

State Bank Of India vs Maithan Alloys Ltd. & Ors on 26 February, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
COMPANY APPEAL (AT) (INSOLVENCY) NO.1245 - 1247 of 2019

In the matter of:

State Bank of India
Stressed Assets Management Branch- II
Jevandeep Building, 1st Floor,
1, Middleton street,
Kolkata-700071

.....Appellant

Vs

1. Maithan Alloys Limited
9 A.J.C Bose Road,
Kolkatta-700017

...RespondentNo.1

2. Sova Electrocasting Limited
37,Shakespeare Sarani,
S.B. Towers, 3rd Floor,
Kolkata-700017

.....RespondentNo.2

3. Typhoon Financial Services Limited
35,Omkar House,
Near Swastik Cross Road
C.G road,Navranpura,
Ahmedabad- 380009

.....RespondentNo.3

4. Sonar Bangla Career Academy Pvt. Ltd
62,New Adarsh Nagar,Agorpara Gholi,
North 24 Parganas,
Kolkatata-700109

.... Respondent No.4

5. Mr.Samir Kumar Bhattacharya
Liquidator of Impex metal & Ferro Alloys Limited
104,S.P Mukherjee Road,
Sagar trade cube,
Kolkata-700026

... Respondent No.5

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Present :

For Appellant :

Mr.Krishnan Venugopal (Senior Advocate), Mr.
Sanjay Kapur, Mr. V.M. Kanna,Mr. Harshal
Narayan, Mr.Rajesh Chaubey, Ms. Pallavi
Srivastava Advocates.

For Respondents :

Mr. Rahul Auddy (R-5), Mr. Abhijeet Sinha, Mr. Saikat Sarkar, Mr. Neeraj Kumar Gupta, (R-1) Advocates.

J U D G M E N T

(26th February, 2020) Dr. Ashok Kumar Mishra, Technical Member

1. The Appellant M/s. State Bank of India, stressed Asset Management Branch II Kolkata has filed an appeal under Section 61 (1) of the Insolvency and Bankruptcy Code 2016, against the Impugned Order dated 25th September 2019, passed in CA (IB) NO. 796/KB/2019 in CP (IB) No. 176/KB/2018 by the Ld. National Company Law Tribunal, Kolkata Bench. Impugned order dated 23rd October 2019 Passed in CA(IB) No. 1366/KB/2019 in CP(IB) No. 176/KB/2018 by National Company Law Tribunal, Kolkata Bench and impugned order dated 6th November 2019 passed in CA(IB) No. 293/KB/2019, CA(IB) No. 1165/KB/2018, CA(IB) No. 615/KB/2019, CA(IB) No. 625/KB/2019, Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 CA(IB) No. 755/KB/2019, CA(IB) No. 883/KB/2019, CA(IB) No. 957/KB/2019, CA(IB) No. 1345/KB/2019 in CP(IB) No. 176/KB/2018 by National Company Law Tribunal, Kolkata Bench. The respondents are as follows:

Maithan Alloys Limited (R-1), Sova Electrocasting Limited (R-2), Typhoon, Financial Services Limited (R-3), Sonar Bangla Career Academy Pvt. Ltd. (R-4), Mr. Samir Kumar Bhattacharya (Liquidator of Impex Metal & Ferro Alloys Limited) (R-5).

2. Out of the above Respondent No. 1 has accepted the bid of the Company under liquidation, M/s. Impex Metal & Ferro Alloys Limited, in accordance with law and have paid the requisite amount of EMD and other such payment in accordance with the terms and conditions of auction/with the approval of NCLT. The liquidator is Respondent No. 5, Mr. Samir Kumar Bhattacharya, liquidator of Impex Metal & Ferro Alloys Limited Kolkata. The appellant has prayed for the following reliefs:

a) To set aside the impugned order dated 25.09.2019 passed in CA (IB) NO. 796/KB/2019 in CP (IB) No. 176/KB/2018 by the National Company Law Tribunal, Kolkata Bench.

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b) To set aside the impugned order dated 23.10.2019 passed in CA(IB) No. 1366/KB/2019 in CP(IB) No. 176/KB/2018 by National Company Law Tribunal, Kolkata Bench.

c) To set aside the impugned order dated 06.11.2019 passed in CA(IB) No. 293/KB/2019, CA(IB) No. 1165/KB/2018, CA(IB) No. 615/KB/2019, CA(IB) No. 625/KB/2019, CA(IB) No. 755/KB/2019, CA(IB) No. 883/KB/2019, CA(IB) No. 957/KB/2019, CA(IB) No. 1345/KB/2019 in CP(IB) No. 176/KB/2018 by National Company Law Tribunal, Kolkata Bench.

d) Pass an order directing the 1st Respondent to complete the sale transaction by paying the balance Sale Consideration;

e) Pass an order imposing heavy penalty of Rs. 17,06,25,000/- being 25% of the bid amount upon Respondent Nos. 2 to 4 for derailing and delaying the sale proceedings conducted by the 5th Respondent/Liquidator.

f) To pass ad interim ex-parte orders in terms of prayer (a), (b), (c),

(d) & (e) may be granted;

g) Pass such other orders as this Hon'ble Appellate Tribunal may deem fit in the facts and circumstances of the case and thus render justice.

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3. The Appellant is the Financial Creditor of the Corporate Debtor which is under liquidation. On account of Corporate Insolvency Resolution Process having failed the NCLT directed the liquidation of the Corporate Debtor to sell the Corporate Debtor as a going concern. The liquidator pushed e-auction notice for Going Concern Sale(GCS), calling for bids on 27th May, 2019 and the terms and conditions of bid e-auction here as follows;

The E-auction process for sale of Corporate Debtor as a going concerns shall be completed in following steps, brief of which is mentioned here under:

a) Submission of EoI by Prospective Bidder(s) [hereinafter referred to as PB]

b) Submission of Confidentiality undertaking by PB in specified format.

c) Submission of Eligibility undertaking by PB in specified format.

d) Site Visit by the PB.

e) Submission of EMD of 10% of the reserve price in the form of NEFT/RTGS by interested PB.

Account Name: Impex Metal & Ferro Alloys Limited (in liquidation) Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 Account No.: 37593815470 Bank Name: State Bank of India IFSC Code: SBIN0001936 Branch: IFB KOLKATA

f) Generation of User Id of the PB concerned for participation in E-Auction through designated service provider after submission of KYC document and EMD.

g) Bidding by PB through designated e-auction platform on the appointed day.

Pre-bid qualification: Technical & Financial EOI would be subject to evaluation on various Technical Parameters e.g. Consolidated group revenue and/or Assets under Management (AUM) in the same/similar activity and various Financial Parameters e.g. Consolidated Group Net Worth and/or Funds available for deployment including the following:

In case of body Corporates:

Private/Public Limited Company, LLP, Body Corporate whether incorporated in India or outside India, with minimum Tangible Net Worth (TNW) of INR 30.00 Crores (Rupees Thirty Crore only) as Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 per The Companies Act, 2013) in the immediately preceding completed financial year.

In case of Financial Institutions (FI)/Funds/Private Equity (PE) Investors/Non-banking financial company (NBFC**)/Any other applicant:

Minimum Asset Under Management (AUM) of INR 500.00 Crores (Rupees Five Crore only) in the immediately preceding completed financial year, OR *FI as defined under Section 45-I(c) of RBI Act **NBFC as defined under Section 45-I(f) of RBI Act Note:

1. The aforesaid financial parameters to be certified by Auditor/Independent Chartered Accountant
2. Management shall also certify the same in addition to submission of supporting documents.

In case of bidding as a consortium:

Lead member must hold at least 51% equity in the consortium. All other members would need to have a minimum stake of 20% each in the consortium.

Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 In case the consortium is body corporate, Tangible net worth (TNW) of consortium shall be calculated as weighted average of individual member's INW (value of negative TNW members shall be considered as Nil).

In case the consortium is of FIs/Funds/PE Investors/NBFCs/Any other applicants the minimum AUM of consortium shall be calculated as weighted average of individual member's AUM OR Committed funds available for investment/deployment in Indian companies shall be calculated as weighted average of individual member's committed fund to investment/deployment in Indian companies.

No Change in lead member or any member whose financials have been used to meet the criteria set out herein shall be permitted after the last date for submission of EoIs.

The Prospective Bidder shall bear the applicable stamp duties/additional stamp duty/ transfer charge, fees, GST etc. and all the statutory/non-statutory dues, taxes, rates, assessment charges, fees, etc. owing to anybody to get it transferred in its own name. Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 It shall be the responsibility of the interested bidder to inspect the property at their own expenses and satisfy themselves about the property before submission of the bid.

If any offer is received within the last 5 minutes of closure time, the bidding time will be extended automatically by another 5 minutes and if no higher bid is received within the extended 5 minutes, the auction will automatically get closed at the extended 5 minutes. Upon confirmation of sale the successful bidder (purchaser) shall Deposit 25% of sale price (including EMD) in 7 days and the balance sale consideration of 75% be paid within 30 days of sale If the purchaser fails to pay amounts in time the amounts so far deposited will be forfeited. The property shall be put to re-auction and the defaulting bidder shall have no claim/right in respect of property/amount deposited.

The prospective qualified bidders may avail online training on e- auction from www.ncltauction.auctiontiger.net prior to the date of e-Auction. Neither the liquidator nor www.ncltauction.auctiontiger.net will be held responsible for any Internet network problem/power failure/ any other technical lapses/failure etc. In order to ward off such contingent situation the Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 interested bidders are requested to ensure that they are technically well equipped with adequate power back-up etc. for successfully participating in the e-Auction event.

The sale shall be subject to provisions of IBC 2016 and regulation of insolvency and bankruptcy board of India (Liquidation process) regulation 2016.

4. The bid was notified by liquidator on 10.05.2019 originally as first bid and the reserve price fixed was Rs. 80 Cr. but there was no response to the bid as a result of which second bid dated 27.05.2019, was notified with reduced value of Rs. 68 Cr. in which only one bidder declared successfully, who is Respondent No. 1/ Maithan Alloys Limited and on 10th June, 2019 M/s. Maithan Alloys Limited was declared the successful bidder and in compliance with the terms and conditions and deposited the requisite amount during June, 2019. It was submitted that on 3rd July 2019 Respondent No. 2 to 4 forming a consortium challenged the e-auction in which the above said bidder i.e M/s Maithan Alloys Limited declared successfully and paid the requisite amount.

5. The Appellant had granted credit facility/loans to the Corporate Debtor and an amount of Rs. 469.29 Cr. approximately remained outstanding as on 31.12.2017. The Financial Creditor that is SBI filed an application under Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 Section 7 of the IBC and the same was admitted by NCLT on 09.03.2018 and Corporate Insolvency Resolution Process was initiated.

6. The Resolution Professional as C.O.C made all efforts till February 2019 to affect resolution of the Corporate Debtor within the frame work of IBC.

7. NCLT also extended time on a few occasions in order to achieve resolution of the Corporate Debtor. However no resolution could be found and therefore NCLT vide its order dated 12.02.2019 directed liquidation of the Corporate Debtor as a going concern and appointed R-5 as the liquidator.

8. The liquidator called for bid for e-auction in newspaper on 10.05.2019. The reserve price was fixed at Rs. 80 Cr. The detailed terms and conditions of the auction sale was also published. However, no response was received from any legible bidder pursuant to the above notice and fresh e-auction notice was published on 27th/28th May, 2019 by reducing the Reserve Price of the assets of the Corporate Debtor to Rs. 68 Cr.

9. In this e-auction notice Respondent No. 1/Maithan Alloys Limited offered to purchase the Corporate Debtor for an amount of Rs. 68 Cr. and deposited an amount of Rs. 6.84 Cr. on 10.06.2019 and thereafter an amount of Rs. 10.26 Cr. on 19.06.2019 and thereby completed 25% of total price in accordance with the terms and conditions of auction sale. Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019

10. Respondent No. 2 to 4 had not even participated in public auction filed C.A (IB) No. 796/KB/2019 before the NCLT Kolkata. Despite several opportunities granted by the liquidator to submit documents Qua the Consortium requirements and to meet the legible requirements R-2 to R-4 never submitted the same. The R-2 to R-4 across the Bar offered a price of Rs. 70/- Cr. and thereafter filed a detailed Affidavit dated 03.09.2019 that they will pay the amounts as follows;

I. 10% for the offered price Rs. 70 Cr. will be paid immediately upon acceptance of bid no.

II. 15% of the offered amount that is Rs. 10.50 Cr. within a period of one month III. And balance 75% of the offered amount will be paid within 90 days from the date of acceptance of the offer.

11. The Respondents R-2 to R-4 further requested the Tribunal that the liquidator may be directed to hand over the assets and overall affairs of the Corporate Debtor to them as a going concern. In the meantime as per the Order Sheet of NCLT Kolkata on 25.09.2019 vide Para 4 the M/s. Fair Alloy Ltd i.e R-1 made a statement across the Bar that the successful bidder decided to withdraw his offer and purchase of the Corporate Debtor and requested NCLT Kolkata to permit them to withdraw from the process. NCLT Kolkata held on Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 25.09.2019 that this offer of finance bid of Rs.70 cr is in tune with the objective of IBC that is "Maximisation of the Value of Assets of the Corporate Debtor"

and accordingly passed the following order:

I. "The Liquidator to accept bid of applicants/Sova Electrocasting Limited, M/s Typhoon Financial Services Limited and M/s Sonar Bangla Career Academy Private Limited for sum of Rs. 70,00,00,000/- (Rupees seventy crores) as a sale price of the

Corporate Debtor, Impex Metal and Ferro Alloys Limited.

II. The applicants shall make payment of bid amount in following manner:-

a) 15% of the offered amount being sum of Rs. 70,00,00,000/-

(Rupees Seventy Crores only) to be paid by the applicant immediately upon acceptance of offer by the Liquidator.

b) 20% of the offered amount (mentioned above) be paid within one months thereafter; and

c) The balance 65% of the offered amount shall be paid by the Applicant to the Liquidator within a period of 90 days from the date of acceptance of the offer.

Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 III. Upon receipt of the entire bid amount, the Liquidator to hand over possession and custody of all assets of the Corporate Debtor along with the managements "as is and where is basis and file final report"

IV. In case the applicants commit default in making payment as per time schedule mentioned above, their bid shall be treated as a cancelled and any amount deposited by them against the bid shall stand forfeited.

V. CA(IB) No. 796/KB/2019 is disposed.

VI. Other pending applications in this matter are listed for further consideration on 26.11.2019."

12. Thereafter on 23.10.2019 NCLT passed following order:

1) "Vide order dated 25.09.2019, we approved and accepted bid of M/s Sova Electricals Limited, M/s. Typhoon Finance Services Pvt. Ltd. and M/s.

Sonar Bangla Career Academy Private Limited for sum of Rs. 70 Crores and directed the Liquidator to sell the Corporate Debtor to them. We directed the Liquidator to hand over possession and custody of all assets of the Corporate Debtor along with managements "as is and where is basis and file final report" to the successful bidders upon receipt of the entire bid amount. This application is filed by the successful bidders for Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 some clarification and additional prayer to allow them to carry some initial work to make the Corporate Debtor operational.

2) We heard Ld. Counsel for the successful bidders, Ld. Counsel appearing for State Bank of India and Ld. Liquidator.

3) The applicants seek direction to the Liquidator to allow them to start the work so that the Corporate Debtor can be made operational upon their paying first instalment. Ld. Counsel for State Bank of India objected this arrangement only on the ground that the successful bidders did not pay even first instalment as per time schedule.

4) Ld. Liquidator agreed the above arrangements subject to condition that successful bidders pay first instalment within 3 days.

5) We have accepted and approved bid of the applicant. They were only bidders and they have offered an amount more than the liquidation value of the Corporate Debtor. We also consider the fact that the Corporate Debtor must be made operational so that some people may get employment.

6) While directing the successful bidders to pay first instalment to the Liquidator within 3 days, we further direct the Liquidator to allow the successful bidders to start the work under his supervision so that the Corporate Debtor can be made functional.

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7) It is made clear that above arrangement is made for convenience of the successful bidders. But we make it clear that custody and possession of all assets of the Corporate Debtor shall remain with the Liquidator as per order dated 25.09.2019.

8) With above clarification, CA (IB) No.1366/KB/2019 stand disposed off."

13. Vide 6.11.2019 NCLT Kolkata Bench Passed following order:

"Ld. Liquidator appeared Ld. Counsel for the Liquidator appeared d. Counsel for SBI appeared Ld. Counsel for CA (IB) No. 293/KB/2019 appeared ld counsel for CA (IB) No 1345/KB/2019 appeared Ld. Counsel for CA for CA (IB) No 1165/KB/2018 appeared Ld. Counsel for CA (IB) No. 1366/KB/2019 appeared. Ld. Counsel for Maithan Alloys Ltd. appeared. Ld. Counsel for TUF Metallurgical Pvt. Ltd. & Million Link (China) Investment Ltd. appeared. Ld. Counsel for Mortex (India) appeared. Heard Ld. Counsel for the earlier Successful Bidder, namely Maithan Alloys Ltd. Heard Ld. Liquidator. Heard Ld. Counsel for the Financial Creditor i.e.. SBI.

In this proceeding, on 29.04.2019, an order of liquidation of the Corporate Debtor is already passed. Liquidator was directed to sell the Corporate Debtor as a going concern. It appears from record Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 that during process of liquidation, the Liquidator received one bid from M/s. Maithan Alloys Limited. In pursuant to the public notice, the said bidder had given offer of Rs. 68 Crore. Bid was accepted by the Liquidator and that bidder deposited sum of Rs. 17,06,25,000 (Rupees Seventeen Crore Six Lakh Twenty Five Thousand Only) i.e. 25% of the total price with the Liquidator. It is further seen from the record that when the Liquidator was in process to sell the Corporate Debtor to M/s. Maithan

Alloys Limited, an application bearing no. CA(IB) No.796/KB/2019 is filed by M/s Sova Electricals Limited, Typhoon Financial Services Limited and Sonar Bangla Career Academy Private Limited jointly challenging the liquidation process on the ground that the Liquidator did not give them opportunity to bid. Hence, on 03.07.2019, this Adjudicating Authority directed the Liquidator and Successful Bidder i.e. M/s Maithan Alloys Ltd. to file their say. We also directed M/s. Maithan Alloys Limited not to deposit further sum till the application is being disposed off. On 27.08.2019, Ld. Counsel for M/s Maithan Alloys Ltd. made statement that her client does not wish to contest the application filed by the intervener i.e. M/s. Sova Electricals Limited, Typhoon Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 Financial Services Limited and Sonar Bangla Career Academy Private Limited jointly challenging the auction and they may be permitted to withdraw from the process and the Liquidator may be directed to refund its amount. Upon this, we directed the applicant in CA (IB) No.796/KB/2019 to give offer quoting bid price on affidavit and modality of the payment. Accordingly, on 07.09.2019, the applicant gave offer of Rs. 70 Crore. Since their offer was more than the offer by earlier successful bidder and it was more than the liquidation value of the Corporate Debtor, we accepted the offer directing the Liquidator to sell the Corporate Debtor to the applicants. We also observed that M/s. Maithan Alloys Ltd. is allowed to withdraw from the process.

Ld. Counsel for Maithan Alloys Ltd. brought to our notice that thereafter on 30.09.2019, they requested the Liquidator to return the amount paid by it. However, the Liquidator did not consider their prayer. Ld. Counsel for the Liquidator submitted that since other bidders namely, M/s. Sova Electricals Limited, Typhoon Financial Services Limited and Sonar Bangla Career Academy Private Limited did not comply order of payment, Maithan Alloys Ltd. may not be allowed to withdraw from the process. Ld. Counsel Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 for State Bank of India also submitted that the contract between the Liquidator and Maithan Alloys Ltd. may not be cancelled. In our considered opinion, we have already permitted M/s. Maithan Alloys Ltd. to withdraw from the process because we have accepted some good offer from the applicant in CA(IB)No.796/KB/2019. If the applicants in CA(IB)No.796/KB/2019 are not complying the order passed by this Authority, they shall be dealt with separately but only for this reason the Liquidator cannot withhold the amount deposited by Maithan Alloys Ltd.

Hence, we direct the Liquidator to pay back sum of Rs. 17,06,25,000/- (Rupees Seventeen Crore Six Lakh Twenty Five Thousand Only) along with interest agreed thereon within 7 days from today.

It is informed at bar that SBI also filed some more CA. That CA and all other pending CAs to be placed together for further consideration on 25.11.2019."

14. It is submitted by the Appellant:

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a) No allegations of mala fide or arbitrariness on the part of the Liquidator has either been alleged by R2 - R4 or noted by the NCLT.

b) In the absence of any provision either under the IBC or the Liquidation Regulations enabling the NCLT to interfere with a public auction by the Liquidator, the NCLT totally erred in interfering with the sale which stood concluded in favour of the 1st Respondent.

c) It is submitted, that IBBI (Liquidation Process) Regulations, 2016 contemplate that only when the sale is a private sale permission of Adjudicating Authority is needed under certain circumstances.

d) In the instant case when sale is by way of auction there was no scope for interference by Ld. Tribunal.

e) In any event, the NCLT ought not to have entertained an offer by R2 - R4 made orally before the Tribunal overlooking that the law mandates making and acceptance of offers only by public auction. (See Reg. 33 (1) of the IBBI (Liquidation Process) Regulations, 2016).

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f) The filing of objections by R2 - R4 is clearly no ground for the 1st Respondent to withdraw. The only consequence of a withdrawal from the bid is that the amounts deposited by the Bidder would be forfeited.

g) As per the Appellant if he do not set aside the order which would put a wrong and dangerous persistent and sanctity of public auction could be seriously jeopardise the provisions of the IBC and regulation made there under would be rendered ineffective. If such intervention in a public auction is allowed.

15. The Appellant further submits and cited certain judgment to substantiate their claims which are enumerated hereunder:

I. In Valji Khimji & Company Vs. Official Liquidator,(2008) 9 SCC, The Hon'ble Supreme Court held us under:

"11. It may be noted that auction-sale was done after adequate publicity in well-known newspapers. Hence,if anyone wanted to make a bid in the auction he should have participated in the said auction and make his bid... However,in our opinion,entertaining objections after the sale is confirmed should not ordinarily be allowed except on very limited grounds like fraud,otherwise no auction-sale will ever

be completed."

Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 II. In VedicaProcon Private Limited Vs. Balleshwar Greens Private Limited,(2015) 10 SCC 94, The Supreme Court Held:

"40. In other words, in Navalkha case, this Court only recognized the existence of the discretion in the Company Court either to accept or reject the highest bid before an order of confirmation of the sale is made. This Court also emphasized that it is equally a well-settled principle that once the Company Court recorded its conclusion that the price is adequate, subsequent higher offer cannot be a ground for refusing confirmation"

47. "A survey of the abovementioned judgments relied upon by the first respondent does not indicate that this Court has ever laid down a principle that whenever a higher offer is received in respect of the sale of the property of a company in liquidation"

In para51, it was made clear by Hon'ble Supreme Court that except on the grounds of fraud and irregularity, there cannot be an intervention in public auction. Furthermore, a successful bidder contractual obligation arising out of the offer made by the bidder and accepted by the liquidator. III. In Datta Vs. The state of Maharashtra, (2020) 1 BomCR 392, A Division of the Hon'ble Bombay High Court held as under:

"In view of the law laid down in the case of VedicaProcon Pvt Ltd. (supra) and above referred principles and safeguards emerged from various judgements, we have no hesitation to hold that if all the said principles and safeguard are satisfied and if there is nothing to suggests any collusion or fraud, the auction proceeding may not be reopened only on the ground that subsequent to the finalization slightly higher offer is received, than the auctioned price to the sale of Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 the property in the liquidation. Thus, in view of the fact that except allegation of fraud and collusion, no evidence in that regard brought on by any of the petitioners, we are of the considered view that this is not a fit case to reopen the auction proceedings only because slightly higher offer is made by one of the petitioner than the auction price"

IV. Recently, this Hon'ble Appellate Tribunal, In Manjeet commercial LLP Vs. SPM Auto Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 732 of 2019, Decided on 05.09.2019, Upheld the action of the liquidator to inter alias reduce the reserve Price publicity and reducing the time period on allegations being levelled by an objector .This Hon'ble Appellate Tribunal held us under:

"11. However, the Appellant did not participate in the e-auction and now making vague allegations without any substantial grounds cannot be accepted. As per Regulation 44(1) of the Liquidation Process Regulations, 2016, the Liquidator shall liquidate the 'Corporate Debtor' within a period of two years. We are of the view that there should not be any unnecessary delay and protract the liquidation process for

undue advantage of some of individuals or group, which would adversely affect the liquidation process."

V. The power to restore status quo ante was addressed by the Division Bench of the Hon'ble Bombay High Court in Anand jayant more Vs. Bank of India, 2009 SCC Online BOM 1565, as under:

"13...Nevertheless, the petitioner in the main proceedings as well as subsequent amended reliefs, have questioned the validity of the action Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 sorted to by the respondent bank under section 13(4) of the act. If the said challenge succeeds, the Debt Recovery Tribunal would be competent and obliged to grant such reliefs as may be necessary even to the extent of ordering status-quo ante to be resorted."

16. The contention that the Appellant Bank has no locus to file the Appeal is without any merit because as per section 61(1) of the IBC which starts with a non-obstante clause, any person aggrieved by the order passed by the Adjudicating Authority is entitled to file an appeal. The Appellant Bank being the lead Financial Creditor of the consortium of banks of the Corporate Debtor, who had opposed the intervention by NCLT in the auction, is well within its rights to approach this Hon'ble Appellate Tribunal.

17. The contention that time was of the essence and the sale not having concluded in 30 days the 1st Respondent could walk out of the auction is wholly untenable for the reason that:-

a) The reference to the 30 days period in the terms & conditions is in respect of the obligation of 1st Respondent to make the payments within 30 days and not as regards the obligation of the liquidator to conclude the sale in the said period.

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b) The delay, if any was due to the erroneous approach of the NCLT to entertain an oral offer of R2 - R4 made in Court and the same cannot be a ground to completely overlook the public auction conducted in accordance with law.

18. However, the Respondent No.1 have made following submissions:

a) That a Financial Creditor of Corporate Debtor was no way involved during (CIRP) Corporate Insolvency Resolution Process and has no locus standi to file the present appeal. The respondent has also made following submissions:-

b) Bid was submitted by R1 on 10.06.2019 along with 10% of the bid amount and a declaration that amounts paid by R1 to would stand forfeited, if R1 failed to comply with the terms of sale in relation to the assets.

c) R5 informed R1 on 12.06.2019 that R1 was declared the highest bidder. On 17.06.2019, R5 requested R1 to deposit 25% of the bid amount and R1 accordingly deposited the Advance on 18.06.2019 and intimated the same to R5 and R5 acknowledged receipt of the Advance from R1 on 20.06.2019.

d) Respondents 2 - 4 filed an application bearing CA(IB) No. 796/KB/2019 before the Adjudicating Authority (A4) inter alia Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 challenging the proposed auction sale. AA passed ad-interim orders directing R5 not to part with possession on 26.06.2019. On 03.07.2019, AA passed a specific order of injunction restraining R1 from making further payments to R5 in respect of the proposed sale of the Assets. The Terms made it clear that the proposed sale was to be completed within a period of 30 days.

e) On 01.08.2018, much after expiry of 30 days (from acceptance of bid), R1 made a clear request before the AA to withdraw from the proposed sale. On 27.08.2019, AA while referring to the request made by R1 merely directed that such request would be considered on a later date.

f) The Application filed by R2 - R4 was thereafter considered the AA on 5 occasions. However, SBI had at no stage objected to the request of R1 to withdraw from the proposed auction sale. Neither did SBI take the stand that R2 - R4 should not be allowed to derail the (then) proposed sale of Assets to R1. In fact, SBI moved before this Appellate Tribunal only when the AA passed consequential directions to refund the Advance to R1. No Sale Certificate was issued to R1 for the proposed auction sale in terms of Schedule - I of the Insolvency and Bankruptcy Code (Liquidation Process) Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 Regulations, 2016. (Liquidation Regulations) It is clear that SBI's attempt, is to now seek performance of a contract that never came into existence, merely because SBI and R5 have been unable to hold R2 - R4 to the "better" offer.

19. As mentioned above, on 27.08.2019, R1 reiterated its request to withdraw from the auction process. R2 - R4 offered before the AA to improve upon the offer made by R1. AA therefore directed R2 - R4 to file an affidavit stating the modalities of payment for purchase of the Assets. On 03.09.2019, AA directed R2 - R4 to reconsider their proposal by making it workable so that the CD could be sold as a going concern. It is after the order passed on 27.08.2019 it was clear that R1 was replaced by R2 - R4 as the successful bidder and R1 was the erstwhile successful bidder. The order passed on 27.08.2019 was not challenged by either SBI or R5. Neither did anyone seek any recall of the order. That order has attained finality.

20. On 25.09.2019, the AA passed a specific order directing R1 to withdraw from the auction process and accepted the higher bid proposed by R2 - R4. On 23.10.2019, AA granted an extension of 3 days to R2 - R4 for making payment of the bid amount and also directed R5 to allow R2 - R4 to start work qua the CD; and on 06.11.2019, the AA directed R5 to refund the Advance paid by R1.

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21. Liquidator has in compliance of the order dated 06.11.2019 passed by the AA has refunded the Advance. It follows from the above that SBI did not even object to either:

a. The proposed sale in favour of R1 expiring by efflux of time, or b. The direction of completing a sale in favour of R2 - R4.

22. Subsequently, the AA has on 26.11.2019 directed R5 to initiate fresh auction process. Such direction for re-auction has also not been challenged.

23. The Respondent have also challenged the appeal as not maintainable on the following ground:-

a) SBI's case is that AA had no jurisdiction to direct R5 to return the Advance paid by R1. The underlying basis for such submission is that the proposed sale was a matter between R5 and a third party (R1). On that basis, the Appellant itself cannot contend it has any locus.

b) CD is now represented by R5. The only entitlement of SBI during the process of liquidation is to make a claim before R5 in accordance with IBC. During the thirty day period as provided under the Terms, no objection was made to the request for withdrawal of R1, nor did SBI seek any relief of completing the sale.

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c) SBI has taken the stand that R5 had objected to the application filed by R2 - R4 under Section 60 (5) (c) IBC on behalf of the Committee of Creditors (CoC) does not assist SBI. Firstly, this stand is incorrect factually because there is no CoC at the stage of liquidation. Secondly, jurisdiction cannot be created by consent or by waiver. Third, SBI cannot allege to be an aggrieved party in the facts as above.

d) Even assuming the appeal is maintainable, no direction can be sought against R1 at the instance of SBI. It is well settled that even a court cannot create a contract for sale, when on the basis of the Terms no sale could be completed.

24. The Respondent has also submitted that relief sought by Appellant beyond their jurisdiction:

a) It appears that SBI is keen to ensure that a non existing contract is enforced/thrust on R1. SBI is entitled to its remedies against R2 - R4 who, as is clear, are now absconding. Under the Terms of the auction sale (Pg. 22 - 23 Reply), R1 was required to submit a declaration (Pg. 38 - 40 Appeal) alongwith the bid which contained the following conditions:

Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 i. R1 was required to submit an Advance against the proposed auction sale which was subject to confirmation of AA. ii. The balance 75% bid amount was to be deposited within 30

days. iii. The Advance paid by Respondent No. 1 would stand forfeited, in the event R1 failed to pay the remainder 75% amounts within the stipulated timeframe.

b) The only criteria for forfeiture of Advance under the declaration furnished by R1 were:

i. Failure to act upon the Terms of the auction sale, and ii. Failure to complete the transaction within the time limit specified. None of these are fulfilled in the present case.

It was always the understanding between R5 and R1 that the proposed auction sale was subject to the approval of the AA which is also evident from R5's email dated 20.06.2019 to R1. Since, the conditions stipulated under the Terms of the auction sale were never completed and no rights accrued under the Terms of the auction sale and/or from the said declaration. Therefore no specific performance of a non-existing contract can be sought for by SBI against R1. (Section 19 & 20 of The specific relief Act, 1963) Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019

c) Furthermore, SBI has failed to show anywhere from the records that R1 has failed to honour any of its obligation(s) towards deposit of the Advance within the stipulated timelines as set by R5. In fact the Appellant had made payment of the Advance one day before expiry of time i.e., on 18.06.2019. The Appellant was however compelled to stop making further payment upon direction from the AA vide order dated 03.07.2019

d) As stated herein above, that time was of the essence of the auction process. Therefore, R1 cannot be made a scapegoat for no-objection being raised by SBI, at the appropriate stage, to the interference in the alleged concluded sale in favour of R1; despite being aware of the same. The limited objection raised by R5 and SBI before the AA was regarding the non-payment of Advance and/or the bid amount by R2 -

R4. No allegation of misconduct/non-compliance was ever levied against R1.

e) In any event, neither the AA nor this Appellate Tribunal is a civil court; therefore the relief for specific performance sought for by the SBI cannot be granted.

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f) In addition to the above, law enables an auction bidder to withdraw, before the conclusion of auction sale, with the permission of the Court. R1, in the instant case, has therefore acted in accordance with law and submitted to the AA its intention to withdraw from the auction sale prior to its conclusion. R1 only withdrew from the proposed auction sale only after the request for withdrawal was accepted by the AA.³

25. Some of the judgments cited by Respondent are enumerated hereunder:

A. COURT CANNOT MODIFY/REWRITE THE TERMS OF THE CONTRACT:

i. IN *Puravankara Projects ltd.v. Hotel Venus International*, (2007) 10 SCC 33 at page 45 "23.. There is a vital distinction between the administrative and contractual law decisions. There is a vital distinction between the administrative and contractual law decisions." "32.. It was stated in no uncertain terms that duty to act fairly which is sought to be imported into a contract to modify and/or alter its terms and/or to create an obligation upon the State Government which is not there in the contract is not covered by any doctrine of fairness or reasonableness. The duty to act fairly and reasonably is a doctrine developed in administrative law field to ensure the rule of law and to prevent failure of justice when the action is administrative in nature."

Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 "33.. Just as the principles of natural justice ensure fair decision where function is quasi-judicial the doctrine of fairness is evolved to ensure fair action when the function is administrative. But the said principle cannot be invoked to amend, alter or vary the expressed terms of the contract between the parties." ii. *Satyanarayana Construction co. Vs. Union of india*, (2011) 15 SCC 101 : (2014) 2 SCC (Civ) 252 at page 104:

"11 Thus, as per the contract, the contractor was to be paid for cutting the earth and sectioning to profile etc. @ Rs. 110 per cubic meter. There may be some merit in the contention of Mr. Tandale that contractor was required to spend huge amount on the rock blasting work but, in our view, once the rate had been fixed in the contract for a particular work, the contractor was not entitled to claim additional amount merely because he had to spend more for carrying out such work. The whole exercise undertaken by the Arbitrator in determining the rate for the work at serial No. 3 of Schedule 'A' was beyond his competence and authority. It was not open to the Arbitrator to rewrite the terms of the contract and award the contractor a higher rate for the work for which rate was already fixed in the contract. The Arbitrator having exceeded his authority and power, the High Court cannot be said to have committed any error in upsetting the Award passed by the Arbitrator with regard to claim No. 4"

"12. We, thus, find that the High Court did not commit any error in upsetting the Award of the Arbitrator with regard to claim No. 4 in the statement of claim."

Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 **B. ADJUDICATING AUTHORITY OR APPELLATE AUTHORITY IS NOT A CIVIL COURT:**

I. *Embassy Property Developments pvt.ltd. vs. State of Karnataka & ors.* 2019 SCC online SC 1542 "29... The NCLT is not even a Civil Court, which has jurisdiction by virtue of Section 9 of the Code of Civil Procedure to try all suits of a civil nature excepting suits, of which their cognizance is either expressly or impliedly barred. Therefore NCLT can exercise only such powers within the contours of jurisdiction as

prescribed by the statute, the law in respect of which, it is called upon to administer. Hence, let us now see the jurisdiction and powers conferred upon NCLT."

C. WHEN AUCTION BIDDER IS PERMITTED TO WITHDRAW:

I. Narendra Dada Agro Industries Ltd. In re, 2006 SCC online Bom 7 : (2006) 3 Mah LJ 467 2006) 5 Bom 799 at page 479 "19. From the above, it is clear that the bid is to be accepted finally by this Court. The Official Liquidator, therefore, rightly retained two consecutive highest bidders i.e. Bhaskar Exxols Ltd. and Sankh Impex for placing their matters/offers before this Court. The offers were of Rs. 4.87 Crores and Rs. 4.85 Crores respectively. Both these bidders accepted the terms and conditions including clause No. 10 and clause No. 28 above and also deposited earnest money of Rs. 6.5 lakhs each to show their bona fides. Having participated in the auction, both these bidders could not have withdrawn/retracted from the process or, bid. The auction was being conducted as per directions and under the supervision of this Court and unilaterally, Bhaskar Exxols Ltd. and Sankh Impex could not have Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 retracted their bids and withdrawn from auction process. Their bids were not rejected and were under the process of consideration of this Court.

Merely because two new bids were received or negotiations were held, that did not mean that their bids were rejected. The terms and conditions in this case cannot and does not prescribe any time limit, but here, in any case, both the bidders raised their bid only in negotiations on 23-6-2003 and the bids were placed for consideration of this Court in these proceedings on 3-7-2003 in a very reasonable time. Advertisements were issued by the Official liquidator on 15th/17th/18th, June only. Both these bidders could have made appropriate grievance before this Court at the time of consideration of their offers. If they wanted to retract, they could have done so after seeking permission of this Court and only if such permission was granted. Otherwise, they were duty bound to continue to participate till appropriate orders in this respect were passed by this Court. The obligation cast by "terms and conditions" is on each bidder whose offer is to be placed for consideration of this Court. The second highest bidder, therefore, cannot take shelter behind the first highest bidder. Otherwise, the very purpose of incorporating clause Nos. 6 and 8 in said terms and conditions will stand defeated. The said property was required to be re-advertised and sold by undertaking fresh exercise, expenditure and at less price. The breach of Clauses 10 and 6 above by Bhaskar Exxols Ltd. and Sankh Impex is established in the matter. Where the parties have deliberately specified the amount of Rs. 6,50,000/- as Earnest Money for each bidder and agreed to stipulation in clause No. 10 above, there can be no presumption that, at the same time, it was intended to allow the bidder responsible for the breach to give a go-by to the sum specified. Here the Clause of forfeiture is included in Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 tender document only in the interest of Creditors of the Company and to avoid unnecessary delays in restoring to them their legal dues. The clause is, therefore, in the public interest. The offer made by both the bidders was subject to this condition and by paying earnest Money they also accepted it, it represents a guarantee that the contract will be fulfilled as per its terms and conditions. Said amount is part of the purchase price to be adjusted accordingly when the bid is accepted by this

Court. It is liable for forfeiture when the transaction falls through by reason of the default or failure of the purchaser/bidder. Clauses 10 and 28 of the terms and conditions practically covered all situations in which the contract can fall through on account of any mistake on the part of such bidders. There is nothing to the contrary in the terms of the contract to avoid application, of forfeiture clause and hence, on default committed by the bidders, the Official Liquidator is entitled to forfeit said earnest."

26. Liquidator has made following submissions:

a) It is submitted by the Liquidator from the order dated 12.02.2019 directing liquidation of the company the same required the company to be liquidated as a going concern under Regulation 32 (c) of the IBBI (Liquidation Process) Regulation, 2016. The Liquidator has endeavoured to achieve the purpose of ensuring that the company itself sold so as to ensure the continuance of its business after such liquidation as well. The Liquidator has framed the terms and Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 conditions of the sale so as to ensure that the bids are received only from identified entities having certain minimum credential. Which would be indicated of their intention to run the business of the company and to operate as a going concern even after the liquidation sale. So that to ensure continuance of commercial and industrial activities and employment of the workman engaged in such activity.

Therefore, the criteria given is just to ascertaining the identity of the bidders. The initial auction published by him in the reserve price for sale of the company at Rs. 80/- Crores and provided for an earnest money deposit of Rs. 8/- Cr. Even so this e-auction did not receive any response. Thereafter liquidator published another e-auction in "Business Standard" and cuts of the price from 80/- Crores to 68/- Crores in second public announcement. The only eligibility criteria to garb this offer is to meet the requirement of the terms and conditions of the sale.

b) It was further submitted by the liquidator that on 10.06.2019, he received an e-mail from one nucleus consultant submitting a bid form though the e-mail was sent after 5 PM Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 as the RTGS of the EMD was done prior to the 5 PM.

Liquidator is decided to consider the bid form. From the perusal of the bid form it appears that the name of the bidder was "Typhoon Financial Services Limited and Associate Companies". The email id and contract details were given of Typhoon Financial Services Limited however, the EMD was paid by "One Sova Electrocasting Limited". Upon consideration of the said email and the bid form liquidator was not at all sure as to the who is the bidder and who were its associates. The name of the bidder was written as "Typhoon Financial Services Limited and Associates". The EMD was paid by "One Sova Electrocasting" and the email was sent by one nucleus consultant so that liquidator was not at all certain about the identity and credential for the bidders. It was clear that the bid was being done by consortium but no details of the Members of the consortium as per the terms and conditions of the auction sale. It is further submitted by the liquidator that if the bidder is the consortium, then expression of interest (EoI), confidentiality under taking eligibility undertaking of

each of the consortium member Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 was required to be submitted. The only financial eligibility was that a corporate bidder had to have net worth of Rs. 30 Crores and NBFC bidder AUM of Rs. 500 Crores. In present case no document to establish the Financial Creditors of any of the consortium member was submitted. Upon ROC searches conducted by the liquidator it appears that Typhoon was the NBFC whose net worth as on 31.03.2018 was only Rs. 3,12,83,489/- and the AUM requirement for a NBFC to submit its bid was Rs. 500/- Crores.

c) Liquidator submits that on 11.06.2019 nucleus consultants sent mail to the liquidator and forwarded the profile of Typhoon Financial Services Limited, eligibility Affidavit of Typhoon and declaration by Typhoon. After liquidator perused with documents which was submitted and found that the bidder had not yet disclosed the basic information such as name of the consortium members, leave aside the supporting documents, document to show eligibility documents in connection with confidentiality undertaking of all consortium members. Further with regard to Typhoon the bidder does not disclose financial eligibility document as Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 stated above. Liquidator reiterated that the balance sheet of the Typhoon which he obtained from MCA Website. It appeared that their net worth of Rs. 500/- Crores for a NBFC. Therefore the documents were not being disclosed intentionally since they were not complying with the minimum eligibility criteria. Liquidator also pursued study of the balance sheet of the Sova Electrocast and it appears that net worth of Sova Electrocast as on 31.03.2018 was Rs. 22.11 Crores.

d) Liquidator further submitted that it had issued three mails on 11.06.2019 to the bidder seeking clarification upon the net worth and eligibility criteria and calling upon the bidder to submit documents as earliest. It is also stated in the mail that if documents have not been submitted on time then liquidator will not permit prospective bidder to bid in the absence of the document. In response to above mentioned mail nucleus consultant responded back to liquidator by saying that they have done essential requirement of submission of EMD and informed that their group turnover is Rs. 4000 Cr. and sought time to submit the required document and requested to Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 postpone the auction by one week. In response liquidator stated that instead of submitting net worth of bidder, they mentioned turnover of group which is of no use. It is submitted by the liquidator that since the bidder had failed to provide any document for information about its financial eligibility confidentiality undertaking 29 A compliance, which is mandate under the Code .In spite of giving several opportunities again liquidator sent mail on 12.06.2019 about 8 minute before the auction was supposed to commence inform the bidder that he is not allowed to participate in the auction. As appear from the email dated 12.06.2019 issued another mail to liquidator informing that they complied all requisite details and shall sent all document within 4 to 5 days and also requested to participate in the bid. As liquidator obliged to act in accordance with the terms and conditions of sale, liquidator was not at liberty to derogate from the same. It was in any evident to liquidator that the identity of the bidder was not certain, the identity of the consortium was not certain, the identity of the members forming the consortium was not certain, no particulars had Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 been provided to their AUM or net worth as required by the terms and conditions of sale and consequently there was no opportunity whatsoever to independently make an assessment of their

credentials or to obtain any measure of satisfaction with regard to their ability or intent to run the company as a going concern. It is in these circumstances, Liquidator was compelled to consider their bid as ineligible to reject the same. In this context it is also relevant to note that the approach of the said bidder, whose identity however remained uncertain, and even at the time of making of the bid, no consortium had in fact been formed. This was an essential condition of participation in the bid, particularly as the terms and conditions of sale provide that the bidder/consortium members could not be change after the submission of the bid.

e) It is stated by the liquidator that the bidder for the first time after the bid has started says that Sonar Bangla is consortium member but it appears that the bidder was searching for consortium member in the last moment and was sending name as and when it got any company on board. If a bidder Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 and its consortium members are not in position to provide basic information about their net worth and supporting documents such as their balance sheet confidentiality undertakings and 29-A undertakings in three days in spite of several mails sent by liquidators, the same clearly conveys the intention and seriousness and genuinity of the bidder. In the application in one place it says Typhoon is the lead member of the consortium and in another place it says Sonar Bangla Academy is the lead member. It is significant that the bidder for two days over several mail did not mention the name of the lead member of the consortium and only after the bidding had started and after it was disqualified for non- submission of necessary documents, choose to mention for the very first time that Sonar Bangla is the consortium member and in this application for the first time described it as the lead member. As bidder clearly failed to provide the name of the lead member of the consortium the same speaks volumes about the seriousness and intention of such bidders.

f) It is stated by the liquidator that in the instant case, the successful bidder is Maithon Alloys Limited which is a Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 reputed company carrying on the same business as that of the company - In Liquidation. On the other hand, the consortium members of the instant bidder are NBFC, Academic Company etc and they do not even meet the financial requirements. It may be relevant to note that said Maithan Alloys Limited has since, in accordance with the terms and conditions of the sale deposited 25% of the sale price within seven days upon its confirmation as successful bidder.

g) Maithan Alloys Limited, being in the same line of business, has a clear demonstrable interest in running the company as a going concern. It has, in pursuance of such interest, acted as per the clear mandate of the terms and conditions of sale, and satisfied all eligibility criteria set-forth for its participation. It has, thereafter, upon being declared the successful bidder also acted in depositing the 25% of the sale consideration within the time provided and has also clearly represented to me that it was in as state of readiness to deposit the balance 75% of such sale consideration as well. In the aforesaid facts and circumstances compelled to say Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 that the application is frivolous and mala fide even the application made after the collusion of the auction sale does not disclose the true identity of the member of consortium or their true net worth. The application as such deserved to be and should be dismissed in limine.

27. As far as Respondent 2 to 4 are concerned notices on R-2 and R-3 was served on 27.11.2019. Originally notice was issued to R-2 TO R4 on 18.11.2019 which returned as not delivered, thereafter again notice was sent issued on 02.01.2020, 10.01.2020, 22.01.2020, finally e-mail was sent on 27.01.2020. In spite of notice getting served on R-2 and R-3 they have not appeared on 17.12.2019, 07.01.2020, 21.01.2020, 30.01.2020, 31.01.2020 and 04.02.2020. However R-4 has not appeared inspite of getting email notice 30.01.2020, 31.01.2020 and 04.02.2020. In spite of giving all these opportunities since none has appeared accordingly the case was progressed ex parte.

28. We have gone through the various submissions made by them. Appellant, Respondent No. 1 and liquidator and we found that R-2 to R-4 did not participate in the e-auction and filed an application as objectors and offering a higher price in order to create a lust for worth maximisation and thereby vitiated the whole process. In any case R-1 Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 has also withdrawn the offer without there being any corresponding provision in the IBC and NCLT was entitled to forfeit their entire amount. Regulation 32, 32(A) and 33 of Insolvency and Bankruptcy Board of India liquidation process regulation 2016, provides for the mode of liquidation. Regulation 32 of Insolvency and Bankruptcy Board of India Liquidation Process Regulation 2016 the liquidator should originally sell the Corporate Debtor through an auction and private auction is permitted only in certain classes of assets which are of perishable nature, assets likely to deteriorate in value if not sold immediately, if it is sold at a higher price than the Reserve Price of a failed auction etc. Regulation 33(3) states as follows:-

"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."

29. Hon'ble Supreme Court has already observed in Valji and Khimji Company vs. Official liquidator of Hindustan nitro product (Gujarat) limited and others. where bids were received and were Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 opened in the Court. The highest bid was that of the appellant M/s. Valji Khimji & Company amounting to Rs. 3.51 crores. With the consent of the learned advocates representing the secured creditors, the said bid was accepted and the sale was confirmed on 30.7.2003. The Court directed the appellant to deposit 25% of the purchase price i.e. Rs.63,98,000/- within 30 days from the said day and to deposit the balance amount within the next three months. The Court also directed that the amount may be deposited in instalments, but no instalment should be less than Rs.5 lakhs. Accordingly Hon'ble Supreme Court confirmed the auction sale in favour of the Appellant. CONCLUSION

30. The appeal is, therefore, maintainable in view of the provision of Section 61 (1) of IBC as SBI has a large stake of Rs.469.29 cr.

31. The Auction is not challenged on the ground of fraud and/or irregularity.

32. There is no provision in the terms and condition of auction to withdraw from the auction process once it is agreed by the successful bidder (R-1) i.e m/s Maithan Alloys Limited.

33. Section 35 (1) (f) of the IBC empowers liquidator to sell the property of the corporate debtor in liquidation by public Auction, Hence there was no need for adjudicating authority to direct the liquidator for considering the proposal of Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019 R- 2 to R-4 who has approached the Adjudicating Authority after due date of finalisation of Auction.

34. NCLAT has also held in case of MAJIT COMMECIAL LLP VS SPM AUTO PVT.LTD (IN LIQUIDATION) CA(AT) (INSOLVENCY) No. 732 of 2019 that objectors are not to be allowed to unnecessary delay and protract the liquidation process for undue advantage of some of individuals or groups which would affect unnecessarily the liquidation process.

35. This is a case of unilaterally cancelling the contract may be with involvement of R-2 to R-4 and thereby putting the liquidation process into jeopardy.

36. Hence Appeal is allowed by setting aside, impugned order dated 25.09.2019, 23.10.2019 and 06.11.2019 in CA (IB) NO. 796/KB/2019 in CP (IB) No. 176/KB/2018, CA(IB) No. 1366/KB/2019 in CP(IB) No. 176/KB/2018, CA(IB) No. 293/KB/2019, CA(IB) No. 1165/KB/2018, CA(IB) No. 615/KB/2019, CA(IB) No. 625/KB/2019, CA(IB) No. 755/KB/2019, CA(IB) No. 883/KB/2019, CA(IB) No. 957/KB/2019, CA(IB) No. 1345/KB/2019 in CP(IB) No. 176/KB/2018 and directing Respondent No.1 i.e M/s Maithan Alloys Limited to complete sale transaction by paying sale consideration.

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37. Respondent R-2 to R-4 is imposed a fine of Rs. 10 Lakhs each as they have hampered & derailed the liquidation process. The amount is to be deposited in favour of the Corporate Debtor i.e. Impex Metal & Ferro Alloys Limited (in Liquidation) and be handed over to Liquidator, Mr. Samir Kumar Bhattacharya within 30 days from the date of this Judgment.

38. If such dubious systems are permitted, the liquidation process will become unending leading to reduction in value of Asset of Corporate Debtor instead of Maximisation of value of Corporate Debtor.

39. With the above observation, Appeal is disposed off and all interim orders, if any, stands vacated with disposal of Main (CA).

(Justice Jarat Kumar Jain) Member (Judicial) (Mr. Balvinder Singh) Member (Technical) [Dr. Ashok Kumar Mishra] Member (Technical) NEW DELHI RK Company Appeal (AT) (Insolvency) No. 1245 - 1247 of 2019