



2023INSC809

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.7906 OF 2021**

EVA AGRO FEEDS PRIVATE LIMITED

APPELLANT(S)

VERSUS

PUNJAB NATIONAL BANK AND ANR.

RESPONDENT(S)

J U D G M E N T

UJJAL BHUYAN, J.

Application (I. A. No.14220 of 2022) for intervention is allowed.

2. This appeal has been preferred under Section 62 of The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'Code') against the order dated 30.11.2021 passed by the National Company Law Appellate Tribunal, Principal Bench, New Delhi (briefly 'the Appellate Tribunal' hereinafter) allowing the appeal of Punjab National Bank i.e. Respondent No.1 being Company Appeal (AT) (Insolvency) No.757 of 2021. The aforesaid appeal was filed by the Punjab National Bank against the order dated 12.08.2021 passed by the National Company Law Tribunal, Kolkata

Bench, Kolkata (briefly the 'Tribunal' hereinafter) in I.A. (IB) No.663/KB/2021 in CP (IB) 440/KB/2018.

3. At the outset, it would be necessary to advert to the relevant facts:-

- (i) One *Huvepharma Sea (Pune) Private Limited* filed an application under Section 9 of the Code against *M/s. Amrit Feeds Limited* i.e. corporate debtor before the Tribunal. The same was registered as CP(IB) No.440/KB/2018. The Tribunal passed an order dated 22.10.2019 admitting the application filed under Section 9 of the Code as a result of which corporate insolvency resolution process of the corporate debtor commenced.
- (ii) On 19.02.2021, the Tribunal passed an order for liquidation of the corporate debtor. Respondent No.2 was appointed as the Liquidator to oversee the corporate insolvency resolution process.
- (iii) Respondent No.2 by an e-mail dated 07.06.2021 forwarded a sale notice dated 02.06.2021 for sale of the assets of the corporate debtor. 23.06.2021 was the date fixed by Respondent No.2 for auction sale of the assets of the corporate debtor. It appears that the aforesaid auction sale did not materialize. Thereafter by way of an e-mail dated 29.06.2021, Respondent No.2 forwarded a similar notice dated 28.06.2021 for auction sale of the assets of the corporate debtor scheduled on 20.07.2021.

- (iv) It is stated that the appellant i.e., *Eva Agro Feeds Private Limited* was incorporated on 09.07.2021 under the provisions of the Companies Act, 2013.
- (v) Appellant submitted its bid dated 16.07.2021 to Respondent No.2 on 17.07.2021 in respect of the assets of the corporate debtor (in liquidation). The assets put up for auction were lands admeasuring 1,05,250.40 sqft at Plot No.56, Khata Nos.27, 26, 29, 36, 36 (Old) and 362/363 (New), Mouza - Deoria, Pargana Bhuli, Tehsil - Chunar, District - Mirzapur, Uttar Pradesh with building, plant and machinery and other fixed assets thereon on a lump sum basis as mentioned at serial No.3 of the sale notice.
- (vi) In terms of the sale notice, appellant paid the earnest money deposit (EMD) of Rs.1 crore in respect of the subject property. While the last date/time for submission of bid was 20.07.2021 at 14:30 hours, appellant had submitted its bid on 19.07.2021 for a sum of Rs.10 crores which was equivalent to the reserve price as notified in the bid which ended at 14:30 hours on 20.07.2021.
- (vii) On 20.07.2021, appellant received an E-auction certificate from Respondent No.2 certifying that it had won the auction for the assets of the corporate debtor put up for auction sale (referred to hereinafter as the 'subject property'). On 21.07.2021, appellant by way of an e-mail requested Respondent No.2 to issue allotment letter in respect of the subject property. It is stated that on 21.07.2021 itself appellant received an e-mail of the aforesaid date from Respondent No.2 informing that

Respondent No.2 had cancelled the E-auction held on 20.07.2021 under Clause 3(k) of the Disclaimer Clause in the E-Auction Process Information Document. The appellant was further informed that a fresh E-auction would be conducted for the subject property.

- (viii) Aggrieved by the same, appellant filed an application before the Tribunal under Section 60 and related provisions of the Code read with The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 as well as under Rule 11 of the National Company Law Tribunal Rules, 2016 which was registered as I.A. (IB) No.663/KB/2021 in CP (IB) 440/KB/2018. Tribunal *vide* order dated 12.08.2021 disposed of the said application by directing the Liquidator i.e. respondent No.2 to send a communication to the appellant requiring him to deposit the balance sale consideration within the time specified in the E-auction notice.
- (ix) According to the appellant, Respondent No.2 complied with the order of the Tribunal and issued a letter to the appellant to deposit the balance consideration money. Pursuant to the said letter, appellant deposited the entire sum on 10.09.2021 following which Respondent No.2 issued a sale certificate dated 15.09.2021 in respect of the subject property in favour of the appellant.
- (x) While the Liquidator accepted the order of the Tribunal, one of the financial creditors i.e. Punjab National Bank (Respondent No.1) filed an appeal before the Appellate Tribunal under Section 61 of the Code against the order dated 12.08.2021 passed by the Tribunal. The appeal

was contested by the appellant. However, by the impugned order dated 30.11.2021, Appellate Tribunal allowed the appeal and set aside the order dated 12.08.2021 passed by the Tribunal. Consequently, the steps taken pursuant to the said order were also reversed. Liquidator was given liberty to initiate fresh process of auction in accordance with the provisions of the Code read with The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (briefly the 'Regulations' hereinafter).

(xi) Aggrieved, the auction purchaser as the appellant has preferred the present appeal.

4. This court by order dated 10.01.2022 had issued notice and passed an interim order staying the subsequent auction which was scheduled on 17.01.2022.

5. Respondent No.1 - Punjab National Bank in its counter affidavit at the outset pleaded that the appeal deserves to be dismissed at the threshold and that the impugned order of the Appellate Tribunal upholding the decision of the Liquidator to cancel the auction sale is fully justified. Appellant was the sole bidder and quoted exactly the reserve price. Reasoning given by the Appellate Tribunal in paragraphs 11 to 22 of the impugned order are just and proper and calls for no interference. In this connection, Respondent No.1 has referred to Clause 3 (k) of the auction sale notice which says that the Liquidator has the absolute right to accept or reject any or all the bids or adjourn/postpone/cancel the E-auction or withdraw any asset/property or portion thereof from the E-auction at any stage without assigning any reason.

Reliance has also been placed on Clause 5 (m) of the auction sale notice as per which the bidder with the highest offer/bid does not get any right to demand acceptance of its bid. It is in the above context that Respondent No.1 has contended that the Liquidator was well within his rights to cancel the auction sale, which decision has been rightly affirmed by the Appellate Tribunal.

5.1. According to Respondent No.1, it is a settled position that any auction sale, before completion, can always be cancelled. Tribunal had overlooked the provisions contained in Clause-13 of the Regulations which makes it clear that auction sale shall stand completed only on payment of full amount and not at the stage when the highest bidder is invited to provide balance sale consideration within 90 days from the date of demand. Tribunal relied upon Clause 12 of the Regulations as per which, on the closure of auction, the highest bidder shall be invited to provide the balance sale consideration within 90 days of the date of demand; first proviso mentions that payments made after 30 days would attract interest of 12% with the second proviso clarifying that the sale would be cancelled if the payment is not received within 90 days. According to Respondent No.1, Tribunal by placing reliance on Clause 12 mis-directed itself in directing the Liquidator to send a communication to the appellant for depositing the balance sale consideration within the time specified in the E-auction notice.

5.2. There is no express bar or prohibition either under the Code or under the Regulations restraining the Liquidator from cancelling an auction sale even after declaration of the highest bidder but before completion of sale

as understood under Clause 13 of the Regulations. In the absence of such express bar or prohibition and when the auction sale was yet to be concluded, Liquidator was well within his rights in cancelling the auction sale with the intent to have another round of auction sale. Tribunal had erred in interfering with such action of the Liquidator.

5.3. Appellant had accepted the terms and conditions of the auction sale notice while participating in the auction sale, including Clause 3 (k). Therefore, it was not open to the appellant to question the decision of the Liquidator to cancel the auction sale.

5.4. Respondent No.1 has also alleged that the appellant had made incorrect statements in the appeal and did not bring on record relevant documents. It is stated that Respondent No.2 in his written submission before the Tribunal had stated that he was informed by way of e-mail dated 05.08.2021 by *Kapila Krishi Udyog Pvt. Ltd.* that the promoters of the appellant were also the founder promoters of the corporate debtor. On receipt of such e-mail, Liquidator verified the record and found that one of the present directors of the appellant, *Mr. Vijay Kumar Ghidia* was a director of the corporate debtor from its inception i.e. 22.09.1994 to 13.01.2009. Liquidator had submitted that later on it had received letter dated 05.08.2021 from *Sugna Feeds Pvt. Ltd.* expressing its intention to participate in the auction sale of the subject property. It was contended that *Sugna Feeds Pvt. Ltd.* is a well-established player in the poultry feeds sector, whereas appellant was incorporated only on 09.07.2021 i.e. after issuance of the E-auction sale notice.

5.5. Appellant while submitting its bid *vide* application dated 16.07.2021 had accepted the terms and conditions of the auction process shared by the Liquidator which contained paragraph-7. Paragraph-7 is specific: it mentions that applicant would adhere to the terms and conditions of the E-Auction Process Information Document as shared by the Liquidator.

6. Mr. Sunil Mohan Acharya- Liquidator of the corporate debtor i.e., Respondent No.2 has filed counter affidavit. He was appointed as Liquidator of the corporate debtor by the Tribunal *vide* order dated 19.02.2021. According to him, the admitted debts of the corporate debtor are Rs.530 Crores of which claims of financial creditors are Rs.371 Crores.

6.1. By an E-auction notice dated 02.06.2021, the assets of the corporate debtor being, *inter alia*, poultry feed farms at Lucknow (Lot No.2) and Mirzapur (Lot No.3) were put up for auction with reserve prices of Rs.11.30 crores and Rs. 12.69 crores respectively. By an e-mail dated 07.06.2021, respondent No. 2 had forwarded the E-auction notice to the prospective bidders, including to the appellant. However, as no bids were received in respect of any of the assets of the corporate debtor, reserve prices were reduced by 25% as provided in the Regulations, whereafter Lot No.2 and Lot No.3-subject property, with revised reserve prices of Rs.8.50 crores and Rs. 10.00 crores respectively were again put up for auction *vide* E-auction notice dated 28.06.2021. By an e-mail dated 29.06.2021, the E-auction notice along with E-Auction Process Information Document were sent to the prospective bidders, including the appellant.

6.2. Before the date of auction on 20.07.2021, earnest money deposit (EMD) was paid by the appellant and another intending bidder both for Lot No.2 and the subject property. Five minutes before the scheduled closure of bidding time there was a spurt of counter bids for Lot No.2 by the appellant and the other bidder, taking the price from Rs.8.50 crores to Rs.14.79 crores. The pattern of bidding in respect of Lot No.2 and the fact that the same two entities had submitted EMD for the subject property, but the bid being ultimately made only by the appellant led Respondent No.2 to believe that higher bids could be received for the subject property on further re-auction.

6.3. According to Respondent No.2, the subject property had a cost of Rs.17.30 crores and written down book value of Rs.8.59 crores as compared to Lot No.2, which had cost of Rs.9.28 crores and written down book value of only Rs.2.45 crores. However, Lot No.2 was sold for Rs.14.39 crores as against its reserve price of Rs.8.50 crores. Respondent No.2 therefore expected a price higher than Rs.10 crores for the subject property as Lot No.2 despite having a substantially lower worth as per the available record had fetched bids higher than Rs.10 crores.

6.4. For the aforesaid reasons and to maximise the value of the subject property which would enure to the benefit of all stakeholders, Respondent No.2 thought it prudent to explore the possibility of further price enhancement in respect of the subject property and therefore decided to cancel the auction for the subject property.

6.5. In support of the above averments, Respondent No.2 has referred to certain terms and conditions in the E-auction notice and the E-Auction

Process Information Document. Clause 3(f) binds the applicant to accept the terms of the disclaimer, which forms an integral part of the E-Auction Process Information Document. Clause 3 (k) says that the Liquidator has the absolute right to accept or reject any or all bids or adjourn/postpone/cancel the E-auction or withdraw any asset/property or portion thereof from the E-auction at any stage without assigning any reason thereof. As per Clause 5 (m), the bidder with the highest offer/bid does not get any right to demand acceptance of his bid. Clause 5 (n) provides for intimation to be sent to the successful bidder via e-mail. Date of sending the mail would be considered as the date of receipt of the intimation. As per Clause 2 (h), on the close of the auction, the highest bidder shall be invited to provide balance sale consideration within 90 days of the date of such demand. Clause 2 (i) makes it clear that on payment of the full amount, the sale shall stand completed. The Liquidator shall then execute certificate of sale or sale deed to transfer such assets and thereafter the assets shall be delivered to the highest bidder in the manner specified in terms of the sale.

6.6. Respondent No.2 has contended that while submitting its bid for the subject property, the appellant was well aware of the terms and conditions governing the sale by auction. Appellant expressly accepted the aforesaid terms and conditions while submitting its application dated 16.07.2021 for participating in the auction bid process. According to him, on expiry of the time to submit bids on 20.07.2021, an auto generated e-mail from the web portal of '*eauctioneer.com*' was sent to the appellant stating that the bid submitted by it was the highest.

6.7. Thereafter, by an e-mail dated 21.07.2021, Respondent No.2 informed the appellant about cancellation of E-auction held on 20.07.2021 under Clause 3(k) of the E-Auction Process Information Document. Appellant was advised to collect the EMD as a fresh E-auction sale was to be conducted.

6.8. Respondent No.2 has mentioned that he had received an e-mail dated 10.09.2021 from one *Mr. Amit Ghidia* alleging that the directors of the appellant were also the founder promoters of *M/s. Amrit Feeds Limited*, the corporate debtor. On receipt of such e-mail, Respondent No.2 carried out inspection and upon verification came to know that one of the present directors of the appellant, *Mr. Vijay Kumar Ghidia* was a director and the principal shareholder of the corporate debtor during the period 22.09.1994 to 13.08.2019. Respondent No.2 has also mentioned that appellant was incorporated only in July, 2021.

6.9. Referring to the proceeding before the Tribunal instituted by the appellant, he submits that the application filed by the appellant against cancellation of the E-auction was taken up for hearing on 29.07.2021 and concluded on the same day without giving any opportunity to Respondent No.2 to file reply. However, the parties were permitted to file written submissions which were duly filed by Respondent No.2.

6.10. By order dated 12.08.2021, Tribunal allowed the application of the appellant and directed Respondent No.2 to send a communication to the appellant for depositing the balance sale consideration within the time specified in the E-auction notice.

6.11. Punjab National Bank i.e., Respondent No.1, a financial creditor of the corporate debtor, having claims of Rs.136,61,93,948/- assailed the order dated 12.08.2021 before the Appellate Tribunal. In such proceedings, Respondent No.2 supported the stand of Respondent No.1. Appellate Tribunal by order dated 30.11.2021 allowed the appeal of Punjab National Bank and directed Respondent No.2 to initiate a fresh process of auction in accordance with the provisions of the Code and the Regulations.

6.12. It is stated that after the order dated 30.11.2021 was passed by the Appellate Tribunal, Respondent No.2 had sent an e-mail dated 02.12.2021 calling upon the appellant to comply with the order of the Appellate Tribunal and to handover peaceful possession of the subject property. As there was no response from the appellant, Respondent No.2 made several calls to *Navneet Kumar Ghidia*, Director of *Eva Agro Feeds Pvt. Ltd.* on his mobile phone but the calls went unanswered. Appellant did not allow even the representative of Respondent No.2 to enter into the subject property. That apart, representative of Respondent No.2 had informed him that the appellant was wrongfully removing materials and equipments from the subject property.

6.13. It is further stated that subsequent to cancellation of the E-auction sale of the subject property, Respondent No.2 had received a letter dated 05.08.2021 from *Sugna Feeds Pvt. Ltd.*, a well-established player in the poultry feeds sector, expressing its intention to participate in the auction of the subject property. It is stated that in addition to the above, respondent No.2 had received an e-mail dated 20.08.2021 from *IFFCO KISAN Delhi*, a

subsidiary company of *Indian Farmers Fertilisers Cooperative (IFFCO)* expressing its interest in the assets of the corporate debtor.

6.14. In the above circumstances, Respondent No.2 has contended that cancellation of E-auction was justified and was done in the best interest of the stakeholders of the corporate debtor.

7. Appellant has filed rejoinder affidavit to the counter affidavit of Respondent No.1.

7.1. While reiterating its contentions, appellant has stated that the adjudicating authority i.e., the Tribunal had rightly set aside the decision of the Liquidator (Respondent No.2). Respondent No.2 after issuing the certificate certifying that appellant had won the auction of the subject property, cancelled the E-auction without giving any justification or reason for such cancellation. Referring to Clause 3 (a) of the E-Auction Process Information Document, appellant has contended that the said clause is contrary to the Regulations. In the facts and circumstances of the case, Respondent No.2 could not have cancelled the auction. Such act of cancellation of E-auction was wholly illegal and arbitrary. In this connection, reliance has been placed upon para 1(12) of Schedule I to the Regulations. Appellant was the highest and sole bidder in the second round of auction and its bid amount matched the reserve price as mentioned in the sale notice. Reserve price in the first round of auction was fixed at Rs.12,69,00,000/-. However, as the auction sale did not materialise, Respondent No.2 in the second round reduced the reserve price in order to get bidders to at least match the reserve price. This was done successfully by the appellant

whereafter appellant was informed that it had won the bid. Action of Respondent No.2 in cancelling the E-auction after e-mailing the appellant that it had won the bid is a clear case of abuse of the process.

7.2. Respondent No.2 *vide* public notice dated 24.12.2021 scheduled fresh E-auction on 17.01.2022 again fixing the reserve price in relation to the subject property at Rs.10 crores which was the same amount as the reserve price in the second round of bidding and which was the bid amount of the appellant

7.3. Respondent No.1 has misinterpreted Clause 3 (k) to mean that since full amount was not paid, it was entitled to invoke the said clause and cancel the bid. Such a contention is wholly untenable having regard to the overall scheme of the Regulations. No reasons were assigned by the Liquidator while cancelling the auction process. The order cancelling the auction being devoid of any reasons does not indicate application of mind by the Liquidator.

7.4. Appellant has asserted that the Liquidator i.e. Respondent No.2 had accepted the decision of the Tribunal by not filing any appeal against the order dated 12.8.2021. Therefore, it is not open to the Liquidator to contest the claim of the appellant.

8. As noticed above, one *Mr. Harish Bagla* has filed an application seeking intervention which we have allowed.

9. In addition to narrating the facts and commenting thereupon, the intervenor has averred that the principal person in control of the appellant is one *Mr. Vijay Kumar Ghidia* who is a director and principal shareholder of the appellant. *Mr. Vijay Kumar Ghidia* was also one of the promoter directors and

principal shareholders of the corporate debtor. Sale of any asset of the corporate debtor could not have been conducted in favour of a related party of the corporate debtor in view of the specific bar under Section 29A of the Code. As a matter of fact, *Mr. Vijay Kumar Ghidia* is also the maternal uncle of the intervenor who is the ex-managing director of the corporate debtor. *Mr. Vijay Kumar Ghidia* therefore comes within the meaning of 'related party' as defined under Sections 5(24) and 5(24A) of the Code. Therefore, the auction sale in favour of the appellant is bad in law and cannot be sustained.

9.1. This aspect was also brought to the notice of Respondent No.2 i.e. the Liquidator.

9.2. It is stated that the intervenor had filed an appeal before the Appellate Tribunal being Company Appeal (AD) (Insolvency) No.789 of 2021. In the said appeal, an interim order was passed on 27.09.2021 directing the parties to maintain *status quo*. Before the appeal of the intervenor could be heard, the Appellate Tribunal had passed the order dated 30.11.2021 allowing the appeal of Respondent No.1 by setting aside the order of the Tribunal dated 12.08.2021. Therefore, when the appeal of the intervenor came up for hearing before the Appellate Tribunal, the same was disposed of *vide* order dated 09.12.2021 as having been rendered infructuous. When the intervenor came to know that the appellant has filed the present appeal, it had filed the intervention application.

10. We have heard Mr. Neeraj Kishan Kaul, learned senior counsel for the appellant; Mr. Rajesh Kumar Gautam, learned counsel for Respondent No.1; Mr. Krishnaraj Thakker, learned counsel for Respondent No.2; and Mr.

Siddharth Bhatnagar, learned senior counsel for the intervenor - *Mr. Harish Bagla*.

11. Mr. Neeraj Kishan Kaul, learned senior counsel for the appellant at the outset submits that Appellate Tribunal fell in complete error in setting aside the order of the Tribunal and restoring the order of the Liquidator. Adverting to the order of the Liquidator cancelling the auction sale, he submits that the same is devoid of any reasons. Such an order is not only arbitrary but is *non est* in the eye of law. There could not have been any occasion for the Liquidator to go for a fresh auction keeping the reserve price at the same amount of Rs.10 crores which was the bid offered by the appellant and accepted by the Liquidator. In fact, Liquidator had declared that the appellant had won the bid. Tribunal had rightly appreciated the grievance of the appellant and interfered with the aforesaid order of the Liquidator. Liquidator did not challenge the order of the Tribunal dated 12.08.2021, rather Liquidator had complied with the same by accepting the balance sale consideration from the appellant and issuing the sale certificate. Since Liquidator had accepted the order of the Tribunal, it was not open for him to support Respondent No.1 or the order of the Appellate Tribunal in the appeal filed by the appellant. He has also pointed out that at the time of auction, *Mr. Vijay Kumar Ghidia* was no longer connected with the corporate debtor having retired from the said company way back in the year 2011. Therefore, he cannot come within the ambit of the expression 'related party' as defined under the Code. He submits that the present is a fit case for setting aside the order of the Appellate Tribunal and restoring the order of the Tribunal which as a matter of fact has been complied with by the Liquidator.

12. Mr. Rajesh Kumar Gautam, learned counsel for Respondent No.1 submits that appellant has failed to point out any particular provision either in the Code or in the Regulations prohibiting the Liquidator from cancelling the auction sale after declaring the highest bidder but before completion of sale. Power of cancellation is available to the Liquidator under Clause 3(k) of the auction notice. Such a power could be exercised by the Liquidator without assigning any reason. While bidding, the appellant had unconditionally accepted all the clauses of the auction notice, including Clause 3(k). Therefore, the Tribunal was not justified in interfering with such a decision of the Liquidator and further directing the Liquidator to conclude the auction sale process. Before completion of sale, highest bidder has no vested right for confirmation of sale in his favour. Insofar as the maintainability of the appeal before the Appellate Tribunal is concerned, he submits that there is no bar or prohibition restraining a financial creditor from preferring an appeal against an order of the Tribunal since the financial creditor is certainly an aggrieved person and has substantial interest in the auction sale of the subject property of the corporate debtor. That apart, under para 1(11) of Schedule I to the Regulations, the Liquidator has the discretion to conduct multiple rounds of auction to maximize realization in the sale of assets and to promote the best interest of the financial creditors. He submits that reliance on para 1(13) of Schedule I to the Regulations by learned senior counsel for the appellant is misplaced inasmuch as a sale can be said to have been completed only on payment of the full amount and not on declaration of a bidder as the highest bidder who in any case has no vested right to claim confirmation of sale. He submits that appellant is in no way prejudiced by the next round of auction

which was scheduled on 17.01.2022 but could not proceed because of the restraint imposed by this Court. Appellant can certainly participate in the next round of auction.

12.1. In the above context, he submits that Tribunal was not justified in interfering with the decision of the Liquidator and therefore, Appellate Tribunal rightly set aside the said order of the Tribunal and in restoring the order of the Liquidator. He has referred to Clause 3 (k) of the auction notice which confers discretion upon the Liquidator to cancel the E-auction at any stage without assigning any reason. Adverting to the facts of the present case, he submits that the appellant was the sole bidder and his bid amount was exactly the same as the reserve price. It was in that context that the Liquidator decided to cancel the auction with a view to have another round of auction to fetch a better price. There was nothing wrong or illegal in the exercise of such discretion by the Liquidator.

13. Mr. Krishnaraj Thakker, learned counsel for Respondent No.2 has also adopted and reiterated the above submissions made by learned counsel for Respondent No.1. Additionally, he submits that Liquidator had received an e-mail dated 10.09.2021 from one *Mr. Amit Ghidia* informing him that the promoter of the appellant was also the founder promoter of the corporate debtor. *Mr. Vijay Kumar Ghidia* who is one of the directors of the appellant was also a director and principal shareholder of the corporate debtor. Recent incorporation of the appellant in the month of July 2021 also raised suspicion about the nature of the appellant and its intentions.

13.1. Appellant while submitting its bid had accepted the terms and conditions of the auction process. Therefore, it is not open to the appellant to question the exercise of discretion by the Liquidator, which is one of the terms and conditions of the auction.

13.2. In so far issuance of e-mail to the appellant declaring it as the winner of the auction process is concerned, he submits that on expiry of the time for placing of bids, an auto generated e-mail from the e-auction website "*www.eauctioneer.com*" was sent to the appellant stating that the bid submitted by it was the highest. It was an auto-generated e-mail and cannot be construed to be the E-auction certificate. In so far acceptance of the balance sale consideration and issuance of sale certificate is concerned, he submits that the same was done as per the direction of the Tribunal.

13.3. In the course of the hearing, he submitted that there were two assets of the corporate debtor; one at Lucknow (Lot No. 2) and the other at Mirzapur (Lot No.3). Since the assets at Lot No.2 fetched Rs.4.79 crores more than the reserve price, Liquidator believed that the subject property could fetch a higher amount than the reserve price of Rs.10 crores. Keeping this in mind, he had cancelled the E-auction process.

13.4. On the submission that Liquidator did not assail the decision of the Tribunal and therefore had accepted the same, his contention is that in all the proceedings Liquidator had contested the case projected by the appellant. Now that the appeal of Respondent No.1 has been allowed by the Appellate Tribunal, Liquidator is bound by the same. He submits that decision of the Liquidator to cancel the auction was vindicated when post cancellation

of auction, Liquidator received letter dated 05.08.2021 from *Sugna Feeds Private Limited* expressing its intention to participate in the auction of the subject property. *Sugna Feeds Private Limited* is a well-established player in the poultry sector whereas appellant was incorporated after issuance of the E-auction sale notice.

14. Mr. Siddharth Bhatnagar, learned senior counsel appearing for the intervenor highlighted the issue of 'related party'. According to him, appellant should have been disqualified from participating in the E-auction by reason of being a 'related party'. Promoter director of the appellant, *Mr. Vijay Kumar Ghidia*, is the maternal uncle of *Mr. Harish Bagla*, the intervenor. *Mr. Vijay Kumar Ghidia* is one of the directors of the appellant. He was also one of the promoter directors and original subscribers to the Memorandum and Articles of Association of the corporate debtor. Elaborating further, he submits that mother of the intervenor *Smt. Chanda Bagla* is the sister of *Mr. Vijay Kumar Ghidia*. Intervenor has a significant stake in the corporate debtor having held about fifty-three per cent of the paid-up share-capital of the corporate debtor. Liquidator, therefore, should have cancelled the auction sale notice only on the ground that appellant is a 'related party' to the corporate debtor. Referring to the e-mail dated 10.09.2021, he submits that *Mr. Amit Ghidia*, son of *Mr. Vijay Kumar Ghidia* had brought to the notice of the Liquidator that *Mr. Vijay Kumar Ghidia* is the maternal uncle of the intervenor. By virtue of such relationship, appellant would attract disqualification under Section 29A read with Section 5(24) and Section 5(24A) of the Code.

15. Referring to the above contentions, Mr. Neeraj Kishan Kaul, learned senior counsel for the appellant submits that it was because of the activities of persons like the intervenor that the corporate debtor has landed in the present situation. Therefore, it is not open to such persons to talk about getting proper valuation of the auctioned assets of the corporate debtor. In so far allegation of 'related party' is concerned, he submits that the same is no bar at all and cannot be held as a disqualification for the appellant inasmuch as *Mr. Vijay Kumar Ghidia* had ceased to be a director of the corporate debtor way back in the year 2011. To attract disqualification under Section 29A, the relationship has to be proximate. In this connection, he has placed reliance on the decision of this Court in the case of ***Swiss Ribbons Private Limited and Another versus Union of India and Others***¹.

16. Submissions made by learned counsel for the parties have received due consideration of the Court.

17. As we have noted above after initiation of the corporate insolvency resolution process, Liquidator i.e. Respondent No.2 had issued sale notice dated 02.06.2021 for sale of the subject property of the corporate debtor. The reserve price of the subject property was fixed at Rs.12.69 crores, whereas EMD was fixed at Rs.1,26,19,000.00. E-auction was scheduled on 23.06.2021 between 14.00 to 14.30 hrs. This E-auction did not fructify in the absence of any bidders. Thereafter, Respondent No. 2 issued second sale notice dated 28.06.2021 for auction sale amongst others of the subject property. This time the reserve price was scaled down to Rs.10 crores and correspondingly, the

¹ (2019) 4 SCC 17

EMD was fixed at Rs.1 crore. Last date for deposit of EMD was 19.07.2021 and the date and time of bid was fixed as 20.07.2021 at 14.30 hrs. It was mentioned therein that the E-auction sale would be subject to the terms and conditions prescribed in E-Auction Process Information Document available at the website of the second Respondent.

17.1. As it appears, appellant was the sole bidder and its bid value was Rs.10 crores which was equivalent to the reserve price.

18. Pausing here for a moment, we may advert to the Bid Application Form. As per Clause-7 of the Bid Application Form, the applicant i.e. the bidder was required to adhere to the terms and conditions mentioned in the E-Auction Process Information Document. Clause-9 provided that the applicant would participate in the E-auction for the sale of assets on as is where is basis, as is what is basis, whatever there is basis and no recourse basis. Further, if selected as the highest bidder, the bid amount would be unconditionally binding on the applicant. Clause-12 made it clear that the applicant would at all time adhere to the provisions of the Code and the Regulations.

19. The E-Auction Process Information Document was issued by the Liquidator i.e. Respondent No.2 for regulating the E-auction of the subject property of the corporate debtor. As per Clause 2 (g), unless specified otherwise, EMD of the successful bidder would be retained towards part of the sale consideration and EMD of unsuccessful bidder would be refunded, which would not bear any interest. Clause 2 (h) says that in accordance with para 1(12) of Schedule I to the Regulations, on the closure of the auction, the

highest bidder would be invited to provide balance sale consideration within 90 days of the date of such demand. As per proviso (i) of Clause 2(h), payments made after 30 days would attract interest at the rate of 12 per cent and as per proviso (ii) of Clause 2(h), the sale shall be cancelled if the payment is not received within 90 days. Clause 2 (i) says that on payment of the full amount, the sale would stand completed and the Liquidator would execute the certificate of sale or sale deed to transfer such assets which would be delivered to him in the manner specified in the terms of sale. As per Clause 2(m), the information provided in the E-Auction Process Information Document should be read together with the provisions of the Code and the Regulations. In the event of a conflict between the E-Auction Process Information Document and the Code or the Regulations, provisions of the Code or the Regulations, as the case may be, would prevail. Mandate of Clause 2(r) is that the successful bidder would have to take over possession of the movable assets being sold under the E-auction within 15 days from the date of the complete payment to the Liquidator without any damage to the premises where the assets were kept.

19.1. Clause 3 of the E-Auction Process Information Document deals with disclaimer. While Clause 3 (a) says that the said document has been issued by the Liquidator for general information purposes only; sub-clause (b) clarifies that the said document is not a statutory document; it has not been approved or registered with any regulatory or statutory authority of Government of India or any State Government. Further, nothing relating to the E-Auction Process Information Document should be construed as legal,

financial, accounting, regulatory or tax advice by the Liquidator. Clause 3 (f) declares that by procuring a copy of the E-Auction Process Information Document, the recipient accepted the terms of the disclaimer, which forms an integral part of the E-Auction Process Information Document. As per Clause 3(i), E-Auction Process Information Document is neither an agreement nor an offer by the Liquidator to the prospective bidders or any other person. Objective of the E-Auction Process Information Document is to provide interested parties with information that may be useful to them in making their bids. Clause 3(k) declares that the Liquidator has absolute right to accept or reject any or all bids or adjourn/postpone/cancel the E-auction or withdraw any asset/property or portion thereof from the E-auction at any stage without assigning any reason thereof. As per Clause 5(m), the highest bid on the E-auction shall supersede all the previous bids of the respective bidders. However, the bidder of the highest offer/bid does not get any right to demand acceptance of his bid.

20. On 21.07.2021, appellant received a congratulatory e-mail from the second respondent i.e., the Liquidator. The language of this e-mail is quite important. Appellant was informed that it had won the auction for the subject property. The winning bidders' order had been prepared and the item was listed on the appellant's web page. If the appellant had any queries, it was advised to contact the auction administrator. When the appellant requested Respondent No.2 for issuance of allotment letter in respect of the subject property, it received an e-mail from the Respondent No.2 on 21.07.2021 itself at 17:56 pm. Appellant was informed that in terms of Clause 3 (k) of the E-Auction Process Information Document, he had cancelled the E-auction held

on 20.07.2021. Appellant was informed that the Liquidator would come up with a fresh E-auction for sale of the subject property.

20.1. From the aforesaid, we find that no reasons were assigned by the Liquidator for cancellation of the E-auction held on 20.07.2021. Appellant was simply informed that the E-auction was cancelled in terms of Clause 3(k) of the E-Auction Process Information Document. Clause 3 (k) as discussed above only declares that the Liquidator has absolute right to accept or reject any or all bids or adjourn/postpone/cancel the E-auction etc., at any stage without assigning any reason therefor. We will advert to this clause a little later.

21. To complete the narrative, we may mention that aggrieved by such cancellation, appellant had filed an application under Section 60 of the Code before the Tribunal assailing such cancellation. Issue before the Tribunal was whether the Liquidator was justified in cancelling the E-auction. Tribunal noted that the Liquidator had cancelled the auction without assigning any reason. Though a contention was advanced by the Liquidator before the Tribunal that the other assets (at Lucknow) of the corporate debtor put up for auction fetched a higher price and therefore, the Liquidator chose to cancel the auction expecting a higher price in future auction process, the same was not accepted by the Tribunal. It would amount to comparing apples with oranges. Tribunal further noted that there was no material on record to support the perception of the Liquidator that cancelling the present auction and going for further auction would result in better price for the assets in question and that there cannot be an endless wait to obtain a better price.

Holding that there was no reason for the Liquidator to cancel the E-auction when the earlier round of auction process did not fructify resulting in decrease in reserve price, Tribunal *vide* the order dated 12.08.2021 directed the Liquidator to send a communication to the appellant for depositing the balance sale consideration within the time specified in the E-auction notice.

21.1. It has come on record that following the aforesaid order of the Tribunal, Liquidator i.e. Respondent No.2 had called upon the appellant to pay the balance sale consideration and on payment of the same by the appellant, issued the sale certificate to the appellant in respect of the subject property.

22. We may further mention that Respondent No.2, i.e. the Liquidator did not assail the order of the Tribunal before the Appellate Tribunal. One of the financial creditors i.e. Respondent No.1 had filed the appeal before the Appellate Tribunal assailing the order of the Tribunal. Appellate Tribunal by the judgment and order dated 30.11.2021 observed that appellant was the sole bidder, its bid being equal to the reserve price. Liquidator invoked Clause 3(k) of the E-Auction Process Information Document and decided to cancel the auction. There was no concluded contract till that point of time; it is only after the total amount is paid that the sale is concluded. Before the sale can be successfully concluded, Liquidator had the right to cancel the sale. Successful bidder in the auction sale does not acquire any vested right in law to enforce the auction. Therefore, the Tribunal was not justified in setting aside cancellation of auction by the Liquidator. Tribunal had further failed to notice that the terms of the auction sale notice provided absolute right to the

Liquidator to accept or reject any bid or to cancel the auction without assigning any reason. While setting aside the order of the Tribunal as well as the steps taken in compliance thereto, Appellate Tribunal gave liberty to the Liquidator to initiate fresh process of auction. Pursuant thereto, Liquidator i.e. Respondent No.2 had issued a subsequent sale notice dated 24.12.2021 for E-auction sale of the subject property, the date of auction being 17.01.2022. Interestingly, in this round of auction, the reserve price was also maintained at Rs.10 crores. As we have noticed above, this Court by order dated 10.01.2022 while issuing notice had stayed the auction scheduled on 17.01.2022.

23. Section-5 of the Code deals with the definition of various expressions used in the Code. As per section 5(18), 'Liquidator' means an insolvency professional appointed as a liquidator in accordance with the provisions of Chapter III or Chapter V of Part I of the Code, as the case may be. Chapter III deals with liquidation process, whereas Chapter V deals with voluntary liquidation of corporate persons. Section 34, which is under Chapter III, provides for appointment of Liquidator and the fee to be paid. Sub-section (1) of Section 34 says that where an adjudicating authority passes an order for liquidation of the corporate debtor under Section 33, the resolution professional appointed for the corporate insolvency resolution process shall, subject to submission of written consent, act as the Liquidator for the purposes of liquidation unless replaced by the adjudicating authority. As per sub-section (2), on the appointment of a Liquidator under Section 34 all powers of the board of directors, key managerial personnel and partners of the corporate debtor, as the case may be, shall cease to have effect and

shall be vested in the Liquidator. Sub-section (3) requires personnel of the corporate debtor to extend all assistance and cooperation to the Liquidator in managing the affairs of the corporate debtor. Sub-sections (4) to (7) deal with replacement of a resolution professional whereas sub-sections (8) and (9) deal with fees to be charged by the Liquidator.

23.1. Powers and duties of Liquidator are provided in Section 35 of the Code. Sub-section (1) enumerates the various powers and duties that has to be performed and discharged by the Liquidator. Clause (f) says that the Liquidator has the power and duty to sell the immovable and movable properties and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified. As per the proviso, the Liquidator shall not sell the immovable and movable properties or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.

23.2. As per Section 36, for the purpose of liquidation, the Liquidator shall form an estate of the assets to be called the liquidation estate in relation to the corporate debtor and shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

23.3. In addition to the above, there are various other powers and duties of the Liquidator.

24. From a conjoint reading of the above provisions, it is evident that the Liquidator virtually steps into the shoes of the management of the

corporate debtor and oversees the liquidation process. In this process, he holds the liquidation estate of the corporate debtor as a fiduciary for the benefit of all the creditors. While overseeing the liquidation process, he has the mandate to sell all movable and immovable properties and actionable claims of the corporate debtor in liquidation by way of either public auction or by private contract, though he cannot sell such property or claims to any person who is not eligible to be a resolution applicant.

25. While we are on the powers and duties of the Liquidator, it would be apposite to refer to certain provisions of the Regulations framed in exercise of the powers conferred by Section 5 and other sections of the Code read with Section 240 of the Code as per which the Insolvency and Bankruptcy Board of India may make regulations to carry out provisions of the Code. Regulation 3 deals with eligibility for appointment as Liquidator. As per Regulation 3(1), an insolvency professional shall be eligible to be appointed as a Liquidator if he and every partner or director of the insolvency professional entity of which he is a partner or director is independent of the corporate debtor. Explanation below Regulation 3 (1) explains as to who are the persons considered independent of the corporate debtor. As per Explanation (b), a person shall be considered independent of the corporate debtor if he is not a related party of the corporate debtor.

25.1. Regulation 5 says that the Liquidator shall prepare and submit various reports to the adjudicating authority (Tribunal) regarding the liquidation process. If in this process the books of account of the corporate debtor are incomplete on the liquidation commencement date, the Liquidator

under Regulation 6 shall have them completed and brought up to date. That apart, the Liquidator is required to maintain various registers and books in relation to the liquidation of the corporate debtor. In addition to that, as per Regulation 7, he may appoint a professional to assist him in discharging his duties, obligations and functions. However, those professionals should not be his relative or related party of the corporate debtor or has served as an auditor to the corporate debtor in the preceding five years. Under Regulation 8, the Liquidator is required to engage in consultation with the stakeholders and the stakeholders consulted under Section 35 (2) of the Code shall extend all assistance and cooperation to the Liquidator to complete the liquidation of the corporate debtor.

25.2. Regulation 32 empowers the Liquidator to sell the assets of the corporate debtor. Mode of sale is referred to in Regulation 33. As per Regulation 33(1), the Liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I.

26. This brings us to Schedule I of the Regulations dealing with mode of sale. Para 1 lays down the steps to be taken for auction sale of an asset by the Liquidator. The steps to be taken are mentioned in paras 1(2) to 1(13). As per para 1(3), the Liquidator shall prepare terms and conditions of sale, including reserve price, earnest money deposit (EMD) as well as pre-bid qualifications, if any. The second proviso clarifies that EMD shall not exceed 10 per cent of the reserve price, which as per para 1(4) shall be the value of the asset arrived at in accordance with Regulation 35.

27. Reverting to Regulation 35, we may mention that as per sub-Regulation (1) of the aforesaid provision, the Liquidator shall consider the average of the estimates of the values arrived under Regulation 35. As per sub-Regulation (2), in cases not covered under sub-Regulation (1) or where the Liquidator is of the opinion that fresh valuation is required under the circumstances, he shall within seven days of the liquidation commencement date, appoint two registered valuers to determine the realisable value of the assets or the businesses of the corporate debtor. The first proviso mentions certain persons who should not be appointed as registered valuers, such as, a relative of the Liquidator; a related party of the corporate debtor etc. Sub-Regulation (3) says that the registered valuers appointed under sub-Regulation (2) shall independently submit to the Liquidator the estimates of realisable value of the assets or the businesses, as the case may be, computed in accordance with the Companies (Registered Valuers and Valuation) Rules, 2017 after physical verification of the assets of the corporate debtor. Sub-Regulation (4) provides that the average of the two estimates received under sub-Regulation (3) shall be taken as the value of the assets or businesses.

28. Coming back to Schedule-I, we find that as per para 1(4A), where an auction fails at the reserve price, the Liquidator may reduce the price by up to 25% of such value to conduct subsequent auction.

28.1. Paras 1(11), (11A), (12) and (13) of Schedule-I are relevant since much emphasis has been placed by learned counsel for the parties on these provisions. As per para 1(11), if it is required, Liquidator may conduct multiple rounds of auction to maximize the realization from the sale of the

assets and to promote the best interest of the creditors. Para 1(11A) says that where the Liquidator rejects the highest bid in an auction process, he shall intimate the reasons for such rejection to the highest bidder and mention it in the next progress report. While learned senior counsel for the appellant has laid great emphasis on this provision on the basis of which he has assailed the unreasoned cancellation of the bid of the appellant, learned senior counsel for the intervenor has pointed out that para 1(11A) was inserted in Schedule I vide notification dated 30.09.2021 with effect from 30.09.2021. According to him, this provision is prospective and cannot be applied to auctions conducted prior to 30.09.2021, including the auction in question. Therefore, there was no requirement for the Liquidator to give reasons for cancellation of the bid of the appellant.

29. We are afraid we cannot accept such a contention made on behalf of the intervenor. While it is true that para 1(11A) came to be inserted in Schedule 1 to the Regulations with effect from 30.09.2021, it does not imply that an auction sale or the highest bid prior to the aforesaid date could be cancelled by the Liquidator exercising unfettered discretion and without furnishing any reason. It is trite law that furnishing of reasons is an important aspect rather a check on the arbitrary exercise of power. Furnishing of reasons presupposes application of mind to the relevant factors and consideration by the concerned authority before passing an order. Absence of reasons may be a good reason to draw inference that the decision making process was arbitrary. Therefore, what para 1(11A) has done is to give statutory recognition to the requirement for furnishing reasons, if the Liquidator wishes to reject the bid of the highest bidder. Furnishing of

reasons, which is an integral facet of the principles of natural justice, is embedded in a provision or action, whereby the highest bid is rejected by the Liquidator. Thus, what para 1(11A) has done is to give statutory recognition to this well-established principle. It has made explicit what was implicit.

30. In **S. N. Mukherjee versus Union of India**², this Court opined that the requirement to record reason can be regarded as one of the principles of natural justice which governs exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework whereunder jurisdiction has been conferred on the administrative authority. Except in cases where the requirement of recording reasons has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions is required to record the reasons for its decision. This Court held as follows: -

39. The object underlying the rules of natural justice “is to prevent miscarriage of justice” and secure “fair play in action”. As pointed out earlier the requirement about recording of reasons for its decision by an administrative authority exercising quasi-judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making. Keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework whereunder jurisdiction has been conferred on the administrative authority. With regard to the exercise of a particular power by an administrative authority including exercise of judicial or quasi-judicial functions the

² (1990) 4 SCC 594

legislature, while conferring the said power, may feel that it would not be in the larger public interest that the reasons for the order passed by the administrative authority be recorded in the order and be communicated to the aggrieved party and it may dispense with such a requirement. It may do so by making an express provision to that effect as those contained in the Administrative Procedure Act, 1946 of U.S.A. and the Administrative Decisions (Judicial Review) Act, 1977 of Australia whereby the orders passed by certain specified authorities are excluded from the ambit of the enactment. Such an exclusion can also arise by necessary implication from the nature of the subject matter, the scheme and the provisions of the enactment. The public interest underlying such a provision would outweigh the salutary purpose served by the requirement to record the reasons. The said requirement cannot, therefore, be insisted upon in such a case.

40. For the reasons aforesaid, it must be concluded that except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions is required to record the reasons for its decision.

31. This Court in ***State of Orissa versus Dhaniram Luhar***³ reiterated the importance of furnishing reasons in decision making, be it administrative, quasi-judicial or judicial. It was in that context that this Court opined that reason is the heartbeat of every conclusion, and without the same it becomes lifeless. Reasons are live links between the mind of the decision-taker and the decision or conclusion arrived at. Reasons substitute subjectivity by objectivity. One of the salutary requirements of natural justice is spelling out reasons for an order made; in other words, a speaking out. This is what has been opined in paragraph Nos. 7 and 8:

³ (2004) 5 SCC 568

7. Reason is the heartbeat of every conclusion, and without the same it becomes lifeless. (See Raj Kishore Jha v. State of Bihar [(2003) 11 SCC 519 : 2004 SCC (Cri) 212 : (2003) 7 Supreme 152] .)

8. Even in respect of administrative orders Lord Denning, M.R. in *Breen v. Amalgamated Engg. Union* [(1971) 1 All ER 1148 : (1971) 2 QB 175 : (1971) 2 WLR 742 (CA)] observed: “The giving of reasons is one of the fundamentals of good administration.” In *Alexander Machinery (Dudley) Ltd. v. Crabtree* [1974 ICR 120 (NIRC)] it was observed: “Failure to give reasons amounts to denial of justice.” “Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at.” Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the “inscrutable face of the sphinx”, it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The “inscrutable face of the sphinx” is ordinarily incongruous with a judicial or quasi-judicial performance.”

32. Again, in ***East Coast Railway versus Mahadev Appa Rao***⁴, this Court observed that arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making the order is only one of them. Application of mind is best demonstrated by disclosure of mind by the authority making the order and disclosure is best done by recording the reasons that led the authority to pass

⁴ (2010) 7 SCC 678

the order in question. Absence of reasons either in the order passed by the authority or in the record contemporaneously maintained is clearly suggestive of the order being arbitrary, hence legally unsustainable. The above observations of this Court find place in paragraph No.23 which is extracted hereinunder:

23. Arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making the order is only one of them. Every order passed by a public authority must disclose due and proper application of mind by the person making the order. This may be evident from the order itself or the record contemporaneously maintained. Application of mind is best demonstrated by disclosure of mind by the authority making the order. And disclosure is best done by recording the reasons that led the authority to pass the order in question. Absence of reasons either in the order passed by the authority or in the record contemporaneously maintained is clearly suggestive of the order being arbitrary hence legally unsustainable.

33. This position has been reiterated by this Court in ***Kranti Associates (P) Ltd. Versus Masood Ahmed Khan***⁵, wherein this Court emphasized that an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must be a speaking order. In other words, the order must speak for itself. This Court held as follows: -

12. The necessity of giving reason by a body or authority in support of its decision came up for consideration before this Court in several cases. Initially this Court recognised a sort of demarcation between administrative orders and quasi-judicial orders but with the passage of time the distinction between the two got blurred and thinned out and virtually

⁵ (2010) 9 SCC 496

reached a vanishing point in the judgment of this Court in *A.K. Kraipak v. Union of India* [(1969) 2 SCC 262 : AIR 1970 SC 150] .

13. In *Keshav Mills Co. Ltd. v. Union of India* [(1973) 1 SCC 380 : AIR 1973 SC 389] this Court approvingly referred to the opinion of Lord Denning in *R. v. Gaming Board for Great Britain, ex p Benaim* [(1970) 2 QB 417 : (1970) 2 WLR 1009 : (1970) 2 All ER 528 (CA)] and quoted him as saying “that heresy was scotched in *Ridge v. Baldwin* [1964 AC 40 : (1963) 2 WLR 935 : (1963) 2 All ER 66 (HL)] ”.

14. The expression “speaking order” was first coined by Lord Chancellor Earl Cairns in a rather strange context. The Lord Chancellor, while explaining the ambit of the writ of certiorari, referred to orders with errors on the face of the record and pointed out that an order with errors on its face, is a speaking order. (See pp. 1878-97, Vol. 4, Appeal Cases 30 at 40 of the Report).

15. This Court always opined that the face of an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must speak. It must not be like the “inscrutable face of a sphinx”.

34. Having discussed the above, we may again advert to the impugned e-mail dated 21.07.2021, as per which Liquidator informed the appellant that in terms of Clause 3(k) of the E-Auction Process Information Document he had cancelled the E-auction held on 20.07.2021. As we have already noted, Clause 3(k) of the E-Auction Process Information Document simply says that the Liquidator has absolute right to accept or reject any or all bids or adjourn/postpone/cancel the E-auction or withdraw any asset/property or portion thereof from the E-auction at any stage without assigning any reason thereof. While the Liquidator has traced his authority to the

aforesaid provision, we may mention that as per Clause 2(m), the information provided in the E-Auction Process Information Document should be read together with the provisions of the Code and the Regulations. In the event of a conflict between the E-Auction Process Information Document and the Code or the Regulations, the provisions of the Code or the Regulations, as the case may be, shall always prevail. That apart, Clause 3(i) clarifies that the E-Auction Process Information Document is neither an agreement nor an offer by the Liquidator to the prospective bidders or any other person. The objective of the E-Auction Process Information Document is to provide information to the interested party to enable it to offer its bid. As per Clause 5(n) the bidder with the highest offer/bid does not get any right to demand acceptance of his bid.

34.1. A conjoint reading of the aforesaid provisions would make it clear that while the highest bidder has no indefeasible right to demand acceptance of his bid, the Liquidator if he does not want to accept the bid of the highest bidder has to apply his mind to the relevant factors. Such application of mind must be visible or manifest in the rejection order itself. As this Court has emphasized the importance and necessity of furnishing reasons while taking a decision affecting the rights of parties, it is incomprehensible that an administrative authority can take a decision without disclosing the reasons for taking such a decision.

35. It follows therefore that though para 1(11A) has been inserted in Schedule I to the Regulations w.e.f. 30.9.20221, it only recognizes the need and necessity for giving reasons in the event of rejecting the highest bid. It is

an acknowledgment of the fundamental principle. Thus, intimation of the reasons for rejection of the highest bid would also be the requirement prior to 30.09.2021.

36. In so far the present case is concerned, we have already noted the language employed by the Liquidator at the end of the bidding process. Vide the e-mail dated 21.07.2021 the appellant was informed that it had won the auction and that its winning order had been prepared. The language of this e-mail clearly indicates finality of the decision making by the Liquidator.

37. As per para 1(12) of Schedule-I, on the close of the auction the highest bidder shall be invited to provide balance sale consideration within 90 days of the date of such demand. As per the first proviso, payments made after 30 days shall attract interest @ 12%. The second proviso says that the sale shall be cancelled if the payment is not received within 90 days.

37.1 Para 1(13) says that on payment of the full amount the sale shall stand completed. The Liquidator shall execute the certificate of sale or sale deed to transfer such assets and the assets shall be delivered to the successful bidder in the manner specified in the terms of sale.

38. Therefore, if we read the provisions of Schedule-I, more particularly paras 1(11) to (13) thereof, in a conjoint manner a view may reasonably be taken that ordinarily the highest bid may be accepted by the Liquidator unless there are statutory infirmities in the bidding or the bidding is collusive in nature or there is an element of fraud in the bidding process.

39. In ***Valji Khimji and Company Versus Official Liquidator of Hindustan Nitro Product (Gujarat) Limited and Others***⁶, this Court deprecated entertaining objections after confirmation of sale. Entertaining of objections after the sale is confirmed should not ordinarily be allowed, except on very limited grounds like fraud. Otherwise, no auction-sale will ever be complete. In the facts of that case, this Court noted that it was an open auction after wide publicity. There was no allegation of fraud in the auction. Therefore, there was no justification to set aside the confirmation of sale. It was opined that if every confirmed sale can be set aside the result would be that no auction-sale will ever be completed because always somebody can come after the auction or its confirmation offering a higher amount.

40. ***K. Kumara Gupta Versus Sri Markendaya and Sri Omkareswara Swamy Temple and Ors.***⁷, is a case relating to auctioning of land belonging to the Devasthanam. This Court opined that unless and until it was found that there was any material irregularity and/or illegality in holding the public auction and/or the auction sale was vitiated by any fraud or collusion it is not open to set aside the auction or sale in favour of the highest bidder on the basis of some representations made by a third party who did not even participate in the auction proceedings and did not make any offer. If there is repeated interference in the auction process, the object and purpose of holding public auction and the sanctity of public auction would be frustrated. This Court in paragraph 23 of the judgment held that unless there are allegations of fraud, collusion etc., the highest offer received in the public

⁶ (2008) 9 SCC 299

⁷ (2022) 5 SCC 710

auction should be accepted as a fair value. Otherwise, there shall not be any sanctity of a public auction.

41. It is interesting to note that insofar the present case is concerned, even after cancelling the highest bid of the appellant, in the subsequent sale notice dated 24.12.2021, Respondent No.2 i.e. the Liquidator had again fixed the reserve price of the subject property at Rs.10 crores which was the reserve price in the previous round of auction sale and which was also the bid value of the appellant. If this is the position, we fail to find any rationale or justification in rejecting the bid of the appellant and going for another round of auction at the same reserve price.

42. Thus, mere expectation of the Liquidator that a still higher price may be obtained can be no good ground to cancel an otherwise valid auction and go for another round of auction. Such a cause of action would not only lead to incurring of avoidable expenses but also erode credibility of the auction process itself. That apart, post auction it is not open to the Liquidator to act on third party communication and cancel an auction, unless it is found that fraud or collusion had vitiated the auction. The necessary corollary that follows therefrom is that there can be no absolute or unfettered discretion on the part of the Liquidator to cancel an auction which is otherwise valid. As it is in an administrative framework governed by the rule of law there can be no absolute or unfettered discretion of the Liquidator. Further, upon a thorough analysis of all the provisions concerning the Liquidator it is evident that the Liquidator is vested with a host of duties, functions and powers to oversee the liquidation process in which he is not to act in any adversarial manner while

ensuring that the auction process is carried out in accordance with law and to the benefit of all the stakeholders. Merely because the Liquidator has the discretion of carrying out multiple auction it does not necessarily imply that he would abandon or cancel a valid auction fetching a reasonable price and opt for another round of auction process with the expectation of a better price. Tribunal had rightly held that there were no objective materials before the Liquidator to cancel the auction process and to opt for another round of auction.

43. Learned senior counsel for the intervenor argued that *Shri Vijay Kumar Ghidia* who is the director and principal shareholder of the appellant was also one of the promotor director and principal shareholder of the corporate debtor. Therefore, he is a 'related party' of the corporate debtor and as such is not eligible; rather debarred from participating in the auction of the subject property of the corporate debtor. However, it was pointed out by learned senior counsel for the appellant that *Shri Vijay Kumar Ghidia* is no longer connected with the corporate debtor having retired from the said company way back in the year 2011.

44. At this stage, we may advert to Section 5(24) of the Code which defines the expression 'related party' in relation to a corporate debtor. Section 5(24) reads as follows:-

5. Definitions – In this part, unless the context other requires, -

(24) "related party", in relation to a corporate debtor, means—

(a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;

(b) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;

(c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;

(d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent of its share capital;

(e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent of its paid-up share capital;

(f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;

(i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

(j) any person who controls more than twenty per cent of voting rights in the corporate debtor on account of ownership or a voting agreement;

(k) any person in whom the corporate debtor controls more than twenty per cent of voting rights on account of ownership or a voting agreement;

(l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;

(m) any person who is associated with the corporate debtor on account of—

(i) participation in policy-making processes of the corporate debtor; or

(ii) having more than two directors in common between the corporate debtor and such person; or

(iii) interchange of managerial personnel between the corporate debtor and such person; or

(iv) provision of essential technical information to, or from, the corporate debtor;

44.1 Clause (a) of Section 5(24) says that a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor would be a related party. Likewise, as per Clause (e) of Section 5(24), ‘related party’ in relation to a corporate debtor would mean a private or public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives more than two percent of its share capital or paid-up share capital, as the case may be.

45. Similarly, Section 5(24A) defines ‘related party’ in relation to an individual which is as follows: -

5. Definitions – In this Part, unless the context otherwise requires,-

(24A) “related party”, in relation to an individual, means—

(a) a person who is a relative of the individual or a relative of the spouse of the individual;

(b) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner;

(c) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual;

(d) a private company in which the individual is a director and holds along with his relatives, more than two per cent. of its share capital;

(e) a public company in which the individual is a director and holds along with relatives, more than two per cent. of its paid-up share capital;

(f) a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual;

(g) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual;

(h) a person on whose advice, directions or instructions, the individual is accustomed to act;

(i) a company, where the individual or the individual along with its related party, own more than fifty per cent. of the share capital of the company or controls the appointment of the board of directors of the company.

Explanation.—For the purposes of this clause,—

(a) “relative”, with reference to any person, means anyone who is related to another, in the following manner, namely—

(i) members of a Hindu Undivided Family,

(ii) husband,

(iii) wife,

(iv) father,

(v) mother,

(vi) son,

- (vii) daughter,
- (viii) son's daughter and son,
- (ix) daughter's daughter and son,
- (x) grandson's daughter and son,
- (xi) granddaughter's daughter and son,
- (xii) brother,
- (xiii) sister,
- (xiv) brother's son and daughter,
- (xv) sister's son and daughter,
- (xvi) father's father and mother,
- (xvii) mother's father and mother,
- (xviii) father's brother and sister,
- (xix) mother's brother and sister, and
- (b) wherever the relation is that of a son, daughter, sister or brother, their spouses shall also be included;]

45.1. From the above, it is evident that a person who is a relative of the individual or a relative of the spouse of the individual would be a 'related party' in relation to that individual. That apart, a private company or a public company in which the individual is a director and holds along with relatives more than two percent of its share capital or paid up share capital, as the case may be, would be a 'related party' in relation to an individual. Further, as per the explanation, both maternal and paternal uncles would be covered within the definition of 'related party'.

46. Section 29A of the Code mentions persons not eligible to be a resolution applicant. Section 29A reads as follows: -

29-A. Persons not eligible to be resolution applicant.—A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person,—

- (a) is an undischarged insolvent;
- (b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);
- (c) [at the time of submission of the resolution plan has an account,] or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) [or the guidelines of a financial sector regulator issued under any other law for the time being in force,] and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan:

[Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I.—For the purposes of this proviso, the expression “related party” shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares [or completion of such transactions as may be prescribed,] prior to the insolvency commencement date.

Explanation II.—For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from

the date of approval of such resolution plan by the Adjudicating Authority under this Code;]

[(d) has been convicted for any offence punishable with imprisonment—

(i) for two years or more under any Act specified under the Twelfth Schedule; or

(ii) for seven years or more under any other law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;]

(e) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013):

[Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;]

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:

[Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;]

(h) has executed [a guarantee] in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code [and such guarantee has been invoked by the creditor and remains unpaid in full or part];

(i) [is] subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses (a) to (i).

Explanation [I].—For the purposes of this clause, the expression “connected person” means—

(i) any person who is the promoter or in the management or control of the resolution applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii).

* * * * *

46.1. Thus, as per Section 29A(g), a person shall not be eligible to submit a resolution plan if such person or any other person acting jointly or in concert with such person has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the adjudicating authority. Clause (j) says that a person shall not be eligible to submit a resolution plan if such person or any other person acting jointly or in concert with such person has a connected person not eligible under Clauses (a) to (i). As per Explanation (i), the expression ‘connected person’ means-(i) any person who is the promoter or in the management or control of

the resolution applicant; or (ii) any person who shall be the promoter or in the management or control of the business of the corporate debtor during the implementation of the resolution plan; etc.

47. The expression ‘related party’ appearing in Sections 5(24) and (24A) suffering ineligibility under Section 29A has received considerable attention of this Court. In ***Swiss Ribbons Private Limited and Another Versus Union of India and Others***⁸, a constitutional challenge was made to Section 29A(j) of the Code read with the definition of ‘related party’ as defined under Sections 5(24) and 5(24A). While repelling the challenge, this Court held as follows:-

109. We are of the view that persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. Similarly, all the categories of persons mentioned in Section 5(24-A) show that such persons must be “connected” with the resolution applicant within the meaning of Section 29-A(j). This being the case, the said categories of persons who are collectively mentioned under the caption “relative” obviously need to have a connection with the business activity of the resolution applicant. In the absence of showing that such person is “connected” with the business of the activity of the resolution applicant, such person cannot possibly be disqualified under Section 29-A(j). All the categories in Section 29-A(j) deal with persons, natural as well as artificial, who are connected with the business activity of the resolution applicant. The expression “related party”, therefore, and “relative” contained in the definition sections must be read *noscitur a sociis* with the categories of persons mentioned in Explanation I, and so read, would include only persons who are connected with the business activity of the resolution applicant.

110. An argument was also made that the expression “connected person” in Explanation I, clause (ii) to Section

⁸ (2019) 4 SCC 17

29-A(j) cannot possibly refer to a person who may be in management or control of the business of the corporate debtor in future. This would be arbitrary as the explanation would then apply to an indeterminate person. This contention also needs to be repelled as Explanation I seeks to make it clear that if a person is otherwise covered as a “connected person”, this provision would also cover a person who is in management or control of the business of the corporate debtor during the implementation of a resolution plan. Therefore, any such person is not indeterminate at all, but is a person who is in the saddle of the business of the corporate debtor either at an anterior point of time or even during implementation of the resolution plan. This disposes of all the contentions raising questions as to the constitutional validity of Section 29-A(j).

47.1. After a careful analysis, this Court opined that the expressions ‘related party’ and ‘relative’ contained in the definition sections must be read *noscitur a sociis* with the categories of person mentioned in Explanation I. So read, it would include only persons who are connected with the business activity of the resolution applicant. This Court further clarified that the expression ‘connected person’ would also cover a person who is in management or control of the business of the corporate debtor during the implementation of a resolution plan.

48. In ***Phoenix ARC Private Limited versus Spade Financial Services Limited***⁹, this Court noted that the expression ‘related party’ is defined in Section 5(24) in relation to a corporate debtor and Section 5(24A) provides a corresponding definition in relation to an individual. Thereafter, it has been observed as under:-

⁹ (2021) 3 SCC 475

88. An issue of interpretation in relation to the first proviso of Section 21(2) is whether the disqualification under the proviso would attach to a financial creditor only in praesenti, or if the disqualification also extends to those financial creditors who were related to the corporate debtor at the time of acquiring the debt.

48.1. Referring to its earlier decision in ***Arcelor Mittal (India) (P) Ltd. V. Satish Kumar Gupta***¹⁰, where the issue was whether ineligibility of the resolution applicant under Section 29 A(c) of the Code is attached to an applicant at the date of commencement of the corporate insolvency resolution process or at the time when the resolution plan is submitted by the resolution applicant. It was clarified that the opening words of Section 29(A) stating “a person shall not be eligible to submit a resolution plan.....” clearly indicates that the stage of ineligibility attaches when the resolution plan is submitted by the resolution applicant; thus the disqualification applies *in praesenti*. This Court referred to Section 21(2) of the Code, more particularly to the second proviso thereto which deals with the Committee of Creditors and the ineligibility of a related party in the consideration and voting on a resolution plan by the said committee and held as follows:

101. However, if such an interpretation is given to the first proviso of Section 21(2), all financial creditors would stand excluded if they were a “related party” of the corporate debtor at the time when the financial debt was created. This may arguably lead to absurd conclusions for entities which have legitimately taken over the debt of related parties, or where the related party entity had stopped being a “related party” long ago.

¹⁰ (2019) 2 SCC 1

49. ***Arun Kumar Jagatramka Versus Jindal Steel and Power Limited and Another***¹¹, also deals with Section 29A of the Code. In that case, this Court observed that the fundamental postulate of the Code is that a corporate debtor has to be protected from its management and corporate debt. Hence it would be anomalous if a compromise or arrangement can be entertained from a person who is responsible for the state of affairs of the corporate debtor. Referring to ***Arcelor Mittal (India) (P) Ltd.*** (supra), this Court observed that the said decision adverted to Section 29A of the Code as a typical instance of a see-through provision so that one is able to arrive at persons who are actually in 'control' whether jointly or in concert with other persons. It was thereafter that this Court held that Section 29A is a crucial link in ensuring that the objects of the Code are not defeated by allowing 'ineligible persons' responsible for running a company (corporate debtor) aground, to return in the new *avatar* of a resolution applicant.

50. From the above, it is clearly manifest that the disqualification sought to be attached to the appellant is without any substance as the related party had ceased to be in the helm of affairs of the corporate debtor more than a decade ago. He was not in charge of the company or an influential member of the company i.e., the corporate debtor when the appellant had made its bid pursuant to the auction sale notice.

51. Thus having regard to the aforesaid discussion, we have no hesitation in coming to the conclusion that Appellate Tribunal was not justified in setting aside the order of the Tribunal dated 12.08.2021.

¹¹ (2021) 7 SCC 474

Consequently, we set aside the order dated 30.11.2021 passed by the Appellate Tribunal and restore the order dated 12.08.2021. The appeal is accordingly allowed. However, there shall be no order as to costs.

.....**J.**
[B. V. NAGARATHNA]

.....**J.**
[UJJAL BHUYAN]

NEW DELHI;
06.09.2023