

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

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v.

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

(Civil Appeal No. 7722 of 2021)

AUGUST 26, 2022

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**[N. V. RAMANA, CJI, J.K. MAHESHWARI AND  
HIMA KOHLI, JJ.]**

*Insolvency and Bankruptcy Code, 2016 – ss.7, 33, 34, 35, 61 – Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 – r.4 – Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 – Regulations 8, 31A, 32, 33, 33(2)(d), Schedule-I u/Regulation 33 – Gujarat Maritime Board (GMB) leased out a parcel of land to Corporate Debtor for a period of thirty years – ICICI Bank Ltd. moved an application for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor – Interim Resolution Professional (IRP) was appointed – Application moved by the IRP for initiating liquidation proceedings – Adjudicating Authority (NCLT) ordered liquidation of the Corporate Debtor and appointed Respondent No.2 as the Liquidator – Five e-auctions were conducted by the respondent No.2 to sell the consolidated assets of the Corporate Debtor but first four were unsuccessful – In the fifth e-auction, respondent No.2 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 – Respondent no. 2 moved an application before NCLT for permission to sell the assets of the Corporate Debtor through Private Sale, allowed – The Swiss Challenge Process was adopted for sale of the assets of the Corporate Debtor through Private Sale – The first Swiss Challenge Process was unsuccessful – In the second round, 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 published 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,*

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- A *NCLT passed an order directing the respondent No.2 to carry forward the stage upto announcement of the highest bidder, while deferring the rest of the process – Matter pending before the NCLT, the respondent No.2 was approached by the respondent No.7, who evinced interest in purchasing the immovable and movable assets of the Corporate Debtor – NCLT was approached for permission to undertake a composite sale of the Dahej Material and the Shipyard, which was duly granted – Challenged by appellant before NCLAT, dismissed – However, modifying the said order, the NCLAT directed respondent no. 2 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 – On appeal, held: Merely because the appellant 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 – Given the 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 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 – Decision taken by the respondent No.2 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, it is not for Supreme Court to undertake a further scrutiny of the desirability or the reasonableness of the said decision or substitute the same with its own views – Impugned judgment passed by NCLAT to the extent that it modified the order passed by the NCLT and directed restraining of the Private Sale Process, is quashed and set aside.*
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*Insolvency and Bankruptcy Code, 2016 – Swiss Challenge Process – Held: An Anchor Bidder has no vested right beyond the Right of First Refusal (ROFR), being the origination of the proposal – The Swiss Challenge Process is just another method of private participation recognized for its transparency – 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.* A

*Insolvency and Bankruptcy Code, 2016 – Jurisdiction of the NCLT and the NCLAT – Held: Powers vested in and the duties cast upon the Liquidator have been made subject to the directions of the Adjudication Authority (NCLT) u/s.35 – 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, 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.* B C D

*Constitution of India – Judicial Review – Scope of – Commercial Matters – Held: 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.* E

**Allowing CA No. 7731 of 2021 and dismissing CA No. 7722 of 2021, the Court** F

**HELD:** 1.1 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 piecemeal 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 G H

- A **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.
- B 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
- C 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. [Para 39][704-D-H; 705-A]
- 1.2 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
- F 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 significance 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
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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. [Para 40][705-B-F]

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1.3 A bare perusal of the 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. [Para 47][709-D-F]

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1.4 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

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- A 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,
- B 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. 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. 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. [Paras 48, 49][709-G-H; 710-A-E]

*Ravi Development v. Krishna Parishthan & Others*  
(2009) 7 SCC 462 : [2009] 8 SCR 654 – referred to.

- F 1.5 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 *mala fide* exercise. [Para 52][711-E-F]

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*State of Madhya Pradesh and Others v. Nandlal Jaiswal and Others (1986) 4 SCC 566 : [1987] 1 SCR 1; 5 M & T Consultants, Secunderabad v. S.Y. Nawab and Another (2003) 8 SCC 100: [2003] 4 Suppl. SCR 187; State of Jharkhand and Others v. CWE-Soma Consortium (2016) 14 SCC 172: [2016] 4 SCR 157; Laxmikant and Others v. Satyawan and Others (1996) 4 SCC 208 : [1996] 3 SCR 532; Montecarlo Limited v. National Thermal Power Corporation Limited (2016) 15 SCC 272 : [ 2016] 8 SCR 224 – relied on.*

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**1.6 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, it is found 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 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. No infirmity in the said approach adopted by the respondent No.2 – Liquidator. When compared to the above protracted process, 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**

- A 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. [Paras 56, 57][715-F-H; 716-A-D]
- F 1.7 Therefore, 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 is concurred with. 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. It is for the very same reason that this Court is inclined to set aside the subsequent directions issued by the NCLAT of restarting G H

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. [Paras 58, 59][716-D-H; 717-A-B]

1.8 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, 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. In fact, it has been brought to 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

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- A 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. The Core Committee constitutes 70.3% of the financial creditors and when they have weighed in to support
- B the stand taken by the respondent No.2 – Liquidator to continue the bid process commenced on 24th August, 2021, there is no 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. [Paras 60, 61][717-B-E; 718-B-E]

*Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Others (2020) 8 SCC 531 : [2019] 16 SCR 275 – relied on.*

- E *K. Sashidhar v. Indian Overseas Bank and Others (2019) 12 SCC 150: [2019] 3 SCR 845; Committee of Creditors of Amtek Auto Limited v. Dinkar T. Venkatasubramanian and Others (2021) 4 SCC 457 : 2021 (3) JT 110; Kalpraj Dharanshi and Another v. Kotak Investment Advisors Limited and Another. (2021) 10 SCC 401 : 2021 (4 ) JT 128; Ghanashyam Mishra And Sons Private Limited through the Authorized Signatory v. Edelweiss Asset Reconstruction Company Limited through the Director and Others (2021) 9 SCC 657 – referred to.*
- G 1.9 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. The Private Sale process of the composite assets
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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, it is directed 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. [Para 62][718-F-H; 719-A]

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*Tata Cellular v. Union of India (1994) 6 SCC 651: [1994] 2 Suppl. SCR 122; Air India v. Cochin International Airport Limited and Others (2000) 2 SCC 617 : [2000] 1 SCR 505; Agmatel India Private Limited v. Resources Telecom and Others (2022) 5 SCC 362: 2022 (2) SCALE 554; Swiss Ribbons Private Limited and Another v. Union of India and Others (2019) 4 SCC 17 : [2019] 3 SCR 535; EBIX Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited and Another (2022) 2 SCC 401; Jaypee Kensington Boulevard Apartments Welfare Association and Others v. NBCC (India) Limited and Others (2022) 1 SCC 401 : 2021 (5) SCALE 142; Innovative Industries Limited v. ICICI Bank and another (2018) 1 SCC 407 : [2017] 8 SCR 33; Arcelormittal India Private Limited v. Satish Kumar Gupta and Others (2019) 2 SCC 1 : [2018] 12 SCR 362; Sterling Computers Limited v. M/s M & N Publications Limited and Others (1993) 1 SCC 445 : [1993] 1 SCR 81; Mauleshwar Mani and Others v. Jagdish Prasad and Others (2002) 2 SCC 468 : [2002] 1 SCR 423; B.S.N. Joshi & Sons Limited v. Nair Coal Services Limited and Others (2006) 11 SCC 548 : [2006] 8 Suppl. SCR 11; Jagdish Mandal v. State of Orissa and Others (2007) 14 SCC 517; Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Another (2016) 16 SCC 818 : [2016] 3 SCR 551 – referred to.*

	<u>Case Law Reference</u>	
A		
	[2009] 8 SCR 654	referred to
	[1996] 3 SCR 532	referred to
	[2016] 4 SCR 157	relied on
B	[1994] 2 Suppl. SCR 122	referred to
	[2000] 1 SCR 505	referred to
	[2016] 8 SCR 224	relied on
	[2019] 3 SCR 535	referred to
C	[2017] 8 SCR 33	referred to
	[2018] 12 SCR 362	referred to
	[1987] 1 SCR 1	relied on
	[2003] 4 Suppl. SCR 187	relied on
D	[1993] 1 SCR 81	referred to
	[2002] 1 SCR 423	referred to
	[2006] 8 Suppl. SCR 11	referred to
	[2016] 3 SCR 551	referred to
	[2019] 16 SCR 275	referred to
E	[2019] 3 SCR 845	referred to
		Para 11
		Para 16
		Para 16
		Para 17
		Para 17
		Para 17
		Para 20
		Para 25
		Para 34
		Para 52
		Para 52
		Para 55
		Para 60
		Para 60

CIVIL APPELLATE JURISDICTION : Civil Appeal No.7722  
of 2021.

From the Judgment and Order dated 22.11.2021 of the National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT)

F (Insolvency) No.236 of 2021.

With

Civil Appeal No. 7731 of 2021.

Tushar Mehta, SG, K.M. Nataraj, ASG, Dr. Abhishek Manu G Singhvi, Gaurav Mitra, Arvind Datar, Jay Savla, Mukul Rohatgi,

Siddhartha Dave, Vikram Nankani, Sr.Advs., Sameer Pandit, Aman Raj Gandhi, Parthasarathy Bose, Anuj Jain, Aditya Ladha, Ananya Pratap Singh, Azeem Samuel, Nidhiram, Akash Kakade, Gurdeep Singh Sachar, Vikrant Shetty, Shriya Ray Chaudhary, Swetab Kumar, Somanatha Padhan, Abhishek Sharma, Ms. Ashly Cherian, Gaurav Arora, Kamlendra

H Singh, Ms. Renuka, Ms. Renuka Sahu, Alok Tripathi, Rupesh Kumar,

Kannu Agarwal, Mayank Pandey, Mukesh Kumar Maroria, Shiv Mangal Sharma, Saurabh Rajpal, Ms. Shrinjan Khosla for M/S. Aura & Co., Jasdeep Singh Dhillon, Salil Thakore, Prabhay Chaurasia, Rahul Gupta, Ms. R. Nair, Gaurav Mathur, Ms. Anushree Prashit Kapadia, Abhishek Shah, Ms. Priyanka Rathi, Shashank Khurana, M/S. Cyril Amarchand Mangaldas, Advs. for the appearing parties.

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The Judgment of the Court was delivered by

**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<sup>1</sup> (appellant in Civil Appeal No.7731 of 2021 and respondent No.7 in Appeal No.7722/2021) against the judgment dated 10<sup>th</sup> December, 2021 passed by the Appellate Authority, National Company Law Appellate Tribunal, Principal Bench, New Delhi<sup>2</sup> in Company Appeal (AT) (Ins.) No. 690 of 2021 filed by R.K. Industries under Section 61 of the Insolvency and Bankruptcy Code, 2016<sup>3</sup>, assailing the order dated 16<sup>th</sup> August, 2021 passed by the Adjudicating Authority, (National Company Law Tribunal, Ahmedabad)<sup>4</sup> 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.

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**FACTS OF THE CASE**

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

2.1 *Vide* Agreement dated 26<sup>th</sup> February, 2008, Gujarat Maritime Board<sup>5</sup> leased out a parcel of land to ABG Shipyard Limited<sup>6</sup> for a period of thirty years. On 1<sup>st</sup> August, 2017, ICICI Bank Limited moved an application for initiation of Corporate Insolvency Resolution Process<sup>7</sup>

<sup>1</sup> For short ‘Welspun’

<sup>2</sup> For short ‘NCLAT’

<sup>3</sup> For short ‘IBC’

<sup>4</sup> For short ‘NCLT’

<sup>5</sup> For short ‘GMB’

<sup>6</sup> For short ‘Corporate Debtor’

<sup>7</sup> For short ‘CIRP’

- A against the Corporate Debtor under Section 7 of the IBC read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules<sup>8</sup>, 2016 before the Adjudicating Authority, NCLT, Ahmedabad [CP(IB) No.53/NCLT/AHM/2017] wherein, Mr. Sundaresh Bhat was appointed as an Interim Resolution Professional<sup>9</sup>. As no Resolution Plan was approved during the CIRP, an application was moved by the IRP for initiating liquidation proceedings. *Vide* order dated 25<sup>th</sup> 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<sup>10</sup>. Five e-auctions were conducted by the respondent No.2 - Liquidator to sell the consolidated assets of the Corporate Debtor on 17<sup>th</sup> September, 2019; 27<sup>th</sup> September, 2019; 22<sup>nd</sup> October, 2019; 11<sup>th</sup> November, 2019 and 5<sup>th</sup> August, 2020.
- B 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.
- C 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 buyers, the respondent No.2 - Liquidator approached the Stakeholders, who in the meeting conducted on 28<sup>th</sup> January, 2021, took a decision to go in for the sale of the Dahej Material and Scrap<sup>11</sup> 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<sup>12</sup> resolved that the prospective bidders, who proposed to participate in the Private Sale, ought to be encouraged to participate in the Swiss Challenge Process.
- D As a result, the Swiss Challenge Process was adopted for sale of the assets of the Corporate Debtor through Private Sale.

<sup>8</sup>For short 'IBC Rules'

<sup>9</sup>For short 'IRP'

<sup>10</sup>For short 'Liquidation Regulations'

<sup>11</sup>For short 'Dahej Material'

H <sup>12</sup>For short 'SCC'

2.3. The first Swiss Challenge Process that commenced on 12<sup>th</sup> 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 22<sup>nd</sup> 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.

2.4. On 23<sup>rd</sup> 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<sup>13</sup> in terms of the Process Document was as 24<sup>th</sup> March, 2021, the appellant deposited the EMD of ₹ 43.10 crores with the respondent No.2 – Liquidator for selection as an Anchor Bidder on 26<sup>th</sup> 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 27<sup>th</sup> 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 2<sup>nd</sup> 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 6<sup>th</sup> April, 2021, respondent No.1 – HR Commercials Private Limited filed an application before the Adjudicating Authority (NCLT), being IA No.273 of 2021, 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 7<sup>th</sup> April, 2021 directing the respondent No.2 - Liquidator to complete

<sup>13</sup> For short ‘EMD’

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- A 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 12<sup>th</sup> April, 2021. The said interim order dated 7<sup>th</sup> April, 2021 was subsequently extended by the NCLT on 27<sup>th</sup> April, 2021 and 3<sup>rd</sup> May, 2021.
- B 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 18<sup>th</sup> 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 19<sup>th</sup> 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.
- C 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.
- D 5. On 5<sup>th</sup> 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 2<sup>nd</sup> 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’.
- E 6. On 6<sup>th</sup> 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 2<sup>nd</sup> 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 – Liquidator 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 9<sup>th</sup> 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 13<sup>th</sup> 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 16<sup>th</sup> 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 30<sup>th</sup> 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 16<sup>th</sup> 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 10<sup>th</sup> December, 2021. However, the NCLAT has gone on to modify the order dated 16<sup>th</sup> August, 2021 passed by the

- A 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.**
- E 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.
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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.” A

(*emphasis added*) B

### 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. C D

### 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<sup>14</sup> 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 F G

<sup>14</sup> For short ‘ROFR’ H

- A of time had already been spent in the liquidation process without any fruitful results, it was 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
- B 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,
- C reliance has been placed on *Ravi Development v. Krishna Parishthan & Others*<sup>15</sup>.

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
- D 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-Welspan too had all the opportunity to participate in the previous e-auctions conducted by the respondent No.2-Liquidator as also in the 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 19<sup>th</sup> May, 2021, culminating in the final offer made on 16<sup>th</sup> August, 2021, ought not have been entertained.

F **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- Welspan, 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
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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

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- A the Meeting of the stakeholders held on 13<sup>th</sup> 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
- B 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
- C 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
  - D 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<sup>16</sup> and State of Jharkhand and Others v. CWE-Soma Consortium<sup>17</sup>, it was canvassed
  - E 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
- F 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 23<sup>rd</sup> 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
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<sup>16</sup>(1996) 4 SCC 208

<sup>17</sup>(2016) 14 SCC 172

the process if the tender documents so permit, learned counsel has cited **CWE-Soma Consortium** (*supra*); **Tata Cellular v. Union of India**<sup>18</sup> and **Air India v. Cochin International Airport Limited and Others**<sup>19</sup>. The decisions in **Montecarlo Limited v. National Thermal Power Corporation Limited**<sup>20</sup> and **Agmatel India Private Limited v. Resources Telecom and Others**<sup>21</sup> 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 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 24<sup>th</sup> 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

<sup>18</sup> (1994) 6 SCC 651

<sup>19</sup> (2000) 2 SCC 617

<sup>20</sup> (2016) 15 SCC 272

<sup>21</sup> (2022) 5 SCC 362

- A calling upon him to restart the process of Private Sale dated 24<sup>th</sup> 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,
- B 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 15<sup>th</sup> December, 2021, after the impugned order was passed and had expressed
- C 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 15<sup>th</sup> 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
- E 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
- F 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
- G aforesaid conduct of the appellant and it was only after an order was passed by this Court on 21<sup>st</sup> 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.
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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<sup>22</sup> and EBIX Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited and Another<sup>23</sup> 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 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<sup>24</sup> 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

<sup>22</sup> (2019) 4 SCC 17

<sup>23</sup> (2022) 2 SCC 401

<sup>24</sup> (2022) 1 SCC 401

- A contended that the private sale process initiated 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
- B 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 24<sup>th</sup> March, 2021, by 2:00 P.M. whereas, the appellant had admittedly deposited the earnest money two days thereafter,
- C on 26<sup>th</sup> 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)**

- E 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 23<sup>rd</sup> 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 24<sup>th</sup> November, 2021, on which date, orders were reserved in the Appeal followed by the impugned judgment that was passed on 10<sup>th</sup> 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.
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**ANALYSIS**

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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?

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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<sup>25</sup> Volume I : Rationale and Design of November, 2015<sup>26</sup>. As observed in *Innovative Industries Limited v. ICICI Bank and Another*<sup>27</sup>, 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 :

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**“12. .... The Statement of Objects and Reasons of the Code reads as under:**

<sup>25</sup> For short ‘BLRC’

<sup>26</sup> 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](https://www.ibbi.gov.in/uploads/resources/BLRCReportVol1_04112015.pdf)>,

<sup>27</sup>(2018) 1 SCC 407

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- A      “*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.
- B      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.*
- C      **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 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.**
- D      **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**
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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. A

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. D

5. The Code seeks to achieve the above objectives.” E

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.” F G

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

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- A “**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.
- B 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”
- C 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 :
- D “**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
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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.” A

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<sup>28</sup> : B

### **“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.” C

31. In the Fifth Report of the Insolvency Law Committee, May, 2022 published by the Ministry of Corporate Affairs, Government of India<sup>29</sup>, 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 D

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<sup>28</sup> 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](https://www.ibbi.gov.in/uploads/resources/BLRCReportVol1_04112015.pdf)>, last accessed 06-07-2022.

<sup>29</sup> 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

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- A 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.
- B 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 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
- C D the BLRC Report<sup>30</sup> has made the following observations on the "Speed is of Essence" :

- E "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.
- F 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

H <sup>30</sup>[https://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](https://ibbi.gov.in/BLRCReportVol1_04112015.pdf)

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 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<sup>31</sup> 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

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<sup>31</sup> (2019) 2 SCC 1

- A 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.”
- C 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:—

- E 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 (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;
- G 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.
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xxxx                xxxx                xxxx                A

- (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.** C

(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

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- A 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.
- B (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.]**
- C 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:
- E 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.**
- F (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-
- G (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
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(d) the prior permission of the Adjudicating Authority has been obtained for such sale: A

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
- (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." C

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: D

#### **"SCHEDULE I**

#### **MODE OF SALE**

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

#### **1. AUCTION**

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

(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. G

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- A (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**
- B (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.
- C (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”
- D 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 piecemeal manner. The underlying object of the Statute
- E 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
- F 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
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such advice. Though the advice offered is not binding on the Liquidator, A 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 significance 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. F

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 G

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- A 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 28<sup>th</sup> 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.
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- C
- D 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,
- E 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.
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- G 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 16<sup>th</sup> August, 2021.
- H 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 A  
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 B

12.3. Notwithstanding anything to the contrary contained herein, C  
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. D

**Schedule – II : General Terms & Conditions**

xxxx xxxx xxxx E

“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 F

“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 G

“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.” H

- A           “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.”
- B         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.”
- C
- D         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.”
- E         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.”
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- 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.”.
- G         46. The following terms of Schedule IV of the Second Swiss Challenge Process bestows an additional right on the Liquidator:
- H         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.” A

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.” C D

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. E F

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 23<sup>rd</sup> March, 2021 filed by it, G H

- A 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
- B 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
- C 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
- D 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
- E 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.
- F 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.
- G 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 *mala fide* 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*<sup>32</sup>, *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

<sup>32</sup>(1986) 4 SCC 566

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- A 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<sup>33</sup>, the court concluded as under :

- B “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.....”
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- D 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 :

- E “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 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:
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- G “5. The acceptance of the highest bid shall depend on the Board of Trustees.
- H 6. The Trust shall reserve to itself the right to reject the highest or any bid.
- I 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.” A

**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*<sup>34</sup>, *State of Orissa v. Harinarayan Jaiswal*<sup>35</sup>, *Union of India v. Bhim Sen Walaiti Ram*<sup>36</sup> and *State of Uttar Pradesh. v. Vijay Bahadur Singh*<sup>37</sup>. 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 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*) C

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

**“23. The right to refuse the lowest or any other tender is always available to the Government.** In the case in hand, the F

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<sup>34</sup>(1971) 3 SCC 153 G

<sup>35</sup>(1972) 2 SCC 36

<sup>36</sup>(1969) 3 SCC 146

<sup>37</sup>(1982) 2 SCC 365 H

- A 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.”**
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*(emphasis added)*

- C 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 :

- D “**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.”
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*(emphasis added)*

- G [Also refer : **Sterling Computers Limited v. M/s M & N Publications Limited and Others**<sup>38</sup>, **Tata Cellular (Supra)**, **Mauleswar Mani and Others v. Jagdish Prasad and Others**<sup>39</sup>, **B.S.N. Joshi & Sons Limited v. Nair Coal Services Limited and Others**<sup>40</sup>, **Jagdish Mandal v. State of Orissa and Others**<sup>41</sup>,

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<sup>38</sup> (1993) 1 SCC 445

<sup>39</sup> (2002) 2 SCC 468

<sup>40</sup> (2006) 11 SCC 548

<sup>41</sup> (2007) 14 SCC 517

and Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Another<sup>42</sup> A

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 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 6<sup>th</sup> 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.

<sup>42</sup>(2016) 16 SCC 818

- A 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.
- D 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.
- F 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
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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<sup>43</sup>, 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<sup>44</sup>, Committee of Creditors of Amtek Auto Limited v. Dinkar T. Venkatasubramanian and Others<sup>45</sup>, Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another<sup>46</sup>, Ghanashyam Mishra And Sons Private Limited through the Authorized Signatory v. Edelweiss Asset Reconstruction Company Limited through the Director and Others<sup>47</sup> and Jaypee Kensington Boulevard Apartments Welfare Association and Others (Supra). The aforesaid view will apply with equal force to any commercial or business

<sup>43</sup> (2020) 8 SCC 531

<sup>44</sup> (2019) 12 SCC 150

<sup>45</sup> (2021) 4 SCC 457

<sup>46</sup> (2021) 10 SCC 401

<sup>47</sup> (2021) 9 SCC 657

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- A 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.
- B 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 10<sup>th</sup> December, 2021, the Core Committee of Financial Creditors of the Corporate Debtor had conducted a meeting on 15<sup>th</sup> December, 2021 and had unanimously ratified the view of the respondent No.2 – Liquidator that the bid process commenced on 24<sup>th</sup> 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
- C 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 the bid process commenced on 24<sup>th</sup> August, 2021, we do not see any reason to foist the view of the NCLAT on the
- D 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 :**

- F 62. Therefore, the impugned judgment dated 10<sup>th</sup> December, 2021, passed by NCLAT to the extent that it has modified the order dated 16<sup>th</sup> 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 24<sup>th</sup> August, 2021, shall be taken to its logical end and
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brought to a closure by the respondent No.2 – Liquidator within four weeks from the date of passing of this order. A

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. B

Divya Pandey

(Assisted by : Roopanshi Virang, LCRA)

Appeals disposed of.