

IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT II, MUMBAI BENCH
INTERLOCUTORY APPLICATION NO. 5330 OF 2023
IN
COMPANY PETITION (IB) NO. 2849/MB/2018

*Application u/s 60(5) of the Insolvency and
Bankruptcy Code, 2016 read with Rule 11 of the
N.C.L.T Rules, 2016.*

In the matter of:

JSK Estate Private Limited,

through its director, having its address at: Raja
Bahadur Building, 28, Mumbai Samachar Marg,
First Floor, Near Share Market, Opp. State Bank
of India, Fort, Mumbai-400023. ...**Applicant**

Versus

1. **Mr. Sundaresh Bhat, Liquidator of EMCO**

Limited, having his office at: BDO Restructuring
Advisory LLP, Level 9, The Ruby, North West
Wing, Senapati Bapat Road, Dadar West,
Mumbai-400028.

2. **Sherisha Powertech Private Limited.,**

A Successful Auction Bidder, Having its address
at: New No. 1/171, Old No. 1/122 Old No.
1/122, Old Mahabalipuram Road, Thandalam
Village, Thiropur, Tamil Nadu-603110.

...**Respondents**

In the matter between:

Jet Road Lines (India) Private Limited.,

...Petitioner/Operational Creditor

v/s.

EMCO Limited

...Corporate Debtor

Order pronounced on 02.09.2024

Coram:

Shri. Kuldip Kumar Kareer : Member Judicial.

Shri. Anil Raj Chellan : Member Technical.

Appearances (in physical mode)

For the Applicant: Counsel Karen Koya.

For the Respondents: Counsel Ayush Rajani a/w Khusboo Shah appeared for the Respondent No.01/Liquidator.

: Senior Counsel Shri. Navroz Seervai a/w Pooja Mahajan, Saurabh Bacchawat and Priyanka Pandey appeared for Respondent No.02.

ORDER

Per: -Mr. Kuldip Kumar Kareer, Member (Judicial)

1. This is an application filed by the Applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) praying to recall and set aside the Order dated 09th September, 2022 (‘the impugned Order’) declaring Respondent No.02 as a successful bidder for the

sale of assets of Corporate Debtor and all other reliefs sought by the Applicant at Para 43 of the Application are consequential to the aforesaid prayer. Essentially, the present application has been filed by the Applicant, *inter-alia*, challenging the e-auction sale process conducted for purchase of the Corporate Debtor in liquidation on a going concern basis which, according to the Applicant, was carried out in contravention of the provisions of the IBBI (Liquidation Process) Regulations, 2016 (being hereinafter referred to as “the Liquidation Process Regulations” for the sake of brevity).

Facts of the Case (in brief):

2. The Applicant is a prospective bidder, who is interested in buying the Corporate Debtor under liquidation. Respondent No.01 is the Liquidator appointed by this Tribunal for liquidation of the Corporate Debtor vide Order u/s 33 dated 09th August, 2021 passed in IA No. 203/MB/2021.
3. This Tribunal vide Order dated 09th September, 2022 in IA No. 870/MB/C-II/2022 granted certain reliefs and concessions to Respondent No.02, the Successful Bidder, with regard to the purchase of Corporate Debtor as a going concern.
4. The Applicant has averred in its application that the factum of sale of Corporate Debtor as a going concern to Respondent No.02 came to its knowledge in or about October, 2023. The Applicant further avers that it was surprised to know that the Corporate Debtor has been sold in auction, as despite the best efforts to conduct a search of all relevant newspapers, the Applicant was unable to trace the public announcement in the newspapers. However, the Applicant searched

the website of IBBI and discovered the Public Announcement dated 08th March, 2022 concerning the auction sale of the Corporate Debtor on the IBBI portal.

5. After making further enquiries, the Applicant seeks to challenge the auction sale on following grounds:
- i. Non-publication of the Public Announcement in newspapers.
 - ii. The Liquidator was also required to act in terms of Clause 2 of the Schedule of the Regulations and was required to prepare a marketing strategy with the help of a marketing professional, if required, for the sale of the Corporate Debtor which may have included (i) releasing advertisement, (ii) preparing information sheets for the asset, (iii) preparing a notice of the sale, (iv) liaising with agents. However, it is not known if this requirement as per the Regulations was complied with or not and the Order does not set out that it has been carried out.
 - iii. As per Clause 11 of Schedule 1 of the Regulations, if required, the Liquidator may conduct multiple rounds of auctions to maximize the realization from the sale of assets and to promote the best interest of the creditors. It does not appear that the Liquidator has acted in accordance with the aforesaid Clause (the Order does not record any such attempt), and indeed it appears that he went ahead with the auction despite receiving only one bid (and that too, at a mere Rs. 10 lakhs above the reserve price).
 - iv. It is also not known as to how the reserve price of Rs 166.60 crores was arrived at. It is noted that Regulation 35 of the Regulations and Clause 4 of Schedule 1 of the Regulations prescribes a procedure as to how the reserve price is to be arrived at. It is not known as to whether these Regulations have been followed in arriving at the reserve price and the Order does not set out that it has been carried out.

6. The Applicant submits that in the aforesaid circumstances, it is evident that the Liquidator has not undertaken the process of auction of the Corporate Debtor in a fair manner and the said process is in violation of the said Regulations. The Applicant states that subject to grant of reliefs as set out herein, it is willing to offer a substantially higher bid which is higher by several crores of rupees more than the bid of the Respondent No. 2 who has paid only rupees ten lakhs more than the reserve price. The Applicant also states that it is not prevented by any bar under section 29A of the IBC from submitting its bid for purchase of the assets of the Corporate Debtor in liquidation.

7. Reply filed by Respondent No.01:

- i. The Respondent No.01 has opposed to the above-captioned application preferred by the Applicant on the grounds that the Applicant has no locus standi since the Applicant is neither a stakeholder nor an unsuccessful bidder. Hence, the Respondent prays that the present application deserves to be dismissed at the threshold since it is not maintainable.
- ii. It is submitted that the sale process of the Corporate Debtor was not carried out in contravention of the Liquidation Regulations.
- iii. The Applicant has failed to make out any case as to in which capacity has it learnt about the order dated 08th September, 2022 passed in IA No. 870 of 2022 in October 2023.
- iv. It is submitted that the Public Announcement dated 08 March 2022 was made available in public domain as follows, in strict compliance of the applicable IBBI Liquidation Regulations, 2016:
 - a) On the Website of IBBI;
 - b) On the website of the Corporate Debtor and;

- c) In one English and one regional language newspaper i.e Free Press Journal and Navshakti Mumbai edition, The Financial Express English, Gujarati -Ahmedabad edition, Lokmat Marathi, Jalgaon edition.
- v. The Respondent No.01 further submits that the Corporate Debtor was carrying on its material operations at Thane. The Jalgaon plant locations were shut since early 2019. Nonetheless, the Respondent No. 1/ Liquidator has published the advertisement for sale in both in Mumbai and Jalgaon editions of the newspapers, as stated in above mentioned responses. As mentioned above, the advertisement was issued for all 3 locations- Mumbai, Ahmedabad and Jalgaon.
- vi. The sale process was conducted in a total transparent manner by the Respondent No. 01/Liquidator. First E-auction sale process commenced on 10th December, 2021 and the second e-auction sale process commenced on 08th March, 2022. In fact, apart from the EOI received from the successful bidder SPPL, EOIs were also received from M/s. Eco Globe E Waste Recyclers. As far as sale of the Corporate Debtor is concerned, the sale was done pursuant to receipt of bid under an e-auction sale process, strictly in accordance with the e-auction sale process document dated 08 March 2022. The Respondent No. 1/Liquidator consulted the stakeholders that comprises of the lenders of the Corporate Debtor, the employees and workmen representatives and representatives of the operational creditors of the Corporate Debtor, on the sale process of the Corporate Debtor and took into consideration their inputs and thereafter commenced the e-auction sale processes. Thus, the allegations levelled by the Applicant that only one bid was received from the person to whom the Corporate Debtor was sold as a going concern and that the sale was made without consultation, are baseless and nothing but false accusations. In fact, the Applicant did not participate

in the sale process despite the public announcement published in newspapers in wide circulation, as mentioned above.

- vii. The Respondent No. 01/Liquidator concluded the sale of the Corporate Debtor under e-auction on 22 March 2022. The sale consideration of Rs. 166.70 Crore was realized within 90 days of the E-auction process. SPPL, the successful bidder has also paid interest of Rs. 2.95 Crore as per the terms of the E-auction sale process over and above the sale consideration of Rs. 166.70 Crores.
- viii. It is submitted that the Reserve Price for the E-auction sale process was derived on the basis of valuation conducted by two registered valuers duly appointed and in accordance with Regulation 35 of the Liquidation Regulations. Moreover, the auction can even be concluded at reserve price and but here the Respondent No. 1/Liquidator was able to recover Rs. 10 lakhs over and above reserve price.
- ix. It is submitted that the sale process stands concluded as on date and the Respondent No. 1/Liquidator has already transferred the management and control of the Corporate Debtor to the successful Bidder SPPL. As mentioned above, any bid from the Applicant cannot be entertained at this stage. In fact, the majority of the amounts received from the sale of the Corporate Debtor have also been distributed to the stakeholders and balance amounts shall be distributed upon conclusion/disposal of the pending Interlocutory Applications before this Hon'ble Adjudicating Authority. Thus, there is no question of setting aside sale process which will otherwise only render the entire process topsy turvy after the successful conclusion of a lawful E-auction sale process, more than a year ago.

8. Reply filed by Respondent No.02:

- i. Respondent No. 2 has submitted that the Applicant has no locus to file the above-captioned application.

- ii. The present application suffers from gross delay as the Applicant has approached this Adjudicating Authority only on 18th November, 2023 i.e. after almost two years from the date of first e-auction notice by the Liquidator and after over 1 year of the approval order being passed by this Tribunal. The Applicant cannot take the plea of ignorance as both the public announcements of the e-auction notice and the approval order were available in public domain in the newspapers and the NCLT website respectively.
- iii. Even assuming whilst denying that due process of law was not followed and/or there were procedural irregularities in the auction process conducted by the Respondent No.01/Liquidator, yet it cannot render the sale invalid since the Respondent No.02 is a bona fide purchaser of EMCO who acted in good faith and bought EMCO for a value.
- iv. Pertinently, the approval order was not challenged in appeal by any person and thus, it has attained finality in the eyes of law. Further, the Applicant has failed to make out any ground for recall of the impugned Order and the Adjudicating Authority cannot now go behind its order as that would entail review on merits of the case and it is now a settled position in law that the Adjudicating Authority has no power to review its own order.

9. **Rejoinder filed by the Applicant:**

- i. The Applicant has stated that vide Order dated 28th September 2022 bearing Order reference no. IBBI/DC/ 131/2022 (" IBBI Order") passed by the Disciplinary Committee of the Insolvency and Bankruptcy Board of India (IBBI), the registration of the Liquidator, Mr. Sundaresh Bhat bearing Registration No. IBBI/IPA-001/IP-P00077/2017-2018/10162 was suspended for a period of 2 years. It is noted that Mr. Sundaresh Bhat has been suspended to act as an insolvency professional for various contraventions of the provisions of IBC. Despite his suspension, the

Liquidator conducted the liquidation process and it appears that he did not inform the CoC about his suspension.

- ii. The Liquidator offered only three clear days for eligible bidders to submit their bids. Further, the Applicant repeats and re-iterates its allegations with respect to the Liquidator's failure to publish public announcements in accordance with Regulation 12(3) of IBBI (Liquidation Process) Regulations 2016 and has breached the same.
- iii. As per the two valuation reports relied upon by the Liquidator, the average fair value of the Corporate Debtor was INR 309,10,73,800/- and the average liquidation value of the Corporate Debtor was INR 183,66,55,900/-. However, the reserve price fixed by the Liquidator in the Public Announcement dated 08th March, 2023 was Rs. 166 crores. The Liquidator has not provided any justification for fixing such lower reserve price.
- iv. The public auction attracted only two interested parties (including the successful bidder) and despite the same, the Liquidator has not carried out any further auction, contrary to what is envisaged and provided for in the Regulations.

ANALYSIS AND FINDINGS

10. During the course of arguments, the Ld. Counsel for the Applicant has argued that in this case the sale was conducted in a hurried manner, without adequate notice, at a price below the reserve price as contemplated under Regulation 35 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016 ("**Liquidation Regulations**"), resulting in the sale at a value far below the actual value of the property in question. The sale was also conducted in a manner contrary to the express provisions of the Liquidation Regulations. Both these factors vitiate the sale which has resulted in the sale

having taken place in a manner that does not provide for maximisation of value of the asset in question.

11. Ld. Counsel for the Applicant has further contended that the Respondents have wrongly claimed that the sale of a property in liquidation is a matter solely within the domain of the Liquidator and the Stakeholders Consultation Committee and that their decision in this regard cannot be questioned by this Hon'ble Tribunal even if the object of maximisation of value of the asset has been achieved. The Respondents have also questioned the very jurisdiction of this Tribunal to entertain any application challenging the Sale, either on the ground that the process was not followed or on the ground that value maximisation has not been achieved which the correct position under the law is not.
12. Ld. Counsel for the Applicant has further contended that undisputedly the first Public Announcement inviting bids was made on 10th December 2021 by the Liquidator which was subsequently cancelled on 2nd March 2022 for unknown reasons. Thereafter, on 8th March 2022, a second Public Announcement was published. It is to be noted that the Corporate Debtor had businesses and properties located in Jalgaon, Thane and Vadodara. However, admittedly, this Public Announcement was not published in any English newspaper in Jalgaon, where the registered office of the Company is located nor was it published in Vadodara and Thane where the Company conducts its material business operations, as required under the provisions of the Regulation 12(3) of the Liquidation Regulations. Therefore, the very first step in the process was contrary to the process prescribed by the Liquidation Regulations.
13. The Ld. Counsel for the Applicant has further pointed out that as per the Second Public Announcement, a period of *only three days was given for submission*

of EOI. The cut-off date in this regard was 11th March 2022. Thus, the process was conducted in undue haste. This in effect was the second step in the process which was contrary to the achievement of value maximisation.

14. According to the Counsel for the Applicant, the last date fixed for submission of EMD was 22nd March 2022 and the date scheduled for the e-auction was 24th March 2022. These dates were thereafter advanced by the Liquidator without any further publication in any newspapers to 21st March 2022 and 22nd March 2022 respectively without any explanation for the advancement of these dates.

15. The Ld. Counsel for the Applicant has further contended that the reserve price mentioned in the Second Public Announcement was fixed at INR 166.60 crores. This price was way below the average fair value of the Corporate Debtor and the average liquidation value of the Corporate Debtor being INR 309,10,73,800 and INR 183,16,55,900 respectively. It is also to be noted that the reserve price of INR 166.60 crores for the Corporate Debtor as a whole including its legal entity, brand name and financial assets, as set out in the Second Public Announcement, was lower than the aggregate reserve price of approx. INR 167.93 crores which was fixed in the First Public Announcement as the price for the aggregate of the Corporate Debtor's assets on a standalone basis (excluding its financial assets, intangible assets and brand name). The Liquidator has given no explanation in his affidavit in reply for fixing the reserve price in the Second Public Announcement, below the aforesaid values, in contravention of Schedule I (4) read with Regulation 35 of Liquidation Regulations. This in effect was the third and perhaps most important step in the process which was contrary to the process prescribed by the terms of the Liquidation Regulations and to the achievement of value maximisation.

16. The Ld. Counsel for the Applicant has further argued that the terms of the sale by way of e-auction as per the e-auction process document, inter alia, stated that the auction asset was being sold with all the existing and future encumbrances/claims, dues, demands whether known or unknown to the Liquidator and further that the Liquidator shall not be responsible in any way for any third party claims/rights/dues. According to the Counsel for the Applicant, the imposition of this unnecessary condition had a deterrent effect on prospective buyers which also militated against the object of achievement of value maximization, as subsequently the Tribunal vide its order dated 09.09.2022 confirmed the sale on a clean slate basis.
17. The Ld. Counsel for the Applicant has further argued that after the auction was conducted on 22nd March 2022, the Liquidator was suspended by an Order dated 28th September 2022 passed by IBBI and notwithstanding his suspension, the Liquidator proceeded to issue a Sale Certificate to Respondent No. 2 on 4th October 2022 which was also illegal and amounts to misconduct on his part.
18. The Ld. Counsel for the Applicant has further contended that the Applicant is willing to offer a substantially higher bid than the one offered by Respondent No. 2 and is willing to pay a sum of INR 100 crores over and above the price of INR 166.70 crores at which the Corporate Debtor was sold as a going concern to Respondent No. 2. According to the Counsel for the Applicant, all these circumstances go on to show that the sale of the Corporate Debtor as a going concern to Respondent No. 2 was at a fraction of its real value and that the sale did not achieve the object of value maximisation and, therefore, the same is liable to be set aside as it has not only failed to achieve the objective of value maximisation and also the process of auction and sale has been run in utter disregard of the Regulations.

19. In support of his submissions the Ld. Counsel for the Applicant has relied upon *Bank of India vs. Enfield Apparels Ltd. (NCLT Kolkata dated 12th March 2020) in CP (IB) No. 38/KB/2018* whereby it has been held that when a situation of challenge to auction process arises on the ground of assets not being sold at maximum possible value, such process can be enquired into and set aside. Ld. Counsel for the Applicant has further relied upon *Raj Singhania Official Liquidator of Gontermann- Peipers (India) Limited (In Liquidation) vs Chinar Steel Segment Centre Pvt. Ltd and Others. as well as Sanefell Heights LLP vs Chinar Steel Segment Centre Pvt. Ltd and Others. (2022) SCC Online NCLAT 4074* whereby it has also been held that even a confirmed sale can be set aside in the event of undue haste and/or material irregularities in the process. The Ld. Counsel for the Applicant has further relied upon *Allahabad Bank and Ors. Vs Bengal Paper Mills Co. Ltd and Ors. (1999) 4 Supreme Court Cases 383* whereby it has held that a confirmed sale can be set aside even though there was a delay when approaching the court for setting aside the sale.
20. The Counsel for the Applicant has further relied upon *Naren Seth Liquidator of Ciemme Jewels Ltd., vs. Sunrise Industries, with Marine Electricals (India) Ltd vs Sunrise Industries (2023) SCC OnLine NCLAT 1942* whereby it has been held by the Hon'ble NCLAT that it is the duty of the Court to keep openness of the auction so that the intending bidders would be free to participate and offer higher value. If that path is cut down or closed, the possibility of fraud or to secure inadequate price or underbidding would loom large.
21. The Ld. Counsel for the Applicant has further argued that the applicant has the locus to maintain the present Application as he is willing to offer a substantially higher bid which is Rs. 100 crores more than the bid of Respondent no. 2. Besides, the Applicant does not suffer from any inability in terms of

section 29A of the IB Code, 2016. The Ld. Counsel for the Applicant has further contended that the sale approval order dated 09.09.2022 can be recalled in the light of the law laid down by the Hon'ble NCLAT in *Union Bank of India vs Official Liquidator H.C. of Calcutta and Ors (2000) SCC 274* as well as *Greater Noida Industrial Development Authority vs Prabhjit Singh Soni & Anr in Civil Appeal Nos. 7590-7591 of 2023* whereby it has been held that the power of recall can be exercise where the order is without jurisdiction or it has been obtained by the misrepresentation of facts and by playing fraud upon the Court/Tribunal resulting in gross failure of justice.

22. In the light of the above submissions, the Ld. Counsel for the Applicant has urged that the Application be allowed, and the auction/sale be set aside.
23. On the other hand, Ld. Counsel for the liquidator has argued that the Applicant has no locus standi since it is neither a stakeholder nor an unsuccessful bidder and thus is not entitled to challenge an already concluded sale process, wherein the assets and the affairs of the Corporate Debtor have been transferred pursuant to an E-auction sale process conducted by the Respondent No. 1 to Sherisha Powertech Private Limited (Respondent No.2) as a going concern. Hence, this present application is not maintainable.
24. It is submitted by the Ld. Counsel for the liquidator that the sale process of the Corporate Debtor was carried out in strict compliance of the Liquidation Regulations. The Corporate Debtor has been transferred to Sherisha Powertech Private Limited (“**SPPL**”) as a going concern and the auction sale legally and lawfully completed cannot be challenged by the Applicant at this stage, given the fact that the Corporate Debtor has been transferred to SPPL and the management and control of the affairs of the Corporate Debtor also now vests with SPPL.

25. Ld. Counsel for the liquidator has submitted that the sale process was conducted in a total transparent manner by the Respondent No. 1 / Liquidator. In fact, apart from the EOI received from the successful bidder SPPL, EOIs were also received from M/s Eco Globe E Waste Recyclers during the second e-auction sale process. As far as sale of the Corporate Debtor is concerned, the sale was done pursuant to receipt of bid under an E-auction sale process, strictly in accordance with the E-Auction sale process document dated 08 March 2022.
26. It is submitted that the Respondent No. 1 / Liquidator has followed due and complete process, as prescribed under the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 for sale of the Corporate Debtor. It is noteworthy that the Applicant did not participate either in the first E-auction sale process commenced on 10 December 2021 nor in the second E-auction sale process commenced on 08 March 2022. Hence, now at this juncture, the Applicant has no locus to file this frivolous application when Corporate Debtor has already been sold as going concern and the Respondent have also filed closure application in terms of Regulation 45 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, which is pending adjudication before this Tribunal.
27. It is further submitted by the Ld. Counsel for the liquidator that the Reserve Price for the E-auction sale process was derived on the basis of valuation conducted by two registered valuers duly appointed and in accordance with Regulation 35 of the Liquidation Regulations. Even though auction can be concluded at reserve price, still the Respondent No. 1 / Liquidator was able to recover Rs.10 Lakhs over and above reserve price. The Respondent No. 1 / Liquidator has conducted the sale process in a fair and transparent manner and realized the amounts in a timely manner. The particulars of the sale process

were made available on the IBBI website as well as website of the Corporate Debtor, which evidences that Respondent No. 1 / Liquidator has conducted the liquidation process in a fair and transparent manner.

28. According to the Ld. Counsel for the liquidator, as per Profit and Loss account of the audited financial statement of the Applicant for FY 31 March 2023, there is no revenue from operations and there is NIL profit & loss for the said year. As against this, the Applicant has offered an amount of Rs.266.70 Crore/- to buy the Corporate Debtor as a going concern. Ld. Counsel for the liquidator has further submitted that the question of setting aside the sale process, which will otherwise only reverse the entire process at this belated stage i.e. more than 22 months after successful conclusion of a lawful E-auction sale process, does not arise at all.
29. It has been argued on behalf of Respondent No.2, the controversy in the present case does not relate to value maximization, as contended by the Applicant, but whether the applicant, who neither participated in the auction process nor challenged the auction process, can be permitted to question an auction process after more than 1.5 years using the bogey of value maximization.
30. According to the Ld. Counsel for Respondent No.2, the Applicant is not a stakeholder of Emco. The Applicant is not even a bidder (leave alone an unsuccessful one) in the auction for purchasing Emco. The Applicant is, thus, a rank outsider to the liquidation process of EMCO and does not have any locus to challenge the sale process of EMCO or the passing of Relief Order by this Authority. He has further argued that the present proceeding is not a public interest litigation being conducted by the Applicant in the interest of stakeholders of Emco. To challenge any process of e-auction or the Relief Order

passed by this Hon'ble Authority, the Applicant must first explain the right of the Applicant that has been affected by the process or the Relief Order. Till the filing of the present Application, the Applicant had shown no interest in Emco. The CIRP of Emco commenced on 22 July 2019. Even during the CIRP, various notices were issued by the then resolution professional ("RP") of Emco inviting resolution plans for Emco. The Applicant never approached the RP for submitting a resolution plan. Further, the Applicant never approached the Liquidator at the time when two sale notices were issued. Hence, the Applicant, who is now desperate to buy Emco, and is even willing to make oral offers before this Authority, was completely absent from the CIRP and liquidation process of Emco since 22 July 2019.

31. Ld. Counsel for Respondent No.2 has invited attention to *Manjit Commercial vs. SPM Auto, 2019 SCC OnLine NCLAT 1173* (para 11) where it was held that a person that did not participate in the e-auction cannot challenge auction process making vague allegations without any substantial grounds.
32. Ld. Counsel for Respondent No.2 has further contended that even if the Applicant is considered to have a locus, the Application ought not to be entertained on the grounds of delay and laches. The Applicant claims that Emco is a very well known company, yet it is surprising and rather convenient that it claims not to know of the e-auction of Emco for almost 2 years from the date of first e-auction notice. It further claims to not know of the order dated 09.09.2022 for more than 1 year the relief order was passed.
33. Ld. Counsel for Respondent No.2 has further submitted that since the e-auction notices and the Relief Order were admittedly in public domain and since admittedly the auction notice was issued (not once but twice) in Mumbai

(where the Applicant is based), a presumption must be drawn that the Applicant was aware of the issuance of the notices and passing of the Relief Order. The Applicant has thus failed to rebut such presumption and no explanation whatsoever has been given by the Applicant to explain the delay in filing of the present Application.

34. According to the Ld. Counsel for Respondent No.2, it is settled law that doctrine of delay and laches can be applied to non-suit the litigants who approach the court/appellate authorities belatedly without any justifiable explanation for bringing action after unreasonable delay. This aspect has been dealt with by the Hon'ble Supreme Court in the matter of *Chairman, State Bank of India v M J James*, (2022) 2 SCC 301, wherein it was inter alia held as under:

"36. What is a reasonable time is not to be put in a straitjacket formula or judicially codified in the form of days, etc. as it depends upon the facts and circumstances of each case. A right not exercised for a long time is nonexistent. Doctrine of delay and laches as well as acquiescence are applied to non-suit the litigants who approach the court/appellate authorities belatedly without any justifiable explanation for bringing action after unreasonable delay. In the present case, challenge to the order of dismissal from service by way of appeal was after four years and five months, which is certainly highly belated and beyond justifiable time. Without satisfactory explanation justifying the delay, it is difficult to hold that the appeal was preferred within a reasonable time. Pertinently, the challenge was primarily on the ground that the respondent was not allowed to be represented by a representative of his choice. The respondent knew that even if he were to succeed on this ground, as has happened in the writ proceedings, fresh inquiry would not be prohibited as finality is not attached unless there is a legal or statutory bar, an aspect which has been also noticed in the impugned judgment. This is highlighted to show the prejudice caused to the appellants by the delayed challenge. ..."

35. According to Ld. Counsel for the Respondent No. 3, this being the case, even if the Applicant is able to establish a locus, the Application must be dismissed basis the settled principles of delay and laches Ld counsel for Respondent No.2 has further argued that the Applicant has tried to justify its

locus and delay by raising a bogey of value maximization. In this regard it is submitted that *firstly*, issues relating to value maximization can only be raised by stakeholders that are actually impacted by lack of value maximization. No stakeholder of EMCO has raised a concern with respect to value maximization and the Liquidator has confirmed that the Stakeholder Consultation Committee (“SCC”) was duly consulted with respect to all aspects of the sale process. *Further*, in the absence of fraud, value maximization can never be a ground to set aside a sale that has already taken place. While the Applicant has made some oral averments of fraud, it is relevant to point out that no fraud has been pleaded by the Applicant in the application.

36. In the light of the aforesaid submissions, Ld. Counsel for Respondent No.2 has prayed that the application be dismissed with exemplary costs as the same is frivolous and vexatious in nature.
37. We have weighed the contentions raised by the counsel for the parties and have also gone through the case law cited by them in support of their respective contentions.
38. By way of this application, the Applicant has sought to challenge the very auction process and declaration of Respondent no-2 as successful bidder on the ground that the process was conducted by the liquidator in an illegal manner and in utter disregard of the Liquidation Regulations. The applicant has further sought the recall of the order dated 09.09.2022 passed by this Tribunal granting certain reliefs and concession to Respondent no.2, the successful bidder, with regard to purchase of the Corporate Debtor as going concern.
39. Primarily, a challenge has been raised by the Applicant against the auction process on the ground that the corporate debtor has business properties and

interest in Jalgaon, Thane and Vadodara whereas the liquidator did not get published any public announcement in any newspaper in Jalgaon or in Vadodara and Thane. It has also been pointed out that after the second public announcement, a period of only 3 days was given for submission of EOI with the result that only one party could submitted its EOI. It has also been pointed out that though the last date for submission of EMD was 22.03.2022 and the auction was scheduled for 24.03.2022 but subsequently the dates were advanced to 21.03.2022 and 22.03.2022 respectively. According to the counsel for the Applicant, undue haste was shown by the liquidator, obviously to benefit the auction purchaser. However, perusal of the record reveals that auction notices dated 10.12.2021 was published in The Free Press Journal as well as Lokmat. Thereafter, the liquidator, in consultation with the stakeholders issued second e-auction notice in accordance with the Liquidation Regulation 12(3)(a) on 08.03.2022 in Free Press Journal, Navshakti, Financial Express English and Gujarati-Ahmedabad edition, Lokmat, Jalgaon edition It, therefore, cannot be said that the publication of the auction notices was not proper or de hors Regulations. It has been rightly pointed out by the counsel for the Respondents that at the relevant time, there was no minimum time prescribed for the submission the EOI. Besides, the Applicant has failed to explain as to how it was prejudiced with regard to the time given for submission of EOI. Under the circumstances, it cannot be said that any prejudice was caused to the Applicant.

40. Much stress has been laid by the counsel for the Applicant on the point that the whole process was run in a slipshod manner that it failed to achieve objective of value maximization. It has been agitated on behalf of the Applicant that the reserve price of Rs.166.60 crores was way below the average fair value of the Corporate Debtor as well as the average liquidation value of the Corporate Debtor and this was also fatally contrary to the process prescribed in

the Liquidation Regulations for the achievement of value maximization. In this regard, it has been pointed out by the counsel for the Applicant that the Applicant is willing to pay a price of more than 100 crores over and above the price of Rs.166.70 crores at which the Corporate Debtor has been sold as a going concern to Respondent no. 2.

41. The above contentions raised on behalf of the Applicant, though look attractive, yet the same seem to be devoid of any merit or substance. Firstly, the Applicant never participated in either the CIRP or the Liquidation process of the Corporate Debtor. The Applicant, admittedly did not submit any Resolution Plan in the CIRP of the Corporate Debtor nor submitted any EOI. Therefore, at this belated stage, the Applicant cannot be heard harping that the value maximization has been a causality in the whole process. As regards, the offer made by the Applicant, which is higher than the offer of Respondent no. 2 by Rs. 100 Crores, the same cannot be accepted at this stage after a lapse of more than one and half year of the completion of the auction process. Even the offer being made by the Applicant seems to be a far cry considering the facts that the latest balance sheet of the Applicant does not vouch for the financial credentials of the Applicant to make such a lucrative offer. It has been rightly pointed out that the audited financial statement of the Applicant for the year ending 31.03.2023 depicts no profit for the relevant period. Therefore, the Applicant does not appear to have the financial credentials to offer a substantially higher bid.

42. It has been pointed out by the Ld. Counsel for the Applicant that the Public Notice/Second Public Announcement issued by the Liquidator states that the terms of sale will be as per the terms and conditions set out under the e-auction Process Document and Schedule B of the e-auction Process Document, which

sets out the terms and conditions of the e-auction process @ item 24 *inter alia* provides that “The Auction Asset is being sold with all the existing and future encumbrances/claims, dues, demands whether known or unknown to the Liquidator. The Liquidator shall not be responsible in any way for any third-party claims/rights/dues.” According to the Ld. Counsel for the Applicant, it goes without saying that the imposition of this unnecessary condition, had a deterrent effect on prospective bidders. This, in effect, was the fourth step in the process which was contrary to the achievement of value maximisation.

43. Having thoughtfully considered the above contention, we are of the considered view that it is settled law that sale on ‘as is where is’ basis in liquidation does not necessarily mean that the successful bidder has to bear past liabilities which get settled as per Section 53 of the Code. Even if the auction notice contained clause of ‘as is and where is basis’ or of encumbrances, no fault can be found with the liquidator for having issued such a notice. The Liquidator was quite justified in doing so in order to be on the safer side and to avoid incurring any future liability out of the proposed sale. There is nothing wrong if the successful bidder approached the Hon’ble NCLT for various reliefs and concessions with respect to ‘clean slate’ and for transfer of assets without encumbrances and if the appropriate reliefs and concessions were granted as per the settled law. It cannot be said to be a dampener for value maximization if the auction notice contained ‘as is where is clause’ or subsequently the relief of clean slate was granted as per law. It is a matter of common knowledge that in case of sale of a corporate debtor as going concern, this relief is usually granted and it cannot be said that this resulted in a deterrent for the prospective buyers to participate in the auction proceedings as they were not aware that the company was being sold on clean slate basis rather than on as is where is basis.

44. It has further been argued by the Ld. Counsel for the Applicant that after the auction was conducted on 22nd March 2022, the Liquidator was suspended by an Order dated 28th September 2022 passed by IBBI. Notwithstanding his suspension, he proceeded to issue a Sale Certificate to Respondent No. 2 on 4th October 2022. Even this contention raised on behalf of the Applicant is not tenable considering the fact that despite the suspension order, the stakeholders committee allowed the liquidators to continue.
45. By virtue of this application, the Applicant is seeking to recall the order dated 09.09.2022 passed by this bench on the ground that there was no opposition to the I.A. filed by the Respondent No.2 and further it was not brought to notice of the bench that by confirming the sale on clean slate basis, the terms of auction stood radically altered. In this regard it has been argued on behalf of the Applicant that that the Tribunal has the power to recall in the light of the law laid down in *Greater Noida Industrial Development Authority Vs. Prabhjit Singh Soni and Others in Civil Appeal No. 7590-7591/2023* whereby it has been held by the Hon'ble Supreme Court that the power of recall can be exercised where the order is without jurisdiction and has been obtained by misrepresentation of facts or by playing fraud resulting in gross failure of justice. In this regard, it has further been pointed out that since the Tribunal was not informed that the sale was advertised with all existing and future encumbrances/claims/dues/demands and further that if the Tribunal had been informed of this fact, it might have directed a fresh option to be conducted to ensure value maximization.
46. Having considered the aforesaid contention, we are of the considered view that in the absence of any fraud having been established by the Applicant, the order dated 09.09.2022 cannot be recalled. Similarly, the argument that the auction notice was issued on 'as is where is basis' while the sale was approved

on clean slate basis can also not be a ground for recall of the impugned order. It cannot be disputed that a successful bidder of a property in liquidation proceedings under the IBC is always at liberty to seek certain reliefs and concessions on the principle of clean slate and, therefore, if respondent no. 2 subsequently successfully obtained certain reliefs and concessions, on this ground it cannot be said that there was some misrepresentation or fraud. Besides, the Applicant has not pleaded any fraud in the application. Therefore, in our considered view, the law laid down in *Greater Noida Industrial Development Authority Vs. Prabhjit Singh Soni and Others (supra)* cannot be applied to the facts and circumstances of the instant case.

47. It has also been pointed out that on behalf of the Applicant that the Applicant has the locus to maintain the present application as it is willing to offer a substantially higher bid. In this regard the counsel for the Applicant has relied upon *Navalkha and Sons Vs. Sri Ramanya Das and Others 1969(3) SCC 537* whereby it was held that denial of opportunity to purchase the property by persons who would have taken part in the option bid but for want of notice is a serious matter and further that since there was want of publicity and lack of opportunity to the public at large to take part in the auction, the acceptance of the highest bid was not a sound exercise of discretion.
48. On the contrary, the Ld. Counsel for the liquidator has relied upon *Valji Khimji & Co. Vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. and others (2008) 9 SCC 299* whereby the Hon'ble Supreme Court held that if every confirmed sale can be set aside, the result would be that no option sale will ever be complete because there would always be somebody who can come after the auction or its confirmation offering a higher amount. It was further held that if auction sale was done after wide publicity in the newspapers having

sufficient circulation, then setting aside the sale after its confirmation would create huge problems. It was further held in this very case that entertaining objections after the sale is confirmed should not ordinarily be allowed except on very limited ground like fraud, otherwise no auction sale shall ever be complete.

49. As regard the pointed raised by the Ld. Counsel for the Applicant with regard to the fact that the value of the property in question was not properly assessed before it was put for auction, in this regard, it would be suffice to say that to prove this contention the Applicant has not come up with any concrete and tangible evidence to show that the property in question was having value much higher than Rs. 166 Crore at which it was sold or that the valuation reports relied upon by the liquidator were not legal or valid or suffered from some legal infirmity. No independent valuation report has been brought on record by the Applicant in support of this contention. Therefore, even this contention raised on behalf of the Applicant has not been substantiated and deserves to be rejected. Besides, the liquidator proceeded on the basis of valuation conducted by the two registered valuers.
50. Having considered the above contentions of the parties, we are of the considered view that at this belated stage, after the sale has already been confirmed, the objections raised by the Applicant cannot be entertain especially when there is no allegation of fraud. Besides, the Applicant was never in picture ever since the CIRP commenced against the Corporate Debtor. Therefore, simply on the ground that the Applicant did not get to know about the auction proceedings or that it is willing to offer higher price, the auction process cannot be set aside at this belated stage. In our considered view, the Applicant is guilty

of delay and latches and, therefore, the application is liable to rejected on this ground alone.

51. As a result of the above discussion, we are of the considered view that no ground in made out to set aside the auction or to recall the order dated 09.09.2022. Under the circumstances, the **IA No. 5330/2023 is dismissed** being devoid of any merit leaving the parties to bear their own costs.

Sd/-
ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
(MEMBER JUDICIAL)