

# Tarun International Ltd vs Vikram Bajaj (Rp For Anil Special Steel ... on 3 March, 2021

NATIONAL COMPANY LAW APPELLATE TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1194 of 2019

IN THE MATTER OF:

Tarun International Ltd.

...Appellant

Versus

Mr. Vikram Bajaj (RP for Anil Special Steel ...Respondents  
Industries Ltd.) & Ors.

Present:

For Appellant: Mr. Jagdev Singh, Mr. Praveen K. Sharma, Mr.  
Rajeev Sharma and Mr. Sachin Saini, Advocates.

For Respondents: Mr. Abhishek Anand and Mr. Mohak Sharma,  
Advocates for R1.  
Mr. Gaurav Bharadwaj and Ms. Sushmita Tanwar,  
Advocates for R2  
Mr. Brijesh Kr. Tamber, Advocate for R3  
Mr. Rajeev Mehra, Senior Advocate with Mr.  
Ankit Singal and Mr. Shivam Goel, Advocates for  
R4.  
Mr. Harish Kr. Tripathi, Advocate for R5.

## JUDGMENT

BANSI LAL BHAT, J.

On an application being IA No.32/60/JPR/2018 filed in CP No.(IB)- 35(ND)/2018, TA No.118/2018 filed by the Resolution Professional, the Adjudicating Authority (National Company Law Tribunal), Jaipur Bench, in terms of impugned order dated 1st October, 2019 passed a slew of directions saddling the Appellant with liability to bear all the claims of Respondent No.2- 'Rastriya Anil Steel Majdoor Sangh' and Respondent No.5- Mr. Rajendra Sharma with allied and ancillary directions after recording a finding that Respondent No.3- Allahabad Bank had made it very clear to the Appellant to acquire the Unit No.1 of the Corporate Debtor on 'as is where is basis, as is what is basis, whatever there is basis' which implied that it shall also acquire all the liabilities thereon. Feeling aggrieved, the Appellant has assailed the impugned order through the medium of instant appeal on grounds set out in the memo of appeal to which we shall be adverting to as we proceed further.

2. The brief facts which are required to be noticed for understanding the controversy involved at the bottom of the matter may be summarised as under:

Company Petition No. (IB)35(ND)/2018 came to be filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) on behalf of the Operational Creditor for initiating Corporate Insolvency Resolution Process (CIRP) against Corporate Debtor- 'Anil Special Steel Industries Ltd.'. During the course of CIRP, Interim Resolution Professional (IRP) was replaced by Resolution Professional (RP) who, upon noticing that one of the assets i.e. Unit No.1 of the Corporate Debtor comprising of industrial land along with plant and machinery situated at Khasra No.317, Village- Pitwas, Badrama, Area 20 Biga, 13 Biswa (12.90 acres) near Kanakpura Railway Station, P.O. Meenawala, Jaipur registered with Sub-Registrar, Jaipur had been sold off by Respondent No.3- Allahabad Bank in its capacity as a Financial Creditor under the provisions of SARFAESI Act, 2002 ("the Act, 2002" for short) and thus the sale had taken place before the commencement of CIRP in respect of the Corporate Debtor. The RP filed IA No. 32/60 of 2018 before the Adjudicating Authority seeking determination in regard to liabilities of the workers and Company Appeal (AT) (Insolvency) No. 1194 of 2019 employees and other liabilities pertaining to Unit No.1 of the Corporate Debtor sold under the Act, 2002 prior to commencement of CIRP. The prayer in the application called upon the Adjudicating Authority to determine whether the liability towards workmen and employees as also other liabilities pertaining to Corporate Debtor are payable by the purchaser of Unit No.1 or the same continued to be admissible against the Corporate Debtor. The Adjudicating Authority while taking note of the respective stands of the parties and the auction notice dated 15.11.2018 issued by Respondent No.3- Allahabad Bank under the Act, 2002 for recovery of its dues against the Corporate Debtor through sale of land, building, plant and machinery etc. of the Corporate Debtor with the Allahabad Bank pleading that in the said notice under the heading details of the encumbrances known to the secured creditors' it had been specifically and categorically mentioned that: "other liabilities (Statutory/ other dues, if any) put on E-auction as mentioned in the notice will be borne by the prospective purchaser" arrived at the finding that since Respondent No.3- Allahabad Bank had made it very clear to Appellant that its acquisition of Unit No.1 of the Corporate Debtor on 'as is where is basis, as is what is basis, whatever there is basis' implying that it shall also acquire all the liabilities thereon. This finding culminated in passing of the impugned order saddling the Appellant with liability to bear all claims of Respondent Nos. 2 and 5 and the slew of directions incidental thereto or consequent thereupon. The finding has been assailed as being erroneous and unsustainable.

3. It is contended on behalf of the Appellant that Appellant is the auction purchaser of the property in question owned by the Corporate Debtor prior to Company Appeal (AT) (Insolvency) No. 1194 of 2019 initiation of CIRP against the Corporate Debtor. The property was sold by Respondent No.3 under provisions of Act, 2002. Since the Corporate Debtor had committed default in respect of financial debt, Allahabad Bank issued notice under Section 13(4) of the Act, 2002 which

tantamounts to transfer. It is, therefore, contended that as on 01.11.2017, the Corporate Debtor had no right, title or interest in the said property. It is further submitted that the Allahabad Bank which issued the notice of sale of property on AS IS WHERE IS BASIS, AS IS WHAT IS BASIS, WHATEVER THERE IS BASIS, specifically made it clear that the property was free of encumbrances other than those specifically mentioned therein. It is further submitted that the Appellant submitted the bid along with earnest money deposit of Rs.2.74 Crores for participating in e-auction. It happened on 15.12.2017. Allahabad Bank informed the Appellant about the demand letters from PF department, Income Tax Department and Employees. However, Allahabad Bank clarified that the claims/ dues are yet to be crystallised by the Competent Authority/ Court and the sale certificate shall be issued in favour of highest bidder after obtaining necessary orders/ directions from the Competent Authority/ Court/ Tribunal. Referring to chronology of events, it is submitted on behalf of Appellant that on 19.12.2017, Appellant wrote to Allahabad Bank either to cancel the entire bid process and refund security or let the bid process be carried to its logical conclusion, the Appellant being ready to deposit the balance amount of 25% of the bid amount minus Rs.2.74 Crores when the Bank would be able to issue the sale certificate. It is further submitted that e-auction was conducted on 20.12.2017 and the Appellant submitted highest bid of Rs.27,61,00,000/-. On 21.12.2017, Allahabad Bank issued acceptance of offer of purchase and Company Appeal (AT) (Insolvency) No. 1194 of 2019 informed that since claims/ dues are yet to be crystallised, the sale certificate would be issued after obtaining necessary order/ directions from Competent Authority/ Court/ Tribunal. It is submitted that on 26.12.2017, Appellant responded to the letter of Allahabad Bank stating that all the conditions regarding auction/ sale imposed after accepting the earnest money are illegal and are not binding on the Appellant. On 30.12.2017, Allahabad Bank responded to Appellant's letter informing that the only purpose of its letter dated 21.12.2017 was to draw the attention with respect to various dues of Corporate Debtor and not a demand of any amount by the Bank. On 23.01.2018, Appellant issued legal notice to Allahabad Bank asking it to get the property cleared off its dues or take responsibility to pay off the dues and issue the sale letter. It is further submitted that in its reply dated 29.01.2018 Allahabad Bank reiterated the earlier stand further clarifying that the object was to draw the attention of the Appellant to various dues of Corporate Debtor and not a demand of any amount by the Bank. It is further submitted that on 09.02.2018, the property in question was sold to Appellant vide Registered Sale Certificate 'free from all encumbrances' under the Act, 2002. Thus, the transaction of sale was completed and all earlier communications subsumed and culminated in the Registered Sale Certificate. It is further submitted that on 09.02.2018, the authorised officer of Allahabad Bank issued certificate stating that in pursuance to order dated 08.02.2018 passed by Senior Civil Judge Court and Chief Metropolitan Magistrate, Jaipur Mahanagar, the possession of the property has been handed over to the Appellant free from all encumbrances. Subsequently, it is submitted, CIRP commenced on 05.03.2018 and the Adjudicating Authority, admitted the Company Petition filed by the Company Appeal (AT) (Insolvency) No. 1194 of 2019 Operational Creditor against the Corporate Debtor. It is further submitted that on 10.09.2018, the IRP admitted the liabilities of the workers and employees and other liabilities pertaining to Unit No.1 of the Corporate Debtor sold under the Act, 2002 prior to commencement of CIRP as liability of the Corporate Debtor. However, on instructions of Committee of Creditors (COC), RP filed application under Section 60(5) of the 'I&B Code' being IA 32/60 of 2018 before the Adjudicating Authority for determination whether it was the liability of Corporate Debtor or the Appellant/ auction purchaser. This led to passing of the

impugned order which is assailed by the Appellant herein.

4. Learned counsel for Appellant laid emphasis on the fact that the Adjudicating Authority had no jurisdiction as it could not pass orders in relation to prior transaction except in so far provided under Sections 44-45 of the 'I&B Code'. It is contended that the impugned order is without jurisdiction and after issuance of Sale Certificate and delivery of possession to Appellant- auction purchaser the property in question no longer remained the property of the Corporate Debtor. It is further submitted that the terms and conditions of the sale of the property clearly stated that the purchaser would receive the property free from all encumbrances. It is further submitted that the Appellant acquired only the property and not the company, therefore, the liability of the Corporate Debtor has been wrongly fastened upon the Appellant.

5. Per contra, it is submitted by the RP that the Appellant purchased Unit No.1 from the Bank even after knowing all the liabilities of the Corporate Debtor. It is further submitted that the Appellant was intimated by the Allahabad Bank about the dues raised by employees/ labourers and other Company Appeal (AT) (Insolvency) No. 1194 of 2019 statutory bodies against the Corporate Debtor even before the e-auction was conducted. Thus, the Appellant could not escape the liability to pay off the same.

6. It is submitted by learned counsel for Respondent No.4- 'Prudent ARC Limited' that even though the sale in question had been effected prior to initiation of CIRP, the Adjudicating Authority alone had the jurisdiction to decide upon the claims against the Corporate Debtor. It is submitted that the Adjudicating Authority alone had the power and jurisdiction to determine whether the liabilities of the workmen/ employees pertaining to Unit No.1 were payable by the auction purchaser of Unit No.1 or the same continued to be admissible against the Corporate Debtor. It is further submitted that the factum of sale having been effected under Act, 2002 is irrelevant. It is contended that the sale was not pursuant to order of learned CMM. It is further submitted that admission of claim by IRP/ RP is irrelevant as he is not vested with any adjudicatory powers to admit or reject a claim. It is further pointed out that at the time of sale/ auction the provisions of 'I&B Code' had already been enforced and the Appellant as also Allahabad Bank were aware of this factual position but still proceeded ahead with the bid process despite being aware of the liabilities. It is further submitted that as per terms of sale, such liabilities were to be borne by the prospective purchaser who was required to make own independent inquiry regarding the encumbrances/ claim/ liabilities. It is further submitted that the Appellant participated in the bid process being fully aware and conscious of the liabilities and encumbrances. With reference to correspondence between the Allahabad Bank and Appellant, it is pointed out Company Appeal (AT) (Insolvency) No. 1194 of 2019 that the Appellant, instead of backing out of the bid process after being fully aware of the liabilities and encumbrances unconditionally accepted the terms of the sale and it cannot be permitted to wriggle out of the liability notwithstanding the fact that it has unilaterally tried to resile from the terms and conditions of the sale. It is lastly pointed out that under Employees Provident Fund and Miscellaneous Provisions Act, 1952, the dues of EPF are an encumbrance on the 'establishment' and become first charge thereupon. Thus, it is submitted, the dues of EPF over Unit No. 1 were first charge over the unit only and same are an encumbrance on the said unit rendering the auction purchaser (Appellant) liable.

7. The sole issue for consideration in this appeal is whether the liability in respect of the workers and employees and other liabilities pertaining to Unit No.1 of the Corporate Debtor sold under the Act, 2002 prior to commencement of CIRP are the liability of Corporate Debtor or the Appellant- auction purchaser.

8. It is the admitted position in the case that the Appellant- 'Tarun International Limited' is the auction purchaser of aforesaid Unit No.1 from Respondent No.3- Allahabad Bank under the Act, 2002. Unit No.1 was purchased by Appellant in auction proceedings for an amount of Rs.27,61,00,000/-. The Corporate Debtor- 'Anil Special Steel Industries Ltd.', vide communication dated 22nd November, 2017 called upon Respondent No.3- Allahabad Bank to discharge liability in respect of dues of workers/ employees of the Corporate Debtor up to 30th November, 2017 out of the proceeds of Company Appeal (AT) (Insolvency) No. 1194 of 2019 auction of Unit No.1 and in the alternative Appellant was requested to pay the dues as per list enclosed with the communication. It emerges from record that the Resolution Professional of Corporate Debtor approached the Tribunal to determine whether the liabilities in respect of workers and employees as also other liabilities pertaining to Unit No. 1 of the Corporate Debtor sold under the Act, 2002 before the commencement of CIRP in respect of the Corporate Debtor were payable by the purchaser of Unit No.1 or continued to be admissible against the Corporate Debtor. Upon consideration of all relevant factors bearing upon the transaction culminating in sale of Unit No.1 in favour of auction purchaser (Appellant), the Adjudicating Authority arrived at the conclusion that the Allahabad Bank had categorically told the Appellant and made it clear that the acquisition of Unit No.1 of Corporate Debtor by the Appellant- auction purchaser was on 'as is where is basis, as is what is basis, whatever there is basis' implying that such acquisition shall be subject to encumbrances in the nature of liabilities thereon. The directions in the impugned order saddling the Appellant with liability to bear all the claims of 'Rashtriya Anil Steel Majdoor Sangh' and of Mr. Rajendra Sharma besides the liability jointly shared with Allahabad Bank came to be passed at the hands of Adjudicating Authority as a sequel to the finding recorded by it as on the basis of conclusion drawn which have been referred to hereinabove.

9. According to Appellant, Unit No.1 was sold to it in terms of Registered Sale Certificate dated 9th February, 2018 free from all encumbrances under the Act, 2002, it being submitted that the transaction of sale was complete and all earlier communications subsumed and culminated in the Registered Sale Company Appeal (AT) (Insolvency) No. 1194 of 2019 Certificate. Reference in this regard is made to Page 447 of the appeal paper book which is the Sale Certificate with following stipulations:-

".....The sale of the scheduled property was made free from all encumbrances known to the secured creditor listed below on deposit of the money demanded by the undersigned."

10. It is further submitted on behalf of the Appellant that the possession of the property was handed over to the Appellant on the same day free from all encumbrances in pursuance of order of Senior Civil Judge Court and Chief Metropolitan Magistrate, Jaipur Mahanagar dated 8th February, 2018. Reference in this regard is made to Page 450 of the appeal paper book which reveals that the

Allahabad Bank, on behalf of consortium of four Banks, including the lender Allahabad Bank handed over possession to Appellant in pursuance of the court orders free from all encumbrances known to the secured creditors, on deposit of the money. This happened before the commencement of CIRP against the Corporate Debtor on 5th March, 2018 when the Adjudicating Authority admitted the Company Petition under Section 9 of the 'I&B Code' with respect to Corporate Debtor-'Anil Special Steel Industries Ltd.'. It is pointed out on behalf of the Appellant that the IRP had admitted these liabilities as the liabilities of the Corporate Debtor but after substitution of IRP by RP, the latter, on instructions of COC approached the Adjudicating Authority with I.A No.32/60/JPR/2018 under Section 60(5) of the 'I&B Code' for determination of liability of workers and employees and other liabilities culminating in passing of the impugned order. The impugned order is assailed as having been passed without jurisdiction as the Adjudicating Authority had no jurisdiction to pass Company Appeal (AT) (Insolvency) No. 1194 of 2019 order in relation to liabilities of Corporate Debtor prior to commencement of CIRP except insofar as is provided under Sections 44 & 45 of the 'I&B Code'. It is the Appellant's case that the property was sold to it free from all encumbrances and it had acquired only the property and not the company, therefore, liabilities of the Corporate Debtor could not have been fastened upon the Appellant. Relying upon extracts from various judgments which have not been produced before us for perusal, it is submitted on behalf of the Appellant that the terms and conditions of the sale must be read as a whole, that the contribution cannot be recovered from the auction purchaser who is a bonafide purchaser, that the liability arises only when the transferee is stepping into the shoes of employer and in case of the transfer by operation of law the position would be different, that the obligation of joint and several liability comes into play only when establishment is transferred by employer of that establishment prior to auction, that the auction purchaser was the purchaser with condition of the same being free from all encumbrances, that a company purchasing the unit in auction will not be liable for the ESI arrears as payable by the company which own the establishment prior to auction, that mere purchase of some properties of a person having outstanding dues in respect of excise duty would not make it liable and that the auction purchaser cannot be held liable to clear the arrears of commercial tax of previous owner.

11. Respondent No.4- 'Prudent ARC Limited' which is the largest Financial Creditor of COC holding approx. 74.31% of the voting share refuted the contention of Appellant by submitting that both Allahabad Bank as well as the Appellant- auction purchaser were aware of the 'I&B Code' provisions having Company Appeal (AT) (Insolvency) No. 1194 of 2019 been enforced when the auction/ sale was undertaken and the Appellant as made aware of the liabilities of Corporate Debtor before the issuance of Sale Certificate. Thus the sale proceeds were liable to be distributed in accordance with Section 53 of the 'I&B Code'. Reference is made to Page 388 of the appeal paper book to demonstrate that notice under Section 8 of the 'I&B Code' had been served upon the Corporate Debtor by the workers on 12th December, 2017 i.e. a week before the bid which was scheduled for 20th December, 2017. It is further pointed out that even prior to issuance of Sale Certificate on 9th February, 2018, the Corporate Debtor had admitted its dues before the Adjudicating Authority on 31st January, 2018 and both Appellant and Allahabad Bank being parties before the Adjudicating Authority were aware of the same. It is, therefore, contended on behalf of Respondent No.4- 'Prudent ARC Limited' that the condition of notice of sale dated 15th November, 2017 that sale was being made on 'as is where is basis, as is what is basis, whatever there is basis' (Page 113 of the

appeal paper book), "other liabilities (statutory dues, if any) of the property under E-auction will be borne by the prospective purchaser" (Page 114 of the appeal paper book) and "the intending bidders should make their own independent inquiries regarding the encumbrances and claims/ rights/ dues affecting the property, prior to submitting their bid" (Page 117 of the appeal paper book) the liabilities of workman/ employees/ EPF relating to Unit No.1 stood assigned to auction purchaser (Appellant) and would no longer be admissible against the Corporate Debtor. Pages 113, 114 & 117 of the Appeal paper book are extracted hereinbelow:-

Company Appeal (AT) (Insolvency) No. 1194 of 2019 Company Appeal (AT) (Insolvency) No. 1194 of 2019 Company Appeal (AT) (Insolvency) No. 1194 of 2019 Company Appeal (AT) (Insolvency) No. 1194 of 2019

12. On perusal of these documents, it is abundantly clear that the auction purchaser was aware of all the dues outstanding against the Corporate Debtor and the terms of the sale but it proceeded to participate in the auction held on 20th December, 2017 and emerged as the sole bidder/ successful auction purchaser. Perusal of the confirmation/ acceptance letter dated 21st December, 2017 comprising Pages 138-140 of the appeal paper book brings it to fore that all liabilities qua the assets within the knowledge of the Allahabad Bank were reiterated to be paid by the purchaser which included the demand in respect of recovery of PF Department, Income Tax dues, Employee salary dues, outstanding labour payment, retired workers dues, pending dues of Mahendra Orrhopedic Centre, claims in respect of salary under Industrial Dispute matter, claims in terms of demand notice under Section 8 of the 'I&B Code' and other demands with express stipulation that all liabilities on the assets shall be paid by the Appellant. In regard to mail dated 19th December, 2017 emanating from the Appellant, it was incorporated in the acceptance letter dated 21st December, 2017 that the Sale Certificate will be issued after obtaining necessary orders from Competent Authority/ Court/ Tribunal as regards the claims/ dues yet to be crystallised. The acceptance of offer purchase dated 21st December 2017 (Pages 138-140 of the appeal paper book) are reproduced hereinunder:-

Company Appeal (AT) (Insolvency) No. 1194 of 2019 Company Appeal (AT) (Insolvency) No. 1194 of 2019 Company Appeal (AT) (Insolvency) No. 1194 of 2019 Company Appeal (AT) (Insolvency) No. 1194 of 2019

13. It further emerges from record that the Appellant subsequently tried to resile from the terms and conditions of sale, obviously to wriggle out of the liabilities that it was liable to pay in terms of acceptance of offer purchase letter dated 21st December, 2017. This was sought to be done unilaterally on the pretext that in the event of Appellant having backed out, the EMD would have been forfeited. This explanation was neither realistic nor plausible. By proceeding to accept the offer purchase Appellant unconditionally accepted the terms of sale. Reliance placed by Appellant on the letters dated 30th December, 2017, 23rd January, 2018 and 29th January,

2019 that it was only informed of the liabilities, it being specifically stated that the same were not demanded by the Bank, would be of no consequence as such liabilities passed on to Appellant in terms of the acceptance of offer purchase and sale letter with no demand put up by the Bank for its recovery from Appellant- auction purchaser. In the face of bulk of evidence staring in the face of the Appellant assigning the liabilities to it, the Appellant could not be permitted to unilaterally back out of such liability.

With express stipulation in auction notice and all relevant documents connected with auction and sale proceedings under the Act, 2002, it cannot be said that this being a sale in auction proceedings under the Act, 2002, the auction purchaser would not be saddled with the liabilities of Corporate Debtor as only assets had passed on to it and not the liabilities of the Corporate Debtor which was faced with the prospect of triggering of CIRP, regard being had to demand notice served upon it under Section 8 of the 'I&B Code' prior to issuance of sale certificate. Therefore, stipulation in the Sale Certificate that the sale was free from encumbrances is irrelevant when the information in regard to encumbrances known to the creditor was shared with the Appellant through the Company Appeal (AT) (Insolvency) No. 1194 of 2019 correspondences referred to hereinabove and such encumbrances were yet to be discharged.

14. Dealing with the aspect of public auction incorporating a condition in the nature of 'as is where is', the Hon'ble Apex Court in "Punjab Urban Planning and Development Authority & Ors. vs. Raghu Nath Gupta and Ors.- Reported in (2012) 8 SCC 197" observed as under:-

"17. We are of the view that the judgment in Amarjeet Singh (supra) is a complete answer to the various contentions raised by the respondents. We may reiterate that after having accepted the offer of the commercial plots in a public auction with a super imposed condition i.e. on "as is where is" basis and after having accepted the terms and conditions of the allotment letter, including installment facility for payment, respondents cannot say that they are not bound by the terms and conditions of the auction notice, as well as that of the allotment letter. On facts also, we have found that there was no inordinate delay on the part of PUDA in providing those facilities."

15. This is a complete answer to refute the issue raised by Appellant that it cannot be saddled with liability towards workman and employees as also other liabilities pertaining to Corporate Debtor.

16. In "Maharashtra State Co-operative Bank Ltd. v. Babulal Lade- CA No. 232 of 2016 decided on 04.12.2019", it was observed by the Hon'ble Company Appeal (AT) (Insolvency) No. 1194 of 2019 Apex Court that the sale under the Act, 2002 is to be governed by the terms of the sale.

17. Mentioning that it was free from encumbrances would be inconsequential as long as the liabilities known to the Allahabad Bank and brought to the notice of auction purchaser remain undischarged. There is considerable force in the contention raised by Respondent No.4 that dues of EPF are an encumbrance on the establishment and become first charge thereupon within the



purview of Section 11(2) of the Employee's Provident Funds and Miscellaneous Provisions Act, 1952. Though the sale in auction proceeding was limited to Unit No.1 while the Corporate Debtor owned two units, mere fact of common ownership of two units by the Corporate Debtor would not make it one establishment. The two units were separate and independent units treated so by EPFO with separate registration numbers allotted to these units. Therefore, EPFO dues over Unit No.1 which was the subject of auction or sale under the Act, 2002 were the first charge over the unit only and the sale proceeds thereof could not be utilised by the Allahabad Bank without discharging the same. We are told that the Allahabad Bank has not joined issue in regard to this position and even made a part payment of about Rs.17.51 lakhs as reflected at Page 456 of the appeal paper book.

18. Having dealt with the issue raised in this appeal in the context of material on record, respective contentions of parties, arguments advanced and the case law cited at the Bar, we are of the considered opinion that the Appellant- auction purchaser had accepted the acquisition of Unit No.1 subject to condition of 'as is where is basis, as is what is basis, whatever there is basis' Company Appeal (AT) (Insolvency) No. 1194 of 2019 and being fully aware of the nature of liabilities passing on to it in consequence of such sale besides being aware of the issuance of demand notice by Respondent No.2- 'Rashtriya Anil Steel Majdoor Sangh', thus the liabilities said to have been acquired by the Appellant in terms of the impugned order cannot be held to be an erroneous conclusion warranting interference.

We find that the impugned order does not suffer from any legal infirmity and factual frailty. The appeal lacks merit and is dismissed.

[Justice Bansilal Bhat] Acting Chairperson [Shreesha Merla] Member (Technical) NEW DELHI 3rd March, 2021 AR Company Appeal (AT) (Insolvency) No. 1194 of 2019 Later on, The appeal, in terms of the majority judgment (2:1), is dismissed.

[Justice Bansilal Bhat] Acting Chairperson [Shreesha Merla] Member (Technical) NEW DELHI 3rd March, 2021 AR Company Appeal (AT) (Insolvency) No. 1194 of 2019 NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH, NEW DELHI Company Appeal (AT) (Insolvency) No.1194 of 2019 [Arising out of Impugned Order dated 1 October 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Jaipur Bench, in IA. No. 32/60/JPR/2018 in CP No. (IB) 35 (ND)/2018] IN THE MATTER OF:

Tarun International Ltd.

Appellant

Versus

Mr. Vikram Bajaj (RP for Anil Special Steel Industries Ltd.) & Ors.

Respondents

Present:

For Appellant

: Mr Jagdev Singh, Mr Praveen K. Sharma, Mr Rajeev Sharma and Mr Sachin Saini, Advocates.

For Respondent

: Mr Abhishek Anand and Mr Mohak Sharma,

Advocates for R1.

Mr Gaurav Bharadwaj and Ms Sushmita Tanwar,

Advocates for R2

Mr Brijesh Kr. Tamber, Advocate for R3

Mr Rajeeve Mehra, Senior Advocate with Mr Ankit Singal and Mr Shivam Goel, Advocates for R4.

Mr Harish Kr Tripathi, Advocate for R5.

## J U D G M E N T

[Per; V. P. Singh, Member (T)]

## JUDGMENT

I have gone through the detailed judgement authored by Hon'ble Acting Chairperson Justice B L Bhatt. Still, I cannot persuade myself to agree with the views expressed by Hon'ble Acting Chairperson Justice Bhatt; I would like to give my finding separately.

Company Appeal (AT) (Insolvency) No. 1194 of 2019 1 of 34 The Appellant has preferred this Appeal against the Impugned Order dated 1 October 2019 passed in IA No. 32/60/JPR/2018 in CP No. (IB) 35 (ND)/2018 by the Adjudicating Authority/National Company Law Tribunal Jaipur Bench 2. By Order dated 1 October 2019, the Adjudicating Authority has issued directions on the Application filed by Resolution Professional fastening the liability on the Appellant Tarun International Ltd to bear all the claims of Respondent No. 2 'Rashtriya Anil Steel Mazdoor Sangh' and Respondent No.5, Mr Rajendra Sharma with a further clarification that the Corporate Debtor cannot be fastened with any of the liabilities of Unit-1 of Corporate Debtor which was sold under the SARFAESI Act. The parties in this Appeal are referred by their original status in the company Petition for the sake of convenience.

2. The brief facts of the case are as under;

The Appellant 'Tarun International Ltd' is a bona fide Auction Purchaser of immovable property comprising of industrial land along with the plant and machinery (the property) owned by 'Anil Special Steel Industries Limited', Corporate Debtor ("ASSIL"), from the time before the initiation of Corporate Insolvency Resolution Process ("CIRP") against corporate Debtor 'ASSIL'. The property was sold to the Appellant by Allahabad Bank, Respondent, No 3 under the provision of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), vide sale certificate (under Rule 9 (6) of Security Interest (Enforcement) Rules 2002) dated 9 February 2018, which was duly registered in the office of Sub Registrar, Jaipur on the same day. Company Appeal (AT) (Insolvency) No. 1194 of 2019 2 of 34

3. The corporate Debtor owned two units, and the Appellant is the auction purchaser of Unit-1 of ASSIL. After the Sale of Assets of Unit-1 of the Corporate Debtor 'Anil Special Steel Industries Limited' under the SARFAESI Act by secured Creditor Allahabad Bank, the Application filed under Section 9 of the Insolvency and Bankruptcy Code 2016 was admitted by Order dated 5 March 2018 passed by the Adjudicating Authority. During the CIRP of the Corporate Debtor, the IRP, Mr Brij

Kishore Sharma, collated the claims and constituted the Committee of Creditors (in short, CoC). Later, on a resolution passed by the CoC, the Resolution Professional, Mr Vikram Bajaj, replaced the IRP Mr Brij Kishore Sharma vide Order dated 14 May 2018 passed by Adjudicating Authority.

4. During CIRP, the RP filed IA No. 32/60/J PR/2018 in CP. No. (IB) 35 (ND)/2018 before the Adjudicating Authority seeking the following relief:

"Allow the present application and determine as to whether liabilities pertaining to unit-1 which had been sold under SARFAESI prior to the insolvency commencement date are payable by the purchaser of unit -1, i.e. Tarun international Ltd or the same continued to be admissible against the corporate debtor."

5. The Appellant filed its Reply to the Application above and stated that such an Application is not maintainable as the directions being sought would fasten liability on the third party, entirely unconnected with the Corporate Debtor's CIRP. By impugned Order dated 1 October 2019, the Adjudicating Authority held that the claims of the workers relating to the property were to be born by the Appellant and not by the Corporate Debtor ASSIL. Company Appeal (AT) (Insolvency) No. 1194 of 2019 3 of 34

6. The Appellant has not been connected with and has no right, interest or obligations concerning ASSIL either at present or from the time before purchasing the property. The Adjudicating Authority on an Application filed by the Resolution Professional (in short "RP") u/s 60 (5) (b) and (c) of the I&B Code 2016 vide Order dated 1 October 2019 has held that the Appellant is liable to pay workmen's dues and other charges on the property. The Appellant contends that such findings are without jurisdiction because;

The Adjudicating Authority under the Code has jurisdiction only about triggering of proceedings under Part II of the Code. Jurisdiction of the Adjudicating Authority in relation to prior transactions is limited to the extent as provided under section 44 and 45 of the Code.

7. The Appellant contends that pursuant to default by the Corporate Debtor-Anil Special Steel Industries Limited ("ASSIL"), Allahabad Bank issued notice to ASSIL under Section 13 (2) of SARFAESI Act, 2002 on 22 November 2016 and subsequently a notice under Section 13 (4) of SARFAESI Act, 2002 on 1 November 2017. After that, Allahabad Bank, Respondent No. 3 exercising its power under SARFAESI Act, 2002, issued the sale notice for an auction on 15 November 2017, with the right to sell properties of Unit-1 of the Corporate Debtor. Accordingly, the Appellant had submitted its bid of 27,61,00,000 for the purchase of Unit-1 properties. It was sold to the Appellant "free from all encumbrances" under SARFAESI Act, 2002 vide Sale Certificate dated 9 February 2018, which was duly registered in the Registrar's office Jaipur on 9 February 2018. The Sale of unit 1 to the Appellant was completed before the insolvency commencement date of ASSIL under the Company Appeal (AT) (Insolvency) No. 1194 of 2019 4 of 34 Code. On 5 March 2018, the Adjudicating Authority admitted Company Petition (IB)-35 (ND)/2018 filed under Section 9 of the Code against the corporate Debtor ASSIL and appointed Mr Brij Kishore Sharma as IRP.

8. The Appellant contends that it was never involved in the Insolvency Resolution Process initiated against ASSIL. The Appellant has not made any claim against ASSIL. Therefore, the Appellant cannot be considered a corporate person about the CIRP of ASSIL. The Appellant is entirely unaware of the details of the Resolution Process.

9. The Appellant further contends that IA was not maintainable as the directions being sought may affect the third party's fastening liability, which was not ever connected with the CIRP of ASSIL under the Code. The Adjudicating Authority cannot, u/s 60 (5) of the Code, determine the auction purchaser's liabilities, which had purchased the property belonged to ASSIL conducted under the SARFAESI Act before the commencement of insolvency proceedings.

10. The Allahabad Bank filed its Reply to IA filed by RP stating that the Appellant was aware of the terms of the auction of Unit-1 of the Corporate Debtor. Allahabad Bank's recovery of amounts should not be disturbed in any way. The Allahabad Bank had initiated proceedings for recovery of its dues against the Corporate Debtor under the SARFAESI Act and in sequence thereof issued Notice of Sale dated 15 November 2017 'for the sale of land and building, plant and machinery etc. of the principal borrower M/S Anil Special Steels'. In the said notices, under the heading "Details of encumbrances Company Appeal (AT) (Insolvency) No. 1194 of 2019 5 of 34 known to the Secured Creditor, it was explicitly and categorically mentioned that "The prospective purchaser will bear other Liabilities (statutory/the dues, if any) of the property put in E-auction as mentioned in this notice". The auction purchaser had purchased the property with a clear understanding of the auction notice's condition mentioned above.

11. Respondent No. 4, in its Reply to IA, stated that the liability towards employees dues, including provident fund, falls upon the Appellant, as the auction was carried out on an "As is where is basis, as is what is basis, whatever there is basis".

12. It is contended that the auction was scheduled for 20 December 2017 at 11 AM. Before the same, employees of the Corporate Debtor and the EPF authorities intimated their dues to Respondent No. 3, Allahabad Bank, in advance. The RP of the Corporate Debtor sent a letter dated 22 November 2017 to Respondent No. 3 Bank, intimating its employees' dues to the tune of 6,01,67,395 and requested for arranging the funds for the repayment from the proceeds of the auction. Letter dated 4 December 2017 was sent on behalf of Respondent No. 1/workers union, bringing to the notice of Respondent No. 3 about the dues of more than 3 crores are of the workers and the fact regarding the non-deposit of Provident Fund by the Corporate Debtor. In addition to the above, the Recovery Officer of EPFO also sent a letter dated 7 December 2017 informing Respondent No. 3 before the auction of unit-1 of ASSIL. It also apprised that the same would be a charge on the assets/sale proceeds of the auction of the establishment and may become the individual liability of Respondent No. 3.

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13. It is further contended that 17,51,325/- has been paid by Respondent No 3 Allahabad Bank from the Sale's proceeds. The Counsel for Respondent No. 4 also contends that having become

aware of the said dues, Respondent No. 3 informed the intending purchaser, i.e. Appellant, vide letter dated 19 December 2017, i.e. before the intimation of the bidding process. The said letter mandated the bidder to analyse the situation and satisfy itself about the property dues prior to the bid. The relevant portion of the said letter is as under;

"this has reference to a bid admitted on 15 December 2017 along with an EMD of 2.74 crores for participating in E-auction for account M/S Anil Special Steel Industries Limited. In this regard, you being the intending buyer, we would like to inform you that we have received the following demand letters from the PF department and income tax department, which is as below;

1. The recovery of the PF department of 17,51,325 (current dues) and the disputed amount of 3,09,18,151.
2. Income tax dues of 4,15,59,150.

14. The Adjudicating Authority by the impugned Order directed that;

- a. The Respondent Number 2 shall bear all the claims of the Respondent No. 1 and Respondent No. 5.
- b. In the event any money which has been deducted towards the statutory dues of EPF and is still lying with the corporate Debtor, the RP shall forthwith credit the same to the appropriate accounts of the concerned authority.

Company Appeal (AT) (Insolvency) No. 1194 of 2019 7 of 34 c. For recovery of the claims of any statutory dues, it is open for the Respondent No 1 and 5 to proceed against the Respondent No. 2 and 3.

d. So for, the Corporate Debtor is concerned it cannot be fastened with any of the liability of Unit number 1, which was sold under the SARFAESI Act, 2002 by the Respondent No. 3, except with regard to the statutory dues of EPF, in case if it is lying still with the corporate Debtor as stated before. With these directions, IA number 32/60/J PR/2018 is disposed of."

15. Following issues arises for the determination of this Appeal;

1. Whether the Adjudicating Authority under the I&B Code 2016 has jurisdiction to determine a bona fide auction purchaser's liability under the SARFAESI Act's provision when the property had been sold, and sale certificate was issued before the commencement of CIRP of the Corporate Debtor?
2. Whether the Adjudicating Authority can decide the liabilities of a third party auction purchaser, which had no role in the Corporate Debtor's Resolution Process and did not fall under the ambit of avoidance transactions as outlined under Sec 44 & 45, under Section 60 (5) of the Code?

3. Whether the Sale of only Part of the Assets of the Corporate Debtor under the SARFAESI Act can be considered the Sale of a Company (or Part thereof) as a going concern to make the purchaser liable for workmen's dues?

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16. I have heard the learned counsel's argument for the parties, perused the record, and now record deliberations on the issues framed above. Issue No. 1 to 3;

17. Admittedly, the Appellant had purchased the immovable property comprising "industrial land along with plant and machinery" owned by Anil Special Steel Industries Limited (in short ASSIL) before the commencement of the Corporate Insolvency Resolution Process (CIRP) against ASSIL. The property was sold to the Appellant by Allahabad Bank under the provisions of the SARFAESI Act. Simultaneously, the sale certificate dated 9 February 2018 was issued and was duly registered in the Sub- Registrar office on the same day.

18. Learned Counsel for the Appellant contends that upon default by ASSIL, Respondent No. 3-Allahabad Bank issued notices to ASSIL under section 13 (2) of the SARFAESI Act on 1 November 2017, after that, on 15 November 2017, under Section 13 (4) of the SARFAESI Act. By implication of Section 13(4) of the SARFAESI Act, once the Bank has taken over the possession, the Corporate Debtor loses its right to the property.

19. Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002( in short 'SARFAESI Act') is mentioned below for ready reference;

13. Enforcement of security interest.--(1) Notwithstanding anything contained in Section 69 or Section 69-A of the Transfer of Property Act, 1882 (4 of 1882), Company Appeal (AT) (Insolvency) No. 1194 of 2019 9 of 34 any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act. (2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4). 10[Provided that--

(i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee;] (3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of

non-payment of secured debts by the borrower. 1[(3-A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the Company Appeal (AT) (Insolvency) No. 1194 of 2019 10 of 34 secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate 2[within fifteen days] of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17-A.] (4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or Sale for realising the secured asset;

3[(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or Sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or Sale shall be exercised only where the substantial Part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or Part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;] Company Appeal (AT) (Insolvency) No. 1194 of 2019 11 of 34

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause

(d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the Company Appeal (AT) (Insolvency) No. 1194 of 2019 12 of 34 residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(9) [Subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of ] financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than 5[sixty per cent] in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realised from the Sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of Section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of Section 529-A of that Act:

Provided also that liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of Section 529-A of the Companies Act, 1956 (1 of 1956) and in case such workmen's Company Appeal (AT) (Insolvency) No. 1194 of 2019 13 of 34 dues cannot be ascertained, the liquidator shall intimate the estimated amount or workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:



Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any."

20. Undisputedly, the Appellant is the auction purchaser of the immovable property comprising industrial land, plant and machinery of Unit-1 owned by Anil Special Steel Industries Limited/ ASSIL, i.e. Corporate Debtor. Before commencement of the Corporate Insolvency Resolution Process against ASSIL, the property was sold by Allahabad Bank under the SARFAESI Act's provisions, 2002. Given the default by ASSIL, notices were issued against ASSIL u/s13 (2) & 13(4) of the SARFAESI Act on 1 November 2017 and 15 November 2017, respectively and the Sale of the property was done on "as is where is the basis, as is the basis, whatever there is basis" with the stipulation that the property was free from encumbrances. The photostat copy of the sale notice is given below for ready reference.

Company Appeal (AT) (Insolvency) No. 1194 of 2019 14 of 34 Company Appeal (AT) (Insolvency) No. 1194 of 2019 15 of 34 Company Appeal (AT) (Insolvency) No. 1194 of 2019 16 of 34 Company Appeal (AT) (Insolvency) No. 1194 of 2019 17 of 34

21. It is pertinent to mention that in Clause 20 of the sale notice (supra), it is stated that "to the best of knowledge and information of the authorised officer, there is no encumbrance on the properties other than mentioned above (if any). However, the intending bidders - should make their own independent inquiries regarding the encumbrances and claims/the rights/dues/affecting the property, prior to submitting their bid. The e-auction advertisement does not constitute and will not be deemed to constitute any commitment or any representation of the Bank. The authorised officer/secured creditor shall not be responsible in any way for any third-party claims/rights/dues other than mentioned above (if any)."

22. It is also important to mention that in the sale notice, in the column about the details of the secured creditor's encumbrances, no details of liabilities were mentioned. But it is only mentioned that "other liabilities (statutory/other dues, if any) of the property put under e-auction as mentioned in this notice will be borne by the prospective purchaser".

23. In compliance with the above-mentioned sale notice, the Appellant submitted its bid on 15 December 2017 along with the earnest money deposit of 2.74 crores for participating in E-auction. On 19 December 2017, Allahabad Bank informed the Appellant about the Income Tax Department's demand letter and about the Employees dues. Allahabad Bank, however, clarified that the claims/dues are yet to be crystallised by the Competent Authorities, and the sale certificate in favour of the highest bidder shall be issued after obtaining necessary orders /directions from the Competent Authority/Court/Tribunal.

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24. In pursuance of information about the dues of Provident Fund, Income Tax Department, and Employees Dues, the Appellant submitted a letter before the Chief Manager, Allahabad Bank, annexed with the appeal paper book at page No. 396. It also appears that when the information was given to the Appellant about the outstanding dues against the Corporate Debtor, then the Appellant requested the Bank to either cancel the entire bid process and refund the security or start the bid process and issue a letter of acceptance to the successful bidder and accept the balance amount (25% of the bid amount).

25. However, the Bank conducted an e-auction on 20 December 2017, wherein the Appellant submitted the highest bid of 27,61,00,000. After that, on 21 December 2017, Allahabad Bank issued acceptance of the offer of purchase and informed that since claims/dues are yet to be crystallised by the Competent Authority/Court, the sale certificate will be issued after obtaining the necessary order/direction from the Competent Authority/Court/Tribunal. On 26 December 2017, in the Appellant's Reply to Allahabad bank's letter dated 21 December 2017, it is stated that the conditions regarding the auction, imposed after accepting the earnest money, are illegal and are not binding on the Appellant.

26. After that, on 30 December 2017, Allahabad Bank, in response to the Appellant's letter dated 26 December 2017, issued a letter to Appellant clarifying the position that its letter dated 21 December 2017 was to draw the attention concerning the various dues of ASSIL and not a demand of any amount by the Bank. This letter is annexed with the Appeal paper book on page number 421 (Relevant para 8 and 9). Further, on 9 February 2018 Company Appeal (AT) (Insolvency) No. 1194 of 2019 19 of 34 registered sale certificate about the property sold to the Appellant was issued. The sale Certificate shows that the property sold under the SARFAESI Act was free from all encumbrances. The relevant portion of the sale certificate (page 450 of Appeal paper book) is given below for ready reference;

"In pursuance to Senior Civil Judge Court and Chief Metropolitan Magistrate, Jaipur Order Number Nearly Dated 8th Further 2018 we have on behalf of consortium of four banks, i.e. Allahabad bank (lender), Bank of Maharashtra, Indian Overseas Bank, State Bank of India handed over the possession to M/S Tarun international Ltd... of the schedule property listed below, free-form all encumbrances known to the secured creditors, on deposit of the money by the undersigned. Schedule Description of Immovable Property Industrial Land along with the plant and machinery situated at Kasra number 317, village Pithawas, Badarama, area 20 Bigha 13 Biswa (12.90 acres)..... In the name of M/S Anil Special Steel Industries Limited, registered with Sub- Registrar, Jaipur in Book No 1, volume number 3575 at page number 1630169 at serial number 1275 and bounded as under;..."

27. It is pertinent to mention that CP (IB.) No. 35 (ND)/2018 filed under Section 9 (6) of the Insolvency & Bankruptcy Code 2016 was admitted against the Corporate Debtor ASSIL on 5 March 2018. The IRP admitted the liabilities mentioned above as the liabilities of the Corporate Debtor.

However, the RP, on the instructions of the 'CoC', filed an application u/s 60 (5) (b) & (c) of the Company Appeal (AT) (Insolvency) No. 1194 of 2019 20 of 34 Code before the Adjudicating Authority for seeking directions as mentioned above.

28. The Adjudicating Authority vide impugned Order dated 1 October 2019 held that the workers' claims are to be borne by the Appellant, i.e. Auction Purchaser.

29. It is pertinent to mention that based on the chronology of events, it is clear that the Allahabad Bank auctioned immovable property along with plant and machinery of Unit - 1 of the Corporate Debtor ASSIL under SARFAESI Act, 2002 and the Sale Certificate was issued on 9 February 2018. CIRP commenced against the Corporate Debtor ASSIL on 5 March 2018. The most important question that arises for our consideration is whether the Adjudicating Authority, while exercising its powers under the I&B Code, 2016 had any authority to fasten the liability of the Corporate Debtor on the auction purchaser whom the property was sold before the commencement of CIRP.

30. Hon'ble Supreme Court decision in case of Embassy Property Developments (P) Ltd. v. the State of Karnataka, (2020) 13 SCC 308 is very relevant. In this case, Hon'ble the Supreme Court has held;

"32. In contrast, sub-sections (4) and (5) of Section 60 of the IBC, 2016 give an indication respectively about the powers and jurisdiction of the NCLT. Section 60 in entirety reads as follows:

"60. Adjudicating authority for corporate persons.-- (1) The adjudicating authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial Company Appeal (AT) (Insolvency) No. 1194 of 2019 21 of 34 jurisdiction over the place where the registered office of the corporate person is located.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before the National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate Debtor shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate Debtor pending in any court or tribunal shall stand transferred to the adjudicating authority dealing with insolvency resolution process or liquidation proceeding of such corporate Debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debts Recovery Tribunal as contemplated under Part III of this Code for the purpose

of sub-section (2).

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of--

(a) any application or proceeding by or against the corporate Debtor or corporate person;

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(b) any claim made by or against the corporate

Debtor or corporate person, including claims by or against any of its subsidiaries situated in India;

and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate Debtor or corporate person under this Code.

(6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963) or in any other law for the time being in force, in computing the period of limitation specified for any suit or Application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded."

33. Sub-section (4) of Section 60 of the IBC, 2016 states that the NCLT will have all the powers of the DRT as contemplated under Part III of the Code for the purposes of sub-section (2). Sub-section (2) deals with a situation where the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor of a corporate debtor is taken up, when CIRP or liquidation proceeding of such a corporate debtor is already pending before NCLT. The object of sub-section (2) is to group together (A) the CIRP or liquidation proceeding of a corporate debtor, and (B) the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor of the very same corporate Debtor, so that a single forum may deal with both. This is to ensure that the CIRP Company Appeal (AT) (Insolvency) No. 1194 of 2019 23 of 34 of a corporate debtor and the insolvency resolution of the individual guarantors of the very same corporate Debtor do not proceed on different tracks, before different fora, leading to conflict of interests, situations or decisions.

38. It was argued by all the learned Senior Counsel on the side of the appellants that an Interim Resolution Professional is duty-bound under Section 20(1) to preserve the value of the property of

the corporate Debtor and that the word "property" is interpreted in Section 3(27) to include even actionable claims as well as every description of interest, present or future or vested or contingent interest arising out of or incidental to property and that therefore the Interim Resolution Professional is entitled to move the NCLT for appropriate orders, on the basis that lease is a property right and NCLT has jurisdiction under Section 60(5) to entertain any claim by the corporate Debtor.

39. But the said argument cannot be sustained for the simple reason that the duties of a resolution professional are entirely different from the jurisdiction and powers of NCLT. In fact Section 20(1) cannot be read in isolation, but has to be read in conjunction with Section 18(1)(f)(vi) of the IBC, 2016 together with the Explanation thereunder. Section 18(1)(f)(vi) reads as follows:

"18. Duties of interim resolution professional.--(1) The interim resolution professional shall perform the following duties, namely--

(a)-(e) \*\*\*

(f) take control and custody of any asset over which the corporate Debtor has ownership rights as recorded in the balance sheet of the corporate Debtor, or with information utility or the depository of Company Appeal (AT) (Insolvency) No. 1194 of 2019 24 of 34 securities or any other registry that records the ownership of assets including--

(i) - (v) \*\*\*

(vi) assets subject to the determination of ownership by a court or authority;

(g) \*\*\*

Explanation.--For the purposes of this section, the term "assets" shall not include the following, namely--

(a) assets owned by a third party in possession of the corporate Debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate Debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator."

"40. If NCLT has been conferred with jurisdiction to decide all types of claims to property, of the corporate Debtor, Section 18(1)(f)(vi) would not have made the task of the interim resolution

professional in taking control and custody of an asset over which the corporate Debtor has ownership rights, subject to the determination of ownership by a court or other authority. In fact an asset owned by a third party, but which is in the possession of the corporate Debtor under contractual arrangements, is specifically kept out of the definition of the term "assets" under the Explanation to Section 18. This assumes significance in view of the language used in Sections 18 Company Appeal (AT) (Insolvency) No. 1194 of 2019 25 of 34 and 25 in contrast to the language employed in Section 20. Section 18 speaks about the duties of the interim resolution professional and Section 25 speaks about the duties of resolution professional. These two provisions use the word "assets", while Section 20(1) uses the word "property" together with the word "value". Sections 18 and 25 do not use the expression "property". Another important aspect is that under Section 25(2)(b) of the IBC, 2016, the resolution professional is obliged to represent and act on behalf of the corporate Debtor with third parties and exercise rights for the benefit of the corporate Debtor in judicial, quasi-judicial and arbitration proceedings. Sections 25(1) and 25(2)(b) reads as follows:

"25. Duties of resolution professional.--(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate Debtor, including the continued business operations of the corporate Debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions:

(a) \*\*\*

(b) represent and act on behalf of the corporate Debtor with third parties, exercise rights for the benefit of the corporate Debtor in judicial, quasi-

judicial and arbitration proceedings;"

(emphasis supplied) This shows that wherever the corporate Debtor has to exercise rights in judicial, quasi-judicial proceedings, the resolution professional cannot short-circuit the same and Company Appeal (AT) (Insolvency) No. 1194 of 2019 26 of 34 bring a claim before NCLT taking advantage of Section 60(5).

41. Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate Debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right."

(emphasis supplied)

31. Based on the above judgment ratio, it is clear that the NCLT/Adjudicating Authority has not been conferred with jurisdiction to decide all types of claims to property of the Corporate Debtor. Section 18(1)(f)(vi) have made the task of the Interim Resolution Professional in taking control and

custody of an asset over which the Corporate Debtor has ownership rights, subject to the determination of ownership by a court or other authority. An asset owned by a third party but which is in possession of the Corporate Debtor under contractual arrangements is kept explicitly out of the definition of the term "assets" under the Explanation to Section 18. Insolvency and Bankruptcy Code is complete in itself. Section 18 deals with the duties of Interim Resolution Professional. Sub-Section (f) to Section 18 of the Code provides that IRP can take control and custody of any asset; the Corporate Debtor has ownership and is recorded in the corporate debtor balance sheet. Sub-section (vi) to Section 18 authorises the IRP to take over assets, subject to the determination of ownership by a Court or Authority. Company Appeal (AT) (Insolvency) No. 1194 of 2019 27 of 34

32. Therefore, in the instant case on 5 March 2018, when CIRP commenced against the Corporate Debtor ASSIL, the IRP was authorised to take over its assets. But the property, which was already sold/auctioned before initiation of the CIRP and Sale Certificate dated 9 February 2018, was finally issued in pursuance of the Order of the Senior Civil Judge Court and Chief Metropolitan Magistrate Court Jaipur, was not the property of the Corporate Debtor. The auction purchaser was a third party which had no concern with the Corporate Insolvency Resolution Process of the Corporate Debtor, ASSIL. Thus, the corporate Debtor's liability can't be fastened on the third party, which happens to be a stranger to the CIRP of the Corporate Debtor and that too by exercising powers as an Adjudicating Authority u/s 60(5) of the I & B Code 2016.

33. It is contended by the Appellant that the property of the Corporate Debtor ASSIL was sold, and the sale process was completed before initiation of CIRP under the Code. Therefore, the Adjudicating Authority exercising powers under the I&B Code had no jurisdiction to pass an order to fasten the Corporate Debtors' liability on the Appellant.

34. It is pertinent to mention that proviso to Section 13 of the SARFAESI Act deals with the eventuality of a sale of secured assets where workmen dues remained a liability. The proviso to Section 13 reads as under;

"Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of Section 529 of the Company Appeal (AT) (Insolvency) No. 1194 of 2019 28 of 34 Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of Section 529-A of that Act:

Provided also that liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of Section 529-A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount or workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any."

35. The first provision to Section 13 of the SARFAESI Act provides that where the secured creditor of a company opts to realise security, he may retain the secured assets' sale proceeds after depositing the workmen's dues to Liquidator. The second proviso to Section 13 imposes a duty on the liquidator to intimate the secured creditor about the workmen's dues. In such cases where workmen's dues cannot be ascertained, the liquidator is obligated to intimate the estimated amount of workers dues to the secured creditor. In Company Appeal (AT) (Insolvency) No. 1194 of 2019 29 of 34 such a case, the secured creditor may retain the secured assets' sale proceeds after depositing the amount of such estimated dues with the liquidator. 4th proviso to Section 13 of SARFAESI Act imposes a duty on the secured creditor to give an undertaking to the liquidator to pay the balance of the workmen dues if any. Thus, it is clear that if a company is being wound up and the secured creditor of such a company opts to realise his security, then the secured creditor has authority to retain the secured assets' sale proceeds after depositing the workmen's dues.

36. In the instant case, Allahabad Bank is a secured creditor of ASSIL which has auctioned the secured assets of the Corporate Debtor. There is not an iota of doubt that the alleged auction sale was under SARFAESI Act. Therefore, the Adjudicating Authority/National Company Law Tribunal had no authority to fasten the Corporate Debtors liability on the auction purchaser. In the case where the Sale is made under the SARFAESI Act, then after completing the sale process and issuance of the Sale Certificate, the Adjudicating Authority had no authority to pass an order U/S 60(5) of the Code.

37. The Learned Counsel representing Prudent ARC contended that Section 238 of the Code and Section 60 (5) also contains the non-obstante clause, which reads as "notwithstanding anything contrary to any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to decide any Application proceeding by the Corporate Debtor or Corporate persons or to entertain and dispose of any claim by or against the Corporate Debtor or Corporate persons. So the admissibility of the claims was the issue Company Appeal (AT) (Insolvency) No. 1194 of 2019 30 of 34 before the Learned Adjudicating Authority, who alone had the power and jurisdiction to determine the issue of whether the liabilities of the workmen/employees about the Unit- 10f the Corporate Debtor are payable by the Auction Purchaser of unit -1 or the same continued to be admissible against the Corporate Debtor'. It is further contended. Admission of a claim by IRP is irrelevant, as the IRP does not possess any adjudicating powers.

38. It is further contended on behalf of Respondent No. 4 that at the time of sale/auction, the provision of IBC had already been invoked. The Allahabad Bank, and Auction Purchaser, were well aware of this. Yet, they proceeded ahead in an unwarranted, arbitrary and hurried manner. Even



otherwise, the Auction Purchaser was made aware of the liabilities. At the time of the auction and before the sale certificate issuance, the Code's provisions had already been invoked. Thus the sale proceeds ought to have been distributed by section 53 of the Code and not otherwise.

39. The Learned Senior Counsel representing R-4 further emphasised the contents of the Sale's notice dated 15 November 2017, which states that "as is where is basis, as is what is basis, whatever there is basis". Clause 19 and 20 of the notice also states that "the intending bidders should make their own independent inquiries regarding the encumbrances and claims/rights/affecting the property, prior to submitting their bid".

40. It is further argued that the Bank requested the auction purchaser to analyse the situation before bidding. The Allahabad Bank continued informing the receipt of the notice under Section 9 of the Code. Thus the said 'letter' Company Appeal (AT) (Insolvency) No. 1194 of 2019 31 of 34 became Part of the terms of Sale. Despite becoming aware of all the dues and the Sale's terms, the Appellant proceeded to participate in the auction held on 20 December 2017 and succeeded in being the sole bidder. It is further argued that a sale certificate was issued on 9 February 2018 stating that the property was "free from all encumbrances known to the secured creditor listed below". Therefore, Sale's notice and subsequent correspondence became the Sale's terms, and the liabilities formed Part of the Sale and are no longer admissible against the Corporate Debtor. Further, the dues of EPF are an encumbrance on the unit/establishment. Under section 11 (2) of The Employees Provident Fund Act, the dues of EPF are encumbrance on the establishment and becomes the first charge thereupon.

41. It is also pertinent to mention that in the instant case, the entire process of auction sale was completed before the commencement of the Corporate Insolvency Process against the Corporate Debtor ASSIL. Given the law laid down by the Hon'ble Supreme Court in Embassy property (supra), it is clear that Resolution Professional cannot short-circuit the process, to bring a claim before the NCLT taking advantage of Section 60 (5) of the Code.

42. Therefore in the light of the statutory scheme, as culled out from various provisions of the IBC 2016, it is clear that whenever the Corporate Debtor has to exercise a right that falls outside the purview of IBC 2016, especially in the realm of public law, they cannot, through the Resolution Professional, take a bypass and go before the NCLT for the enforcement of such a right. In the instant case if there was any grievance either against the Order of issuing notice under Section 13 (2) or against the Act of taking Company Appeal (AT) (Insolvency) No. 1194 of 2019 32 of 34 possession of the secured assets under Section 13 (4) or further in relation to the auction sale of the property of Unit -1 of the corporate Debtor the NCLT/Adjudicating Authority did not have the jurisdiction under the SARFAESI Act to pass any order in this regard. Given the law laid down by the Hon'ble Supreme Court in the Embassy property case, the Resolution Professional was not authorised to move an application under Section 60 (5) of the Code.

43. Even otherwise, the property' land, plant and machinery has been sold to the Appellant free from all encumbrances. The Appellant had acquired only Part of the property/Assets of the Corporate Debtor and not the Company itself. Therefore, the liabilities of the Company ASSIL had

been wrongly fastened upon the Appellant.

44. Based on the above discussion, I hold that the Adjudicating Authority under the I&B Code 2016 had no jurisdiction to determine a bona fide auction purchaser's liability under the SARFAESI Act's provisions; the same has been purchased before the commencement of CIRP of the Corporate Debtor.

45. I further hold that while exercising its power u/s 60(5) of the Code, the Adjudicating Authority has exceeded its jurisdiction in determining a third party's liabilities, which had no role in the Corporate Debtor's Insolvency Resolution Process.

46. I further hold that the Adjudicating Authority erroneously determined the Sale of assets, precisely land, plant and machinery of Unit-1 of the Company Appeal (AT) (Insolvency) No. 1194 of 2019 33 of 34 corporate debtor 'ASSIL' as the Sale of a Company as a going concern, thereby making the purchaser liable for workmen's dues.

47. Based on the above discussion, the Appeal deserves to be allowed by setting aside the impugned Order. However, the majority view authored by separate judgement brother Hon'ble Acting Chairperson Justice B.L. Bhatt shall prevail.

[V. P. Singh] Member (Technical) NEW DELHI 3rd March 2021 Company Appeal (AT) (Insolvency) No. 1194 of 2019 34 of 34