

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 452 & 453 of 2024

[Arising out of order dated 13.02.2024 passed by the Adjudicating Authority
(National Company Law Tribunal, Mumbai Bench, Court – II), in I.A.
No.5737/2023 & I.A. No. 261/2024 in CP (IB)/03/MB/C-II/2017]

IN THE MATTER OF:

Rajkumar Vishambernath Agarwal
Authorised representative of
Eshan Minerals Private Limited

Having its address at:

Block Nos. T-2 & T-3, 4th Floor Above,
Ganesh Restaurant, Saraf Court Apartment,
Dhantoli,
Maharashtra – 440012

Email ID: nagpuoffice@eshangold.com

...Appellant

Versus

1. M/s. Sachani Developers LLP,

Having its address at:

Shop No. 102, Mudliyar Complex,
Abhyankar Road,
Dhantoli, Nagpur,
Maharashtra – 440012

Email ID: info@sachanidevelopers.com

...Respondent No. 1

2. Manish Gupta

Liquidator of Bhupen Electronic Limited,

Having its address at:

190, SFS Flats,
Hauz Khas,
New Delhi – 110016

Email ID: manish.gupta@jhalani.co.in

...Respondent No. 2

3. State Bank of India

Stressed Assets Recovery Branch (Retail)

Having its Branch Office at:

23, Najafgarh Road,
New Delhi – 110015

Email ID: SBI.05169@SBI.CO.IN

...Respondent No. 3

Present:

For Appellant : Mr. Abhijeet Sinha, Sr. Advocate with Mr. Abhishek Anand, and Ms. Jasleen Singh Sandha, Advocates.

**For Respondents : Mr. Aditya Gauri, Mr. Amar Vivek and Mr. Dhananjaya Sud, Advocates for R-1.
Ms. Purti Gupta and Ms. Henna George, Advocates for R-2/Liquidator.
Mr. Sanidhya Kumar and Mr. Amrendra Kumar Singh, Advocate for R-3/SBI.**

WITH

Company Appeal (AT) (Insolvency) No. 651 of 2024

[Arising out of order dated 13.02.2024 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court – II), in I.A. No.5737/2023 & I.A. No. 261/2024 in CP (IB)/03/MB/C-II/2017]

IN THE MATTER OF:

Best One Infraventures Private Limited

Having registered address at
KH. NO. 56/1, N.H.A.D.B., Type-B,
Civil Lines, Nagpur GPO, Nagpur, Nagpur,
Maharashtra, India – 440001
AND

Having its corporate office at:
Block No. B-2, 3 & 4, MHADA Complex,
Amravati Rd., Civil Lines,
Nagpur, Maharashtra, 440001.

...Appellant

Versus

1. Manish Gupta

Liquidator of Bhupen Electronic Limited,

Flat No.190, SFS Flats, Hauz Khas,
New Delhi – 110016
Email ID: manish.gupta@jhalani.co.in

Having IBBI registration number;
IBBI/IPA-001/IP-P00194/2017-18/10373

...Respondent No. 1

2. Eshan Minerals Private Limited

Block T2 and T3, 4th Floor, Above Ganesh
Restaurant, Saraf Court Appt., Dhantoli,
Nagpur, Maharashtra – 440012.

...Respondent No. 2

3. Maharashtra Industrial Development Corporation (MIDC)

Udyog Sarathi, Marol Industrial Area,
Mahakali Caves Road, Andheri (East),
Mumbai – 400093.

...Respondent No. 3

Present:

For Appellant : Mr. Amar Dave, Sr. Advocate with Mr. Bharat Sood, Advocates.
For Respondents : Ms. Purti Gupta and Ms. Henna George, Advocates for R-1/Liquidator.
Mr. Abhijeet Sinha, Sr. Advocate with Mr. Abhishek Anand, and Ms. Jasleen Singh Sandha, Advocates for R-3.

ORDER

ASHOK BHUSHAN, J.

Both these Appeals have been filed against the order dated 13.02.2024 passed by the Learned Adjudicating Authority, (National Company Tribunal, Mumbai Bench, Court – II) in I.A. No.5737/2023 & I.A. No. 261/2024 in C.P. (IB)/03/MB/C-II/2017.

2. The Appellant in Comp. App. (AT) Ins. No. 452 & 453/2024 is a successful bidder in a private sale whereas Appellant in Comp. App. (AT) Ins. No. 651/2024 claimed to be a prospective bidder in the private sale of Corporate Debtor.

3. Facts of the case necessary for deciding the Appeal are:

- i. Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor/Bhupen Electronic Ltd. commenced by order dated 17.01.2017 of the Adjudicating Authority. The Adjudicating Authority passed an order on 28.07.2017 directing for liquidation of the Corporate Debtor.
- ii. The State Bank of India and Canara Bank are the Financial Creditors of the Corporate Debtor.
- iii. The Respondent/Manish Gupta in both the Appeals is the Liquidator of the Corporate Debtor appointed by the Adjudicating Authority.
- iv. Liquidator issued 6 e-Auction Notices to sell the property of the Corporate Debtor i.e., on 22.02.2019, 27.03.2019, 03.05.2019,

Comp. App. (AT) (Ins.) Nos. 452, 453 & 651 of 2024

28.10.2020, 24.12.2020 and 08.10.2021, all the e-Auctions failed. Reserved price of the last e-Auction was ₹15,71,06,250/-.

- v. Eshan Minerals Pvt. Ltd. (Appellant in Comp. App. (AT) Ins. No. 452 & 453/2024) sent an offer of private sale on 20.09.2023, offering to take the property for an amount of ₹15,72,00,000/- plus GST.
- vi. The offer of Eshan Minerals Pvt. Ltd. was revised to ₹15,80,00,000/- plus GST. The Eshan Minerals Pvt. Ltd. also made and payment of ₹3,95,00,000/-, i.e., 25% of the sale consideration as Earnest Money Deposit (EMD) was approved by the Financial Creditor on 16.11.2023.
- vii. The offer of the Appellant was also placed before the Financial Creditor, who approved in its Meeting of the Creditors dated 16.11.2023.
- viii. On 21.11.2023, Letter of Intent (LoI) was issued by Liquidator to the Eshan Minerals Pvt. Ltd.
- ix. On 23.11.2023, an email was received from M/s. Sachani Developers LLP & Ors. (Sachani Developers), expressing interest to participate in the purchase of rights in the property under private sale. Liquidator having already issued LoI did not respond to the letter of Sachani Developers.
- x. Liquidator on 01.12.2023, filed I.A. No. 5737/2023 before the Adjudicating Authority seeking approval of Adjudicating Authority for private sale of the property in favour of Eshan Minerals Pvt. Ltd.
- xi. Sachani Developers also filed an I.A. No. 261/2024 before the Adjudicating Authority seeking direction to the Liquidator to allow it to participate in the bidding process.

- xii. Both the applications have been disposed of by the order of the Adjudicating Authority dated 13.02.2024. Adjudicating Authority by impugned order rejected the I.A. No. 5737/2023 filed by the Liquidator seeking approval of the private sale, whereas I.A. No. 261/2024 was allowed.
- xiii. In pursuance of the order of the Adjudicating Authority, 13.02.2024, Liquidator issued a Public Announcement dated 21.02.2024 in two newspapers in fixing last date of EMD as 02.03.2024 and 05.03.2024 from 02:00 PM to 04:00 PM as date of Auction.
- xiv. Auction notice mentioned the auction as is where is, whatever there is and without recourse basis.
4. Comp. App. (AT) Ins. No. 452 & 453/2023 was filed by Eshan Minerals on 23.02.2024 in which following interim order was passed by this Tribunal on 05.03.2024:

“Learned counsel for the Appellant submits that the Adjudicating Authority by the impugned order has rejected the private sale whereas the Liquidator has already filed application for approval of the private sale and at that stage Respondent No.1 filed an application stating that he is interested to take the property and on whose instance the order reserved on the application for approval was de-reserved, application was heard and impugned direction was passed.

An Additional Affidavit has been filed by the Appellant where the Appellant has brought on record letter dated 26.02.2024 sent by the Respondent No.1 that he does not want to involve in any litigation matter, hence, he does not want to proceed further in the proposal. Learned counsel for the Appellant submits that in view of the disinclination shown by Respondent No.1, the whole order is erroneous.

Learned counsel for the Liquidator also submits that she has also received letter dated 26.02.2024.

In view of the aforesaid, we are of the view that auction in pursuance of the impugned order may not be held till further order.

Let reply be filed by the Respondents within 10 days from today.

*List this Appeal on **20.03.2024.***”

5. In view of the interim order dated 05.03.2024, Auction scheduled to take place on 05.03.2024 could not take place. Liquidator has filed an Affidavit bringing on record the publication dated 21.02.2024.

6. It is further stated by the Liquidator that in pursuance of the said publication an EMD has been received by one party and EoI was submitted by Best One Infraventures Pvt. Ltd. but no EMD was submitted. One M/s. SD Reality has submitted EoI along with EMD and deposited the EMD which is kept in the Fixed Deposit.

7. Appellant in Comp. App. (AT) Ins. No. 651/2024, Best One Infraventures Pvt. Ltd., after e-Auction Notice issued by Liquidator dated 21.02.2024 sent a letter 27.02.2024 to the Liquidator enquiring about the outstanding dues of MIDC (Maharashtra Industrial Development Corporation) on the property. Best One Infraventures Pvt. Ltd. claimed to have prepared a Demand Draft of ₹1,58,00,000/- towards deposit the EMD, but Demand Draft was not deposited.

8. Best One Infraventures Pvt. Ltd. filed Comp. App. (AT) Ins. No.651/2024 in this Tribunal on 28.03.2024, challenging the order dated 13.02.2024. Both the Appeals were heard on 04.04.2024 by this Tribunal.

9. We have heard Sh. Abhijeet Sinha, Learned Sr. Counsel appearing on behalf of the Appellant in Comp. App. (AT) Ins. No. 452 & 453/2024 and Sh. Amar Dave, Sr. Advocate appearing for the Appellant in Comp. App. (AT) Ins.

No. 651/2024. Ms. Purti Gupta and Ms. Heena George has appeared for the Liquidator.

10. Sh. Abhijeet Sinha Learned Sr. Counsel for the Appellant appearing for the Eshan Minerals Private Ltd. submits that the private sale in favour of Eshan Minerals Pvt. Ltd. was made after 6 failed Auction. LoI was issued in favour of the Eshan Minerals Private Ltd. on 21.11.2023 and the Liquidator has filed an application being I.A. No. 5737/2023 seeking approval of the Adjudicating Authority which has been refused by the impugned order on insufficient grounds. It is submitted that Sachani Developers, who had filed an I.A. No. 261/2024 showing interest in participating in the bidding process of Corporate Debtor has subsequently by letter dated 26.02.2024 has withdrawn his offer which has been noticed by this Tribunal in its interim order dated 05.03.2024, when Sachani Developers have withdrawn their offer, there is no occasion to proceed with any Auction in pursuance of the order dated 13.02.2024 and the private sale in favour of the Appellant need to be confirmed. It is submitted that State Bank of India/Financial Creditor have also filed an Affidavit that private sale in favour of the Appellant be confirmed. The order dated 13.02.2024, directing for e-Auction be set aside.

11. Learned Counsel for the Liquidator advancing submission on behalf of the Liquidator submits that Liquidator has issued Auction Notice dated 21.02.2024, in pursuance of the order of the Adjudicating Authority dated 13.02.2024 and it has received one EoI from M/s. SD Reality but the Auction could not take place in view of the interim order passed by this Tribunal on 05.03.2024. Liquidator further submits that the Liquidator has also received

the letter dated 26.02.2024 from Sachani Developers that they are no more interesting to participate in the sale of the Corporate Debtor.

12. Sh. Amar Dave, Learned Sr. Counsel for the Appellant appearing in Comp. App. (AT) Ins. No. 654/2024 submits that Appellant is interested in participating in the bidding process of the Corporate Debtor. It is submitted that Liquidator has not clarified about the dues of the MIDC. It is submitted that it was obligated for Liquidator to find out the current dues of the MIDC and transparency requires that dues of MIDC be informed to all the prospective bidders to submit their bid. It is submitted that Appellant has prepared a draft of ₹1,64,00,000/- to submit EMD. Adjudicating Authority did not commit any error in issuing a fresh e-Auction Notice.

13. Learned Counsel for the Liquidator refuting the submission of Sh. Amar Dave submits that Appellant-Best One Infraventures Pvt. Ltd. although submitted the EoI but did not submit an EMD hence, they were not entitled to participate in the bid in the Auction. It is submitted that Liquidator has already filed an application before the Adjudicating Authority being I.A. No.830/2022 seeking a direction against the MIDC that no transfer charges are payable to the MIDC, which application is still pending. MIDC has already informed about its pending dues of ₹17,16,64,355/- till 04.12.2020 and transfer fee which amount must have increased by time, sale is being as is where is basis. It is the bidder who has to pay all the dues of the MIDC and the Eshan Mineral Private Limited has undertaken to pay the dues of MIDC directly.

14. We have considered the submissions of the Counsel for the parties and perused the record.

15. In Comp. App. (AT) Ins. No. 452 & 453/2024, challenge is to the order dated 13.02.2024, by which Adjudicating Authority has refused to approve the private sale in favour of Eshan Minerals Private Limited as was prayed in I.A. No.5737/2023.

16. Submission has been made by the Appellant that Financial Creditor having also approved the private sale Adjudicating Authority ought to have approved the private sale in favour of the Appellant. Offer of the Appellant being higher than reserve price of the last failed Auction. It is submitted that Appellant Eshan Minerals Private Limited has already undertaken to pay all MIDC dues, including transfer charges directly to the MIDC. It is submitted that offer for private sale given by the Appellant was after 6 failed Auction and hence there was no reason for not approving the said sale.

17. Adjudicating Authority in paragraphs 11 & 12 made following observations:

“11. While the Liquidator has taken various steps to ensure the private sale is reasonable and transparent, we cannot ignore the fact that the Liquidation Regulation provides for some more checks and balances on the private sale in Schedule 1 of the Liquidation Regulations which includes, inter alia, preparation of a strategy to approach interested buyers for assets to be sold by private sale, liaising with potential buyers or their agents, completion of sale in accordance with the terms of sale, etc. It is observed that the Buyer approached the Liquidator on his own and expressed interest to acquire the rights over the said Property above the reserve price fixed at the last failed auction. Though belated ie., after issue of letter of intent in favour of the Buyer, another person (the Applicant in IA.No.261/2024) has come out with an expression of interest to acquire the rights on the said Property. Thus it is evident that there is interest in the market to acquire the rights in the said Property even though there are other outstanding issues.

Furthermore, substantial time has passed after the last public auction in October 2021.

*12. It is also pertinent to observe from the Liquidation Regulations that the private sale has to be conducted in a manner so as to maximize the realizations from the sale of assets. The Hon'ble NCLAT in the case of **State Bank of India Vs. Bhuvée Stenovate Private Limited and Ors. Comp. App. (AT) (Ins) No. 1013/2022** observed that the Liquidator, for conducting private sale is not to identify one buyer and sell the assets; rather, strategy has to be made to approach the interested buyer for assets which is with the object to attract more and more interested buyers to maximize the realization from the sale of assets. Keeping in mind the above decision and considering the interest shown by the Applicant in IA.No.261/2024, we feel it appropriate to give an opportunity to the Applicant in IA No.261/2024 and other interested parties, if any, to participate in the sale process."*

18. The Adjudicating Authority after noticing the sequence of the event and the fact that offer of private sale was received from the Appellant/Eshan Minerals Private Ltd. and the Liquidator had not to identify one buyer and sell the assets rather strategy has to be made to approach the interested buyer for asset with the object to attract more and more to maximise the realisation from the sale of assets. Adjudicating Authority in paragraph 12 of the order as noted above with the object of giving opportunity to the Applicant in I.A. No. 261/2024 and other '**interested parties**' to participate in the sale of the process directed for issue of a fresh Notice for conducting sale in two newspapers.

19. We have already noticed that fresh Auction Notice was issued on 21.02.2024 fixing 05.03.2024 for Auction which Auction could not take place due to interim order passed on 05.03.2024 by this Tribunal.

20. It is relevant to notice that Adjudicating Authority himself has directed that bid offered by the Appellant be treated as anchor bid and in the event higher bid is received than the anchor bid the buyer shall have the option to match the same. It is useful to extract the directions issued in paragraph 13 of the impugned order which are as follows:

“13. For the foregoing reasons, we disallow private sale in terms of the Letter of Intent annexed as Exhibit O in IA. No. 5737 of 2023 and dismiss IA No. 5737 of 2023 with the following directions to the Liquidator under Section 35 of the Code:

(i) The Liquidator shall issue fresh notice of conducting sale in two newspapers circulating in the area where the said Property is situate and invite bids above the bid submitted by the buyer by adopting Swiss Challenge method, thereby treating the bid offered by the Buyer as an anchor bid. The interested bidders will have to submit 10% of the bid amount as EMD along with the bid. In the event of receipt of higher bid than the anchor bid of the Buyer, the Buyer shall have the option to match the same.

(ii) The Liquidator may finalize other terms relating to MIDC dues, time period for making deposit of consideration, documentation, etc.

(iii) The entire sale process to be completed within one month from the date of the order and there is no requirement of obtaining fresh consent/approval of financial creditors for confirming the private sale in favour of the highest bidder subject to satisfaction of other terms and conditions as may be specified by the Liquidator.”

21. We have already noticed that Liquidator has submitted that in pursuance of the Auction Notice dated 21.02.2024, one EMD has already been received and the Appellant-Best One Infraventures Pvt. Ltd. has sent EoI, but EMD was not paid.

22. We are of the view that Adjudicating Authority did not commit any error in issuing a direction for issue of a fresh Notice of conducting sale to other

interested parties one party had been already expressed interest and filed I.A. No.261/2024.

23. The submission of Sh. Abhijeet Sinha that Sachani Developers who had shown interest and filed an I.A. No.261/2024 subsequently withdrawn his offer by letter dated 26.02.2024 there is no occasion to proceed with the Auction any further. The Auction Notice was already issued on 21.02.2024 and the letter dated 26.02.2024 was issued by Sachani Developers on 26.02.2024 subsequent to e-Auction and in pursuance of Notice for fresh Auction, EMD has already been received at least by one party.

24. We thus are of the view that fresh Auction need to be conducted by issuance of corrigendum by Liquidator in continuation of the e-Auction Notice by 21.02.2024 by fixing a date within two weeks from today for conduct of the e-Auction. The Liquidator in the corrigendum may also state that the successful bidder has to pay all the dues of MIDC.

25. The interest of the Appellant Eshan Minerals Private Limited are also protected by the impugned order since the bid given by the Appellant has been treated to be anchor bid. We are of the view that in event no higher bid is received in a Swiss Challenge Method, private sale in favour of the Appellant as per LoI dated 21.11.2023, need to be confirmed without requiring any further approval from the Adjudicating Authority.

26. Coming to the Comp. App. (AT) Ins. No. 651/2024, the prayer in the Appeal by the Appellant is as follows:

“a) Stay the effect of the Impugned Order, effectively, the auction process adopting the Swiss Challenge Method allowed by the Impugned Order till the hearing and adjudication of the present Appeal.

b) In the alternative, stay the Corporate Insolvency Resolution Process of the Corporate Debtor till the hearing and disposal of the present Appeal.

c) Pass such further and other relief or directions as the nature and circumstances of the case may require.”

27. The prayer of the Appellant Best One Infraventures Pvt. Ltd., challenging the order of the Adjudicating Authority insofar as it direct for adopting Swiss Challenge Method cannot be accepted. Appellant- Best One Infraventures Pvt. Ltd. in event intend to participate in the Swiss Challenge Method. It is open for Best One Infraventures Pvt. Ltd. to submit an EMD in pursuance of EoI already issued by the Appellant and subject to this liberty to the Appellant- Best One Infraventures Pvt. Ltd., no other relief can be granted in Comp. App. (AT) Ins. No. 651/2024.

28. In view of the abovementioned discussions and conclusions, the Appeals as above are decided in following manner:

- i. The order dated 13.02.2024 passed by the Adjudicating Authority, challenged in the above Appeals is upheld.
- ii. The Liquidator to issue a corrigendum fixing a date of e-Auction within two weeks from today in continuation of e-Auction Notice dated 21.02.2024 to conduct the e-Auction by Swiss Challenge Method as directed by Adjudicating Authority by order dated 13.02.2024.
- iii. Appellant-Best One Infraventures Pvt. Ltd. who has send its EoI but has not given the EMD is at liberty to submit its EMD to the Liquidator within a week from today.
- iv. On submission of the EMD and other necessary compliances by Appellant- Best One Infraventures Pvt. Ltd., Appellant shall also be permitted to participate in the Swiss Challenge Process.

- v. That in event in the Swiss Challenge Method in pursuance of the e- Auction as directed herein above, no other bid is received higher to the consideration offered by the Appellant, i.e., Eshan Minerals Private Limited the private sale in favour of the Eshan Minerals Private Limited as per LoI dated 21.11.2023 shall stand confirmed without requirement of any approval by the Adjudicating Authority.
- vi. In Swiss Challenge Method, the Liquidator after completion of the Swiss Challenge Method shall issue LoI to highest successful bidder and take all other steps as per Auction Notice.

Parties shall bear their own cost.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

NEW DELHI

16th April, 2024

himanshu