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LIMITED JUDICIAL REVIEW BY NCLT AND NCLAT DURING LIQUIDATION PROCEEDINGS: SUPREME COURT

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Introduction

A 3-Judge Bench of the Supreme Court (SC) in its judgment dated 26 August 2022, in *M/s R.K. Industries (Unit-II) LLP v. M/s H.R. Commercials Private Limited & Anr.*, Civil Appeal Nos. 7722/2021 and 7731/2021, examined the provisions of the Insolvency and Bankruptcy Code (Code) and the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Liquidation Regulations). The SC also examined the powers of the liquidator to affect a private sale of the assets of the corporate debtor in liquidation proceedings, and the scope and purport of the jurisdiction of the Adjudicating Authority or Appellate Authority to interfere in the sale/tendering process in liquidation sale. The issue arose in the context of the liquidation proceedings of ABG Shipyard Ltd.

Background

- The Corporate Debtor (ABG Shipyard Ltd) was engaged in the business of import of ship building components and materials, and export of constructed ships after completion. The imported goods were stored by the Corporate Debtor in Custom Bonded Warehouses in Gujarat and Container Freight Stations in Maharashtra, and the Corporate Debtor availed the Export Promotion Capital Goods Scheme and was granted a license under the said scheme with respect to the said warehoused goods.
- The National Company Law Tribunal, Ahmedabad Bench (NCLT) passed an order dated 1 August 2017 commencing Corporate Insolvency Resolution Proceedings (CIRP) against the Corporate Debtor under the provisions of the Code, appointed an interim resolution professional, and imposed moratorium in terms of Section 14 of the Code.
- The Corporate Debtor went into liquidation proceedings on 25 April 2019, terminating the moratorium under Section 14 of the Code, and thereby marking commencement of moratorium under Section 33 (5) of the Code.
- Subsequently, in the liquidation process, the liquidation sale of the assets of the Corporate Debtor was undertaken. To this effect, two Swiss Challenge Process auctions were conducted, and the highest bid was lodged by the Appellant – R.K. Industries (Unit-II) LLP (R.K. Industries). During the pendency of the Swiss Challenge process, upon an application being instituted by the liquidator, the NCLT granted permission, to the liquidator to undertake a private sale of the

Dahej site and shipyard of the Corporate Debtor to Welspun Steel Resources Private Limited (Welspun), thereby annulling the Swiss Challenge process.

- The NCLT order was challenged by R.K. Industries before the National Company Law Appellate Tribunal (NCLAT), and set aside by the NCLAT vide order dated 10 December 2021 (i.e., impugned order before the SC). The NCLAT on equitable considerations, directed the liquidator to restart the entire sale process by issuing fresh notices to all the prospective buyers, without limiting the sale to buyers who had participated in the Swiss Challenge process.
- R.K. Industries challenged NCLAT's Order before the SC in Civil Appeal No. 7722/2021 and Welspun also filed a separate appeal Civil Appeal No. 7731/2021 before the SC, challenging the same order.

Question for Consideration

- What are the powers, role, and responsibilities of the liquidator to affect a sale of assets of the corporate debtor in liquidation proceedings?
- Whether NCLAT has jurisdiction under provisions of the Code and/or in Liquidation Proceedings to modify the mode of sale adopted by the liquidator?

What the Supreme Court Held

- The SC set aside NCLAT's directions to restart the entire process of Private Sale by issuing fresh notices to prospective buyers. The SC directed that all eligible bidders who had made Earnest Money Deposit, would be entitled to participate in negotiations with the liquidator for private sale, within a period of 4 (four) weeks. Hence, the Civil Appeal filed by R.K. Industries was dismissed and the Civil Appeal filed by Welspun was partly allowed by the SC in its final disposition.
- The liquidator is enjoined with the responsibility to secure the assets and goods of the corporate debtor under Section 35 (1) (b) of the Code read with the Liquidation Regulations.
- The liquidator is authorized to sell the immovable and movable property of the corporate debtor through a public auction or a private contract, either collectively, or in a piecemeal manner. The liquidator may also apply to the Adjudicating Authority (NCLT), for appropriate orders or directions as may be considered necessary.
- The prescribed procedure under the Code and Liquidation Regulations, is to protect and preserve the assets of the corporate debtor in liquidation, and to proceed to sell them at the best possible price.
- The liquidator is permitted to consult the stakeholders who are entitled to distribution of the sale proceeds, but the opinion of the stakeholders is not binding on the liquidator as per the proviso to Section 35 (2) of the Code.
- There is no vested right that accrues to bidders in liquidation sale beyond the express terms of the offer documents, as the liquidator may elect to undertake private sale of the assets of the corporate debtor, in order to attain maximization of value and a higher and quicker recovery for the stakeholders, to avoid delay,

and to provide a guaranteed timeline for completion of the liquidation proceedings.

- The scope of judicial review in commercial transactions is fairly limited, and the Court ought to restrain itself from substituting its decisions with that of the tendering agency.

Conclusion

The SC held that the scope of judicial review at the stage of liquidation sale is limited, as the NCLT and NCLAT cannot interfere in commercial transactions and purely business driven decisions taken during the liquidation sale process. The SC pointed out that NCLTs and NCLAT are not courts of equity and cannot exercise plenary powers as their jurisdiction is limited.

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