesaid submission that removal of the Dahej Material will take upto 15 to 20 months and only thereafter, could the process for conducting sale of the land be undertaken, which would further delay the entire liquidation process and having regard to the view of the stakeholders that consolidated sale of all the assets of the Corporate Debtor at one go will save time and maximize the value to the stakeholders, the NCLT passed an order on 16th

August, 2021, permitting the respondent No.2–Liquidator to go in for Private Sale of all the assets of the Corporate Debtor and complete the entire sale process in consultation with the SCC within a period of three weeks. The respondent No.2–Liquidator was also directed to permit all the parties before the NCLT to participate in the bidding process.

ORDER OF THE APPELLATE AUTHORITY (NCLAT)

9. It was the aforesaid order that was challenged by the appellant–R.K. Industries before the NCLAT, which has been dismissed, by the impugned judgment dated 10th December, 2021. However, the NCLAT has gone on to modify the order dated 16th August, 2021 passed by the NCLT directing the respondent No.2–Liquidator to complete the entire private sale within three weeks in the following manner :

> "39. It is clear from the ratio of the above mentioned judgments that the specific context in which an auction is carried out can only elucidate the aspect of arbitrariness and favouritism or otherwise. Thus, in the present appeal where the Impugned Order challenging the stoppage of second Swiss Challenge Process and taking up a fresh private sale process has been challenged, it is seen that the decision of the stakeholders and the liquidator, upon which the Adjudicating Authority has based its order does not grant any particular party any favour. It is driven by the stakeholders' wish to get the liquidation process concluded early without losing sight of maximization of value of assets. **Also, even though this is a private sale as opposed to sale by a government authority, we are of the opinion that the standards and norms of transparency, fairness and responsibility should be adopted without any qualification or reservation and all prospective bidders should get**

> **sufficient notice and time to enable them to participate in the bidding in an effective manner. The process should be taken up after proper notice to prospective buyers and not limited to chosen few.**
>
> 40. The impugned order directs the Liquidator to complete the entire private sale (relating to the assets contained in the WSRPL offer) within three weeks from the date of Adjudicating Authority's order. It additionally directs the Liquidator to allow the parties who are involved in the hearing of CP(IB) No. 53 of. 2017 and related IAs to participate in the sale process. **We are of the opinion that rushing into the sale of composite assets with only such parties participating who had earlier not evinced keen interest in the five failed rounds of e-auction may not achieve the value maximization objective. The process should be restarted with adequate preparation and after giving open notice to prospective buyers.** We also hope liquidator will take steps to initiate and complete the sale process in accordance with the provisions of IBC and Liquidation Regulations without any favouritism and bias and with transparency and fairness.
>
> 41. **In view of the above discussion, we direct, in partial modification of the impugned order, that while the second Swiss Challenge Process stands cancelled, the private sale process should be undertaken in accordance with the directions contained in the preceding paragraph of this judgment as per relevant legal provisions."**
>
> *(emphasis added)*

THE APPEAL

10. It is the aforesaid order that has brought the appellant - R.K. Industries to this Court with a grievance that there was no good reason for the NCLAT to have permitted the procedure of Private Sale of the composite assets of the Corporate Debtor instead of taking the Second Swiss Challenge Process to its logical conclusion. As regards Welspun, respondent No.7 in Civil Appeal No. 7722 of 2021 and the appellant in Civil Appeal No. 7731 of 2021, the limited grievance raised is

with regard to the directions issued in the penultimate paragraphs of impugned judgment of restarting the process of Private Sale after issuing an open notice to all prospective buyers instead of confining the same to the parties who had earlier participated in the process.

SUBMISSIONS OF THE APPELLANT – R.K. INDUSTRIES

11. Arguing on behalf of the appellant–R.K. Industries, Mr. Gaurav Mitra, learned Senior counsel submitted that the NCLAT has erred in upholding the order of NCLT of going in for Private Sale of the composite assets of the Corporate Debtor inasmuch as there were no takers for the same at the announced reserve price in five rounds of e-auction conducted earlier by the respondent No.2–Liquidator. Contending that when there are no allegations or observations made in the impugned order that the Swiss Process challenge was irregular or improper, there was no justification for interfering with the said process that had already been set into motion for a second time in March, 2021 wherein the appellant was declared as the Anchor Bidder thereby giving it a Right of First Refusal[14] in respect of the Dahej Material. Finding fault with the observations made in the impugned order that the views of the stakeholders regarding the sale of assets are significant as they are the ultimate beneficiaries of the liquidation process and a substantial period of time had already been spent in the liquidation process without any fruitful results, it was

14 For short 'ROFR'

submitted on behalf of the appellant that the aforesaid observations run contrary to Regulation 31-A of the Liquidation Regulations and Section 35(2) of the IBC that state in clear terms that the views of the SCC are not binding on the Liquidator. It was urged that the NCLT and the NCLAT ought not to have permitted the respondent No.2-Liquidator to terminate the Swiss Challenge Process when it was at the final stage as the said termination will lead to a further delay and huge financial losses for all the concerned parties. In support of the submission that sale through the Swiss Challenge Process has been recognized by courts as a fruitful method of maximisation of value, reliance has been placed on ***Ravi Development v. Krishna Parishthan & Others***[15]***.***

12. It was next submitted by learned counsel for the appellant that the respondent No.20-Liquidator having failed to succeed in the e-auction process that was undertaken by him on five occasions, he had himself supported the Swiss Challenge Process for liquidating the assets of the Corporate Debtor and therefore, he could not have been permitted to drop the said process halfway through and approach the NCLT for seeking permission to conduct a Private Sale of the composite assets of the Corporate Debtor. It was contended that the NCLAT has failed to appreciate that the respondent No.7-Welspun too had all the opportunity to participate in the previous e-auctions conducted by the respondent No.2-Liquidator as also in the

15 (2009) 7 SCC 462

Second Swiss Challenge Process in respect of the Dahej Material and having elected not to do so, its first offer made as late as on 19th May, 2021, culminating in the final offer made on 16th August, 2021, ought not have been entertained.

SUBMISSIONS OF THE RESPONDENT NO.2 – LIQUIDATOR

13. The conduct of the respondent No.2 - Liquidator has also been questioned by the appellant on the ground that initially he had repeatedly refused to entertain the offers made by the respondent No.7-Welspun, but later on, did a complete 'U' turn in the attempt to transfer the composite assets of the Corporate Debtor to the said respondent and towards this aim, has tailor-made the Bid Documents to favour the respondent No.7. It was argued that simply because Clause 11.6 of the terms of the Second Swiss Challenge Process entitles the respondent No.2-Liquidator to abandon/cancel/terminate/waive the said process at any stage, it cannot be a ground to take such a step in an arbitrary manner, as has been done in the instant case, more so when the entire sale process had almost reached a closure when respondent No.7 - Welspun suddenly intervened seeking a composite sale of the assets of the Corporate Debtor. Lastly, learned Senior Counsel for the appellant submitted that the NCLAT has erred in directing that a fresh bid ought to be conducted. Instead, the appellant being the Anchor Bidder, ought to be given the

benefit of matching the highest bid submitted without scrapping the Second Swiss Challenge process.

14. Mr. Arvind Datar and Mr. Savla, learned Senior counsel appearing for the respondent No.2 - Liquidator sought to repel the arguments advanced on behalf of the appellant and asserted that the respondent No.2 - Liquidator had conducted the liquidation process of the Corporate Debtor in consultation with the stakeholders at every step and in the best interest of the Corporate Debtor, while strictly adhering to the provisions of the IBC and the Liquidation Regulations. Laying emphasis on the mandate of the Liquidator under the IBC to ensure maximisation of the value of the assets of the Corporate Debtor, it was stated that the intention of the respondent No.2 - Liquidator all through was to sell the consolidated assets of the Corporate Debtor and towards this direction, five e-auctions were conducted by him. In the first two e-auctions, attempts were made to sell the assets of the Corporate Debtor compositely but that was to no avail. Left with no other option, respondent No.2 - Liquidator decided to offer the assets of the Corporate Debtor for sale singly or in smaller lots, besides compositely. Despite adopting the aforesaid route in the third, fourth and fifth e-auction processes, the auction sales failed to take off and none of the assets of the Corporate Debtor could be liquidated except for two residential apartments situated in Mumbai and Ahmedabad. It was only after five failed auctions that the respondent No.2 - Liquidator moved an application before the NCLT for

permission to sell the assets of the Corporate Debtor by way of Private Sale, in terms of Regulation 33(2)(d) of the Liquidation Regulations, which was duly allowed.

15. Arguing that the appellant has no right to insist that the respondent No.2 - Liquidator ought to have concluded the Second Swiss Challenge Process when a higher offer was available and was duly recommended by the stakeholders, learned counsel cited the Minutes of the Meeting of the stakeholders held on 13th August, 2021 recording the view of the stakeholders that a composite sale of the Dahej assets as opposed to the sale set out under the Swiss Challenge process, would be far more beneficial and lead to maximising recovery in a guaranteed time line and that the said strategy ought to be adopted to ensure certainty of realization of the sale proceeds in the shortest possible time. It was stated that the respondent No.2 - Liquidator was only acting in terms of the views expressed by the stakeholders which stood to reason and logic and the said view has found favour with both, the NCLT as also the NCLAT.

16. As for the plea taken by the appellant that the Second Swiss Challenge Process ought to have been taken to its logical conclusion and could not have been abandoned midstream, learned counsel for the respondent No.2 - Liquidator submitted that simply because the appellant had participated in and was selected as an Anchor Bidder in the Second Swiss Challenge Process, does not mean that it has

any vested right to have the same concluded in its favour. Moreover, the said process comprises of two-stage bidding and the second stage which involved opening the process to the public to match the bid given by the appellant as the Anchor Bidder, was not concluded. Relying on the decisions in ***Laxmikant and Others v. Satyawan and Others***[16] and ***State of Jharkhand and Others v. CWE-Soma Consortium***[17], it was canvassed that since the Second Swiss Challenge Process was not concluded, no vested right had accrued in favour of the appellant for seeking enforcement in the Court of Law.

17. It was next argued that having accepted the terms of Anchor Bid Document, the appellant cannot be permitted to challenge the decision of the respondent No. 2-Liquidator who had to cancel the Second Swiss Challenge Process. In this context, reference was made to the affidavit dated 23rd March, 2020 submitted by the appellant wherein it had undertaken to remain unconditionally and irrevocably bound by the Swiss Challenge Process document as also by the decision of the respondent No.2 - Liquidator to cancel/ abandon/modify at any time solely at his discretion, the sale process or any part thereof. To bring home the said point, reliance has been placed on Clause 11.6 of the Swiss Challenge Process and Clause 12.3 of the Anchor Bid Document. To buttress the argument that the entity issuing the tender is well empowered to cancel the process if the tender documents so permit, learned

16 (1996) 4 SCC 208
17 (2016) 14 SCC 172

counsel has cited ***CWE-Soma Consortium*** *(supra);* ***Tata Cellular v. Union of India***[18] and ***Air India v. Cochin International Airport Limited and Others***[19]. The decisions in ***Montecarlo Limited v. National Thermal Power Corporation Limited***[20] and ***Agmatel India Private Limited v. Resources Telecom and Others***[21] have been relied on in support of the submission that courts should show restraint in matters relating to the interpretation of the tender document and the Agency floating the tender is best placed to decide its requirements.

18. Refuting the submission made on behalf of the appellant that the respondent No.2 - Liquidator has adopted an unfair process for conducting Private Sale of the assets of the Corporate Debtor, learned counsel asserted that there are no *malafides* on the part of the Liquidator in inviting fresh bids after taking the decision to cancel the Second Swiss Challenge Process when the stakeholders were duly consulted and they had unanimously expressed an opinion to go in for Private Sale of the composite assets of the Corporate Debtor. It was pointed out that even after receiving an offer from the respondent No. 7-Welspun in May, 2021, respondent No.2 - Liquidator did not unilaterally decide to scrap the Second Swiss Challenge Process. Rather, he approached the stakeholders on 6th August, 2021 and only after receiving a green signal from them, he took the matter to the NCLT. Alluding to the terms of

18 (1994) 6 SCC 651
19 (2000) 2 SCC 617
20 (2016) 15 SCC 272
21 (2022) 5 SCC 362

Schedule I, Clause 2(3) of the Liquidation Regulations, it was argued that Private Sale through direct liaison with potential buyers or through the agents is permissible. The attention of the Court was also drawn to Regulation 4 of the Liquidation Regulations which requires the liquidation process to be completed within two years and it was submitted that the order for liquidation of the Corporate Debtor was passed on 24th May, 2019 and three years have already lapsed since then and if the Dahej land and scrap are directed to be sold separately, it will require a minimum period of 15 to 18 months to remove the material from the Dahej shipyard thereby delaying sale of the Dahej land and buildings and adversely impacting the value of the Corporate Debtor and its assets.

19. The only grievance raised on behalf of the respondent No.2 - Liquidator is in respect of the directions issued in the impugned order calling upon him to restart the process of Private Sale dated 24th August, 2021 after giving an open notice to all the prospective buyers. Supporting a similar stand taken by the respondent No.7 - Welspun (appellant in Civil Appeal No. 7731 of 2021) that any such step will delay the liquidation process and result in putting the clock back to the stage of open auction, learned counsel submitted that the process that is under challenge is the Private Sale process which is duly contemplated in Regulation 33(2) of the Liquidation Regulations and cannot be questioned. Additionally, reference was made to a subsequent development where the Core Committee of Financial Creditors

conducted a meeting on 15th December, 2021, after the impugned order was passed and had expressed a unanimous view that the Private Sale process should be continued and not restarted having regard to the fact that it has taken almost three years to find a buyer and the same is at the stage of being brought to a closure. A copy of the minutes of the Core Committee held on 15th December, 2021, has been enclosed with IA No.34322/2022 (application for permission to file additional documents) filed by the respondent No.2 – Liquidator.

SUBMISSIONS OF THE RESPONDENT NO. 7 - WELSPUN

20. Arguments advanced by Mr. Aman Raj Gandhi, learned counsel for Welspun, respondent No.7 in Civil Appeal No. 7722 of 2021 and appellant in Civil Appeal No. 7731 of 2021 are broadly on the same lines as those advanced on behalf of the respondent No.2 – Liquidator. It was submitted that the appellant was involved in the bidding process since March, 2021 and had all the opportunity to conduct site visits and undertake due diligence to come up with a bid for the consolidated assets offered for sale by the respondent No.2 – Liquidator, but it failed to do so that even as on date, the appellant has not evinced any interest in bidding for the consolidated assets of the Corporate Debtor; that the entire effort of the appellant is to resort to dilatory tactics and stall the liquidation process; that earlier too, Welspun was constrained to approach this Court by way of Civil Appeal No. 5855 of 2021 in view

of the aforesaid conduct of the appellant and it was only after an order was passed by this Court on 21st September, 2021, requesting the NCLAT to dispose of the appeal preferred by the appellant within two months that the impugned order has been passed which deserves to be upheld except to the extent that the NCLAT has directed the Private Sale process to be restarted after giving an open notice to the prospective buyers. Stressing the fact that such a direction is not in consonance with the object of the IBC and does not subserve the interest of the stakeholders who have already given their unanimous consent to the Private Sale of the composite assets of the Corporate Debtor by invitation, learned counsel for Welspun has argued that the aforesaid direction deserves to be set aside, being bereft of any rationale. Besides, the said direction has been passed by the NCLAT when none of the parties appearing before it had sought any such relief. Citing the decision in ***Swiss Ribbons Private Limited and Another v. Union of India and Others***[22] and ***EBIX Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited and Another***[23] wherein it has been observed that a delay in the liquidation process results in depletion in the value of the Corporate Debtor and a low realization, learned counsel for Welspun argued that it is imperative to preserve the economic value of the assets of the Corporate Debtor and expedite the realization process by carrying it forward instead of putting the clock back and directing the

22 (2019) 4 SCC 17
23 (2022) 2 SC 401

respondent No.2 - Liquidator to start afresh. In fact, the aforesaid direction was sought to be described as a fusion of two distinct concepts of 'Private Sale' and 'public auction' and it was submitted that issuance of an 'open notice' runs contrary to the very object of going in for a private sale. Learned counsel for Welspun concluded by citing a recent decision in ***Jaypee Kensington Boulevard Apartments Welfare Association and Others v. NBCC (India) Limited and Others***[24] where emphasis has been laid on the object of the IBC being to ensure resolution/liquidation in a time bound manner for maximization of value assets in order to balance the interest of all the stakeholders. It was urged that as the respondent No.2 - Liquidator has taken a decision to sell the assets of the Corporate Debtor on a composite basis by Private Sale in consultation with the Stakeholders Consolidation Committee, the NCLAT ought not to have replaced the commercial wisdom of the SCC with its own view, without offering any justification for doing so.

SUBMISSIONS OF RESPONDENT NO.8 – M/s KANTER STEEL INDIA PRIVATE LIMITED

21. Mr. Gaurav Mathur, learned counsel for the respondent No.8 – M/s. Kanter Steel India Private Limited has also supported the submissions made on behalf of the respondent No.7 - Welspun and contended that the private sale process initiated

24 (2022) 1 SCC 401

by the respondent No.2 - Liquidator has the potential of fetching greater value for the larger good of the stakeholders of the Corporate Debtor and deserves to be continued. Referring to the offer of ₹431 crores made by the appellant under the Second Swiss Challenge Process, it was stated that the same was evidently below the base price of ₹460 crores declared by the respondent No.2 - Liquidator and the appellant was also in clear breach of the timelines fixed in the Sale Process Documents. The timeline fixed for submitting the earnest money deposit in the Sale Process Document for the Anchor Bidder was 24th March, 2021, by 2:00 P.M. whereas, the appellant had admittedly deposited the earnest money two days thereafter, on 26th March, 2021, which itself was sufficient ground for the respondent No.2 - Liquidator to have rejected its offer at the threshold. It was submitted that all the aforesaid submissions form a part of the objections taken by the respondent No.8 and other parties before the NCLT which were still pending when the matter came to be finally decided by the NCLAT. It has thus been argued that the appellant having participated in the bid process with eyes wide open and without any demur, it cannot be heard to state now that a vested right has been created in its favour merely on account of its participation in the bid process.

SUBMISSION OF THE APPLICANT/INTERVENOR, KIRI INFRASTRUCTURE PRIVATE LIMITED (IA NO.166862/2021)

22. Mr. Mukul Rohtagi, learned Senior counsel for the applicant - Kiri Infrastructure submitted that the applicant had filed an application before the Adjudicating Authority (NCLT) on 23rd November, 2021 seeking impleadment and had made an offer of ₹680 crores to purchase the Dahej Material, the Shipyard land and buildings. Simultaneously, a similar application was moved by the applicant before the NCLAT. However, the said application was not on record when the Company Appeal was listed before the NCLAT on 24th November, 2021, on which date, orders were reserved in the Appeal followed by the impugned judgment that was passed on 10th December, 2021. The applicant seeks impleadment in the present Appeal and supports the impugned judgment to the extent that the NCLAT had directed the respondent No.2 – Liquidator to restart the sale process after issuing an open notice to the prospective buyers, thereby affording an opportunity to the applicant to submit a bid for the consolidated assets of the Corporate Debtor on a plea that so far, its offer is the highest.

ANALYSIS

23. We have perused the impugned judgment as well as the documents placed on record and carefully considered the rival submissions advanced by learned counsel for the parties. Only two points arise for consideration in these appeals. Firstly, whether the respondent No.2 – Liquidator was justified in discontinuing the

Second Swiss Challenge Process for the sale of a part of the assets of the Corporate Debtor wherein the appellant – R.K. Industries was declared as an Anchor Bidder and opting for a Private Sale Process through direct negotiations in respect of the composite assets of the Corporate Debtor? If so, was the NCLAT justified in directing the respondent No.2 – Liquidator to restart the entire process of Private Sale after issuing an open notice to prospective buyers instead of confining the process to those parties who had participated in the process earlier?

24. To begin with, it is considered necessary to have an overview of the IBC and its relevant provisions along with the Liquidation Regulations for a better understanding of the manner in which a Liquidator is expected to proceed for conducting the sale of the assets of the Corporate Debtor in liquidation.

25. Conscious of the inadequate and ineffective framework of the insolvency and bankruptcy resolution, the Government decided to overhaul the insolvency regime. Towards this end, there were several rounds of deliberations and consultations, followed by presentation of Committee Reports, prominent among them being the Report of the Bankruptcy Law Reforms Committee[25] Volume I : Rationale and Design of November, 2015[26]. As observed in ***Innovative Industries Limited v. ICICI Bank***

25 For short 'BLRC'

26 The Report of the Bankruptcy and Law Reforms Committee Vol. I : Rationale and Design, accessible at <https://www.ibbi.gov.in/uploads/resources/BLRCReportVol1_04112015.pdf >,

and Another[27], the aim of the Parliament was to codify a legislation that would bring the entire insolvency and bankruptcy regime under one umbrella and speed up the process.

26. The Statement of the Objects and Reasons that prevailed upon the legislature to enact the IBC is as follows :

> **"12.** .... The Statement of Objects and Reasons of the Code reads as under:
>
> "*Statement of Objects and Reasons* — There is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debts Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the Courts. *The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation*.
>
> **2.** *The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely*

27 (2018) 1 SCC 407

> *resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development*.
>
> **3.** The Code seeks to provide for designating NCLT and DRT as the adjudicating authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy. The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code. Information Utilities would collect, collate, authenticate and disseminate financial information to facilitate such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code.
>
> **4.** The Code seeks to provide for amendments in the Indian Partnership Act, 1932, the Central Excise Act, 1944, Customs Act, 1962, the Income Tax Act, 1961, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Finance Act, 1994, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, the Payment and Settlement Systems Act, 2007, the Limited Liability Partnership Act, 2008, and the Companies Act, 2013.
>
> **5.** The Code seeks to achieve the above objectives."

27. The Preamble of the IBC describes the Act as:

> "An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests

> of all the stakeholders including alteration in the order of priority of payment of government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."

28. In ***EBIX Singapore Private Limited*** (supra), discussing the *raison d'étre* of the IBC for giving a purposive interpretation of the statute, this Court has observed that :

> **"96.** .... IBC was introduced as a watershed moment for Insolvency law in India that consolidated processes under several disparate statutes such as the 2013 Act, SICA, SARFAESI, the Recovery of Debts Act, the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920, into a single code. A comprehensive and time-bound framework was introduced with smooth transitions between reorganisation and liquidation, with an aim to inter alia maximise the value of assets of all persons and balance the interest of all stakeholders"

29. The underlying object of the IBC of maximization of the value of the assets of the Corporate Debtor has been highlighted in ***Swiss Ribbons Private Limited*** (supra) in the following words :

> **"27.** As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit

> in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme—workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern."

30. In the BLRC, the liquidation process has been discussed in Chapter 5 and much stress has been laid on the observations of time value in the following terms[28] :

> **"5.5 A time-bound, efficient Liquidation**
>
> Liquidation is the state the entity enters at the end of an IRP, where neither creditors nor debtors can find a commonly agreeable solution by which to keep the entity as a going concern. In India, it is widely accepted that liquidation is a weak link in the bankruptcy process and must be strengthened as part of ensuring a robust legal framework. The process flow in liquidation shares some objectives in common with that of resolving insolvency. Preservation of time value is the most important, and efficient outcomes under collective action is the next, both of which are important principles driving the design. However, this is not straightforward in implementation, particularly in an environment where different creditors have different rights over the assets of the entity, information is asymmetric, and governance and enforcement has been traditionally weak."

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28 5.5, The Report of the Bankruptcy Law Reforms Committee, Vol. 1: Rational & Design (November 2015), available at <https://www.ibbi.gov.in/uploads/resources/BLRCReportVol1_04112015.pdf >, last accessed 06-07-2022.

31. In the Fifth Report of the Insolvency Law Committee, May, 2022 published by the Ministry of Corporate Affairs, Government of India[29], while examining whether the role of the SCC ought to be reviewed and suitable provisions be enacted in the IBC to give its statutory recognition, the Committee observed that the BLRC has designed the CIRP to be driven by creditors of the Corporate Debtor, the liquidation process is met to be driven by the Liquidator. Therefore, the act does not contemplate a Creditors' Committee in the liquidation process. The creditors have a limited role of participation in the decision making during the said process. In fact, UNCITRAL Legislative Guide on Insolvency Law also acknowledges that it is generally not important for creditors to intervene in proceedings or participate in decision making during the liquidation process as the said process is driven by the Liquidator. The suggestion made by the UNCITRAL Legislative Guide is that in instances such as sell of assets in the context of liquidation proceedings, the creditors may be given a more significant role to play to boost the value of returns from such sale.

32. That time is the essence of the insolvency and the liquidation process and one of the paramount factors that weighed with the legislature for introducing the new insolvency regime through the IBC, has been referred to by the BLRC that has observed that *"the swiftness with which the liquidation face can be completed with the*

29 The Fifth Report of the Insolvency Law Committee, May, 2022 published by the Ministry of Corporate Affairs, Government of India at <https://www.ibbi.gov.in/uploads/resources/f841a45902d901ef311fe6d76127d094.pdf>, last accessed 06-07-2022

most efficient way as always rested on the Liquidator". One of the central problems identified in the poor implementation of bankruptcy systems in India has been the Liquidator. It has been highlighted how important it was to speed up the working of the Bankruptcy Code and what are the benefits of such a fast paced process. Significantly, the Executive Summary of the BLRC Report[30] has made the following observations on the "Speed is of Essence" :

> "Speed is of essence for the working of the Bankruptcy Code, for two reasons. First, while the "calm period" can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.
>
> From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay."

33. It has been noticed from past experience that judicial delays is one of the major reasons for the failure of the insolvency process. Thus, much emphasis was laid in the BLRC Report on expediting the liquidation process by curtailing the delay to ensure that the assets of the Corporate Debtor do not get frittered away or depreciated due to the time lag. Once the stage of CIRP is over and the process of liquidation is set into motion, it is critical that least time is lost in liquidating the assets

30 https://ibbi.gov.in/BLRCReportVol1_04112015.pdf

of the Corporate Debtor. The reasons are not far to see. A quick, smooth and seamless process of liquidation goes a long way in stemming deterioration of the value of the assets of the Corporate Debtor in liquidation and increases the chances of maximizing the returns to the stakeholders.

34. Keeping in mind the underlying object of this special enactment, we may directly proceed to examine Chapter III of the IBC that encapsulates the liquidation process right from the stage of initiation of liquidation, till the stage of dissolution of the Corporate Debtor. Section 33 of the IBC states as follows :

> "**33. Initiation of Liquidation** - (1) Where the Adjudicating Authority—
>
> (a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or
>
> (b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, it shall—
>
> (i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;
>
> (ii) issue a public announcement stating that the corporate debtor is in liquidation; and
>
> (iii) require such order to be sent to the authority with which the corporate debtor is registered."

35. The circumstances in which liquidation can be triggered by the Adjudicating Authority (NCLT) under Section 33, have been spelt out in ***Arcelormittal India Private Limited v. Satish Kumar Gupta and Others***[31] as below:

> **"76.10.** As has been stated hereinbefore, the liquidation process gets initiated under Section 33 if, (1) either no resolution plan is submitted within the time specified under Section 12, or a resolution plan has been rejected by the adjudicating authority; (2) where the Resolution Professional, before confirmation of the resolution plan, intimates the adjudicating authority of the decision of the Committee of Creditors to liquidate the corporate debtor; or (3) where the resolution plan approved by the adjudicating authority is contravened by the corporate debtor concerned. Any person other than the corporate debtor whose interests are prejudicially affected by such contravention may apply to the adjudicating authority, who may then pass a liquidation order on such application."

36. Section 34 of the IBC contemplates that on passing an order for liquidation of the Corporate Debtor under Section 33, the Resolution Professional appointed for the CIRP shall act as a Liquidator for purposes of liquidation. Once appointed as a Liquidator, all powers of the Board of Directors, key managerial personnel and the partners of the Corporate Debtor stand vested in the Liquidator. The powers and duties of the Liquidator have been elaborated in Section 35. To contextualize the ensuing discussion, extracted below is Section 35 of the IBC:

> **"35. Powers and duties of liquidator** - (1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:—

31 (2019) 2 SCC 1

xxxx xxxx xxxx

(b) to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;

xxxx xxxx xxxx

(f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified;

xxxx xxxx xxxx

(n) to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board.

xxxx xxxx xxxx

(2) The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds under section 53: Provided that any such consultation shall not be binding on the liquidator: Provided further that the records of any such consultation shall be made available to all other stakeholders not so consulted, in a manner specified by the Board."

37. Coming next to the Liquidation Regulations, Regulations 8, 31A, 32 and 33 need to be highlighted and state as follows:

"8. Consultation with stakeholders.

(1) The stakeholders consulted under section 35(2) shall extend all assistance and cooperation to the liquidator to complete the liquidation of the corporate debtor.

(2) The liquidator shall maintain the particulars of any consultation with the stakeholders made under this Regulation, as specified in Form A of Schedule II.

xxx xxxx xxxx

31A. Stakeholders' Consultation Committee.

(1) The liquidator shall constitute a consultation committee within sixty days from the liquidation commencement date, based on the list of stakeholders prepared under regulation 31, to advise him on the matters relating to sale under regulation 32.

xxxx xxxx xxxx

(5) Subject to the provisions of the Code and these regulations, representatives in the consultation committee shall have access to all relevant records and information as may be required to provide advice to the liquidator under sub-regulation (1).

xxxx xxxx xxxx

(7) The liquidator shall chair the meetings of consultation committee and record deliberations of the meeting.

(8) The liquidator shall place the recommendation of committee of creditors made under sub-regulation (1) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, before the consultation committee for its information.

(9) The consultation committee shall advise the liquidator, by a vote of not less than sixty-six percent of the representatives of the consultation committee, present and voting.

(10) The advice of the consultation committee shall not be binding on the liquidator: Provided that where the liquidator takes a decision different from the advice given by the consultation committee, he shall record the reasons for the same in writing.

32. [Sale of Assets, etc.

The liquidator may sell-

(a) an asset on a standalone basis;

(b) the assets in a slump sale;

(c) a set of assets collectively;

(d) the assets in parcels;

(e) the corporate debtor as a going concern; or

(f) the business(s) of the corporate debtor as a going concern:

> Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate.]
>
> **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 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;
>
> (c) the asset is sold at a price higher than the reserve price of a failed auction; or
>
> (d) 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."

38. Schedule-I under Regulation 33 lays down the procedure to be followed by the Liquidator for selling the assets of the Corporate Debtor. The relevant clauses of Schedule-I are extracted as below:

"SCHEDULE I
MODE OF SALE

(Under Regulation 33 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016)

1. AUCTION

(1) Where an asset is to be sold through auction, a liquidator shall do so the in the manner specified herein.

(2) The liquidator shall prepare a marketing strategy, with the help of marketing professionals, if required, for sale of the asset. The strategy may include-

(a) releasing advertisements;

(b) preparing information sheets for the asset;

(c) preparing a notice of sale; and

(d) liaising with agents.

(3) The liquidator shall prepare terms and conditions of sale, including reserve price, earnest money deposit as well as pre-bid qualifications, if any.

xxxx xxxx xxxx

2. PRIVATE SALE

(1) Where an asset is to be sold through private sale, a liquidator shall conduct the sale in the manner specified herein.

(2) The liquidator shall prepare a strategy to approach interested buyers for assets to be sold by private sale.

(3) Private sale may be conducted through directly liaising with potential buyers or their agents, through retail shops, or through any other means that is likely to maximize the realizations from the sale of assets.

xxxx xxxx xxxx"

39. On a conjoint reading of the aforesaid provisions of the IBC and the Liquidation Regulations, it is evident that the Liquidator is authorized to sell the immovable and movable property of the Corporate Debtor in liquidation through a public auction or a private contract, either collectively, or in a piece-meal manner. The underlying object of the Statute is to protect and preserve the assets of the Corporate Debtor in liquidation and proceed to sell them at the best possible price. Towards this object, the provisions of the IBC have empowered the Liquidator to go in for a public auction or a private contract as a mode of sale. Besides reporting the progress made, the Liquidator can also apply to the Adjudicating Authority (NCLT) for appropriate orders and directions considered necessary for liquidation of the Corporate Debtor. The Liquidator is permitted to consult the stakeholders who are entitled to distribution of the sale proceeds. However, the proviso to Section 35 (2) of the IBC makes it clear that the opinion of the stakeholders would not be binding on the Liquidator. Regulation 8 of the Liquidation Regulations refers to the consultative process with the stakeholders, as specified in Section 35 (2) of the IBC and states that they shall extend all necessary assistance and cooperation to the Liquidator for completing the liquidation process. Regulation 31A has introduced a Stakeholders' Consultation Committee that may advise the Liquidator regarding sale of the assets of the Corporate Debtor and must

be furnished all relevant information to provide such advice. Though the advice offered is not binding on the Liquidator, he must give reason in writing for acting against such advice.

40. When it comes to the mode of sale of the assets of the Corporate Debtor, whether immovable or movable and other actionable claims, Regulation 33 of the Liquidation Regulations comes into play and states that ordinarily, the Liquidator will sell the said assets through auction, as specified in Schedule-I(1). Sub-section (2) of Section 33, IBC gives an option to the Liquidator to sell the assets of the Corporate Debtor through a Private Sale, in the manner set out in Schedule-I (2). Regulation 33 of the Liquidation Regulations is couched in a language which shows that ample latitude has been given to the Liquidator, who may "ordinarily" sell the assets through auction thereby meaning that in peculiar facts and circumstances, the Liquidator may directly go in for a Private Sale. To avoid the pitfalls of disposing of the assets by conducting a Private Sale for the Pittance, Regulation 33 has prescribed some stringent conditions that the Liquidator is under an obligation to comply. The said pre-conditions are that (i) the asset is perishable; (ii) the asset is likely to deteriorate in value significancy 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). Even the mode of sale has been regulated under the Liquidation Regulations for both, a public auction and a Private Sale. All the above dos and don'ts have been inserted to protect the assets of the Corporate Debtor and safeguard the interest of the stakeholders.

41. It is a matter of record that in the instant case, following the mandate of Regulation 33 (1) of the Liquidation Regulations, the respondent No.2 – Liquidator took steps to sell the assets of the Corporate Debtor through the e-auction process not once or twice, but on five separate occasions. On each of the said occasion, efforts were made by the respondent No.2 – Liquidator to conduct a consolidated sale of the assets of the Corporate Debtor, but with no fruitful results. Faced with the said situation, the respondent No.2 – Liquidator approached the Adjudicating Authority (NCLT) in terms of Section 35 (1)(n), IBC read with Regulation 33(2) of the Liquidation Regulations for seeking permission to sell the assets of the Corporate Debtor through Private Sale. Only after due permission was granted, did the respondent No.2 – Liquidator approach the stakeholders for consultation. In the meeting held on 28th January, 2021, the stakeholders resolved that the prospective bidders, who wished to participate in the Private Sale of the Dahej Material, be encouraged to do so by adopting the Swiss Challenge Process. Pertinently, the first

stage of the said process requires selection of an Anchor Bidder; the second stage entails inviting prospective bidders to submit their bids against the reserve price offered by the Anchor Bidder. At the third stage, the Anchor Bidder gets one chance to exercise the ROFR against the H1 bidder by placing a bid higher than the H1 bid. In the event the Anchor Bidder fails to exercise the ROFR, the said right stands extinguished and H1 bidder would then be declared as successful.

42. In the instant case, the first Swiss Challenge Process did not succeed as the highest offerer failed to deposit the EMD. In the second round of the Swiss Challenge Process, as against the base price of ₹460 crores fixed for the Dahej Material and scrap, the appellant made a bid of ₹431 crores that was accepted. Thereafter, the respondent No.2 – Liquidator did publish an advertisement inviting bidders to submit their bids against the Anchor Bid in response whereto, the appellant, respondents No.3, 4, 5, and 6 submitted their bids, but before the process could be taken further, on an application moved by the respondent No.1, the Adjudicating Authority (NCLT) passed an order directing the respondent No.2 – Liquidator to carry forward the stage upto announcement of the highest bidder, while deferring the rest of the process.

43. When the matter was still pending before the NCLT, the respondent No.2 – Liquidator was approached by the respondent No.7 – Welspun, who evinced interest

in purchasing the immovable and movable assets of the Corporate Debtor, i.e., the Ship building yard along with the metal and scrap, etc., lying in the complex. As this offer was considered more attractive not only by the respondent No.2 – Liquidator, but also by the SCC, the Adjudicating Authority (NCLT) was approached for permission to undertake a composite sale of the Dahej Material and the Shipyard, which was duly granted vide order dated 16th August, 2021.

44. For testing the arguments advanced on behalf of the appellant that the respondent No.2 – Liquidator should not have been granted permission to cancel the Second Swiss Challenge Process, which was at an advance stage, it is imperative to peruse Clause 12.3 of the terms and conditions of the Anchor Bid Documents and the relevant clauses of Schedule II, which are quoted below:

> "**12. Terms and Conditions**
>
> xxxx xxxx xxxx
>
> 12.3. Notwithstanding anything to the contrary contained herein, the Liquidator expressly reserves the right to abandon/cancel/terminate/ waive the current process or a part thereof contemplated hereunder (at any stage without any liability). Further, the Liquidator reserves the right to reprice and resize or change the lots / combination of lots in the current Sale Process or in any other sale process that may be contemplated, in accordance with applicable laws and without incurring any liability in this regard, in the best interest of the stakeholders.
>
> **Schedule – II : General Terms & Conditions**
>
> xxxx xxxx xxxx
>
> "k. This not an offer document and is issued with no commitment or assurances. This intimation document does not

> constitute and will not be deemed to constitute any offer, commitment or any representation of the Liquidator / ABGSL. The Process has to be completed as set out under this document to conclude the transaction/sale successfully."
>
> xxxx xxxx xxxx
>
> "m. It is clarified that issuance of this Process Document does not create any kind of binding obligation on the part of the Liquidator or ABG to effectuate the sale of the assets of ABG."
>
> xxxx xxxx xxxx
>
> "s. The Liquidator reserves the right to cancel, abandon or reject a Bidder / Successful Bidder at any time during the process, and the Liquidator also reserves the right to disqualify a Successful Bidder, in case of any irregularities found such as ineligibility under the I & B Code."
>
> "t. Liquidator of ABGSL reserves the right to suspend/ abandon/cancel/extend or modify the process terms and/or documents and/or reject or disqualify any Bidder at any stage of process without assigning any reason and without any notice liability of whatsoever nature."

45. Clause 11.6 and Schedule IV of the Second Swiss Challenge Process Document are also relevant and are worded on the same lines:

> **"11.6** Notwithstanding anything to the contrary contained herein, the Liquidator expressly reserves the right to abandon/ cancel/ terminate/ waive the current process or a part thereof contemplated hereunder (at any stage without liability). Further, the Liquidator reserves the right to reprise and resize or change the lots/ combination of notes in the current sale process or in any other sale process that may be contemplated, in accordance with applicable laws, and without incurring any liability in this regard, in the best interest of stakeholders."
>
> **Schedule – IV : Terms & Conditions**
>
> "e. It is clarified that issuance of the Process Document does not create any kind of binding obligation on the part of the Liquidator or ABG to effectuate the sale of the assets of ABG."

xxxx xxxx xxxx

"x. The Liquidator reserves the right to cancel, abandon or reject a Bidder / Successful Bidder at any time during the process, and the Liquidator also reserves the right to disqualify a Successful Bidder, in case of any irregularities found such as ineligibility under the I & B Code."

xxxx xxxx xxxx

"y· Liquidator of ABGSL, reserves the right to suspend/abandon/cancel/ extend or modify the process terms and/or documents and/or reject or disqualify any Bidder at any stage of process without assigning any reason and without any notice liability of whatsoever nature."·

46. The following terms of Schedule IV of the Second Swiss Challenge Process bestows an additional right on the Liquidator:

"Schedule – IV : Terms & Conditions

"u. Notwithstanding anything contained herein and contrary thereto, the Liquidator may at any stage include a Bidder to participate in the Sale Process. The Liquidator reserves the right to decide the procedure for including such potential Bidders into the Sale Process. All bidders agree and accept that the Liquidator has the right to accept or reject any Bids even after the deadline as prescribed herein or at any stage of the Sale Process in order to maximize the realization from the sale of assets in the best interest of the stakeholders."

xxxx xxxx xxxx

"mm. Notwithstanding anything to the contrary contained herein : the Liquidator proposes to sell the assets of the Company as a whole to maximize overall recovery and decision for sale shall also be made after taking cognizance of operational management matters to effectuate and practically enable the Sale Process for the collective sale of assets of the Company and will take all steps and actions required to effectuate this."

47. A bare perusal of the aforesaid clauses of the Anchor Bid Document and the Second Swiss Challenge Process Document, leave no manner of doubt that the prospective bidders were informed that the Liquidator had reserved the right to abandon/cancel/terminate/waive the said process and/or part thereof at any stage; that issuance of the Anchor Bid Document did not create any binding obligations on the Liquidator to proceed with the sale of the assets of the Corporate Debtor; that the Anchor Bid Document did not constitute an offer/commitment or an assurance of the Liquidator. Identical rights were reserved with the Liquidator even in the Second Swiss Challenge Process Document. In fact, as noted above, Schedule IV goes a step further and entitles the Liquidator to include a bidder to participate in the sale process at any stage. He could even decide to sell the composite assets of the Corporate Debtor during the said process.

48. Merely because the appellant herein had submitted a bid under the Anchor Bid Document and was declared as the Anchor Bidder in the Second Swiss Challenge Process, could not vest a right on it for it to insist that the said process must be taken to its logical conclusion. The appellant has been harping about the vested right that had allegedly accrued in its favour on being declared as the Anchor Bidder. But it has conveniently glossed over an affidavit dated 23rd March, 2021 filed by it, undertaking *inter alia* that it would remain unconditionally and irrevocably bound by the Swiss Challenge Process Document and the decision of the respondent No.2

- Liquidator. Given the aforesaid terms and condition of the Anchor Bid Document and the Second Swiss Challenge Process Document, read collectively with the unqualified undertaking given by the appellant acknowledging that the respondent No.2 – Liquidator was well empowered to cancel/modify or even abandon the said process, it does not lie in the mouth of the appellant to urge that once it was set into motion, there was no justification to discontinue the Second Swiss Challenge Process. No special rights came to be bestowed on the appellant as the Anchor Bidder for it to insist that the said process ought to be taken forward and concluded, irrespective of the subsequent decision taken by the respondent No.2 – Liquidator, backed to the hilt by the stakeholders of discontinuing the Swiss Challenge Process and opting for Private Sale of the consolidated assets of the Corporate Debtor to be conducted through direct negotiations

49. To put it otherwise, an Anchor Bidder has no vested right beyond the ROFR, being the origination of the proposal. It must be borne in mind that the Swiss Challenge Process is just another method of private participation that has been recognized by this Court for its transparency [Refer : ***Ravi Development*** (supra)]. Ultimately, the IBC has left it to the discretion of the Liquidator to explore the best possible method for selling the assets of the Corporate Debtor in liquidation, which includes Private Sale through direct negotiations with the object of maximizing the value of the assets offered for sale.

50. In the instant case, there was good reason for the respondent No.2 – Liquidator to have halted the Second Swiss Challenge Process midstream and approached the Adjudicating Authority (NCLT) armed with an offer of ₹675 crores received from the respondent No.7 – Welspun who had shown interest in the composite sale of the Dahej assets. In fact, this was all along the preferred choice of the respondent No.2–Liquidator as can be seen from the fact that when public auctions were conducted by him on five earlier occasions, bids were invited for the composite assets of the Corporate Debtor. It is a different matter that the earlier e-auctions turned out to be unsuccessful, thus compelling the respondent No.2 – Liquidator to explore other options, including the option to sell the assets in smaller lots.

51. In his wisdom, the respondent No.2 – Liquidator found the offer made by the respondent No.7 – Welspun to be of better value for more than one reason. Firstly, unlike the sale proposed under the Second Swiss Challenge Process that was confined to the Dahej Material, respondent No.7 – Welspun expressed its willingness to purchase the Dahej land and the scrap as a composite asset thereby curtailing two rounds of sales, first for the Dahej Material followed by the Shipyard and the other assets. Secondly, the respondent No.2 – Liquidator had valid reasons to believe that a consolidated sale of the assets of the Corporate Debtor will lead to a higher return and a quicker recovery for the stakeholders. Thirdly, composite sale of the assets

would lead to maximization of recovery within a guaranteed timeline. In the assessment of the respondent No.2 – Liquidator, a two tier process of selling the Dahej Material in the first round through the Swiss Challenge method, followed by the sale of the Dahej land in the second round, would have caused prejudice to the stakeholders for the reason that continuing the Second Swiss Challenge Process would have meant that the appellant or the H1 bidder, as the case may be, would have to be granted at least 15 to 18 months to lift the material from the Dahej Shipyard, thus stalling the entire process of the sale of the Dahej land to a period well beyond 18 months. This delay in concluding the process could directly impact the value of the assets of the Corporate Debtor and hurt the interest of the stakeholders.

52. We are of the firm view that it is not for the court to question the judiciousness of the decision taken by the respondent No.2 – Liquidator with the idea of enhancing the value of the assets of the Corporate Debtor being put up for sale. The right to refuse the highest bid or completely abandon or cancel the bidding process was available to the respondent No.2 – Liquidator. The appellant has not been able to demonstrate that the decision of the respondent No.2 – Liquidator to discontinue the Second Swiss Challenge Process and go in for a Private Sale through direction negotiations with prospective bidders was a *malafide* exercise. It is a well-settled principle that in matters relating to commercial transactions, tenders, etc., the scope

of judicial review is fairly limited and the court ought to refrain from substituting its decisions for that of the tendering agency [Ref.: ***State of Madhya Pradesh and Others v. Nandlal Jaiswal and Others***[32], ***Tata Cellular*** (supra) and ***Air India*** (supra)]. In **Nandlal Jaiswal and Others** (supra), this Court held that while granting a licence for setting up a new industry, the State Government is not under any obligation to advertise and invite offers for the said purpose and that the State Government is well entitled to negotiate with those who have come up with an offer to set up such an industry. In ***5 M & T Consultants, Secunderabad v. S.Y. Nawab and Another***[33], the court concluded as under :

> **"17.** …… It is by now well settled that non-floating of tenders or absence of public auction or invitation alone is no sufficient reason to castigate the move or an action of a public authority as either arbitrary or unreasonable or amounting to mala fide or improper exercise or improper abuse of power by the authority concerned. Courts have always leaned in favour of sufficient latitude being left with the authorities to adopt their own techniques of management of projects with concomitant economic expediencies depending upon the exigencies of a situation guided by appropriate financial policy in the best interests of the authority motivated by public interest as well in undertaking such ventures……."

53. On the aspect of rejecting even the highest bid received by an Authority, this Court has held in ***Laxmikant and Others*** (supra) as under :

> **"4.** Apart from that the High Court overlooked the conditions of auction which had been notified and on basis of which the aforesaid public auction was held. Condition No. 3 clearly said

32 (1986) 4 SCC 566
33 (2003) 8 SCC 100

that after the auction of the plot was over, the highest bidder had to remit 1/10 of the amount of the highest bid and the balance of the premium amount was to be remitted to the trust office within thirty days "from the date of the letter informing confirmation of the auction bid in the name of the person concerned". Admittedly, no such confirmation letter was issued to the respondent. Conditions Nos. 5, 6 and 7 are relevant:

> "5. The acceptance of the highest bid shall depend on the Board of Trustees.
>
> 6. The Trust shall reserve to itself the right to reject the highest or any bid.
>
> 7. The person making the highest bid shall have no right to take back his bid. The decision of the Chairman of the Board of Trustees regarding acceptance or rejection of the bid shall be binding on the said person. Before taking the decision as above and informing the same to the individual concerned, if the said individual takes back his bid, the entire amount remitted as deposit towards the amount of bid shall be forfeited by the Trust."

From a bare reference to the aforesaid conditions, it is apparent and explicit that even if the public auction had been completed and the respondent was the highest bidder, no right had accrued to him till the confirmation letter had been issued to him. The conditions of the auction clearly conceived and contemplated that the acceptance of the highest bid by the Board of Trustees was a must and the Trust reserved the right to itself to reject the highest or any bid. This Court has examined the right of the highest bidder at public auctions in the cases of *Trilochan Mishra* v. *State of Orissa*[34] , *State of Orissa* v. *Harinarayan Jaiswal*[35] , *Union of India* v. *Bhim Sen Walaiti Ram*[36] and *State of Uttar Pradesh.* v. *Vijay Bahadur Singh*[37] . **It has been repeatedly pointed out that State or the authority which can be held to be State within the meaning of Article 12 of the Constitution is not bound to accept the highest tender or bid. The acceptance of the highest bid is subject to the conditions of holding the public auction and the right of the highest bidder has to be examined in context with the different conditions under which such auction has been held**. In the present case no right had accrued to the respondent either on

34 (1971) 3 SCC 153
35 (1972) 2 SCC 36
36 (1969) 3 SCC 146
37 (1982) 2 SCC 365

> the basis of the statutory provision under Rule 4(3) or under the conditions of the sale which had been notified before the public auction was held." *(emphasis added)*

54. Further, in ***CWE - Soma Consortium*** (supra), this Court had held as under :

> **"23. The right to refuse the lowest or any other tender is always available to the Government.** In the case in hand, the respondent has neither pleaded nor established mala fide exercise of power by the appellant. While so, the decision of the Tender Committee ought not to have been interfered with by the High Court. **In our considered view, the High Court erred in sitting in appeal over the decision of the appellant to cancel the tender and float a fresh tender. Equally, the High Court was not right in going into the financial implication of a fresh tender."**
>
> *(emphasis added)*

55. On the scope of judicial review in examining the decision of the tenderer to cancel the process if the tender document so permits, we may usefully refer to ***Montecarlo Limited*** (supra), wherein it is has been held as under :

> "**26.** ……. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. **But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible.** The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."
>
> *(emphasis added)*

[Also refer : ***Sterling Computers Limited v. M/s M & N Publications Limited and Others***[38]***, Tata Cellular (Supra), Mauleshwar Mani and Others v. Jagdish Prasad and Others***[39]***, B.S.N. Joshi & Sons Limited v. Nair Coal Services Limited and Others***[40]***, Jagdish Mandal v. State of Orissa and Others***[41]***,*** and ***Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Another***[42]***]***

56. The Statute enjoins the Liquidator to sell the immovable and movable assets of the Corporate Debtor in a manner that would result in maximization of value, lead to a higher and quicker recovery for the stakeholders, cut short the delay and afford a guaranteed timeline for completion of the process. On examining the records, we find that these were the considerations that have weighed not only with the respondent No.2 – Liquidator, but also with the stakeholders, who were unanimous in their decision that the Second Swiss Challenge Process Document ought to be abandoned in favour of the Private Sale process where not only the appellant, but all the other prospective bidders who had participated in the process were permitted by the Adjudicating Authority (NCLT) to make a bid in respect of the consolidated assets of the Corporate Debtor. In its anxiety to claim a vested right as an Anchor Bidder, the appellant tends to forget that the Swiss Challenge Process adopted by the

38 (1993) 1 SCC 445
39 (2002) 2 SCC 468
40 (2006) 11 SCC 548
41 (2007) 14 SCC 517
42 (2016) 16 SCC 818

respondent No.2 – Liquidator also falls in the category of a Private Sale, referred to in Schedule-I(2) under Regulation 33 of the Liquidation Regulations. For conducting a Private Sale, all that the Liquidator is required to do is to prepare a strategy to approach the interested parties. He is authorized to directly liaise with the potential buyers to ensure that realization from the sale of the assets can be maximized. We do not find any infirmity in the said approach adopted by the respondent No.2 – Liquidator.

57. When compared to the above protracted process described in para 53 above, a single buyer for the Dahej land along with the metal scrap, etc., lying at the complex was bound to speed up the entire process inasmuch as the successful bidder could be handed over the possession straightaway and the respondent No.2 - Liquidator would be in a position to receive the payment for the composite assets in a timebound manner with a higher rate of recovery. All these factors that fall in the realm of commercial considerations were examined holistically by the respondent No.2 – Liquidator who then placed the cards before the stakeholders in the meeting conducted on 6th August, 2021. Even though the provisions of the IBC empower the Liquidator to take an independent decision for the sale of the assets of the Corporate Debtor in liquidation, it can be seen that he has taken the stakeholders into confidence at every step. Only after finding them to be in agreement with the option sought to be explored by him of halting the Second Swiss Challenge Process and

proceeding with the Private Sale of the consolidated assets of the Corporate Debtor by directly liaising with the potential buyers, did the respondent No.2 – Liquidator take such a decision solely with the object of augmenting realization from the sale of the assets. Thereafter, the matter was taken to the Adjudicating Authority (NCLT) for necessary permissions under Section 35(1) of the IBC that was duly granted. The decision taken by the respondent No.2 – Liquidator cannot be treated as arbitrary, capricious or unreasonable for interference by this Court. The said decision is tempered with sound reason and logic. It is a purely commercial decision centered on the best interest of the stakeholders. The stakeholders having unanimously endorsed the view of the respondent No.2 – Liquidator, it is not for this Court to undertake a further scrutiny of the desirability or the reasonableness of the said decision or substitute the same with its own views.

58. Therefore, we concur with the view expressed by the NCLAT that the decision of the respondent No.2 – Liquidator was driven by the desire of the stakeholders to complete the liquidation process in the shortest possible time. Let us not forget that the aforesaid exercise of selling the assets of the Corporate Debtor has been ongoing for about three years, with several litigations spewed throughout to cause further delay. The sooner the curtains are drawn on the process, the better it would be for all concerned.

59. It is for the very same reason that we are inclined to set aside the subsequent directions issued by the NCLAT of restarting the entire process of Private Sale by issuing fresh notices to all the prospective buyers without limiting them to those who had participated in the process. No doubt, a public auction entails the procedure of issuing public notices. But that is not the case with a Private Sale where the procedure prescribed permits the Liquidator to directly liaise with the potential buyer and conduct the negotiations. It may be emphasized that these are commercial transactions and purely business driven decisions, which are not amenable to judicial review. The insolvency regime introduced under the IBC has placed fetters on the power of interference by the Adjudicating Authority (NCLT) and the Appellant Authority (NCLAT). The decision of the NCLT to have the sale of the composite assets negotiated with the parties who had participated in the earlier rounds of sale, cannot be described as a rushed decision for the NCLAT to have modified the said order and direct that the clock be set back to the initial stage of issuing notices to the prospective buyers. No such relief was sought by any of the parties to the *lis*, nor has the NCLAT given any plausible reason for issuing such a direction.

60. The powers vested in and the duties cast upon the Liquidator have been made subject to the directions of the Adjudication Authority (NCLT) under Section 35 of the IBC. Once the Liquidator applies to the Adjudicating Authority (NCLT) for appropriate orders/directions, including the decision to sell the movable and immovable assets of

the Corporate Debtor in liquidation by adopting a particular mode of sale and the Adjudicating Authority (NCLT) grants approval to such a decision, there is no provision in the IBC that empowers the Appellate Authority (NCLAT) to *suo motu* conduct a judicial review of the said decision. The jurisdiction bestowed upon the Adjudicating Authority [NCLT] and the Appellate Authority [NCLAT] are circumscribed by the provisions of the IBC and borrowing a leaf from ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Others***[43], they cannot act as a Court of equity or exercise plenary powers to unilaterally reverse the decision of the Liquidator based on commercial wisdom and supported by the stakeholders. The Court has also observed in the captioned case that *"from the legislative history, there is contra-indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority."* A similar reasoning has prevailed with Respondent in ***K. Sashidhar v. Indian Overseas Bank and Others***[44]***, Committee of Creditors of Amtek Auto Limited v. Dinkar T. Venkatasubramanian and Others***[45]***, Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another.***[46]***, Ghanashyam Mishra And Sons Private Limited through the Authorized Signatory v. Edelweiss Asset Reconstruction Company Limited through the***

43 (2020) 8 SCC 531
44 (2019) 12 SCC 150
45 (2021) 4 SCC 457
46 (2021) 10 SCC 401

Director and Others.[47] *and* ***Jaypee Kensington Boulevard Apartments Welfare Association and Others (Supra)***. The aforesaid view will apply with equal force to any commercial or business decision taken by the Liquidator for conducting the sale of the movable/immovable assets of the Corporate Debtor in liquidation. The Appellate Authority cannot don the mantle of a supervisory authority for overseeing the validity of the approach of the respondent No.2 – Liquidator in opting for a particular mode of sale of the assets of the Corporate Debtor.

61. In fact, it has been brought to our notice by the respondent No.2 – Liquidator that close on the heels of the impugned judgment passed by the NCLAT delivered on 10th December, 2021, the Core Committee of Financial Creditors of the Corporate Debtor had conducted a meeting on 15th December, 2021 and had unanimously ratified the view of the respondent No.2 – Liquidator that the bid process commenced on 24th August, 2021, ought to be continued and not restarted having regard to the fact that it had taken almost three years to find such buyers and the sale was at the cusp of being closed. It was also recorded in the minutes of the meeting that several attempts had already been made to solicit interest from parties but none had come forward to make an offer for the composite purchase of the assets. We may note that the Core Committee constitutes 70.3% of the financial creditors and when they have weighed in to support the stand taken by the respondent No.2 – Liquidator to continue

47 (2021) 9 SCC 657

the bid process commenced on 24th August, 2021, we do not see any reason to foist the view of the NCLAT on the respondent No.2 – Liquidator that he ought to restart the process for sale of the composite assets of the Corporate Debtor from the scratch after issuing an open notice to the prospective buyers.

CONCLUSION :

62. Therefore, the impugned judgment dated 10th December, 2021, passed by NCLAT to the extent that it has modified the order dated 16th August, 2021 passed by the NCLT and directed restraining of the Private Sale Process, is quashed and set aside. In our opinion, the Private Sale process of the composite assets of the Corporate Debtor should be taken further by the respondent No.2 – Liquidator without losing any further time and be concluded at the earliest. All the eligible bidders who have made Earnest Money Deposits would be entitled to participate in the negotiations to be conducted by the respondent No.2–Liquidator for privately selling the consolidated assets of the Corporate Debtor. Accordingly, we direct that the process of private negotiations that had commenced on 24th August, 2021, shall be taken to its logical end and brought to a closure by the respondent No.2 – Liquidator within four weeks from the date of passing of this order.

63. As a result, Civil Appeal No.7722 of 2021 filed by R.K. Industries fails and the same is dismissed along with I.A No. 166862/2021. Civil Appeal No.7731 of 2021

filed by Welspun is allowed on the afore-stated terms. Parties are left to bear their own costs. Pending applications, if any other than IA No. 166862/2021 shall stand disposed of.

……CJI.
[N.V. RAMANA]

.....J.
[J.K. MAHESHWARI]

.....J.
[HIMA KOHLI]

NEW DELHI,
AUGUST 26, 2022