

**Through Videoconference**

IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH, COURT No. - I

\*\*\* \*\*

IA No. 2264 of 2020

in

C.P. (IB) No. 1239/MB/2018

(Application under Section 60(5) of the  
Insolvency and Bankruptcy Code, 2016)

Gaurav Jain

21 C-(A), Mittal Tower, C-Wing, 2<sup>nd</sup>  
Floor, Nariman Point, Mumbai – 400 021

*... Applicant*

*Versus*

Sanjay Gupta,

Liquidator of Topworth Pipes & Tubes Pvt  
Ltd

Village – Hedavali, Khopoli Pali Road,  
Taluka – Sudhagad, Khopoli,  
Maharashtra – 410 205

*... Respondent*

*In the matter of:*

Bank of Baroda

*... Financial Creditor*

*V/s*

Topworth Pipes & Tubes Private Limited

*... Corporate Debtor*

Order Dated: 09.03.2021

Coram:

Hon'ble Member (Judicial), Janab Mohammed Ajmal

Hon'ble Member (Technical), Shri V. Nallasenapathy

Appearance:

For the Applicant: Mr Gaurav Joshi, Senior Advocate with Ms. Shubhabrata Chakraborti, Mr Hafeez Patanwala & Anirudh Jakhotia, Advocates i/b Juris Corp.

For the Respondent: Ms Ankita Singhania, Advocate with Nidhi Pathania, Yashowardhan Dixit & Hridhay Khurana, Advocates i/b Linklegal India Law Services.

*Per: V. Nallasenapathy, Member (Technical)*

**ORDER**

1. The Applicant herein is the successful bidder in the E-auction for the Sale of the assets of the Corporate Debtor as a going concern and the Respondent herein is the Liquidator of the Corporate Debtor.
2. On a Petition under Section 7 filed under the Insolvency and Bankruptcy Code, 2016 (the Code) by Bank of Baroda, the Corporate Debtor viz. Topworth Pipes & Tubes Private Limited was put under Corporate Insolvency Resolution Process (CIRP) by an order dated 11/12/2018 of this Bench.
3. In the absence of a Resolution Plan, this Bench on 12/06/2020 passed an order for liquidation of the Corporate Debtor under Section 33 of the Code.
4. The Liquidator invited bids for the sale of the Corporate Debtor as a 'going concern' by an E-auction process memorandum

dated 13/10/2020. The Liquidator published first addendum to the E-auction process memorandum on 29/10/2020 and second addendum on 03/11/2020.

5. The E-auction process memorandum states that the sale of the Company is on 'going concern' basis in accordance with the provisions of the Code, Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Liquidation Process Regulations) and the E-auction process information document. It further states that the sale of the Company is proposed to be done on "as is where is basis", "as is what is basis", "whatever there is basis" and "no recourse basis" and the proposed sale of the Company on going concern basis does not entail transfer of any other title, except the title which the Company had on its assets as on the date of transfer. The Liquidator does not take or assume any responsibility for any shortfall, defect or shortcoming in the moveable / immoveable assets of the Company. The Reserve Price fixed was Rs. 152 Crores.
6. Key highlights of the assets of the sale process as mentioned in the E-auction process information document at page no. 60 are extracted below-

|                                      |  |
|--------------------------------------|--|
| <i>Version dated:</i>                | <i>October 13th, 2020</i>  |
| <i>Corporate Debtor</i>              | <i>Topworth Pipes &amp; Tubes Pvt. Ltd.</i>  |
| <i>Asset Lot #</i>                   | <i>Block 1</i>   |
| <i>Asset Lot: Brief description:</i> | <i>Khopoli Unit (As a going concern)<br/>Details of assets are available in<br/>the asset sale memorandums<br/>available on the Primus's website</i> |

|   |  |
|---|--|
|   | <i>listed at<br/>(<a href="http://www.primusresolutions.in">http://www.primusresolutions.in</a>)<br/>and shall also be uploaded on the<br/>E-auction portal<br/><a href="http://www.right2vote.in">www.right2vote.in</a></i> |
| <i>Auction Commencement date and time</i> | <i>November 2nd, 2020 at 12 pm</i>   |
| <i>Auction closure date &amp; time</i>    | <i>November 2nd, 2020 at 3 pm</i>  |
| <i>Reserve Price</i>                      | <i>Rs. 152 Crores</i>  |
| <i>Refundable Earnest Money Deposit:</i>  | <i>Rs. 15.20 Crores</i>  |
| <i>Minimum bid increment amount:</i>      | <i>Rs. 5 Lakhs</i>   |

*The asset lot comprising the unit in Khopoli is proposed to be sold on a "going concern" basis, as per the order of the Adjudicating Authority on June 12<sup>th</sup> 2020. Accordingly, all the current assets of the unit are being sold along with the transfer of the employees and workmen who are currently engaged in running the unit, as well as transfer of licenses, to the extent permissible under the applicable law. Post the transfer, the successful bidder shall be entitled to transfer / apply for transfer of all the licenses, approvals, concessions, benefits as may be applicable to the unit. Any liabilities, current or long term, contingent or not whether due or otherwise pertaining to the operations of Khopoli unit post liquidation commencement date and all current employees related liabilities including Provident Fund, ESI and other retirement/terminal benefits shall be to the account of the successful bidder including any liabilities accruing post auction date i.e. November 2<sup>nd</sup>, 2020.*

7. Under the eligibility criteria, the E-auction process memorandum mentioned about the proviso to Section 35(f) of

the Code, which provides that the Liquidator shall not sell the assets of the Company to any person who is not eligible to be a Resolution Applicant under Section 29A of the Code which provides that certain persons are not eligible to be Resolution Applicant.

8. The Liquidator issued an Addendum dated 29/10/2020 to the E-auction process document wherein the key timelines were mentioned. The Liquidator issued another Addendum dated 03/11/2020 to the main E-auction process document wherein the key highlights of the asset sale process mentioned in the E-auction process document dated 13/10/2020 is replaced as below-

|   |  |
|---|--|
| <i>Version dated:</i>                     | <i>October 13th, 2020</i>  |
| <i>Corporate Debtor</i>                   | <i>Topworth Pipes &amp; Tubes Pvt. Ltd.</i>  |
| <i>Asset Lot #</i>                        | <i>Block 1</i>   |
| <i>Asset Lot: Brief description:</i>      | <i>Khopoli Unit (As a going concern)<br/>Details of assets are available in the asset sale memorandums available on the Primus's website listed at (<a href="http://www.primusresolutions.in">http://www.primusresolutions.in</a>) and shall also be uploaded on the E-auction portal <a href="http://www.right2vote.in">www.right2vote.in</a></i> |
| <i>Auction Commencement date and time</i> | <i>November 2nd, 2020 at 12 pm</i>   |
| <i>Auction closure date &amp; time</i>    | <i>November 2nd, 2020 at 3 pm</i>  |
| <i>Reserve Price</i>                      | <i>Rs. 152 Crores</i>  |
| <i>Refundable Earnest Money Deposit:</i>  | <i>Rs. 15.20 Crores</i>  |
| <i>Minimum bid increment amount:</i>      | <i>Rs. 5 Lakhs</i>   |

*The Company proposed to be sold on a "going concern" basis, as per the order of the Adjudicating Authority on June, 12<sup>th</sup> 2020. Accordingly, Corporate Debtor along with the business, assets and liabilities, including all contracts, licenses, concessions, agreements, benefits, privileges, rights or interests be transferred to the acquirer. Post the transfer, the Successful Bidder shall be entitled to transfer/apply for transfer of all the licenses, approvals, concessions, and benefits as may be applicable to the unit.*

9. Further Clause 10.3 of the Addendum provides as below:

*10.3 The Liquidator proposes to conduct sale of the Company on a going concern basis as contemplated under Regulation 32(e) of the Liquidation Process Regulations through E-auction Process:-*

*a. Upon payment of 25% of the bid amount, an agreement including Term Sheet shall be executed between the Liquidator representing the Corporate Debtor and the successful bidder to give effect for sale of the Corporate Debtor as a going concern. The broad terms are stated herein below:-*

- The cut-off date for the purposes of determination of all assets and liabilities of the Corporate Debtor shall be the liquidation commencement date i.e. June 12<sup>th</sup>, 2020.*
- The sale of the Corporate Debtor as a going concern shall result in the transfer of the entire available assets of the Corporate Debtor in favour of the successful bidder.*
- All known or unknown, claimed or unclaimed disclosed or undisclosed liabilities / obligations risk as on the cut-off date including prior claims of all creditors whether secured, unsecured workers, employees, statutory authorities on*

*account of Income Tax, Sales Tax, GST, Service Tax, DGFT, Excise, Customs etc, shareholders on account of transactions prior to the cut-off date shall be dealt as per Section 53 of the Insolvency and Bankruptcy Code, 2016 as full and final settlement of their dues. The Liquidator shall be in no event be responsible for any liabilities / obligations / risks pertaining to the period prior to the Cut-off date, and the same shall be dealt with as per the provisions of law and Directions of Hon'ble NCLT or any higher authority thereof.*

- The transfer of ownership of the Corporate Debtor shall take place by way of writing off the entire existing shareholding of Corporate Debtor and issuance of fresh equity shares to the successful bidder. The shares shall be issued only in the name of the successful bidder and will not be issued in any other name.*
- The closing date of the agreement shall be 90 days from the payment of the last instalment, wherein in these 90 days, all the ancillary processes as mentioned in the agreement shall be executed and implemented by the Liquidator and the bidder. The said executions include but are not restricted to distribution of the purchase consideration to the various stakeholders, extinguishment of shares of the Corporate Debtor, issuance of fresh equity shares to the bidder, execution of novation deeds which the relevant counter parties to novate the contracts executed by the Corporate Debtor, employee related agreements and contracts, etc.*

*b. Confirmation of sale:*

*On payment of the 100% of the bid amount, and any applicable GST/Taxes, registration fees, etc. the successful bidder shall be issued the letter for confirmation of sale. The confirmation of sale is*

*subject to the necessary approvals and processes, if any, towards various statutory and non statutory authorities which includes but is not restricted to Securities and Exchange Board of India, Bombay Stock Exchange, National Stock Exchange, The Directorate General of Foreign Trade, Income Tax, GST Department, Factory Inspector, MPCB, etc.*

10. On 11/11/2020, the Applicant submitted his bid before the Liquidator by depositing the Earnest Money Deposit (EMD) equivalent to 10% of the reserve price i.e., Rs. 15.2 Crores.
11. The Applicant participated in the E-auction process held on 11/11/2020 and submitted bid for Rs. 190.90 Crores to acquire the Corporate Debtor as a 'going concern'. The Applicant being the H1 Bidder, Liquidator confirmed the Applicant's bid and issued letter of intent (LoI) to the Applicant on 12/11/2020.
12. On 18/11/2020 the Applicant deposited a sum of Rs.32,52,50,000/-. This amount along with the EMD worked out to a total of Rs. 47,72,50,000/- which is 25% of the sale consideration of Rs. 190.90 Crores.
13. The Applicant submits that they have to pay 75% of the sale consideration to the Liquidator on 11/12/2020 and on making the said payment the Liquidator and the Applicant mutually agreed on which Corporate Debtor shall be transferred to the Applicant in accordance with the provisions of the Code and Liquidation Process Regulations and that will be considered as the date of acquisition.



14. The Applicant submits that the mere purchase of the Corporate Debtor as a 'going concern' as per Liquidation Process Regulations will not suffice. In order to ensure smooth running of the business of the Corporate Debtor, it is imperative that certain additional reliefs / concessions / relaxations / and permissions are allowed which would be essential and necessary to run the business of the Corporate Debtor as a 'going concern'. Unless these reliefs / concessions / permissions are provided, the purpose of the revival of the Corporate Debtor as a 'going concern' under Liquidation Process Regulations will not be achieved. In fact, these permissions / relaxation / concessions / reliefs are crucial to kickstart the business of the Corporate Debtor and achieve value maximization of the Corporate Debtor.
15. The Applicant further submits that this Tribunal is empowered to grant necessary reliefs in relation to the Corporate Debtor, sold as a 'going concern' under the provisions of the Liquidation Process Regulations, under Section 60(5)(c) of the Code. Therefore, the Applicant submits that the instant case is a fit case to grant the reliefs in favour of the Applicant.
16. In the above background this Applicant preferred Application with the following reliefs:
  - (a) *the Applicant along with the entities as mentioned in Paragraph 2 above may be permitted to pay/adjust the Sale Consideration in the following manner (i) INR 40,00,00,000/- (Indian Rupees Forty Crores only) by way of investment into the equity shares of the Corporate Debtor; and (ii) the balance amount of INR*

150,90,00,000/- (Indian Rupees One Hundred and Fifty Crores and Ninety Lakhs only) in the form of unsecured debt;

- (b) *a direction be issued that immediately upon payment of the entire Sale Consideration, the Applicant (or the entities as mentioned in Paragraph 2 above, as the case may be) get all the rights, title and interest in the whole and every part of the Corporate Debtor, including but not limited to contracts, free from security interest, encumbrance, claim, counter claim or any demur, and the Sale Consideration shall be distributed by the Liquidator in terms of the Section 53 of the Code;*
- (c) *a direction be issued that on and from the Date of Acquisition, all the claims or demands made by, or liabilities or obligations owned or payable to any actual or potential creditors of the Corporate Debtor including the Government Dues (including but not limited to liabilities, interest and penalties, duties, etc. on account of income-tax, tax deduction at source, tax collection at source, goods and services tax, custom duty, value added tax, service tax, wealth-tax, cess, DGFT dues, etc.) whether direct or indirect, whether admitted or not, due or contingent, asserted or unasserted, crystallized or uncrystallized, known or unknown, secured or unsecured, disputed or undisputed in relation to any period prior to the Date of Acquisition will be written off in full and shall stand permanently extinguished;*
- (d) *a direction be issued that the all inquiries, investigations, assessments, notices, causes of action, suits, claims, disputes, litigations, arbitration, or other judicial, regulatory or administrative proceedings against, or in relation to, or in connection with the Corporate Debtor or the affairs of the Corporate Debtor (other than against the Erstwhile Promoters or former members of the management of the Corporate Debtor), pending or*

*threatened, present or future, in relation to any period prior to the Date of Acquisition or arising on account of the Acquisition shall be deemed to be withdrawn or dismissed;*

- (e) a direction be issued that all financial and pecuniary liabilities of the Corporate Debtor, (including without limitation, any penalty, whether contingent, assessed, known or unknown, interest, fines or fees and any other liabilities and/or obligations which may have a financial impact) in relation to any period prior to the Date of Acquisition shall be deemed to be extinguished;*
- (f) a direction be issued that any non-compliance of provisions of any laws, rules, regulations, directions, notifications, circulars, guidelines, policies, licenses, approvals, consents or permissions prior to the Date of Acquisition shall be deemed to be extinguished;*
- (g) a direction be issued that all the existing shares of the Corporate Debtor shall be extinguished without any consideration, and rights and liabilities arising out of the same shall also be extinguished;*
- (h) a direction be issued that on and from the Date of Acquisition, the status of the Corporate Debtor in the records of the Registrar of Companies should be reflected as 'active' from the status of 'liquidation'*
- (i) a direction be issued that from the Date of Acquisition, the Board of Directors of the Corporate Debtor be re-constituted as per the Companies Act, 2013 and that the following individuals be permitted to act as Directors of the Corporate Debtor duly appointed under the provisions of the Companies Act, 2013, and direct the Registrar of Companies to do all such acts, deeds and things that are necessary to appoint the following individuals as directors of the Corporate Debtor, who are individuals recommended by the Applicant, in order to enable the Corporate Debtor to file relevant returns required by applicable law:*

| <i>Name of the Proposed Directors</i> | <i>DIN</i>      |
|---------------------------------------|-----------------|
| <i>Mr. Satyapal Jain</i>              | <i>00011774</i> |
| <i>Mr. Gaurav Jain</i>                | <i>00077770</i> |
| <i>Mr. Sampat Bhudeka</i>             | <i>02796982</i> |

- (j) *a direction be issued that all subsisting consents, licenses, approvals, rights, entitlements, benefits and privileges whether under law, contract, lease or license, granted in favour of the Corporate Debtor or to which the Corporate Debtor is entitled to shall, notwithstanding any provision to the contrary in their terms and irrespective of the commencement of the insolvency/liquidation proceedings under the Code, in relation to the Corporate Debtor be deemed to continue without disruption, for the benefit of the Corporate Debtor and all additional licenses, registrations and consents required by the Corporate Debtor be made available immediately from the Date of the Acquisition;*
- (k) *a direction be issued that the Corporate Debtor shall have a right to review and terminate any contract that was entered into prior to the date of the Liquidation Order;*
- (l) *a direction be issued that on and from the Date of Acquisition, all the assets specified in the complete E-Auction Memorandums shall continue to be the assets of the Corporate Debtor, towards which the Applicant has made payment by way of the Sale Consideration;*
- (m) *a direction be issued to the Liquidator to cooperate with, and provide all necessary support and assistance to the Applicant, including but not limited to perfecting / amending / modifying / creating the land records in relation to all parcels of land, the immovable properties and assets, belonging to the Corporate Debtor in favour of the Corporate Debtor within 15 days from Date of Acquisition;*
- (n) *a direction be issued to the Liquidator to, immediately, (i) write back all the liabilities of the Corporate Debtor, including creditors, term loans, working capital loans,*

*tax liabilities, other statutory liabilities, etc. which are not payable and reflect the total liabilities at the amount of the consideration (as reduced by the amount of insolvency resolution process costs and the liquidation costs) determined in the auction; and (ii) the assets which are not recoverable (debtors, inventories and loans and advances, etc.) should be written down to their realizable value; in the financial statements (Profit and Loss Account and the Balance Sheet) of the Corporate Debtor as on 31<sup>st</sup> March 2020. The said financial statements should be prepared and filed by the Liquidator with the relevant regulators such as Registrar of Companies, Income Tax Authorities, etc.;*

- (o) a direction be issued to the Liquidator that all the compliances for the period up to the Date of Acquisition including filing of necessary documents and returns with the Registrar of Companies, Income Tax Authorities any other Government Authorities should be completed;*
- (p) a direction be issued that the brought forward tax losses of the Corporate Debtor be permitted to be carried forward and set-off against future income as change of shareholding of the Corporate Debtor is pursuant to the bid submitted by the Applicant under the E-Auction Process;*
- (q) a direction be issued that the eligibility of the Corporate Debtor to claim incentives under the Package Incentive Scheme, as framed by the Government of Maharashtra, shall be extended for a period of 5 (five) years from the Date of Acquisition;*
- (r) the bid submitted by the Applicant should be considered to be a resolution plan under Section 79 of the Income Tax Act, 1961;*
- (s) Other or further order or orders be passed and/or direction or directions be given as this Hon'ble Tribunal may deem fit and proper.*

17. The Respondent / Liquidator in his reply stated that the Prayer in Clause (a) is in consonance with the letter and spirit of the E-auction Memorandum and he has no objection to the said prayer.
18. The Respondent submits that he has filed Second Progress Report dated 10/10/2020 with the Registry of the Tribunal pursuant to the Regulation 15(1)(b) of the Liquidation Process Regulations and the same is extracted below:

*"I say that all the secured financial creditors have relinquished their security interest in liquidation estate of the Corporate Debtor. The aforesaid position has also been recorded in the Second Progress Report dated October 10, 2020 submitted by the Liquidator to this Hon'ble Tribunal pursuant to Regulation 15(1)(b) of the Liquidation Process Regulation. The relevant portion of the Second Progress Report is reproduced herein below:*

*"11. That out of 8 secured financial creditors, Union Bank of India had not relinquished the security interest. It is further submitted that the Applicant vide its mail dated August 5<sup>th</sup>, 2020 had requested UBI to relinquish the security interest in the Liquidation Estate for the reason that the CoC in its last meeting recommended the going concern sale of the Corporate Debtor and as per the judgment of Hon'ble NCLAT in the Company Appeal (AT) (insolvency) No. 1510/2019 in the matter of Mr. Srikanth Dwarkanath, Liquidator of Surana Power Limited vs. Bharat Heavy Electricals Limited has held that Secured Creditor who does not have a requisite 60% value in Secured Interest, does not have a right to realize its security interest out of the Liquidation Process because it will be detrimental to the Liquidation Process and interest of the remaining secured creditors. That the Union Bank of India relinquished its security in the Liquidation Estate*

*on September 10<sup>th</sup>, 2020. Hence, all financial creditors have relinquished their security interest."*

*Copy of the Second Progress Report dated October 10, 2020 is annexed herewith and marked as Annexure "A"."*

19. The Respondent further submits that in respect of the prayers (m), (n) & (o) he does not have any objections.

20. Regulation 32 of the Liquidation Process Regulations provides for the realisation of assets and the same is extracted below:

*"[Sale of Assets, etc.*

*The Liquidator may sell-*

- a) an asset on a standalone basis;*
- b) the assets in a slump sale;*
- c) a set of assets collectively;*
- d) the assets in parcels;*
- e) the corporate debtor as a going concern; or*
- f) the business(s) of the corporate debtor as a going concern:*

*Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate.]"*

21. While the Liquidation Process Regulations recognises going concern sale as one of the methods of sale, however, there is no definition as such for 'going concern' either in the Code or in the Regulations.

22. It is beneficial to refer the report of the Insolvency Law Committee dated 26/03/2018 (Para 8.1 of the Report), wherein the committee examined the term "going concern" as below:

*"The phrase 'as a going concern' imply that the Corporate Debtor would be functional as it would have been prior to the initiation of CIRP, other than the restrictions put by the Code."*

23. It is beneficial to refer Para Nos. 7 & 8 of the Round Table of Insolvency and Bankruptcy Board of India held with the stakeholders on 21/05/2018, referring to the case of *Gujarat NRE*<sup>1</sup>, wherein a note was published by IBBI defining "going concern" as below:

*"7. 'Going Concern' means all the assets, tangibles or intangibles and resources needed to continue to operate independently a business activity which may be whole or a part of the business of the corporate debtor without values being assigned to the individual asset or resource."*

*In view of this, the following options are submitted for consideration:*

*a. The corporate debtor may be sold as a going concern, as provided in the extant regulations. As the Company survives, there will be no need for dissolution of the Company in terms of section 54 of the Code. The assets along with all attendant claims, limitations, licenses, permits or business authorizations remain in the Company. The Company survives as it was; the ownership of the Company is transferred by the Liquidator to the acquirer. The Liquidator shall make an application to the AA for approval of the sale of the corporate debtor as a going concern and the AA may pass an order with respect to:*

*(a) Sale of the corporate debtor to the intended buyer as a going concern*

*(b) Transfer of shares of the corporate debtor to the intended buyer*

---

<sup>1</sup> Gujarat NRE – NCLT KOLKATA BENCH: C.P. (IB) No. 182/KB/2017



- (c) *Transfer of the going concern of the corporate debtor to the buyers*
- (d) *Continuation of the authority, powers and obligations of the Liquidator to complete the liquidation process as provided under the Code and the regulations including the control, operations and continuation of the liquidation bank account of the corporate debtor,*
- (e) *Payment to stakeholders in accordance with section 53 from the liquidation bank account, and*
- (f) *Protection of the intended buyer from all claims and liabilities pertaining to the period prior to the sale of the corporate debtor as a going concern.*

*In such a case, the final report of Liquidator, as required under clause (3) of regulation 45, shall form part of the application for the closure of the liquidation process of the corporate debtor and not for the dissolution of the corporate debtor to the AA to be made under section 54.*

- b. *The regulations may provide another option of sale, that is, sale of business of the corporate debtor as a going concern. It will be only sale of business, not the corporate debtor which will be liquidated in accordance with the regulations. In this case, the assets and liabilities relevant for the business are transferred to a new entity, and stakeholders are paid from proceeds of sale in accordance with section 53 and the corporate debtor will be dissolved."*

*8. Both the options require consent of the secured creditors to relinquish security interest. If security interest is not relinquished, other modes of sale will be used."*

24. One advantage of the sale of the Corporate Debtor as a 'going concern' is that the Corporate Debtor is retained, it will not be dissolved and the Corporate Debtor will be transferred along

with the assets. So, the Corporate Debtor as a legal entity remains as such.

25. The crux of the 'going concern sale' is that the equity shareholding of the Corporate Debtor is extinguished and the acquirer takes over the undertaking with the assets, licenses, entitlements etc. The undertaking includes the business of the Corporate Debtor, assets, properties and rights etc. excluding the liabilities. However, in this case the assets that are included in the E-Auction Memorandum only have to be taken over by the Applicant.
26. The Corporate Debtor survives, only the ownership is transferred by the Liquidator to the purchaser. All the rights, titles and interest in the Corporate Debtor including the legal entity is transferred to the purchaser. After the sale as a 'going concern', the purchaser will be carrying on the business of the Corporate Debtor.
27. As far as the Liquidator is concerned, when the sale consideration is received from the bidder / purchaser, the same will be distributed to the Creditors in accordance with Section 53 of the Code. Since the amount is paid to the Creditors in terms of the Code, the liabilities of the Corporate Debtor towards the Creditors are treated as settled and the purchaser takes the assets free of any encumbrances or whatsoever.
28. In the normal parlance "going concern" sale is transfer of assets along with the liabilities. However, as far as the 'going concern'

sale in liquidation is concerned, there is a clear difference that only assets are transferred and the liabilities of the Corporate Debtor has to be settled in accordance with Section 53 of the Code and hence the purchaser of this assets takes over the assets without any encumbrance or charge and free from the action of the Creditors.

29. This Bench feels that following are the advantages of selling the Corporate Debtor "as a going concern":

- a. The entity i.e., the Corporate Debtor itself gets transferred;
- b. The equity shareholding gets transferred or extinguished and new shares are issued;
- c. The purchaser is expected to carry on the business of the Corporate Debtor after the sale of assets is confirmed;
- d. The existing employees will have a chance to continue in their employment.

30. The decision to sell the Corporate Debtor as a going concern is taken by the Liquidator himself or in consultation with the Creditors / stakeholders and the proceeds from the sale of assets are going to be utilised for distribution to the Creditors in the manner specified under Section 53 of the Code. Hence all the Creditors of the Corporate Debtor get discharged and the assets are transferred free of any encumbrances. The legal entity of the Corporate Debtor however survives.

31. In the case of sale as a 'going concern' the Corporate Debtor will not be dissolved in terms of Section 54 of the Code. The assets with the attendant, claims, limitations, licenses, permits or business authorisations, remains in the Company. Only the ownership of the Company is acquired by the successful bidder from the Liquidator.
32. It is to be noted that even though there is no specific provision in the Code regarding "sale of the Company as a going concern", IBBI has formed the Liquidation Process Regulations, under the Code and we have to take them as guiding principles in dealing with the case.
33. The learned senior counsel for the Applicant referred to *Para 83* of the Hon'ble Supreme Court's judgement in the case of *ArcelorMittal India Private Limited....V/s....Satish Kumar Gupta and Others (MANU/SC/1123/2018)*. The Hon'ble Supreme Court in the said Judgment has referred to Regulation 32 of the Liquidation Process Regulations which states that the Liquidator may also sale the Corporate Debtor as a 'going concern'. Hence there is no impediment for the sale of the Corporate Debtor as a 'going concern'.
34. As a consequence to the above discussions and on perusal of the pleadings and submissions made by the learned senior counsel for the Applicant the following order is passed:
- (a) Prayer (a) is allowed. The Applicant is permitted to bring in Rs. 40 crores as share capital and Rs. 150.90

crores as unsecured debt towards payment of sale consideration.

- (b) The Applicant shall get all the rights, title and interest over whole and every part of the Corporate Debtor, including but not limited to contracts free from security interest, encumbrance, claim, counter claim or any demur. The sale consideration, when received, shall be distributed by the Liquidator in terms of the Section 53 of the Code. Prayer (b) is accordingly allowed.
- (c) The Applicant shall not be responsible for any other claims / liabilities / obligations etc. payable by the Corporate Debtor as on this date to the Creditors or any other stakeholders including Government dues. All the liabilities of the Corporate Debtor as on date stand extinguished, as far as the Applicant is concerned.
- (d) Any proceedings pending against the Corporate Debtor (*other than against the Erstwhile Promoters or former members of the management of the Corporate Debtor*) as on date with respect to its liabilities, enquiries, investigations, assessments, claims, disputes, litigations etc. will not have any bearing against the assets sold in this process. The said assets are free from any financial implications

arising out of any pending proceedings before relevant authorities, if any.

- (e) The existing shares / share capital of the Corporate Debtor shall stand cancelled without there being any payment to the Shareholders. The Liquidator in consultation with the Registrar of Companies (RoC) concerned shall take action to change the status of the Corporate Debtor in the records of the RoC from the status of "liquidation" to the status of "active". The concerned RoC shall do the needful.
- (f) The Board of the Corporate Debtor can be re-constituted as indicated in prayer (i) and necessary filings may be made to the RoC concerned.
- (g) Prayer (j) is allowed subject to payment of renewal fees, if any, from this date to the licensing authorities.
- (h) The Applicant / Corporate Debtor shall have the right to review and terminate any contract that was entered into prior to the date of this order. The assets specified in the E-auction memorandum, on payment of the consideration as above will vest with the Applicant. Accordingly, prayers (m), (n) & (o) are allowed.
- (i) The Applicant shall not be held responsible / liable for any of the past liabilities of the Corporate Debtor in inquiries, investigations, assessments, notices,

causes of action, suits, claims, disputes, litigations, arbitration or other judicial, regulatory or administrative proceedings against or in relation to, or in connection with the Corporate Debtor prior to this date. They shall not have any effect on the Applicant.

- (j) The Applicant is entitled to get all the rights, title and interest whole and every part of the Corporate Debtor.
- (k) Creditors of the Corporate Debtor which include Creditors in any form or category including Government Departments shall stand extinguished *qua* the Applicant.
- (l) The non-compliance of provisions of any laws, rules, regulations, directions, notifications, circulars, guidelines, policies, licenses, approvals, consents or permissions prior to the date of acquisition shall stand extinguished *qua* the Applicant.
- (m) All the assets specified in the E-auction memorandum shall continue to be the assets of the Corporate Debtor on making the payment of the balance sale consideration to the Liquidator by the Applicant.
- (n) The Liquidator is directed to provide all support and assistant to the Applicant for the smooth functioning of the Corporate Debtor to complete the acquisition.

- (o) The Liquidator and Applicant shall be at liberty to take all the steps required to make accounting entries for the smooth transmission and clearing the balance sheet.
- (p) The Liquidator is directed to ensure completion of pending filings with the Registrar of Companies, Income Tax Authorities and any other Government / Statutory Authorities.
- (q) The Corporate Debtor is entitled to get the benefits of brought forward losses, if any, subject to permission of the appropriate authority if so entitled under the relevant provisions of the Income Tax Act, 1961.
- (r) The Corporate Debtor may apply for incentives under the Package Incentive Scheme, framed by the Government of Maharashtra, subject to eligibility and other norms as provided in the said Scheme.
- (s) As far as the prayer for considering the bid submitted by the Applicant as Resolution Plan under Section 79 of Income Tax Act, 1961 is concerned, the Applicant may approach the authority concerned who would consider such request under the Income Tax Act.

Sd/-  
V. NALLASENAPATHY  
Member (Technical)

Sd/-  
JANAB MOHAMMED AJMAL  
Member (Judicial)