

M/S R.K. Industries Unit-Ii Llp vs M/S Hr Commercials Private Limited & Ors on 10 December, 2021

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Ins) No. 690 of 2021

IN THE MATTER OF:

R.K. Industries (Unit-II) LLP

Through its Authorized Signatory,

Shri Jinay Batukbhai Patel,

Having its Office address at Shree Ram House,

Khergada Street, Khargate, Bhavnagar,

Gujarat-364001.

...Appellant

Versus

1. HR Commercials Pvt. Ltd.

Having its Registered Office at
6, Baldev Bhavan, New Rohtak Road,
New Delhi - 110034.

Through its Authorized Representative,
Shri Rakesh Murlidharji Agarwal,
Residing at Flat No. B/4/102,
Spring Park, Ramdevnagar,
Satellite, Ahmedabad - 380015.

...Respondent No. 1

2. Shri Sundaresh Bhat,
Liquidator of ABG Shipyard Limited,
BDO Restructuring Advisory LLP,
Level-9, the Ruby, North-West Wing,
Senapati Bapat Marg, Dadar (W),
Mumbai-400028.

...Respondent No. 2

3. M/s. Bohra Exports Private Limited,
309, Gokul Arcade-B, Subhash Road,
Vale Parle-East Mumbai-400057.

...Respondent No. 3

4. M/s. V.K. Industrial Corporation Ltd.
1123, Hubtown Solaris,
Prof. NS Phadke Marg,
Andheri East, Mumbai-400069.

...Respondent No. 4

5. M/s. Ankit International,
2, Ivanhoe, 139,
G.J. Bhosle Marg,
Nariman Point,
Mumbai-400021.

...Respondent No. 5

Company Appeal (AT) (Ins) No. 690 of 2021

6. M/s. Shree Sai Baba Breaking Co.,
217, Veena Chambers, 21,
Dalal Street, Fort,
Mumbai-400001. ...Respondent No. 6
7. M/s. Welspun Steel Resources Pvt. Ltd.,
Having its registered office at
Welspun City, Village Varsamedi,
Taluka Anjar, District Kutch,
Anjar, Gujarat - 370110. ...Respondent No. 7
8. M/s. Kanter Steel India Pvt. Ltd.,
Having office at Sakar-9, 601, Sixth Floor,
Near Reserve Bank of India,
Ashram Road,
Ahmedabad, Gujarat -380009. ... Respondent No. 8

Present:

For Appellant:	Mr. Krishnendu Datta, Sr. Advocate, Mr. Gaurav Mitra, Mr .Swetab Kumar, Mr. Vikrant Shetty, Mr. Gurdeep Singh Sachar, Advocates.
For Respondent:	Mr.Salil Thakore, Advocates for R-1. Mr. Ramji Srinivasan, Sr. Advocate with Mr. Abhishek Sharma, Mr. Ashly Cherian, Mr. Kamalendra Singh, Ms. Anjali Sharma, Mr. Rajshree Chaudhary, Mr. Shivkirit Rai, Advocates for R-2. Mr.Arun Kathpalia, Sr. Advocate with Mr. Sameer Pandit, Mr. Aditya Ladha, Advocates for R7. (Caveator/ Welspun Steel Resources Pvt. Ltd.) Mr. Abhishek Shah, Mr. Sandeep Singhi, Mr. Gaurav Mathur, Ms. Anushree Kapadia and Ms. Priyanka Rathi, (Caveator for Kanter Steel India Pvt. Ltd.)

Company Appeal (AT) (Ins) No. 690 of 2021

JUDGMENT

(Date: 10.12.2021) (Through Virtual Mode)

1. This appeal, filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called „IBC), emanates from the Impugned Order dated 16.8.2021, passed by the Adjudicating Authority (NCLT, Ahmedabad) in IA No. 273 of 2021, in IA No. 698 of 2020 and Company Petition (IB) No. 53 of 2017.

2. The Appellant had prayed for staying the Impugned Order vide IA No. 1830 of 2021 along with certain interim reliefs. This Tribunal had, on 2.9.2021, after hearing the Learned Sr. Counsels of parties in IA No. 1830 of 2021, passed an order staying the Impugned Order and the auction process till next date of hearing. The relevant portion of this Tribunal's order dated 2.9.2021 is reproduced below.

" 7. We have considered the submissions of Learned Senior Counsels for the parties. It is not appropriate to express any opinion at this stage. This is a fit case for admission as well as for stay of the Impugned Order. Thus, we hereby stay the Impugned Order and the auction process till next date of hearing."

3. M/s. Welspun Steel Resources Private Limited(in short „WSRPL , Respondent No.8 in this Appeal) approached the Hon ble Supreme Court assailing the order passed by this Company Appeal (AT) (Ins) No. 690 of 2021 Tribunal on 2.9.2021 (supra). The Hon ble Supreme Court was pleased to pass the following order in Civil Appeal No. 5855 of 2021 (D.No.21206/2021):-

"Taking into consideration the fact that the instant appeal has been filed against an interim order, and the Company Appeal is listed for hearing on 27.9.2021, before the NCLAT, without expressing any opinion on the merits of the case, we direct the NCLAT to dispose of the matter, pending adjudication before it, in accordance with law expeditiously, preferably within two months."

4. The above order of Hon ble Supreme Court was presented before us on 27.9.2021. This Tribunal, on the request of the Learned Senior Counsels for M/s. Welspun Steel Resources Private Limited and M/s Kanter Steel India Private Limited, ordered that both M/s. Welspun Steel Resources Private Limited and M/s. Kanter Steel India Private Limited be impleaded as respondents. Consequently, the Appellant (R.K. Industries (Unit

- II) LLP) impleaded M/s. Welspun Steel Resources Private Limited and M/s Kanter Steel India Private Limited as Respondents No. 7 and 8 respectively in the present appeal.

5. In brief, the facts of the case are that an admission order, on section 7 application against the corporate debtor ABG Shipyard Limited, was passed by the Adjudicating Authority. Consequently, Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor ABG Shipyard Company Appeal (AT) (Ins) No. 690 of 2021 Limited and Mr. Sundaresh Bhatt was appointed as Resolution Professional („RP in short). Since no Resolution Plan could be obtained during the CIRP, on an application of the RP the Adjudicating Authority ordered liquidation of the Corporate Debtor vide order dated 25.4.2019 and Mr. Sundaresh Bhatt was appointed as liquidator.

6. Thereafter, e-auction process for the composite assets of the Corporate Debtor was taken up by the liquidator. The first e- auction process started on 17.9.2019 (reserve price of composite assets as Rs.1480crores). On it being unsuccessful, the second e-auction process was taken up on 27.9.2019 (reserve price of composite assets revalued as Rs. 1332 crores) which was also unsuccessful. The third e-auction process was taken up on 22.10.2019, also for composite assets of the Corporate Debtor (with a reduced reserve price of Rs.1200crores). Since the third e-auction process was also unsuccessful, the fourth e-auction took place on 11.11.2019 (with reserve price of composite assets being Rs.1102 crores), which also turned out to be unsuccessful. Thereafter the fifth e-auction process was held on 5.8.2020 also for composite assets of Corporate Debtor with reserve price of Rs. 1104 crores. This fifth round of e-auction was also unsuccessful except for sale of two residential flats.

Company Appeal (AT) (Ins) No. 690 of 2021

7. Since the five rounds of e-auctions failed to fructify in sale and disposal of assets, the liquidator sought and received orders from the Adjudicating Authority vide IA No. 698/2020 for disposal of the assets of the Corporate Debtor through private sale in terms of Regulation 33(2)(e) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (hereinafter called „Liquidation Regulations).

8. Thereafter the Liquidator, on receiving an offer from a potential buyer, apprised the stakeholders in meeting dated 28.01.2021, of the interest of some potential buyers in buying the Dahej metals and scrap (hereinafter called „Dahej Materials) at amounts higher than the reserve price of the Dahej Materials fixed in the last fifth-round of the e-auction, which was Rs.516 crores. After the stakeholders committee decided to go for sale of Dahej Materials after taking note of the offer, and also decided that prospective bidders should be encouraged to participate in the Swiss Challenge Process for private sale of the Corporate Debtor s assets, the liquidator undertook the sale of Dahej Materials through private sale adopting the Swiss Challenge Process.

9. In pursuance of this order for private sale, the Swiss Company Appeal (AT) (Ins) No. 690 of 2021 Challenge Process was adopted for sale of assets. The first stage of the first Swiss Challenge Process (which was to decide the anchor bidder) started on 12.3.2021 wherein the liquidator received the highest offer of Rs. 510 crores (against the base price of Rs. 523 crores) from one of the potential buyers (called the „highest offerer). The highest offerer failed to deposit the earnest money amount of 10% of the reserve price, have the process halted and became unsuccessful. It was decided by the Stakeholders Consultative committee (SCC) that the assets in which the government entity had shown interest for purchasing be kept in reserve. It was also decided to hold second Swiss Challenge Process for the sale of the Dahej Materials (the Dahej material and scrap base price was calculated as Rs. 460 crores). This base price was lower than the earlier calculated reserve price of Rs.516 crores since some assets from the total Dahej Materials were kept reserved for the potential buyer.

10. As the first Swiss Challenge Process was unsuccessful, the second Swiss Challenge Process was initiated on 2.3.2021 and in the anchor bid stage, bids were received from V.K. Industrial Corporation Limited, Ankit International and R.K. Industries (Appellant in this appeal). The

Appellant R.K. Industries submitted a bid of Rs.431crores along with expression of interest and payment of Rs. 1 crore in accordance Company Appeal (AT) (Ins) No. 690 of 2021 with the bid requirement. R.K. Industries was declared as "anchor bidder" for the second Swiss Challenge Process. The anchor bidder R.K. Industries deposited Rs. 43.10 crore (10% of the bid amount) and also submitted an affidavit of undertaking, stating that it agrees to the terms and conditions of the second Swiss Challenge Process.

11. The second stage of the second Swiss Challenge Process started on 27.3.2021, with the liquidator publishing advertisement inviting other potential bidders to participate in the Swiss Challenge Process and submit their bids against the anchor bid of Rs. 430 crores. Thereafter, R.K. Industries (Appellant), HR Commercials Private Ltd., (Respondent No. 1), Bohra Exports Private Ltd. (Respondent No. 3)V.K. Industrial Corporation Ltd. (Respondent No.4) Ankit International (Respondent No. 5)and Shree Sai Baba Breaking Company (Respondent No.6) submitted bids. HR Commercials Private Limited proposed to bid in a consortium comprising of HR Commercials Private Limited, M/s Bohra Exports Private Limited, M/s V.K. Industrial Corporation limited, M/s Ankit International and M/s Shree Sai Baba Breaking Company. This consortium submitted an EMD in the second stage of the second Swiss Challenge Process.

Company Appeal (AT) (Ins) No. 690 of 2021

12. In the meantime, IA No. 273 of 2020 was filed by HR Commercials Private Ltd. on 6.4.2021, challenging the anchor bid process in the second Swiss Challenge Process with the prayer that the selection of anchor bidder RK Industries be set aside. This IA No. 273 of 2021 was decided by the Adjudicating Authority vide order dated 7.4.2021 qua which the Liquidator was directed to complete the second Swiss Challenge Process up to announcement of highest bidder and carry out further process after 12.4.2021. The stay order granted by the Adjudicating Authority on 7.4.2021 was extended twice as IA No. 273/ 2021 could not be decided and was pending consideration. Thereafter R. K. Industries filed CA (AT)(Ins) 374-375/2021 before Hon ble NCLAT against orders dated 7.4.2021 and 27.4.2021 passed in IA no. 273/2021. This Tribunal in its order dated 18.6.2021 in CA (AT)(INS) No. 374- 375 of 2021 directed the Adjudicating Authority to decide application IA 273/2021on priority basis, preferably by 20.7.2021. This application IA no. 273 was finally decided on 16.8.2021 through the Impugned order.

13. Around the same time, Kanter Steel India Pvt. Ltd. and Chinar Steel Segment Center Pvt. Limited filed IAs No. 379 of 2021 and 527 of 2021 respectively, for quashing the second Swiss Challenge Process.

Company Appeal (AT) (Ins) No. 690 of 2021

14. On 19.5.2021, WSRPL (Respondent No.7) informed the liquidator regarding its interest in buying the Dahej materials and land of ABG shipyard along with some other assets (list of these assets is attached at pp. 597-598, Appeal Paperbook, Vol. II). The liquidator in its reply dated 20.5.2021to the said email, sought affidavit under section 29-Aof IBC and confidentiality agreement from WSRPL, which was submitted vide WSRPL s email dated 26.5. 2021. Thereafter, WSRPL

through letter dated 11.6.2021 to the liquidator, submitted an offer to acquire the consolidated assets as above for an amount of Rs. 627.50 crores.

15. On receiving the offer from WSRPL, the liquidator vide e- mail dated 21.6.2021 allowed WSRPL to undertake site visit and inspect the assets and also access to Virtual Data Room (VDR), while at the same time informing WSRPL that the Dahej materials are sub-judice and not available for bidding, and therefore, the site visit would only include assets that are not sub-judice.

16. Upon WSRPL filing IA no. 445 of 2021 for permission to inspect the assets of Corporate Debtor, the Adjudicating Authority passed order in IA No. 445 of 2021 on 5.7. 2021 Company Appeal (AT) (Ins) No. 690 of 2021 directing the liquidator to allow WSRPL to inspect assets of Corporate Debtor. After the site visit and inspection of related assets, WSRPL increased its offer for the said assets to Rs. 650 crores. Subsequently Stakeholders Consultation Committee meeting was convened on 6.8.2021, wherein the liquidator apprised the stakeholders about the interest of WSRPL in purchasing the Dahej shipyard (including land, buildings on it and scrap and metals on the yard land) and some other assets. WSRPL again revised its offer upwards to Rs. 675 crores vide e- mail dated 16.8.2021. Another meeting of the Stakeholders Committee took place on 13.8.2021 wherein the stakeholders (all of whom joined through audio calls) decided that it would be beneficial if the Dahej shipyard and related assets are sold as a composite asset. Moreover, the list of assets that formed part of WSRPL s offer included Dhaj Metals and Scrap, Dahej Land and Building, GIDC Labour Colony at Dahej, Office Premises at Patel Chambers, Charni Road, Mumbai, Vasan Udyog Bhawan, Parel Gala, Mumbai, Diamond Harbour Land Parcel, Kolkata and 70 acres land at Village Atali, Kaladara, Bharuch (attached at pg. 5 of the Stakeholders meeting minutes dated 13.8.2021).

17. The Liquidator apprised the Adjudicating Authority of the recommendations of the Stakeholders Committee regarding entertaining a consolidated offer from WSRPL whereupon order Company Appeal (AT) (Ins) No. 690 of 2021 was passed by the Adjudicating Authority on 16.8.2021 (the Impugned Order) allowing the liquidator to cancel the second Swiss Challenge Process and consider the offer of WSRPL for sale of composite assets while allowing other interested bidders to participate in the bidding process.

18. We heard detailed arguments presented by the Learned Senior Counsels/Counsels of all the parties and the appeal memo, pleadings and written submissions were also duly considered.

19. The Learned Counsel for Appellant has argued that while the second Swiss Challenge Process was going on, the liquidator asked WSRPL (Respondent No.7) to deposit an amount of Rs.32.50 crores, which is 5% of the offer price of Rs. 650.00 crores in the form of the bank guarantee without any order from the Adjudicating Authority. This shows undue haste and apparent malafide on the part of the liquidator to create rights in favour of WSPRL. He has further argued that the liquidator asked WSRPL to submit confidentiality agreement and affidavit under section 29A of the IBC without any formal order from the Adjudicating Authority till that time. He has referred to the judgment of Hon ble Supreme Court in the matter Bahadursinh Lakhubhai Gohil vs. Jagdishbhai and M. Kamalia&Ors. Company Appeal (AT) (Ins) No. 690 of 2021 (2004 2 SCC 65) to emphasise that undue haste shown by the Authority amounts to malafide action. He has argued that the

liquidator held meetings of the stakeholders on 6.8.2021 and 13.8.2021 without any order from the Adjudicating Authority to do so and went ahead to invite offers for assets included in WSRPL's offer without halting the Swiss Challenge Process or waiting for any order from the Adjudicating Authority as the second Swiss Challenge process was sub-judice in IA no. 273/2021 before the NCLT.

20. The Learned Counsel for Appellant has referred to the Impugned Order to urge that without any valid reason for stopping the second Swiss Challenge Process or any illegality in the process, it was brought to halt only on the basis of averment of the liquidator regarding decisions in the stakeholders' committee. Another reason given was that the removal of metal and scrap will take 15 to 20 months and only after removal of the same, the liquidator would be able to proceed for sale of land and building, which will delay the completion of the liquidation process. The Learned Counsel for Appellant has adverted to the claim of the liquidator, which appears in the Impugned Order as follows:-

"If these assets are sold in one go, it will save time and maximise the value to the stakeholders."

Company Appeal (AT) (Ins) No. 690 of 2021

21. According to the Learned Counsel of Appellant, this is an arbitrary action of the liquidator, especially when the liquidator does not have any unfettered powers to halt the Swiss Challenge Process, as he is claiming to have under various provisions of the bid document. The Learned Counsel for Appellant also adverted to the fact that as a requirement of the second Swiss Challenge Process, the Appellant has deposited a sum of Rs. 43.1 crores as directed, and the bid offered by the Appellant is adequate. Moreover, he has urged, it is not that WSRPL has projected to the liquidator a higher bid for the same assets as offered in the second Swiss Challenge Process, but rather it has sought to purchase the shipyard and several other properties (listed at pp.597-598, Appeal Paperbook, Vol.II) for an amount whose adequacy is not even assessed or examined. He has pointed out that out of these properties, the yard is located on leasehold land, which is on 30 years lease under an agreement dated 26.3.2008 with Gujarat Maritime Board (GMB) and the liquidator cannot conduct sale of such land which is acquired on lease without the approval of GMB, as is stipulated in clause 24 of the agreement (attached at page 607 of the Appeal paperbook, Vol. III). Thus it is clear that in accepting the offer of WSRPL, the liquidator is playing along with the WSRPL whose aim is to subvert the ongoing Swiss Challenge Process. Company Appeal (AT) (Ins) No. 690 of 2021

22. In addition, the Learned Counsel for Appellant presented the following arguments :-

(i) The liquidator has made a statement before the Adjudicating Authority that the removal of metals and scrap material from Dahej site would take 15 to 18 months even though the Appellant has stated in his e-

mail dated 23.3.2021 (attached at pg. 110 of Appeal paperbook, Vol.I) addressed to the liquidator that he would require at least 15 to 18 months to pick up the assets and the corresponding time given

in Bid Documents is 9-12 months. Thus the liquidator has over-stated the period as 15 to 20 months (as recorded in the Impugned Order at pp.73-74 of the Appeal paperbook) to only strengthen a misleading argument to remove the Dahej Materials from the site.

(ii) Respondent No. 1 HR Commercials Private Limited was sent an invitation to participate in the 1st Swiss Challenge Process by submitting an offer to the anchor bid, but he did not do so. He did not deposit the participation fee or Expression of Interest for participating in the 1st Swiss Challenge Process, citing paucity of funds. Also, Respondent No. 4 through its consortium, submitted Earnest Money Deposit in the second Swiss Challenge Company Appeal (AT) (Ins) No. 690 of 2021 Process and place its best offer/bid, after depositing participation fees and Expression of Interest. Its best offer was of Rs. 401 crores against the base price of Rs. 523 crores (at p. 3 of List of Dates filed by Liquidator vide Dy No. 31495 dated 24.11.2021). It is now trying to get backdoor entry by attempting to get itself declared as anchor bidder.

(iii) The legality and validity of the second Swiss Challenge Process has not been challenged before the Adjudicating Authority. It is being done in accordance with Regulation 33(2)(c) of the Liquidation Regulations, 2016, which expressly permits disposal of assets through private sale. The Swiss Challenge Process has been recognised by courts as a legally valid process, according to the following judgments:-

- (1) Ravi Development vs. Shreekrishna Pratisthan and Ors. (2009 7 SCC 462, Para 27)
- (2) Raju Mathew and Ors. vs. State of Kerala and Ors.

[1 2016 BC 74 (KER.) Para 14] Therefore, Impugned Order is predicated on the unsolicited offer of WSRPL, while the second Swiss Challenge Process is still going on.

Company Appeal (AT) (Ins) No. 690 of 2021

(iv) Despite NCLAT directions contained in its order dated 18.6.2021, the Adjudicating Authority did not decide IA No. 273 of 2021 and IA No.379 of 2021 on priority, but instead of doing so put a halt to the second Swiss Challenge Process.

(v) It is not true that the second Swiss Challenge Process has delayed the disposal of assets in any manner, except for the fact that certain Interlocutory Applications have been filed and such judicial intervention resulted in lapse of some time. Now when the second Swiss Challenge Process is nearing completion, there is a complete turnaround by the liquidator for stopping the Swiss Challenge Process without a cogent explanation. Moreover, the Adjudicating Authority does not ask the liquidator why he has changed his stand, but acts on the premise that the second Swiss Challenge Process will not yield beneficial results and could result in delay the sale process. While the Appellant has no vested right and is only the anchor bidder in the second Swiss Challenge Process, it is raising the issues of lack of transparency, reasonableness and following of due procedure of law in this appeal.

Company Appeal (AT) (Ins) No. 690 of 2021

23. Arguments of the Learned Counsel of the Liquidator (Respondent No. 2)

(i) The Appellant has no vested right to challenge the private sale process, as mere participation or selection of the Appellant as the anchor bidder in the second Swiss Challenge Process does not give him any right to have the process concluded in his favour. Moreover, the Appellant had submitted an affidavit dated 23.3.2021 (attached at pages 83-88 of the reply affidavit of Respondent No. 2 Liquidator, Dy. No. 29873 dated 20.9.2021) binding himself unconditionally and irrevocably to the terms of the Swiss Challenge Process document, which includes being bound by the decision of the liquidator to cancel/abandon/modify the Swiss Challenge Process at any time solely at his discretion. Having accepted the terms of anchor bid process document, it does not lie with the Appellant to challenge the decision of the liquidator to cancel the second Swiss Challenge Process now. Moreover, this was done in consultation with the stakeholders and after placing all relevant facts before the Adjudicating Authority and receiving its orders. He has referred to the judgment of Hon ble Supreme Court in State of Jharkhand vs. CWE Soma Consortium (2016 14 SCC 172) wherein it is held that the tender issuing Company Appeal (AT) (Ins) No. 690 of 2021 entity is empowered to cancel the tender process, if the tender documents so permit.

(ii) The liquidator has conducted the sale process in a fair and transparent manner in consultation with the stakeholders and there is no malafide intention on the part of the liquidator in seeking order of the Adjudicating Authority to cancel the second Swiss Challenge Process and invite fresh bids for sale of composite assets.

(iii) The objective of liquidation process is to achieve value maximisation of the assets and it was after making many efforts to sell the assets in a composite manner, that the liquidator went for the Swiss Challenge Process for selling the assets in smaller lots. After receiving an offer from WSRPL regarding purchasing a big chunk of the assets of the Corporate Debtor, the liquidator placed all the facts as well as the offer of WSRPL before the stakeholders on 6.8.2021, who decided to go for disposal by sale of the composite assets instead of continuing with Swiss Challenge Process. The judgment of the Hon ble Supreme Court regarding maximisation value of assets in the matter of Swiss Ribbons (P) Ltd. vs. Union of India (2019 4 SCC 17) and Innovative Industries Limited vs. ICICI Bank & Anr. (2018 1 SCC 1025) are relevant in this regard.

Company Appeal (AT) (Ins) No. 690 of 2021

(iv) The SCC has recommended for selling the assets as a whole. The commercial wisdom of the creditors should be respected as is laid down in K. Sashidhar vs. Indian Overseas Bank [(2019) 12 SCC 150] and Committee of Creditors of Essar Steel India Limited (through authorized signatory) v. Satish Kumar Gupta and Others, (2020) 8 SCC 531.

(v) If Dahej Materials are sold first, the purchaser will require around 12 to 15 months to first lift the scrap and other material from the site and only after this the related land and other assets can be sold. Such a delay may lead to deterioration of assets quality and decrease in their value.

(vi) The offer of WSPRL was placed before the stakeholders vide oral direction of the Adjudicating Authority dated 9.8.2021 and there are no orders recorded to that effect.

24. Arguments of Learned Counsel of WSPRL:-

(i) The objective of IBC is maximisation of value of assets of Corporate Debtor and their disposal in a time-bound manner. Therefore, time taken in disposal is critical for realising maximum value from the assets.

(ii) Time required for removal of metal scrap from the site Company Appeal (AT) (Ins) No. 690 of 2021 would be about 12 to 18 months and sale of other assets can only commence after the metals and scrap is removed.

(iii) The Swiss Challenge Process began in March 2021 and in April 2021 it was stayed vide order of Adjudicating Authority. In the meanwhile, WSRPL wrote to liquidator about its interest in the purchase of assets without including the assets that are sub-judice. It was given permission to inspect the assets on the order of the Adjudicating Authority, which was not challenged.

(iv) The Stakeholders Committee, after considering all the facts, took the decision to cancel the second Swiss Challenge Process and the Adjudicating Authority has recognised this fact in the Impugned Order.

(v) The process document dated 22.3.2021 for selection of anchor bidder contains various clauses (such as cl.3, cl(k) cl(aa) on page 93-94 of Anchor Bid Document, Appeal Paperbook Vol. I), wherein the liquidator has informed the Appellant that it reserves the right to abandon/cancel/modify the process at any time.

(vi) The Appellant agrees that the process document for selection of anchor bidder is not an offer document but he still insists that he has vested right in the Swiss Challenge Process.

Company Appeal (AT) (Ins) No. 690 of 2021

25. The Learned Counsel for Appellant has cited following judgments in support of his contentions:-

(a) R.D. Shetty vs. International Airport Authority of India and Ors . (1979 3 SCC 489, para 7).

(b) Laxmikant & Ors. vs. Satyawani & Ors. (1996 4 SCC 208, paras 4, 8 and 9)

(c) Meerut Development Authority & Ors. vs. Association of Management Studies and Ors. (2009 6 SCC 171, paras 25, 26 and 27).

26. Rejoinder by Learned Senior Counsel of Appellant -

(i) The liquidator was directed to complete the Swiss Challenge process in the IA 273, and the process was not interdicted. Moreover, no order was recorded to the fact that WSRPL could inspect the sites and assets.

(ii) The minutes of the Stakeholders Consultation Committee meeting held on 13.8.2021 were not produced before this tribunal earlier. Also, while the General Manager of State Bank of India was present before the Adjudicating Authority, he did not make any submission. Under Regulation 31-A(10) of the IBBI (Liquidation Process) Regulations, 2016 and section 35(2) of the IBC, the views Company Appeal (AT) (Ins) No. 690 of 2021 of the Committee are not binding on the liquidator. Therefore, it is not proper for the liquidator to take recourse to the decision of the Stakeholders Consultation Committee in meeting dated 13.8.2021 for scrapping the second Swiss Challenge Process and go for private sale.

(iii) None of the Respondents has shown that there is an illegality in the second Swiss Challenge Process. Therefore, it is not understandable why this process is being scrapped.

27. The appellant has prayed for setting aside the impugned order dated 16.08.2021 passed by the Adjudicating Authority and to stay the bid process for specified assets of ABG Shipyard Limited started by the liquidator.

28. We turn our attention to the Impugned Order dated 16.8.2021 (attached at pp. 72-74 of Appeal paperbook, Vol.I). The Impugned Order reads as follows:-

"Learned Sr. Counsel appearing for the Liquidator during the course of arguments has submitted that IAs have been filed objecting the e-auction process undertaken by the Liquidator for the sale of Dahej metal, scraps and assets. He further submitted that the removal of metals & scrap will take 15 to 20 months and after removal of the same he has to go in for sale of land and buildings, which will delay the Liquidation process. He further submitted that he has received a bid for purchase of metals & Scrap and land and Buildings at Dahej. If these assets are sold in one go, it will save time Company Appeal (AT) (Ins) No. 690 of 2021 and maximise value to the stakeholders. Hence, he is going for cancellation of present auction process in consultation with the stakeholders as terms and conditions of auction process document provide for the same and initiate a new auction for sale of Metals & Scrap and Land and Buildings as a whole at Dahej. Since, the Liquidator is going for new auction, and the tender document allows him to do so, the objections of the Applicant in various IAs except No. 332 of 2021 and I.A. No. 371 of 2021 will not survive. It is seen from the record that the sale process is delayed for almost three years. Hence, we direct the Liquidator to complete the entire sale process in consultation with stakeholder committee within three weeks from the date of this order.

The Liquidator to allow all parties herein to take part in bidding process.

We further make it clear that the Liquidator may fix appropriate condition for the prospective bidders to check their bonafide."

29. We note that one reason given by the liquidator for going for private sale after cancellation of the second Swiss Challenge Process is that the clearance of metal scrap from the site will take 15 to 18 months, though according to the process document, it is only 9 months with an extension of 3 months. The Appellant has also asked for a time period of 15-18 months for clearing the Dahej Materials from the site if it becomes the auction-purchaser in the second Swiss Challenge Process.

30. The second reason given by the liquidator in going for private sale of all the assets in a composite manner is to complete the liquidation process in a timely manner to save Company Appeal (AT) (Ins) No. 690 of 2021 them from deterioration in quality. The list of consolidated assets is available at pp.597-598 of Appeal paperbook, Vol.II).

31. The first Swiss Challenge Process started on 12.3.2021, over seven months after the completion of the five rounds of failed e-auction processes. Thus the time spent in deliberations of stakeholders and the failed e-auctions show that the sale of a complex unit as a shipbuilding yard alongwith accompanying assets, in various states of disuse and disarray, is a complicated process and hence ascribing the delay to any specific part of the entire process such as Swiss Challenge Processes may not be reasonable. A certain balance, therefore, has to be struck between timeliness of disposal and adequate value realisation in the sale processes. This first Swiss Challenge Process only offered Dahej materials for sale, whose reserve price was Rs. 516 crores. "Dahej Materials" consisted of metal and scraps without sheds and warehouse. After first Swiss Challenge Process turned out to be unsuccessful, the second Swiss Challenge Process started on 22.3.2021. In the second Swiss Challenge Process, the Dahej Yard (comprising of land including civil structure, ship lift alongwith specified machineries and custom list of other plant and machinery) was kept out of the "Dahej materials" since a government entity had shown interest in the excluded assets. The Appellant M/s. HR Commercials Company Appeal (AT) (Ins) No. 690 of 2021 Private Limited was declared as anchor bidder in the second Swiss Challenge Process on 23.4.2021 and had deposited Rs. 43.10 crores as 10% of the bid amount along with affidavit of undertaking as proof of its seriousness to go through the second Swiss Challenge Process. IAs were filed by M/s. HR Commercials Private Limited (Respondent No. 1) before the Adjudicating Authority, whereupon a partial stay was imposed on 7.4.2021 and again on 3.5.2021. During the pendency of this IA, WSRPL sent an e-mail dated 19.5.2021 to the liquidator evincing interest in the consolidated assets.

32. It is thus clear that there were no takers for the composite assets of the Corporate Debtor at the announced reserve price in the five failed rounds of e-auction.

33. The various rounds of open sale (all of which failed), the two Swiss Challenge Processes and the offer from WSRPL have been tabulated below for ready reference:

S.no	Process	Date	Date when Assets Reserve Price SCC/ started by Adjudicating liquidator Authority	Result	Decided in process	Included
------	---------	------	--	--------	--------------------	----------

1. 1st E - Proceeded 17.09.2019 Composite Rs 1480 Cr Unsuccessful Auction after decision Process of NCLT on 25.04.2019
 2. E - Auction 25.04.2019 27.09.2019 Composite Rs 1332 Cr Unsuccessful Process
 3. E - Auction 25.04.2019 22.10.2019 Composite Rs 1200 Cr Unsuccessful Process
 4. 4thE - 25.04.2019 11.11.2019 Composite Rs 1102 Cr Unsuccessful Auction Process
 5. 5thE - 25.04.2019 05.08.2020 Composite Rs 1104 Cr Unsuccessful Auction Process
 6. First Swiss 11.03.2021 12.03.2021 Dahej Rs 523 Cr Unsuccessful Challenge materials, (offer Process scrap received = material 510 cr) withsheds and warehouses
 7. Second Swiss 22.03.2021 22.03.2021 Dahej Assets Rs 460 Cr Challenged Challenge (first stage) and Yard Rs 431 Cr before Process 27.03.2021 (Anchor Adjudicating (second Bidder) Authority stage)
 8. Offer 09.08.2021 Dahej yard Reserve proposed by (proposal of ABG, price = Rs WSRPL for made by particularly 627 Cr purchase of WSRPL) land incl. Offer Price assets civil = Rs 650 Cr 16.08.2021 structures, (as stated (liquidator shiplift with inminutes asked them specific of to deposit machineries, stakeholder money for customised meeting sale) list of other dated plant and 13.8.21) machineries (attached at p 26, appeal paperbook) Company Appeal (AT) (Ins) No. 690 of 2021
34. The provision containing sale of assets through private sale is contained in Regulation 33 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, which is reproduced below:-
- "33. Mode of sale. - (1) The liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I. (2) The liquidator may sell the assets of the corporate debtor by means of private sale in the manner specified in Schedule I when -
- (a) the asset is perishable;
 - (b) the asset is likely to deteriorate in value significantly if not sold immediately;
 - (c) the asset is sold at a price higher than the reserve price of a failed auction;
 - (d) the prior permission of the Adjudicating Authority has been obtained for such sale:

Provided that the liquidator shall not sell the assets, without prior permission of the adjudicating Authority, by way of private sale to -

- (a) a related party of the corporate debtor;
- (b) his related party; or
- (c) any professional appointed by him.

35. The relevant provisions regarding Stakeholders Consultation Committee in Section 35 (2) of IBC and Regulation 8 of Liquidation Regulations, 2016 are as follows:-

Section 35 (2) of IBC:-

The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds under section 53:

Company Appeal (AT) (Ins) No. 690 of 2021 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.

Regulation 8 of Liquidation Regulations:-

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

(2) The liquidator shall maintain the particulars of any consultation with the stakeholders made under this regulation, as specified in form a of Schedule II."

36. It comes out from a reading of Section 35 of IBC and Regulation 8 of Liquidation Regulations is that the proviso that any such consultation shall not be binding on the liquidator is ostensibly so to enable the liquidator to perform its duties in a fair, impartial and judicious manner for realising the maximum value from the disposal of assets of the Corporate Debtor. In our opinion the views of the stakeholders regarding the sale of assets are both desirable and valuable, especially as they are the ultimate beneficiaries of the liquidation process and also because substantial period of time (over two years and seven months) has already been spent in the liquidation process without any fruitful results.

Company Appeal (AT) (Ins) No. 690 of 2021

37. The various clauses in the anchor bid document which have been cited by the Ld. Senior Counsels of the Respondents No. 2 and 7 empower the liquidator to modify, cancel and stop the Swiss Challenge Process, coupled with the fact that anchor bidder has given its express consent to such terms and conditions do give the liquidator powers to cancel or modify the process, if such powers are not used in an arbitrary manner and for favouring any particular party. In short, such powers have to be exercised without any bias and by maintaining fairness and transparency.

38. In the judgment of Hon ble Supreme Court in the matter of Meerut Development Authority and Ors. vs. Association of Management Studies and Ors. (supra), it was held that Meerut Development Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons and that such action in accepting or refusing the bid must be free from arbitrariness or favouritism. Also, Hon ble Supreme Court has held in Laxmikant and Ors. vs. Satyawani and Ors. (supra) that the right of the highest bidder has to be examined in the context of the conditions under which such auction has been held, and no right had accrued to the highest bidder under conditions of the sale which were notified before the public Company Appeal (AT) (Ins) No. 690 of 2021 auction was held. Hon ble Supreme Court has held in Ramana Dayaram Shetty vs. International Airport Authority of India and Ors. (supra) that International Airport Authority of India had allowed another inexperienced tenderer to participate and the same was awarded, and others were denied equality of opportunity and, in the circumstances, acceptance of tender was invalid as being violative of equality clause of Constitution as also of rule of administrative law inhibiting arbitrary action.

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. Company Appeal (AT) (Ins) No. 690 of 2021 without any qualification or reservation and all prospective bidders should get sufficient notice and time to enable them to participate in the bidding in an effective manner. The process should be taken up after proper notice to prospective buyers and not limited to chosen few.

40. The impugned order directs the Liquidator to complete the entire private sale (relating to the assets contained in the WSRPL offer) within three weeks from the date of Adjudicating Authority's order. It additionally directs the Liquidator to allow the parties who are involved in the hearing of CP(IB) no. 53 of 2017 and related IAs to participate in the sale process. We are of the opinion that rushing into the sale of composite assets with only such parties participating who had earlier not evinced keen interest in the five failed rounds of e-auction may not achieve the value maximisation 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. Company Appeal (AT) (Ins) No. 690 of 2021

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.

42. The Appeal is disposed off with above directions. There is no order as to costs.

[Justice Jarat Kumar Jain] Member (Judicial) [Dr.Alok Srivastava] Member (Technical) New Delhi
10th December, 2021 /aks/ Company Appeal (AT) (Ins) No. 690 of 2021