

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.22 of 2020

[Arising out of Order dated 13th December, 2019 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in C.A.(IB) No.792/KB/2019 and C.A.(IB)No.684/KB/2019 in C.P.(IB) No.574/KB/2017]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Bharat Heavy Electricals
Ltd.
BHEL House,
Siri Fort
New Delhi – 110 049

Appellant/
Operational Creditor/
Applicant

Appellant

Vs.

1. Mr. Anil Goel,
The Liquidator of
“Visa Power Ltd.”
AAA Insolvency
Professionals LLP
E-10A, Kailash Colony
Greater Kailash – I,
New Delhi – 110048

Respondent No.1
(Liquidator)

Respondent No.1

2. Agrawal Structure
Mills Pvt. Ltd.
Govind Kunj,
Near Krishna Talkies,
Samta Colony,
Raipur – 492001
Chhattisgarh

Respondent No.2
(Auction Purchaser)

Respondent No.2

For Appellant:

**Mr. Punit Dutta Tyagi and Ms. Swastika
Chakravarti, Advocates**

For Respondents:

**Mr. Guarav Mitra, Mr. Nipun Gautam and Mr.
Kanishk Khetan, Advocates for Respondent No.
1**

**Mr. Abhijeet Sinha and Mr. Kumarjit Banerjee,
Advocates for Respondent No. 2.**

J U D G E M E N T

(10th August, 2020)

A.I.S. Cheema, J. :

Case of Appellant

1. The Appellant – Bharat Heavy Electricals Limited (BHEL) has filed this Appeal against Impugned Order dated 13th December, 2019 passed by Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata). The Order was passed in C.A.(IB)No.684/KB/2019 and C.A.(IB) No.792/KB/2019 in C.P.(IB)No.574/KB/2017. These were Appeal and Application filed by the Appellant. Present Appeal claims and it is argued that the Adjudicating Authority although accepted that there was improper valuation, inconsistencies and contradictions in valuation, inconsistencies in the sale of plant and machinery so much so that material sold was at variance as compared to what was advertised and although Adjudicating Authority found undue urgency shown in auction sale, still it upheld the auction sale and consequent removal of goods by Respondent No.2 (auction purchaser) referring to Respondent No.2 as bona fide purchaser. The Adjudicating Authority rejected the Appellant's claim of having statutory lien and charge on the plant and machinery supplied by the Appellant holding that no security interest has been "created", as such.

Appellant claimed to be Secured Creditor

2. It has been argued for the Appellant and the Appeal claims that in February, 2010, Visa Power Limited – Corporate Debtor (now in liquidation) had issued Notice inviting tender (NIT) inviting bids for design, engineering, manufacturing, transportation, storage, erection, testing and commissioning of 2 x 600 MW Coal based Thermal Power Plant at Chhattisgarh. Appellant was awarded Letter of Award (LOA) dated 28th June, 2010. The NIT is at Annexure – 2 (Page – 110) and Letter of Award is at Annexure – 3 (Page – 210). The Appellant argues that as per the Award, BHEL supplied 26,000 MT (approximately) of material and erected 9,500 MT of material putting up plant and machinery before the work came to be suspended as invoices remained unpaid. Appellant initiated arbitration proceedings against Corporate Debtor in 2016 – 2017. It is stated that against the Corporate Debtor, CIRP got initiated on 22nd December, 2017 and Appellant filed Form ‘B’ (Annexure - 4 – Page 227) and claimed unpaid seller’s lien under Sale of Goods Act and statutory charge under Transfer of Property Act, 1882 on the plant and machinery supplied and/or erected. It was filed on 13th January, 2018. Subsequently, CIRP failed and on 11.10.2018, liquidation Order came to be passed. Respondent No.1 – Mr. Anil Goel, who was earlier Resolution Professional, came to be appointed as Liquidator. On 9th November, 2018, Appellant filed Form ‘C’ (Annexure - 5 – Page 254) claiming similar lien/charge on the plant and machinery supplied and/or erected and to be Secured Creditor. It is argued that the Liquidator passed Order dated

31st December, 2018 (Annexure - 8 – Page 299) provisionally admitting monetary claim of BHEL and classifying BHEL under Section 53(1)(f) of the Insolvency and Bankruptcy Code, 2016 (IBC – in short). The provisionally admitted claim was of Rs.290,01,85,395/- (out of Rs.664,98,37,221/-). Claim of lien/charge of the Appellant was rejected and the Appellant was treated as Unsecured Creditor. As such, the Appellant filed Appeal to Adjudicating Authority having CA No.149/2019 and sought setting aside of the Order dated 31st December, 2018 and that lien/charge of the Appellant should be accepted. It is claimed that in the meanwhile, the Liquidator published Sale Notice advertisement (Annexure 4 of Reply Diary No.17759) of auction of assets of the Corporate Debtor divided in four blocks numbered as A, B, C and D. The Notice of auction (Annexure – 9) dated 10th April, 2019 was published in newspapers on 11th April, 2019. Copy of the Sale Notice dated 10th April, 2019 which was published in newspapers, is referred at Annexure – 9 (Page – 300). The Appellant claims [in Para – 7(h)] that in this Sale Notice, none of the plant and machinery supplied and/or erected by the Appellant, was part of the “Plant and Machinery”. The assets picked up for auction were divided in four heads – (A) Land and Building, (B) Plant and Machinery, (C) Furniture and Fixtures, Office Equipment and Computers at Raigarh, Chattisgarh location, and (D) Furniture and Fixtures, Office Equipment and Computers at Kolkata location. (The details are at Annexure – V of the Sale Notice (Annexure – 9 at Page – 340). Appellant claims that although such Notice dated 10th April, 2019

was issued and published on 11.04.2019, the Liquidator suppressed this fact from Appellant and Adjudicating Authority on 11th April, 2019 when the matter came up for arguments of CA 149 of 2019.

Liquidator rushed through before deciding issue of lien/charge – claimed

3. On 10th May, 2019, Adjudicating Authority set aside (Annexure – 8) the Order dated 31st December, 2018 and remitted the matter back to the Liquidator for passing a reasoned decision. Copy of the Order is at Annexure – 12 (Page – 418). The Appeal claims that in spite of the matter being remitted back to the Liquidator on 10.05.2019, to decide if the Appellant had lien/charge and was a Secured Creditor, and give reasons in support, still the Liquidator instead of deciding the claim of the Appellant, went ahead and whereas in Sale Notice, none of the material supplied by Appellant was part of “Plant and Machinery”, in Letter of Intent dated 04.05.2019 (Annexure - 11 – Page 409) surreptitiously Plant and Machinery supplied and erected was included as Plant and Machinery. In spite of Order dated 10.05.2019 of Adjudicating Authority, the Liquidator rushed through and on 20th May, 2019, issued Certificate of Sale in favour of Respondent No.2 (Annexure - 13 – Page 423). In the Certificate of Sale, “plant and machinery” erected which was shown in the Sale Notice as part of “land and building”, was also sold off by way of the Certificate. Appellant states that the Appellant did not know about issue of such Sale Notice or auction process and when Respondent No.2 went to remove material from project site, Appellant immediately issued

Notice to Liquidator and Respondent No.2 not to remove the material from site. Copy of the Notice dated 28th May, 2019 is relied on (Annexure - 14 – Page 430).

4. Appellant claims that although Liquidator had gone ahead to confirm sale by issue of Certificate of Sale to Respondent No.2, he called the Appellant for a sham hearing by sending e-mail on 27th May, 2019 (Annexure – 14) and subsequently, passed Order dated 3rd June, 2019 (Annexure - 16 – Page 455), now accepting monetary claim of Appellant to extent of Rs.5,72,19,46,434/- rejecting the same to the extent of Rs.92,78,90,786/-. The Liquidator again rejected the claim of lien and/or charge and held that the Appellant was Unsecured Creditor.

Auction and Sale Challenged

5. The Appellant on 4th June, 2019 filed CA 684 of 2019 (Annexure - 15 – Page 435) and challenged the auction and sale carried out. Appellant also filed CA 792 of 2019 (Annexure – 18) on 19th June, 2019 against Liquidator's Order dated 3rd June, 2019 rejecting claim of lien/charge and Secured Creditor.

6. The Appeal claims that the Liquidator filed Reply to CA 684 of 2019 (Annexure – 19) claiming that the plant and machinery supplied by the Appellant was lying inside the BHEL enclosure and the auction had nothing to do with the material lying inside the BHEL enclosure. Liquidator also claimed that only the plant and machinery lying outside the enclosure had been auctioned. Appeal claims (Para – 7 w) that

Respondent No.2 forcibly removed material which was not part of Certificate of Sale, including goods lying inside “BHEL’s enclosure” as well as lying outside at other locations. Appellant claims that Appellant sent Notices on 12.07.2019 (Annexure -20) and 26.07.2019 (Annexure – 21) requesting the Liquidator to sequester the plant and machinery so that the auction purchaser may not remove the plant and machinery on which the Appellant was claiming lien. It is argued that in spite of such Notices, the Liquidator did not take necessary actions. The Appeal claims that the Adjudicating Authority had (vide Annexure – 17 dated 12th June, 2019) directed that movement of “goods” would be subject to outcome of proceedings. The Appellant had filed Appeal to this Tribunal having CA (AT) (INS) No.802 of 2019 seeking stay to the operation and effect of Certificate of Sale dated 20th May, 2019. This Tribunal had vide Order (Annexure – 22) dated 7th August, 2019 directed the Liquidator not to allow any person to remove the assets in question, even if it is sold and yet not removed. According to the Appellant, the Liquidator had replied the Notice dated 26th July, 2019 (Annexure – 21) sent by the Appellant by his Reply dated 4th August, 2019 (Annexure – 23) claiming that the sale did not include material lying in BHEL enclosure and that the sale did not include material which was not valued. Appellant claims that the Liquidator failed to ensure safety of the material supplied by the Appellant and picked up by the Respondent No.2.

Valuation Challenged

The Appeal refers to the Valuation Report of the two Surveyors who have done the valuation during CIRP and the two Surveyors and Valuers who did the valuation during liquidation and after referring to the Reports, claims in Para – 7ee and ff as under:-

“

ee. Liquidation values arrived at in the 4 valuation reports are as follows:

Asset/ Valuer	During CIRP		During Liquidation	
	Adroit Valuation	United Surveyors	Mr. Ankit Goel	Mr. Partha P. Chottopadhyay
Land	33,13,79,583	26,92,21,000	39,64,09,415	44,62,38,000
Building	8,99,56,226	6,75,30,000	8,84,18,596 ¹	2,06,19,000
Total (L&B)	42,13,35,809	33,67,51,000	48,48,28,011	46,68,57,000
P&M	14,06,72,000 ²	30,33,11,000 ³	11,83,56,929 ⁴	9,73,46,000 ⁵
Furniture & Fixtures; Office	NIL	NIL	24,46,814	7,84,000

- ¹ Mr. Ankit Goel has taken the partially erected (i) Turbine Generator Structure; (ii) Boiler Tower & (iii) ESP as building and has purportedly valued them on per Sq ft basis.
- ² Adroit has taken only erected portions of (i) Boiler Tower & (ii) ESP towards P&M. No other material lying at site erected or any other partially erected plant has been taken into account or valued. Nor any valuation is done for office furniture & fixtures, viz. ACs, Almirahs etc. nor any valuation is done for computers etc. or any other moveable asset.
- ³ First Valuer depreciated the value by 91% in 3-4 and arrived at a "value" and took 50% of the said value to arrive at the liquidation value. No basis for such huge depreciation was provided. Whereas other valuers provided expected life at 40 years and 60 years. Further, there is absolutely no basis provided in the report. There is no clarity what quantity has been taken into consideration for valuation. Nor any valuation is done for office furniture & fixtures, viz. ACs, Almirahs etc. nor any valuation is done for computers etc. or any other moveable asset.
- ⁴ The valuation was only for the P&M mentioned in the Fixed Assets Register. No material supplied by BHEL was valued.
- ⁵ Valuation was for the P&M mentioned in the Fixed Assets Register and also for the erected portions (assumption is based on the original cost taken for the calculation as that is close to the quantity used for erection).



Equipments, Computers etc				
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- ff. Some of the glaring mistakes and omissions, which were completely missed out by the Liquidator while accepting or rejecting the valuation reports to arrive at the reserve price of the assets for auction are as under:-
- i. The plant and machinery lying un-erected at the project site has not been valued by Adroit, Mr. Ankit Goel and perhaps even by Mr. Partha Pratim.
 - ii. Whether the un-erected plant and machinery was valued by United at all is not clear. If at all it was valued, then approx. what quantity was considered for valuation cannot be found out from the report.
 - iii. Partially erected TG Structure, Boiler Tower and ESP has been considered under Land and Building by Mr. Ankit Goel and has been valued in area, whereas Adroit has valued the same Boiler Tower and ESP under Plant and Machinery. Like un-erected plant and machinery, Adroit has completely left out TG Structure and no valuation is done for the same.
 - iv. Mr. Partha has appeared to have valued the erected structures as part of plant & machinery however, there is a complete mismatch in quantity. Mr. Partha has appeared to have taken less quantity/weight into account as compare to Adroit.
 - v. It is not clear whether the erected structures were valued at all by United Surveyors.

- vi. United Surveyors has without any basis depreciated the value of the plant and machinery by 91% and further considered the liquidation value by considering 50% of the depreciated value. This implies that United Surveyors has considered the useful life of the plant and machinery as 4 years, whereas the other valuers have considered the useful life as 44 years and 60 years respectively. This would imply that the depreciation should be in the range of 5-10% max.
- vii. Depreciated value of the assets has been considered even where the depreciated value is lower than the scrap value. In such case, where the scrap value is higher, the scrap value should have been considered as the liquidation value.
- viii. All reports have ignored the fact that as regards plant and machinery the scrap value was more than the liquidation value arrived at by the respective valuers.”

7. The Appeal referring to the above Chart made by the Appellant refers to various contents of the Valuation Reports to highlight that the different Valuers approached the property available in different manners and putting them in different categories and it was not clear what was valued and what was left out. According to the Appellant, the Joint Plant Committee Report dated 20th June, 2019 (Annexure – 33), which Committee was constituted by Government of India, considered the scrap value of the articles would be more than 325 times of the liquidation value depending on the quantity of assets which have been sold to the Auction Purchaser. Referring to the Annual Reports and Balance Sheets (Annexure -34) of Pavani Construction Works Limited, who was second

bidder in the auction sale, the Appeal points out that the said bidder was not competent even to give security deposit. It refers to Pavani Construction Works Limited as Dummy bidder. The Appeal claims that Respondent No.2 lifted substantial quantities of loose plant and machinery which had been supplied by the Appellant from project site. Appellant filed CA 1483/KB/2019 seeking inventory of what was sold and what was removed, etc. Appellant has filed photographs at Annexure – 35 to show the partly but substantially complete structures and material was on the site which according to the learned Counsel for Appellant, was dismantled and taken away by Respondent No.2.

Per Appeal – The Anomalies/discrepancies in Auction found by Adjudicating Authority

8. The Appeal refers to the Impugned Judgement and Order and referring to the Order, it is claimed that “the Adjudicating Authority found the following anomalies/discrepancies in the auction process:-

- (i) Auction sale without deciding the Appellant’s ‘security interest’ by the liquidator is in violation of Section 52.
- (ii) Liquidator has shown undue unexplained urgency in auction sale.
- (iii) There are inconsistencies and contradictions in valuation reports procured/relied upon by the Liquidator.
- (iv) Undisputedly, case of improper valuation is made out.
- (v) Plant & machinery sold to the auction purchaser is different from what was valued for auction.

- (vi) Assets advertised under the head “land and building” were sold as part of “plant and machinery”.
- (vii) Items sold to the auction purchaser are undervalued.
- (viii) As regards, 2nd bidder Pavani Construction it admitted that it’s a shell company and has no credentials even for depositing the 10% EMD.

however, failed to appreciate that the auction purchaser is the only beneficiary of this unlawful and apparent collusive bidding process still upheld the auction sale and consequent removal of goods by Respondent No.2 holding auction purchaser a *bonafide* purchaser.”

Case of Respondent No.1 - Liquidator

9. We are now making brief reference to the defence put up by the Respondents.

Respondent No.1 – the Liquidator claims that he did receive Form ‘B’ from Appellant during CIRP and Form ‘C’ at the time of liquidation process and the Appellant claimed to be Secured Operational Creditor. The Respondent No.1 claims that as the security interest has not been created by way of transaction, the Appellant could not rely on Sale of Goods Act or Transfer of Property Act and claim to be secured creditor. Respondent No.1 claims that the liquidation process is time bound process and there was no stay to proceed with the auction process and thus, the Liquidator is justifying issue of Sale Certificate even before deciding the claim of the Appellant to be Secured Creditor, for which Order had been passed by the Adjudicating Authority on 10th May, 2019.

He claims that auction process was discussed in Stakeholders Meeting dated 13.03.2019 and 14.05.2019. According to the Liquidator, the Adjudicating Authority did not attribute any motive to the Liquidator. Liquidator claims that E-auction was only for the material lying outside the enclosed portion of BHEL (Para – 19(ix)). When the Adjudicating Authority lifted stay, the Liquidator tread cautiously and when the auction purchaser forcibly removed goods, the Liquidator filed complaint on 19th December, 2019 to Police (Appeal Page – 942). According to the Liquidator, he was bound to accept M/s. Pavani Construction Works Private Limited as bidder for e-auction as it had deposited EMD and was compliant of Section 29A of the Insolvency and Bankruptcy Code, 2016 (Code – in short). It is claimed that the Liquidator acted sincerely and earnestly and had consulted the stakeholders in second and third meeting dated 13th March, 2019 and 14th May, 2019. The figures and sale at reserve price was approved by the stakeholders meeting. According to the Liquidator, the Liquidator took reserve price to sell at higher than the average of two Liquidation Valuation Reports. Reserve price was taken as the average of two CIRP Valuation Reports. Average price of two IBBI (Insolvency and Bankruptcy Board of India) registered valuers came at Rs.14.93 Crores. However, the reserve price of Block (B) was fixed at Rs.23.30 Crores. Liquidator claims that this was fixed pursuant to directions of stakeholders. According to the Respondent No.1, the NIT and LOA given to the Appellant did not provide for any written security nor Appellant entered into any formal contract. The LOA mentioned

about payments secured by Letter of Credit but it was not followed up by Appellant. The same was waived off which is an admitted position. Thus, according to him, there was no security created and the Appellant was not Secured Creditor. Thus, the Liquidator is defending his actions.

Defence of Respondent No.2

10. The Respondent No.2 – auction purchaser claims and argues that it is bona fide purchaser who was successful in the auction sale conducted by way of e-auction on 1st May, 2019 and was issued Sale Certificate on 20th May, 2019 after depositing entire consideration amount of Rs.27.61 Crores (including GST). It is claimed that the Appellant objected belatedly on 3rd June, 2019. Respondent No.2 has argued regarding the claims made by the Appellant regarding lien and charge. The Respondent No.2 is also denying that the articles were undervalued. Respondent No.2 is claiming that it was successful bidder and had right to pick up the material from the project site.

The Findings of Adjudicating Authority

11. It would now be appropriate to refer in short, findings arrived at by the Adjudicating Authority. We are referring to the same as there are many findings which have been arrived at against the Respondents and the findings have not been challenged by them in any Appeal. There are many findings which are held in favour of the Appellant but the Appellant claims that in spite of such findings, relief has not been given to the Appellant.

The Relevant Provisions and findings of Adjudicating Authority

a) Impugned Order refers to the respective cases which were put up and the arguments. Then in Para - 21, the Adjudicating Authority posed the question whether Appellant is a Secured Creditor or Unsecured Operational Creditor. Reference was made to provisions of Sections 45 to 48 of Sale of Goods Act, 1930 and Section 55(4)(b) of Transfer of Property Act, 1882 and Adjudicating Authority deliberated if these provisions could be said to be contrary to IBC or can be read harmoniously. Section 238 of IBC has been looked into. In Paragraphs - 22 to 28, the Adjudicating Authority discussed various provisions of IBC, especially, Section 3(13) which defines “Secured Creditor” and records that Secured Creditor means a Creditor in favour of whom security interest is “created” and laying stress on the word “created”, Section 3(31) has been referred which deals with “security interest” and the fact that the definition provides that it has to be right, title or interest or a claim to property “created in favour of” or “provided for” a Secured Creditor by a “transaction”. Referring to these and other definitions and provisions the Adjudicating Authority found:-

“29) Thus, the word “created” used in Section 3(30) and 3(31) of IBC, 2016 is of paramount importance. The term “create” has not been defined in the IBC, 2016, hence, we have to look for the dictionary meaning of the same. As per *Concise Oxford English Dictionary 12th Edition* this term means “Create”- *v.1bring into existence*”. The term “create” can also be interpreted to mean to make something happen or to develop something. It may also amount to make someone to do something and to provide the condition in which something can happen or exist. It

also means to confer a right or to give rise to right or title or interest. Thus, there must be an action or process of creating meaning thereby that such creation is a result of an action by the parties consciously or explicitly. To explain it further, in our view, a security interest that arise due to operation of law or due to any event other than a deliberate act of creation or provision by the parties will not be covered the under definition of “secured creditor” as well as of “security interest” as given in IBC, 2016.”

b) The Adjudicating Authority then went ahead to observe that IBC provides for interest creating or providing for security interest and observed that these provisions of Sale of Goods Act and Transfer of Property Act relied on by the Appellant were inconsistent or contrary to the specific provisions of IBC and hence not applicable.

Here itself, we may make observations that we would not hold those provisions as inconsistent or contrary but we would hold that the provisions and principles underlying the said provisions can be utilized subject to specific creation or provision of security interest by the parties. In short, if the benefit of lien/charge, etc. is to be taken, the same should be a conscious creation between the Corporate Debtor and the person claiming lien/charge.

The agreement between parties. Held Appellant not a Secured Creditor

c) The Adjudicating Authority then referred to the agreement between the parties by way of NIT and Letter of Award and that the LOA did not have any Clause relating to possessory lien or interest / right in the material supplied and erected. Provision of Letter of Credit Clause had

been deleted subsequently. The Adjudicating Authority in Para – 35 concluded that the Appellant did not have any security interest and consequently could not be considered as Secured Creditor. The Adjudicating Authority then went on to discuss Regulation 21 of IBBI (Liquidation Process) Regulation, 2016 which relates to “proving security interest”. Reference was made to the NIT and Clause 7 of General Conditions of the Contract, between the parties which provided that the “title of ownership of goods to be supplied shall pass on to the owner on despatch Ex-works/F.O.B. Port of shipment.” The Clause provides that “until the work is completed in all respects and the plant is taken over by the owner, the goods shall remain within the custody of the contractor.” Reference was also made to “work” which has been defined in Clause 2.1.38 in the General Conditions of Contract between the parties and “goods” defined in Clause 2.1.19. Adjudicating Authority held in Para – 43 that considering the document of NIT, the goods supplied remained within custody of the Contractor, i.e. the Appellant till the work is completed and plant is taken over by the Corporate Debtor. It found that the plant had not been taken over by the Corporate Debtor as the contract got abandoned in between.

Cancellation of Auction/Restitution issues

d) In Para - 46 of the Impugned Order, Adjudicating Authority took up CA 684 of 2019 which challenged the auction sale. It considered the Chart (see Appeal Para – 7 ee referred supra) put up by the Appellant and its objections to the valuations done. The arguments of the parties

were referred and also discussed the issue raised in CA 792 of 2019 and posed the following questions:-

“66) We have considered the submissions made by the parties and have also perused the material on record of this CA as well as CA(IB)No.792/2019. This application raises following questions:-

- (1) Whether liquidator has complied with the order of the Tribunal dated 10.05.2019 in CA/149/KNB/2019?
- (2) Whether there exists a case for cancellation of auction?
Whether restitution as claimed by the applicant can be made and any mechanism is prescribed for enforcement of such claim in IBC, 2016?”

Adjudicating Authority held Liquidator should have decided claim of lien/charge before issue of Sale Certificate

e) The Adjudicating Authority then went on to discuss the above questions and in Para – 81 observed as follows with regard to question No.1:-

“81) In the present case, the liquidator treated the applicant as unsecured creditor in his provisional order dated 31.12.2018 against which an appeal in C.A.(IB) No.149/KB/2019 had been filed and final order was passed on 10.05.2019 whereby the provisional order of the liquidator dated 31.12.2018 had been set aside and the liquidator was directed to decide the claims made by applicant afresh. Thus, having regard to the sequence of events, the claim of lien/charge had to be decided prior to issue of sale certificate. On this basis, it can safely be concluded that the action of the liquidator in issuing sale certificate before deciding the claim of security interest of appellant is not correct because on that

date there was a possibility that there could be a security interest of the applicant and, if that would have become a reality, unless security interest was relinquished under section 52, such asset could not have formed part of liquidation estate at the very outset. We further hold that order of Tribunal has not been understood by the liquidator in its true spirit.”

Adjudicating Authority held – Inconsistencies in Sale of Plant and Machinery; confusion as to what is sold and what is not; Improper Valuation, etc.

f) With regard to the question No.2 as raised in Para – 66, the Adjudicating Authority referred to the facts brought before it by the Appellant and observed that the Appellant was aggrieved by the functioning and approach of the Liquidator and had also doubted the integrity of the Liquidator. The Adjudicating Authority deliberated (in Para – 84) as to how the grievance of the Appellant could be addressed within framework of IBC. Adjudicating Authority went ahead to discuss other aspects like valuation (Para – 86); inconsistencies in sale of plant and machinery (Para – 87) and the fact that there was confusion as regards what is sold and what is not. Adjudicating Authority found that the valuation had been challenged on all parameters and held in Para - 86:-

“We find that there exist inconsistencies and contradictions in various documents produced before us, hence, a case of improper valuation is made out.”

[Emphasis supplied]

It was further held:-

- “87) We also find that inconsistencies exist in the sale of plant and machinery. It is noted that assets were divided into four blocks. The auction has been done of plant and machinery and furniture and fixtures. Some of the plant and machinery as advertised in auction notice were classified under the head “land and building” in the valuation reports. However, in the sale certificate these appear to have been sold as plant and machinery, although no bids were received for land and buildings. It is also observed that the steel structure on the land foundation has been sold on per sq. meter Civil structure basis as against being sold as scrap/plant and machinery.
- 88) We also find that section 25(2)(h) of IBC, 2016 prescribes norms for preparation of information memorandum and evaluation matrix having regard to the complexities involved in a particular case. Though, such requirement is not applicable in the course of liquidation process, unless corporate debtor or its business is being disposed of on going concern basis. Having said so, this does not mean that disposal of assets can be done without having any intelligent criteria being applied for eligibility of bidders. In the present case, as stated by the liquidator, the only criteria which has been fixed was that deposit of 10% of amount as earnest money deposit (EMD). In our view, when sale of such a huge plant at very large site is involved, the background of the bidder is very important and their past experience of participation in such kind of auction and completing the auction transaction in a smooth manner is of utmost importance. However, in the present case, this criteria has not been appeared to have been followed. The financials of the second bidder do not support the credential even for depositing of 10% EMD.

- 89) There appears to be claims and counter claims as regard to what has been valued and what has not been valued. There also exist dispute as to what has been sold or what has not been sold. There is also a claim by the applicant that goods belonging to the applicant had been wrongly lifted by the auction purchaser. However, it has been refuted by auction purchaser as well as the liquidator.”

[Emphasis supplied]

Legal Corollary to findings – denied by Adjudicating Authority

g) The Adjudicating Authority after making observations as above, in Para – 90 referred to the claim of Appellant to cancel the auction and that Appellant sought restitution, and that the Appellant had claimed return of goods. It was then observed :-

“Although having regard to the above discussion, this should be an outcome but in the facts and circumstances of the case and applicable legal position, the moot question is can it really be done.”

Posing such question, the Adjudicating Authority went on to note that the contract was abandoned and machinery erected remained in open for almost 7 years; the plant and machinery had already been dismantled to substantial extent and cannot be got back to the form in which it was supplied or erected and that it was physically impossible to return the plant and machinery and thus, went on to observe that the prayer of Appellant cannot be given effect to. It also observed that as the Appellant was Unsecured Creditor, the higher sale proceeds, if any,

would not go to the Appellant as the claim of Secured Creditors would be met first. It also observed that granting the prayer would result in prolonged litigation which was not justified. It went on to observe that the Appellant had waived the benefit of Letter of Credit and had on earlier occasion, not sought stay to the auction and that the Appellant had failed to seek relief in time. It also observed that the Respondent No.2 had paid all the consideration and (without recording a finding as such observed that) Respondent No.2 was bona fide purchaser. It went on to observe that the settled judicial principle was that a bona fide purchaser cannot be made to suffer. For such reasons, Adjudicating Authority concluded that auction sale could not be cancelled.

h) The Adjudicating Authority then went on to discuss the question of Restitution and made observations that disciplinary proceedings against Resolution Professional can be taken only by IBBI and that there was specific mechanism in Section 217 and 218 of IBC. Reference was made to Section 220 also which provides for determination of unlawful gain earned by a person and disgorgement and observed that there are specific provisions in this regard and the proper forum to decide the question was IBBI and not the Adjudicating Authority and (thus, expressing helplessness), Adjudicating Authority observed that the claim of Appellant for restitution was required to be rejected.

The Operative Order of Adjudicating Authority

Adjudicating Authority then went on to consider what should be done in the matter and in Para – 98 observed and directed:-

“98) Now, the question arise as to what is to be done in the present facts and circumstances with regard to the lifting of goods/materials, plant and equipment etc. which have been auctioned and sale certificate has been issued and not yet lifted. As sated earlier, it has been alleged that goods belonging to the applicant has also been lifted whereas the same has been denied by the liquidator. Hence, to avoid any dispute in future the liquidator is directed to allow the lifting of goods after giving due notice of the same to the applicant who shall authorise its representative to oversee the lifting of material. The Auction purchaser is also directed to lift only that material which is cleared by applicant henceforth. The applicant is directed to accord it's approval without any delay. In any case, if approval is not done by the applicant of any such request within two days from the date of request made, the approval shall be deemed to have been granted.”

With such findings and observations, the Impugned Order came to be passed disposing of the CAs filed before it by the Appellant.

Such final operative Order created further problems and Appeal Para 7-11 claims that Respondent No.2 commenced lifting material without approval of Appellant or Liquidator (and another report to Police dated 19.12.2019 by Liquidator got filed).

The Question before us and Reasons

12. The question before us is that considering the various facts and findings recorded by the Adjudicating Authority whether the result of the litigation as recorded by the Adjudicating Authority is correct. We proceed to consider this, and other aspects.

The Auction in dispute

13. We first proceed to consider the auction which has taken place.

The Sale Notice Published

a) When CA 149/2019 against earlier Order of Liquidator rejecting claim of Secured Creditor, was pending before Adjudicating Authority, the Liquidator issued Sale Notice (Annexure – 9) dated 10th April, 2019 which was published in newspapers as can be seen from Annexure – 4 filed by the Liquidator as Reply (Diary No.17759). In this Sale Notice, which was published on 11th April, 2019 and 12th April, 2019, what appears is that the first two pages of Annexure – 9 were put in newspaper. The Sale Notice required the bidders to refer the websites as stated in the Public Notice for details of assets, online e-auction bid form, etc. The Appellant has filed the complete Sale Notice as Pages – 300 - 353. It appears that for public information, such Sale Notice was made available. In this Sale Notice, the properties to be e-auctioned were divided into four blocks of block 'A' to 'D' as under:-

“

				INR.
Asset	Block	Reserve Price	EMD Amount	Incremental Value
Land & building at Village Deori, Dumarpali, Tehsil Raigarh, Chhattisgarh. Total 736.23 Acre land including 637.21 Acre Free hold land and 99.02 Acre Leasehold Land.	A	80.96 Crore	8.96 Crore	10 Lacs
Plant & Machinery at plant situated at Raigarh, Chhattisgarh	B	23.30 Crore	2.33 Crore	5 Lacs
Furniture & Fixtures, Office Equipment, Computers at Raigarh Chhattisgarh	C	12 Lacs	1.20 Lacs	5,000
Furniture & Fixtures, Office Equipment, Computers at Kolkata	D	6 Lacs	60,000	5,000

”

At Page – 306 (Annexure – 9), it is stated that the Asset Information Sheet is Annexure – V, Para – C(3) of Annexure – 9 (Page – 309) states that the e-auction would be conducted in the manner specified in this auction process information document. Now, Annexure – V of the Sale Notice published (Annexure – 9 at Page - 340) gives particulars of the various movable and immovable properties of Block ‘A’ to ‘D’. Relevant for the present discussion are portions ‘A’ and ‘B’ which read as follows:-

ANNEXURE VBLOCK A:

Unit I: Plant Situated at Village Deori & Dumrpali, Tehsil & Distt- Raigarh, Chhattisgarh
Land & Building along with Plant & Machinery Village Deori & Dumrpali, Tehsil & Distt- Raigarh, Chhattisgarh

The unit comprises of total Industrial Land measuring "736.20 acres" which includes 99.02 acre leasehold land and Building located at Village Deori & Dumrpali, Tehsil & Distt- Raigarh, Chhattisgarh

Description of land

Sl. No.	Description	Total Land in Acres
A	Land	
	Industrial Land with Village Deori & Dumrpali, R.N.M Kirodimal Nagar P.H. No.-4 Tehsil & Distt- Raigarh, Chhattisgarh • 637.21 Acre of freehold land • 99.02 Acre of Leasehold Land	736.23

Description of Building

Sn No.	Name of Structure	Year of Construction	Total Area in Sq.mtr
1.	Turbine Generator Structure	2015	5000
2.	Boiler Tower	2015	3000
3.	ESP Electrostatic Precipitator	2015	9600
4.	Office	2015	825
5.	Store	2015	1000
6.	Canteen	2015	345
7.	Switchgear Room	2015	36
8.	First Aid Room	2015	144

BLOCK B:Description of Plant & Machinery

Plant & Machinery	Year of Acquisition
20KVA DG SET	2011
TOTAL STATION INSTRUMENT	2010
CHAIN SAW TREE CUTTER	2011

GPS & AUTO LEVEL INSTRUMENT	2010
GPS & AUTO LEVEL INSTRUMENT	2010
250 KVA DG SET	2011
250 KVA DG SET	2011
4HP DIESEL PUMP	2011
FLY ASH BRICK MACHINE	2011
FROGS FOR BRICK MACHINE	2011
125 KVA DG SET	2011
ALUMINIUM LADDER	2011
FIRE EXTINGUISHER	2011
FIRE EXTINGUISHER	2011
FIRE EXTINGUISHER	2011
PANEL BOARD	2011
MONOBLOCK PUMP	2011
SUMERSIBLE PUMP	2011
AIR BLOWER	2011
FIRE EXTINGUISHER	2011
PANEL BOARD	2011
PANEL BOARD	2011
PANEL BOARD for 125kv dg set	2011
GPS--E1/ex/VISTA HCS	2011
FIRE EXTINGUISHER CO2 - 4.5 KG	2012
FIRE EXTINGUISHER DCP - 10KG	2012
FIRE EXTINGUISHER FOAM TYPE - 9 LTR	2012
INPLANT DISTRIBUTION SYSTEM	2012
TRAMMISSION LINE - 33KV	2012
POWER SYSTEM BRICK PLANT	2012
WATER SYSTEM BRICK PLANT	2012
SUMERSIBLE PUMP	2012
AUTO LEVEL INSTRUMENT & STAND	2012
MINI PRISM SET WITH STAND	2012
Megger-(Sweden) Insulation Tester	2012
Geological Instrument	2012
Water Level Indicator	2013
Water Meter	2012
INPLANT DISTRIBUTION SYSTEM	2013
Lighting Tower 100 kva	2016
Prizm and Umbrella for Total Station	2013
Water Meter	2013
MANUAL OPERATED SIRON	2016
BATTERY12V 65AH	2016
100T Capacity Weigh Bridge	2016
Monoblock Pump with accessories	2016

In this Sale Notice, Block 'C' relates to Furniture, Fixtures, Office Equipments and Computers at Raigarh, Chhattisgarh location. It is a long list of various articles including computers and air conditioners. Block 'D' relates to Furniture, Fixtures, Office Equipments and Computers at Kolkata location.

The E-Auction Process Information Document

b) With such Sale Notice in public domain, reference now needs to be made to another document (Annexure - 10 – Page 354) the title of which is “E-auction Process Information Document” (Information Document – in short). This document on the second page has “Notes” and Note 1 reads that this document is issued “only for the interested bidders”. Thus, with Annexure – 9 being the Sale Notice in public domain, the interested bidders would get this information document. Now we proceed to see what this document says. With other things being similar, this document in Annexure – V has material changes when compared with Annexure – V of Sale Notice. We reproduce portion relating to Block 'A' and 'B' of Annexure – V of Annexure 10 which is as under:-

ANNEXURE VBLOCK A:

Unit I: Plant Situated at Village Deori & Dumrpali, Tehsil & Distt- Raigarh, Chhattisgarh
Land & Building along with Plant & Machinery Village Deori & Dumrpali, Tehsil & Distt- Raigarh,
Chhattisgarh

The unit comprises of total Industrial Land measuring "736.20 acres" which includes 99.02 acre leasehold land and Building located at Village Deori & Dumrpali, Tehsil & Distt- Raigarh, Chhattisgarh

Description of land

Sl. No.	Description	Total Land in Acres
A	Land	
	Industrial Land with Village Deori & Dumrpali, R.N.M Kirodimal Nagar P.H. No.-4 Tehsil & Distt- Raigarh, Chhattisgarh <ul style="list-style-type: none"> • 637.21 Acre of freehold land • 99.02 Acre of Leasehold Land 	736.23

Description of Building

Sn No.	Name of Structure	Year of Construction	Total Area in Sq.mtr
1.	Office	2015	825
2.	Store	2015	1000
3.	Canteen	2015	345
4.	Switchgear Room	2015	96
5.	First Aid Room	2015	144

BLOCK B:Description of Plant & Machinery

Plant & Machinery	Year of Acquisition
20KVA DG SET	2011
Turbine Generator Structure	2015
Boiler Tower	2015..
ESP Electrostatic Precipitator	2015
Transformer 500 KVA	
Deminerlisation Water Plant	

TRANSFORMER 1250 KVA	
RING MAIN UNIT	2011
2 TRANSFORMERS 5000 KVA	
11 KV PANELS	
CONTROL & RELAY PANELS	
IRON FOUNDATIONS	
TOTAL STATION INSTRUMENT	2010
CHAIN SAW TREE CUTTER	2011
GPS & AUTO LEVEL INSTRUMENT	2010
GPS & AUTO LEVEL INSTRUMENT	2010
250 KVA DG SET	2011
250 KVA DG SET	2011
4HP DIESEL PUMP	2011
FLY ASH BRICK MACHINE	2011
FROGS FOR BRICK MACHINE	2011
125 KVA DG SET	2011
ALUMINIUM LADDER	2011
FIRE EXTINGUISHER	2011
FIRE EXTINGUISHER	2011
FIRE EXTINGUISHER	2011
PANEL BOARD	2011
MONOBLOCK PUMP	2011
SUMERSIBLE PUMP	2011
AIR BLOWER	2011
FIRE EXTINGUISHER	2011
PANEL BOARD	2011
PANEL BOARD	2011
PANEL BOARD for 125kv dg set	2011
GPS--EtrexVISTA HCS	2011
FIRE EXTINGUISHER CO2 - 4.5 KG	2012
FIRE EXTINGUISHER DCP - 10KG	2012
FIRE EXTINGUISHER FOAM TYPE + 9 LTR	2012
INPLANT DISTRIBUTION SYSTEM	2012
TRAMMISSION LINE - 33KV	2012
POWER SYSTEM BRICK PLANT	2012
WATER SYSTEM BRICK PLANT	2012
SUMERSIBLE PUMP	2012
AUTO LEVEL INSTRUMENT & STAND	2012
MINI PRISM SET WITH STAND	2012
Megger-(Sweden) Insulation Tester	2012
Geological Instrument	2012
Water Level Indicator	2013
Water Meter	2012
INPLANT DISTRIBUTION SYSTEM	2013
Lighting Tower 100 kva	2016

Prizm and Umbrella for Total Station	2013
Water Meter	2013
MANUAL OPERATED SIRON	2016
BATTERY12V 6SAH	2016
100T Capacity Weigh Bridge	2016
Monoblock Pump with accessories	2016

BLOCK C:

Furniture Fixture , Office Equipment & Computers at Raigarh, Chhattisgarh Location

Comparing Annexure – V of Sale Notice with Annexure – V of Information Document

If both the above Annexure – V of Annexure – 9 and Annexure - 10 are compared, the major change which can be noticed, is that in the “Description of Building” in Sale Notice (the structures embedded in ground as photographs on record show) (1) Turbine Generator Structure, (2) Boiler Tower and (3) ESP Electrostatic Precipitator – were included as “Buildings” while in this Information Document, these properties were shifted from the “Description of Building” category to category of “Plant and Machinery” and removed from Block ‘A’ and added into Block ‘B’. If the two Annexure – V are seen, in Sale Notice, Annexure – V Block ‘B’ had 46 items which even after the above change, did not convert into 49 but became 57 items in the information document. How? Keep searching.

In spite of such difference, in Information Document, the Reserve Price still remained the same for Block ‘B’ as Rs.23.30 Crores.

Certificate of Sale issued not matching with Public Notice – Fundamental Defect

c) Now, if Annexure – 13 (Page 423) – the Certificate of Sale dated 20.05.2019 is seen, Schedule – 1 of the Certificate (Page – 427) shows that above 3 installations which were part of building in Sale Notice, and other items had been sold off to the Respondent No.2 as “Plant and Machinery”.

14. We have seen the Reply filed by Respondent No.1 (Diary No.17759). The Liquidator appears to have taken a stand that in stakeholders meeting, reserve price had been settled. For this, the Liquidator relies on the stakeholders meeting dated 13th March, 2019. The Reply at Page – 64 has Minutes of that meeting. It can be seen that in this meeting, the Liquidator referred to valuations received in CIRP from Adroit and United Surveyors and the valuation which was conducted by Punjab National Bank (PNB – in short) pre-CIRP, on 22.12.2017. He referred to the Valuers appointed at the time of liquidation and recorded in the Minutes that the Valuers had completed physical verification of assets located at Raigarh, Chhattisgarh, Kolkata and Orissa and had provided “Draft Reports of valuation” wherein “tentative values of assets were provided”. He compared those tentative values during valuation done in CIRP and valuation done by PBN before CIRP and the Minutes state that the stakeholders suggested to fix reserve price of land on the basis of value arrived from valuation conducted by Punjab National Bank and reserve price of plant and machinery would be based on average realisable value

arrived during CIRP. Thus, in the Minutes, it was recorded that the “Reserve Price for Land and Building” would be Rs.80.96 Crores and Reserve Price for “Plant and Machinery” would be Rs.23.30 Crores. The Minutes do not appear to be showing that any details of items regarding “Plant and Machinery” were disclosed. It is not the case that Stakeholders agreed to shifting of items from Category of “Building” to “Plant and Machinery” after issue of Sale Notice (Annexure – 9). The Liquidator has not argued nor explained before us as to why there is such major difference between Annexure – V of Sale Notice compared with Annexure – V of the information document. Clearly what was sold as “Plant and Machinery” was different and much more than what was advertised in the Sale Notice. How can Reserve Price for “Plant and Machinery” remain same even after embedded huge “structures” were shifted from Block ‘A’ to Block ‘B’ in that category? They could not have and should not have been shifted. What was later taken away by the Respondent No.2 was shocking and still worst. We will discuss that after sometime. Here, we record that there is material difference between what was advertised in Public Notice and what was put in the information document and actually passed on by way of Sale Certificate. The above factors in our view are themselves sufficient to set aside such auction which must be said to be vitiated as there is fundamental defect in putting up the articles for auction.

Liquidator failed to prescribe pre-bid Qualifications. – Defective Auction process

15. Apart from above, although it is claimed to be Auction, it could hardly be said to be an Auction as the Adjudicating Authority considering the Annual Returns of the second bidder – M/s. Pavani Construction Works Private Limited (whose Annual Reports have been filed at Annexure – 34) observed in Para – 88 of the Impugned Order that the financials of the second bidder did not support the credentials even for depositing of 10% EMD. The Respondents have not filed Appeal to challenge such finding of Adjudicating Authority. At this stage, we refer to the observations made by the Adjudicating Authority in Para – 88 of the Impugned Order (reproduced supra), although Adjudicating Authority observed that Section 25(2)(h) of IBC relating to preparation of Information Memorandum and valuation matrix is not applicable to liquidation process and expressed that this would not mean that disposal of assets can be done without having any intelligent criteria being applied for eligibility of bidders. We find that attention of Adjudicating Authority was not drawn to Schedule – 1 of Liquidation Process Regulations which relates to mode of sale and Sub-Clause (3) requires the liquidator to prepare terms and conditions of sale, including reserve price, earnest money deposited “as well as pre-bid qualifications” if any. Thus, the Regulations required the Liquidator to prescribe pre-bid qualifications. This does not appear to have been done in spite of value and volume of material and thus, with practically one bidder, the auction appears to

have been completed of plant and machinery which was in Block 'B'. When the credentials of second bidder did not support it to even deposit 10% EMD (which is returnable), even if it somehow on its own or on behest of someone deposits the EMD, it does not make it genuine bidder. Liquidator failed to prescribe pre-bid qualifications as per Regulations to secure real competition and failed in his duty. This is yet another factor hitting at the auction process which has been conducted. It was defective Auction process with no genuine bidding.

Improper Valuations relied on

16. Coming to the valuation which was done, we have seen the four Valuation Reports filed by the Appellant at Annexures – 29 to 32 on the basis of which the Appellant prepared Chart and added comments in Para – 7 'ee' and 'ff' of the Appeal which we have reproduced. The criticism is not baseless.

17. Going through the Valuation Reports, although these are documents by experts, it appears that the Valuers treated different items differently. Someone picked/left some items in building category and someone picked/left the same in plant and machinery category and vice versa. No clear instructions appear to have been given to Valuers by Liquidator (who was earlier RP even in CIRP) with regard to particulars and categories of the assets. The Liquidator appointed Valuers during liquidation but gave up on them midway after taking tentative valuation and jumped to the valuation got done in CIRP. The higher figures of plant

and machinery recorded in the valuation done by Punjab National Bank with regard to plant and machinery was not adopted although for land, that Valuation Report was relied on. According to the Appellant in CIRP, the Articles included in Block 'C' relating to Furniture, Fixtures, Office Equipment, etc. were not valued but such big list of articles was given reserve price of Rs.12 Lakhs in the Public Notice and was put up for sale as scrap. What was the basis for such figure is also not clear. Section 18(1)(a) requires IRP to collect all information relating to the assets of Corporate Debtor. Section 18(1)(f) requires IRP to take control and custody of any asset over which Corporate Debtor has ownership rights. Section 36 of IBC shows how Liquidation Estate is formed. There could not be confusion relating to particulars of the assets. It does appear that there was confusion in Valuation Reports even for categorisation of items of assets in different Blocks and thus, the Reports were improper and not comparable to arrive at liquidation value or to fix average for "Reserve Price".

Conduct of Liquidator

18. In this context, we are taking further note of the conduct of the Liquidator.

The Liquidator as RP had received claim of the Appellant in Form 'B' (Annexure – 4) on 13th January, 2018 where the Appellant claimed unpaid sellers' lien over material supplied lying/stored at VPL's Project Site and statutory charge on goods supplied that have been erected and

operational dues. We are not told what was done of this Form 'B' during CIRP. At liquidation stage, Liquidator received Form 'C' (Annexure – 5) dated 9.11.2018 with similar claims and operational dues. On 31st December, 2018, Liquidator passed Order (Annexure – 9) provisionally admitting claim of Appellant at Rs.290,01,85,395/- out of Rs.664,98,37,221/- and by putting Appellant in order of priority under Section 53(1)(f) of IBC, he rejected the claim of lien/charge or that the Appellant was a secured creditor. Against this, the Appellant filed CA 149 of 2019 to Adjudicating Authority on 17th January, 2019. It was heard on 11th April, 2019 when it appears that fact of already issuing Public Notice of sale was hidden from Appellant and Adjudicating Authority. (Now, of course, Liquidator is arguing that Appellant did not timely seek stay to the Auction.) On 10th May, 2019, Adjudicating Authority by Order (Annexure – 12) set aside the Order of Liquidator directing him to pass reasoned Order. Thus, the claim of Appellant at that point of time was still open for decision by Respondent No.1, a quasi judicial authority whether or not the Appellant was Secured Creditor entitled to benefits under Section 52 of IBC. In spite of this, Liquidator hurriedly, for no justifiable reasons, went ahead to issue Sale Certificate (Annexure – 13) to Respondent No.2 on 20th May, 2019 without deciding claim of the Appellant, making his subsequent action of hearing the Appellant on 29th May, 2019 (as per his e-mail dated 27th May, 2019 – Annexure -14), a mere formality. He again rejected the claim of the Appellant to be secured Creditor for the material and the erected structures. Having already sold

off the material and structures, he could not have taken any other decision on this count although for operational dues, now he admitted the claim (vide Annexure - 16 - Order dated 3rd June, 2019) of Rs.5,72,19,46,434/- out of Rs.664,98,37,221/-, a substantial increase when compared with his earlier Order (Annexure - 8) dated 31st December, 2018. The Liquidator then appears to have sat down to convince the Adjudicating Authority that he did not defy its Order dated 10th May, 2019 (Annexure - 12) and was only required to record reasons on remand. Because of this, the Adjudicating Authority made observations as in Para - 81 of the Impugned Order (referred supra). He did change the figures of operational dues substantially but he had closed the doors on himself regarding claim of Secured Creditor by his own conduct of hurriedly issuing Sale Certificate of the same material. It is immaterial here as to what were/are the merits of lien/charge or being Secured Creditor claimed by the Appellant. Material is that the Liquidator - a semi-judicial statutory authority behaved in a manner one would not expect such authority to behave.

Incidents post issue of Sale Certificate

19. Now we proceed to consider the manner in which further incidents took place after the Respondent No.1 issued Sale Certificate dated 20.05.2019 to the Respondent No.2. On record, we have Notice dated 28th May, 2019 (Annexure - 14 - Page 429 @ 430) issued by the Appellant to both the Respondents sent by e-mail and courier reminding of its pending claims and details of the developments in litigation and how

unknown persons claiming to be representatives of Respondent No.2 had come to take away plant and machinery from project site claiming that there was Sale Certificate, Schedule of which shows it included Plant and Machinery over which lien/charge is claimed; and that large quantity of Plant and Machinery is removed by them. Appellant claims to have then filed CA 684 of 2019 (Annexure – 15) against the auction on 3rd June, 2019.

No proper system put in place by Liquidator

On 12th June, 2019, by Order (Annexure - 17 – Page 463), Adjudicating Authority directed that movement of goods, if any, would be subject to the result of the Application. In spite of this, it does not appear that Respondent No.1 put in place any mechanism for handover/movement of goods and material from the concerned project site. Appellant sent Notice dated 12.07.2019 (Annexure - 20 – Page 522), inter alia, requesting the Liquidator to have process of identifying sequestering the plant and machinery which are lying un-erected within BHEL's enclosure or which have been erected outside or are lying un-erected outside BHEL's enclosure. Appellant reminded Respondent No.1 of his fiduciary responsibility to ensure protection of assets against which lien and charge was claimed. Appellant had sent yet another Notice to both Respondents on 26.07.2019 also (Annexure – 21). Respondent No.1 appears to have sent the Reply (Annexure - 23 – Page 537) on 4th August, 2019 claiming that e-auction was conducted only for limited material

lying outside the enclosed portion of the BHEL at the site and that the Sale Notice did not include:

- 1) material lying inside the BHEL enclosure,
- 2) all the material for which valuation was not done,
- 3) water pipes (partly underground and partly outside, running approximately 36 kilometres),
- 4) Transmission Towers duly erected at various locations at the site.

In Para – 7 of above Reply Notice, Respondent No.1 stated that unauthorised lifting of material from the site is illegal and strict action shall be taken against person/entity involved in such activity. It was mentioned that “In case any of the material is unauthorizedly lifted from the site, it is the duty of all to report such lifting to the concerned authorities as well as to the undersigned.” Thus he left it to others to report if unauthorized lifting is there. On 7th August, 2019, this Tribunal had in Company Appeal (AT) (Ins) No.802 of 2019 (Annexure - 22) directed the Adjudicating Authority to decide the Appeal of Appellant on an early date and in the meantime, Liquidator was directed not to allow any person to remove the assets in question even if it is sold but if not yet removed. On that date of 07.08.2019, Counsel for Respondent No.1 kept opposing the Appellant, not telling us that on 05.08.2019, his representative “visited the project site and found” Respondent No.2 had

already removed items worth Rs.20 Crores illegally and Respondent No.1 had filed Police Complaint dated 06.08.2019 (see Annexure - 7 - Diary No.17759). So, after leaving the project site open for Respondent No.2 (since Sale Certificate dated 20.05.2019), the Representative visits on 05.08.2019 which means none responsible was posted. Else before wrong/illegal lifting of such magnitude, Respondent No.1 would have known.

Respondent No.1 lacked information and control

The Respondent No.1 has filed Reply (Diary No.17759) and at Para – 17 of Primary Objections, it is mentioned, “that it is unclear as to how much material was actually delivered at the site of the Corporate Debtor and only the key managerial personnel of the Corporate Debtor are privy to the same details.” In spite of provisions like Section 18(1)(a) and (f) requiring Interim Resolution Professional to collect all information relating to the assets, etc. of the Corporate Debtor and take control and custody of assets for which the Corporate Debtor has ownership rights and provisions like Section 35(1)(b) of IBC providing that the Liquidator shall take into his custody or control all the assets, property, etc. of the Corporate Debtor, we have the present Respondent No.1 stating that it was unclear as to how much material was actually delivered at the site of the Corporate Debtor. What prevented him from taking stock as per records and physical availability? In Reply (Annexure – 23), Respondent No.1 claimed that at the site, there was BHEL enclosure, where according to him, illegally and unauthorizedly Guards had been posted by BHEL

and that material lying in that enclosure was not part of Sale Notice. But, in the Reply before us in Para – 18, he has claimed that the possession of the goods allegedly supplied by the Appellant was not with the Appellant as the goods supplied were duly entered into the Fixed Asset Register of Corporate Debtor. He does not appear taking firm stands.

20. Appellant has filed Annexure – 2 as true copy of Notice inviting tender. At Appeal Page – 149 of this Annexure which is part of “General Conditions of Contract”, the Condition - 7 states as follows:-

“in the case of divisible contract, the title of ownership of goods to be supplied shall pass on to the owner on despatch Ex-works/F.O.B. Port of shipment. However, until the work is completed in all respects and the plant is taken over by the owner, the goods shall remain within the custody of the contractor”.

It appears that between the parties, there was only this document of NIT and Annexure - 3 – Letter of Award. If the above condition which is Condition – 7 is seen, the title of ownership of goods would pass to the Corporate Debtor on despatch Ex-works/F.O.B. Port of shipment. The custody may have remained with the Appellant as the works did not get completed and the plant was not commissioned. Under the provisions, at CIRP stage itself Respondent No.1, (then as Resolution Professional) was expected to decide Form B – dated 13.01.2018 and question of lien/charge, which if rejected he should have taken possession of material, ownership in which had been passed. When the ownership is of

the Corporate Debtor, it was responsibility of the Respondent No.1 – Liquidator to take stock and possession of all the material. He does not seem to have done anything with the dispute of lien/charge during CIRP when Form 'B' was filed. This being so, Respondent No.1 cannot be heard claiming that it was not clear how much material was actually delivered at the site of Corporate Debtor.

21. The Appellant has claimed in the Appeal (Para 7 - w) that Respondent No.2 forcibly removed material, which was not part of Certificate of Sale including goods inside BHEL's enclosure as well as lying outside, at other locations.

Incidents post Impugned Order

22. We have already reproduced the operative part of the Impugned Order dated 13.12.2019 (Para – 98) which led to further inappropriate actions at the spot. Annexure - 36 (colly) – Pages 920 – 969 includes correspondence exchanged between the Appellant and Respondents between 16.12.2019 and 26.12.2019. Going through the material, it appears that Respondent No.2 in the face of resistance from Appellant and Respondent No.2, went ahead to remove further goods/material from the spot. We make reference to some of the correspondence.

There is e-mail dated 16th December, 2019 (Page – 920) sent by the Liquidator to Appellant to depute authorized representative. On same day evening at 19.13 hours, Respondent No.2 appears to have sent e-mail (Page – 922) that Respondent No.2 has already mobilized their

transportation and lifting personnel at the site and await the personnel of BHEL and Liquidator at the site. It shows the hurry of Respondent No.2. The Appellant by e-mail dated 17th December, 2019 sent to Liquidator sought Notice specifying the exact material proposed to be lifted. Another Notice was sent to Respondent No.2 also.

Liquidator was asking Respondent No.2 to state what items picked up?? None responsible on spot.

Respondent No.1 sent e-mail dated 18th December, 2019 at 16.49 hours (Page – 932) to NCLT and parties which mentions that the Liquidator had informed the auction purchaser from whom “we also sought list of items picked up prior to stay and list of items to be picked up from the buyer”. The e-mail also mentions that auction purchaser had illegally and forcefully entered the premises of Corporate Debtor with the help of local Police and is trying to lift material and that in spite of requests, the auction purchaser (Respondent No.2) is not listening; and that the local Police scared the guards of the Liquidator. So, Respondent No.1 had only some Guards on spot. It appears that on 19.12.2019, the Liquidator filed complaint to SHO, Bhupdevpur, District Raigarh with regard to such highhanded actions of Respondent No.2. Copy of the complaint is at Page – 942 of the Appeal. The developments as appearing from the record and the correspondence which we have noticed, makes it clear that on project site, there were only Guards posted by the Respondent No.1 and the Appellant who appears to have been on the project site since before due to the contract, was holding on to what is

referred as “BHEL enclosure” having its own Guards. Even after his first complaint to Police dated 06.08.2019 of illegal lifting to the extent of Rs.20 Crores, it does not appear that Respondent No.1 had posted any responsible person on site or laid down any procedure or ensured that, on spot the auction purchaser is handed over only due articles which were part of Sale Certificate after the Impugned Order. Conspectus of above discussion and record is that it appears that Respondent No.2 had a freehand and freewill at the project site to pick up and take away goods and materials it wanted, even against resistance by some Guards (who would naturally not know what is, or what is not part of the Sale Certificate, under dispute).

Respondent No.2 picked up articles worth Rs.20 Crores which were not sold? – No system in place

23. What we have just mentioned above gets evident from yet another document of Respondent No.1 himself. As mentioned, Respondent No.1 had on 6th August, 2019 filed a complaint [Annexure – 7 of his Reply (Diary No.17759)]. This complaint was also to SHO, Bhupdevpur, District Raigarh, Chhattisgarh in which initially the Respondent No.1 referred to liquidation proceedings and his selling of plant and machinery “and other assets” (?) of the Corporate Debtor through e-auction and then it is mentioned:-

“Thereafter, the purchaser started dismantling and lifting of the material sold to them from the project site of the VISA Power Limited. However, on 05.08.2019 our representative visited the project site and found that the purchaser has also dismantled

and removed the following items, having value of approx. Rs.20 crores, without the permission of the Liquidator from the project site which were not sold to them and the same were not included in the aforesaid list of plant & machinery provided to the purchaser.

1. Transmission Towers (Total 26 nos.) - about 19 towers are missing
2. Water Pipe Line (Length of approx. 35 KM) about 10 km of pipeline is missing.

Above mentioned movable properties has been removed by the purchaser without any authority and without the consent of the Liquidator. This is a case of illegal removal of above items and the purchaser has committed theft.

Based on the facts and circumstances stated to you, I would request you to lodge an FIR against the incident of theft and illegal removal of above mentioned assets from the premises of VISA Power Limited.”

The above contents are shocking. Record shows that soon after the Certificate of Sale dated 20th May, 2019 was issued, the Appellant was raising grievances of what all was being lifted from the spot and Respondent No.1 went on defending his actions before the Adjudicating Authority, and even in Appeal before us. The above complaint sent to Police shows that after the e-auction, the purchaser started dismantling and lifting even material not sold to them from the spot and project site of Corporate Debtor. It is stated in the Complaint that on 5th August, 2019, Representative of the Respondent No.1 “visited project site” and found that the purchaser had dismantled and removed transmission

towers and water pipe line having value of approximately Rs.20 Crores (?) without the permission of the Liquidator (?) and it was not sold to them. It is surprising that when so much of material was at project site and some was to be allowed to be lifted (and Appellant was making grievances), no system was put into place for identifying, segregating and permitting, lifting of goods/material. It is shocking to see that an auction purchaser who was issued Certificate of Sale (Annexure - 13) with description of Asset Schedule - 1 referring to plant and machinery and Block 'B' for Rs.23.40 Crores, lifts further material worth Rs.20 Crores from the spot and the Liquidator does not come to know about it in good time? Definitely time must have been consumed for removing of transmission towers and laid water pipe lines. This only indicates and we repeat that there was no system put in place for protecting and managing the huge and valuable property of the Corporate Debtor which was there on the project site. When Liquidator sends an e-mail (see Page - 932) stating that it has "sought list of items already picked up", it shows that the Liquidator did not know as to what was/is being picked up. The complaint to Police dated 6th August, 2019 shows that there was much more to the project site than what was included by the Respondent No.1 in Sale Notice putting the properties of the Corporate Debtor in the Blocks of A, B, C (and D). There is no explanation of Respondent No.1 why all goods/material at project site were not included in the sale and if only part was included, why system to segregate and handover was not put into place. It is surprising that when before Adjudicating Authority,

the Appellant claimed (see Para – 53 of Impugned Order) that the auction purchaser had even lifted the material belonging to BHEL but no FIR or other corrective actions were taken by Liquidator to prevent happening of such event, the Respondent No.1 retaliated submitting to the Adjudicating Authority that he had already filed FIR. At that stage, the FIR was Annexure – 7 dated 6th August, 2019. If the Liquidator had already filed such FIR, that Respondent No.2 had already lifted material not sold to the extent of Rs.20 Crores, still Respondent No.1 does not appear to have highlighted this to Adjudicating Authority and the Adjudicating Authority also did not go into this Complaint/FIR and in the result, Adjudicating Authority passed above operative Order leading to further undesirable actions at the project site on the part of Respondent No.2, which we have already discussed.

Criminal Actions took place at Project Site

24. A) We have seen Reply in Appeal (Diary No.17761) of Respondent No.2 and heard its Counsel, Respondent No.2 claims to be bona fide purchaser asserting that it was throughout represented to it that assets forming part of auction sale process are unencumbered and upon payment of full consideration it shall have absolute possession.

We do not agree. The issue of lien/charge was sub-judice and was being agitated. If respondent No.2 did not enquire, it cannot claim to be bona fide purchaser.

B) In Para – 40 of Reply, Respondent No.2 claims that after sale was concluded and full money was received by Liquidator, “possession of the factory premises made over to Respondent No.2 and the Sale Certificate had been issued,” then BHEL objected. In Para – 46, Respondent No.2 claims “the very fact that Respondent No.2 was allowed to remove some material/plant and machinery from the project site will imply that the possession was delivered to Respondent No.2 by the Liquidator.

Thus, although the Sale Certificate provided that the Liquidator agrees “to put the purchaser in possession of the Asset” – Respondent No.2 admittedly went around as if impliedly it got possession of the factory premises and project site itself. In our view only because an Auction Purchaser has a Certificate of Sale in pocket, of some (out of many) articles/goods of Plant and Machinery scattered at the remote project site , it is no license to take over the Factory Premises/ project site claiming implied possession and walk away with things without the Liquidator putting the “ purchaser in possession of the Asset” as was mentioned in the Sale Certificate. Documents show acts of scaring guards took place. Such acts of the Respondent No. 2 must be said to be criminal acts. The Reply has no denials to specific averments of the Appeal that Respondent No.2 went on to remove/take away forcibly materials/goods even which were not part of Sale Certificate. There are no explanations of Respondent No.2 to Appeal and claim of Respondent No.1 of forcible

entries and removal of goods/material, leading to filing of 2 Police Complaints, one of which alleged theft of articles worth Rs.20 Crores.

C) Reply of Respondent No.2 speaks poorly of Respondent No.1 and picture emerging shows that once Sale Certificate was issued, Respondent No.2 forcibly exercised possession at site itself and took away goods/material even not part of Sale Certificate. Apparently, there were much more articles/goods on project site than what was put as Blocks A to C. Respondent No.1 tacitly let Respondent No.2 do whatever it wanted on project site. This is not permissible.

25. The Liquidator has not brought before us any material to show as to what happened to the two complaints dated 6th August, 2019 and 19th December, 2019 which he had filed with the SHO. It appears to us that on spot, criminal actions have taken place and they deserve to be properly investigated.

Reasons of Adjudicating Authority not to grant relief not maintainable

26. We have already referred in short (see Para – 11(g) supra) the reasons recorded by the Adjudicating Authority in Paragraphs – 91 to 101 as to why cancellation of auction and restitution cannot be ordered. In the face of record as discussed above, and law, we do not find that the reasons recorded by the Adjudicating Authority in Paragraphs 91 to 101 of the Impugned Order can be maintained. When there were Orders dated 12th June, 2019 (Annexure – 17) “that movement of goods would be

subject to outcome of proceedings”, the outcome cannot change only because there was movement of goods. Even if the plant and machinery had been dismantled, that could not have been reason to deny the relief of return of material. The other reason that the Applicant/Appellant was only an Unsecured Creditor and higher proceeds would not go to the Applicant – Appellant was no reason not to cancel the auction. Appellant is admittedly Operational Creditor. Illegality in the process and illegal loss to Corporate Debtor is bound to affect the beneficiaries down the line of Section 53 of IBC. If the auction is illegal, without proper valuation and there was also confusion with regard to what is lifted, declining to take action would amount to rewarding the wrong done. The Appellant had not pursued the provision of Letter of Credit, was also no reason to refuse to cancel the auction. When the Appellant had from the initial stage itself moved the Liquidator and the Adjudicating Authority with regard to the auction sale which had come to Notice of Appellant and sought reliefs, only because Appellant did not ask for stay of auction, would be no reason not to cancel the auction sale even after noticing material errors and illegalities in the process followed. The Liquidator had fiduciary responsibility and had duty to avoid loss/further loss to Corporate Debtor. The auction purchaser had paid the consideration would also be no reason not to set aside the auction considering the illegal factors we have found in this Appeal as well as what findings Adjudicating Authority recorded in this regard. There was no material before the Adjudicating Authority to refer to the Respondent No.2 as

“bona fide purchaser”. The reference was made in the passing. When Adjudicating Authority held that it was wrong on the part of Liquidator, to first not decide question of lien/charge and Secured Creditor and could not have issued Sale Certificate clearly dispute was pending litigation. Respondent No.2 who did not check up, cannot claim to be bona fide purchaser. Similarly, the Adjudicating Authority erred in not giving any restitution. It expressed helplessness claiming that disciplinary proceedings against a Resolution Professional can be taken only by IBBI and that if somebody has unlawfully gained and restitution is to be provided to the person who has suffered loss, the same also can be done only by IBBI. Even if actions as stated in Chapter – VI relating to Inspection and Investigation are to be taken by IBBI, Section 218 of IBC provides that where the Board, on receipt of a complaint under section 217 or has reasonable grounds to believe that any insolvency professional agency, etc. has contravened any of the provisions of the Code or the Rules, it may direct an investigation. The Judgement and Order of the Adjudicating Authority or this Appellate Tribunal can always be basis for the IBBI to consider if there are “reasonable grounds” and IBBI can definitely look into the same to consider if action under Chapter – VI needs to be taken. We thus set aside reasons and findings recorded in Paragraphs - 91 to 101 in Impugned Order. Reliefs as we grant should have been granted.

Appellant cannot be treated as Secured Creditor under IBC

27. The Appellant in Form 'B' and Form 'C' claimed that it has unpaid sellers' lien under the Sale of Goods Act on the material supplied which is lying/stored at Corporate Debtor's project site and a statutory charge under the Transfer of Property Act on the goods supplied that have since been erected. The Liquidator rejected this claim and held that the Appellant was not a Secured Creditor. The Adjudicating Authority also looked into this aspect and in Paragraphs – 21 to 30 referred to the provisions of IBC. It has also looked into the agreement between the parties and the contractual provisions at Paragraphs – 31 to 34 of the Impugned Order and held that the Appellant is not having security interest and consequently, cannot be considered as a Secured Creditor. We have gone through the reasonings. Although we do not hold that that provisions of Sale of Goods Act and Transfer of Property Act are inconsistent or contrary as such to IBC, we hold that considering the provisions (as discussed in detail by the Adjudicating Authority) as found in Section 3(30) which defines "Secured Creditor" and Sections 3(31), 3(33) read with Section 238 of IBC, if benefit is to be taken under the provisions of IBC, it can be done if there was a contractual arrangement/transaction creating security interest in favour of the Creditor. It has to be a security interest which is "created" as such. IBC is complete Code in itself. The Appellant is claiming to be Secured Creditor on statutory basis. Admittedly, the Appellant is not relying on any contractual provision, or transaction creating security interest to claim benefits of lien/charge. Counsel for Appellant relied on **"ICICI**

Bank Vs. Sidco Leathers” – (2006) 10 SCC 452 where inter alia it was considered that Section 529-A and Section 529 under the Companies Act, 1956 were silent on the question of inter se priority between Secured Creditors and Section 48 of Transfer of Property Act, 1882 applied. Reliance was also placed on **“Central Bank of India vs. State of Kerala”** – (2009) 4 SCC 94 in which inter alia issue was State Legislators creating first charge on the property of dealer/person liable to pay sales tax and Section 34(1) of DRT Act and Section 35 of Securitisation Act, for enforcing security interest were examined and observation was that non-obstante clauses in said Central Acts could not render first charge created by said State enactments inoperative. In our humble opinion, the said Judgements do not help Appellant in interpretation and application of IBC in the manner in which Appellant wants. We agree with the Adjudicating Authority in this regard that the Appellant cannot be treated as Secured Creditor.

28. For the above reasons, we pass the following Order:-

ORDER

- 1) The Appeal is allowed as follows.
- 2) The observations and findings and directions as recorded by the Adjudicating Authority in Impugned Order, in Paragraphs – 91 to 101 are quashed and

set aside. Rest of the Judgement we mostly agree subject to our observations and findings recorded in this Judgement.

- 3) Claim of the Appellant made in CA(IB)792/KB/2019 (in Annexure – 18) in CP(IB)574/KB/2017 before Adjudicating Authority of having statutory lien and statutory charge over material supplied lying/stored at Corporate Debtor's project site and material supplied which is/was erected and thus to be Secured Creditor – is rejected.
- 4) Claim of the Appellant seeking setting aside of auction dated 01.05.2019 in favour of Respondent No.2 is accepted. Sale Notice (Annexure – 9) dated 10th April, 2019 and further process culminating into auction dated 1st May, 2019 and issue of Certificate of Sale dated 20th May, 2019 (Annexure – 13) in favour of Respondent No.2, and subsequent lifting of goods/material by Respondent No.2/its Directors or on their behest are all set aside as illegal.
- 5) a) Respondent No.1 shall forthwith recover possession from whoever is in possession and Respondent No.2, and its Directors are liable and directed to return

back at their costs, within 15 days, to the project site, All the material/goods (including goods/material which was made part of Certificate of Sale which we set aside) picked up and transported by Respondent No.2/its Directors or on their behest, purporting to act as successful auction purchaser.

b) SHO, Bhupdevpur, District Raigarh, Chhattisgarh shall assist Respondent No.1 – Liquidator to pursue the Complaints dated 6th August, 2019 and 19th December, 2019 filed by him and register them as FIR (if yet not so registered) and investigate the same.

c) Respondent No.1 – Liquidator is directed to personally, on the basis of record and actuals, immediately take stock of material/goods as were on the Project Site at Raigarh and which have been taken away/missing and may file further report to Police for material taken away/missing. Criminal acts as may have been committed purporting to act on the basis of Certificate of Sale, may be reported. Liquidator will place Report before Adjudicating Authority to whom we remit back this matter. Respondent No.1 will report inventory of all the plant

and machinery and goods which (i) were on the spot, and (ii) which have been removed/missing and (iii) which are still now available.

d) Adjudicating Authority is requested to give further necessary directions/Orders from time to time to Respondent No.1 – Liquidator to ensure further actions to recover goods/material removed/taken away by Respondent No.2/its Directors or on their behest.

e) Respondent No.1 is directed to report the Adjudicating Authority particulars with regard to all goods/material taken away/missing/damaged and Respondent No.2 and its Directors shall be liable to pay for the same.

f) Respondent No.1 shall after taking such and other steps as may be directed by Adjudicating Authority, on recovery of the goods/material of the Corporate Debtor, put them to re-auction. The earlier Valuation Reports shall be ignored from consideration and Liquidator shall call for fresh valuation reports from 2 new registered valuers as per procedure, duly giving them necessary information and copy of this Judgment and after

taking fresh Valuation Reports the assets of the Corporate Debtor shall be put to re - auction following due process and procedure. Thereafter, Respondent No.1 will report to Adjudicating Authority calculations and costs and expenses and loss and damage, etc. caused to the goods/material and what, if any, amount of consideration paid by Respondent No.2 is payable back to Respondent No.2, or deserves to be forfeited for illegal lifting, damage/loss, etc. of material/goods.

6) Any material/goods belonging to the Appellant, (i.e. (1) material/goods other than on which Appellant has been claiming lien/charge; and/or (2) goods/material, other than goods/material supplied by Appellant which was entered in Fixed Asset Register or other records (by whatever name called) and Balance Sheets of the Corporate Debtor) – be returned to the Appellant.

7) Copy of Judgement of the Adjudicating Authority and this Judgement may be sent to IBBI which may consider if actions, if any, are required to be initiated under Chapter – VI of IBC. If Respondent No.1 – Liquidator, extends full cooperation in carrying out

the Orders which we are passing, especially, to get back goods/material of Corporate Debtor and re-auction, IBBI may consider the same as mitigating factor, in favour of Respondent No.1 in action (if any) under Chapter - VI of IBC.

- 8) If it appears to Adjudicating Authority that Respondent No.1 is not cooperating, it would be at liberty to replace him with another person as Liquidator.
- 9) Appellant will be entitled to be treated under Section 53(1)(f) of IBC for its monitory claim admitted by Respondent No.1 vide Order (Annexure – 16) dated 3rd June, 2019.
- 10) C.A. (IB) 684/KB/2019 in C.P.(IB) No.574/KB/2017 is restored to file of Adjudicating Authority for taking steps as per this Judgement and Order. Matter is remitted back to Adjudicating Authority with directions as above. The Adjudicating Authority will be at liberty to pass any further suitable directions/Orders keeping above directions/objectives in view. Parties will be at liberty to move Adjudicating Authority for any guidance/directions/Orders in above context and the same will be decided by Adjudicating Authority.

- 11) The Respondent No.2 shall pay costs of Appeal quantified as Rs.5 Lakhs to the Appellant.
- 12) Copies of this Judgement be sent also to SHO, Bhupdevpur, and to Superintendent of Police, District Raigarh, Chhattisgarh for suitable action.

[Justice A.I.S. Cheema]
Member (Judicial)

[Justice Anant Bijay Singh]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

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