

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No. 6327 of 2022

**Kashvi Power & Steel Private Limited and another
Vs.
West Bengal State Electricity Distribution Company Limited and others**

For the petitioners	:	Mr. Ratnanka Banerji Mr. Rishav Banerjee Mr. Supriyo Gole Ms. Madhuja Barman Mr. A.K. Awasthi
For the WBSEDCL	:	Mr. Madhu Sudan Sarkar Mr. Ishaan Saha Mr. Mousamjit Sarkar
For the State	:	Mr. Anirban Ray Mr. Debashis Ghosh Mr. Sayan Ganguly
Hearing concluded on	:	11.07.2022
Judgment on	:	12.08.2022

Sabyasachi Bhattacharyya, J:-

1. The petitioner acquired the respondent no.3 as a going concern in a liquidation sale under the Insolvency and Bankruptcy Code, 2016 (IBC). The respondent no.1-Electricity Distribution Company, being an operational creditor, filed its claim with the Resolution Professional as well as the Liquidator and a portion of the claim was admitted. However, when

the petitioner, being the auction purchaser of the corporate debtor, applied for new electricity connection, the same was refused by the respondent no.1–Distribution Licensee, demanding past outstanding dues against respondent no.3.

2. In such context, the petitioner refers to certain dates.
3. On October 22, 2019, the respondent no.3 was admitted under Corporate Insolvency Process (CIRP) *vide* an order of the NCLT, Kolkata Bench.
4. On January 5, 2021, on the failure of a resolution plan to materialize, the NCLT passed an order admitting the respondent no.3-Company into liquidation. The claim of respondent no.1 in respect of dues was admitted by the Resolution Professional during the CIRP on June 23, 2020 as well as by the Liquidator, at the stage of liquidation, on January 3, 2022.
5. *Vide* order dated January 4, 2022, the NCLT granted certain reliefs and concessions in favour of the petitioner in respect of the respondent no.3 so that the business could be carried on smoothly by the petitioner as a successful bidder.
6. However, the respondent no.1 issued a Demand Notice on January 27, 2022 for the alleged outstanding dues to the tune of Rs. 26,87,37,466/- for starting the procedure of new connection.
7. On March 15, 2022, balance confirmation was issued by respondent no.1 to the petitioner to admit outstanding of Rs. 26,87,37,466/- for the Haldia Plant and Rs. 14,10,91,244.63 p. for the Bishnupur Plant.
8. It is submitted on behalf of the petitioners that the IBC is a complete code in itself, as held in *Embassy Property Development Pvt. Ltd. Vs. State of Karnataka and others*, reported at (2020) 13 SCC 308. The petitioners cite

Innoventive Industries Ltd. Vs. ICICI Bank, reported at (2018) 1 SCC 407 in support of the proposition that the IBC is an exhaustive code on the subject matter of insolvency in relation to corporate entities and others. It is contended that Section 53 of the IBC has a non-obstante clause and lays down the method by which the proceeds from the sale of the liquidation assets of a corporate creditor in liquidation will be distributed among various stakeholders. The claim of the respondent no.1, it is argued, was admitted both in the CIRP and in liquidation and it was supposed to be paid, as an operational creditor, as per Section 53(1)(f) of the IBC.

9. If the liabilities are shifted to the buyer of the going concern, it is argued, then the various claimants who have a claim on the liquidation estate would have two claims, one on the liquidation estate and another claim on the buyer of the going concern, which cannot be permissible in law.
10. It is submitted that if electricity dues are permitted to be realized from the auction purchaser, then the electricity company, which is an operational creditor, will be given the status of a special creditor who will rank higher than all other creditors mentioned in Section 53 of the IBC, including the workmen and secured financial creditors.
11. Section 30(b) of the IBC requires that the payment of debts of the operational creditors shall not be less than (i) the amount to be paid to the creditors in the event of liquidation of the corporate debtor under Section 53; or (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in Section 53(1) of the IBC. Regulation 32 of the Insolvency and Bankruptcy Board of India

(Liquidation Process) Regulations, 2016 was amended *vide* notification dated March 27, 2018 with effect from April 1, 2018, inserting the clause “sell the corporate debtor as a going concern”. Other methods of sale, including the sale of the business of the corporate debtor as a going concern, were also introduced by the amendment dated October 22, 2018 from the said date.

12. Relying on Regulation 32A, the Supreme Court held in *Arcelor Mittal India Private Limited Vs. Satish Kumar Gupta & Ors.*, reported at (2019) 2 SCC 1 that if there is a Resolution Applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see this possibility.
13. It is submitted by the petitioners that Regulation 32A of the said Regulations provides that liquidation sale has two facets, asset sale and sale as a going concern. Going concern sale can be with or without liabilities. As, in the present case, no liabilities were indentified, whether by the committee of creditors or the liquidator, as would be apparent from the Expression of Interest (EoI), no liabilities could be cast upon the present petitioners.
14. In such context, the petitioners rely on *Isha Marbles Vs. Bihar State Electricity Board & Anr.*, reported at (1995) 2 SCC 648, for the proposition that when the corporate debtor is sold as a going concern under liquidation and the claims are to be distributed as per Section 53, claims of any other creditor cannot be entertained contrary to the provisions of Section 53. The intent of the provision was to provide a clean slate to aid the purchaser of the corporate debtor who bought it as a going concern.

15. Learned counsel for the petitioners next cites *Kolkata Municipal Corporation and another Vs. Union of India and others*, a Single Bench Judgment of this court, reported at (2021) SCC Online Cal 145, wherein it was held that Income Tax dues are in the nature of crown debts and cannot take precedence over secured assets, which proposition was upheld, thereby finalizing the claim of KMC within the realm of the IBC. The said claim, it was held, would have to wait for the outcome of the process and the distribution of the assets in terms of Section 53 of the IBC. The said Judgment was upheld by a Division Bench, as reported at (2022) SCC Online Cal 225.
16. Next placing reliance on *Eastern Power Distribution Company of Andhra Pradesh Limited Vs. Maithan Alloys Limited in Company Appeal (AT) (Insolvency) No. 961 of 2021*, it is submitted that the Adjudicating Authority held that as the sale is on a going concern basis, the corporate debtor is entitled to receive connection in its own name. The appellant was directed to energize the connection to the corporate debtor. Against the same, an appeal was preferred and it was held that if the payment of the entire pre-CIRP and post-CIRP dues is taken from the successful auction purchaser, the same will be in contravention of the IBC.
17. It is pertinent to mention, the petitioners argue, that the petitioners had already paid the sale consideration price of Rs.166 crores and have invested huge sums of money and refurbished the plants of respondent no.3 which were in dilapidated condition.
18. Insofar as the judgments cited by the respondent is concerned, the reliance on *M/s. Visisth Services Limited Vs. S.V. Ramani*, reported at

MANU/NL/0033/2022, it is argued, is misplaced because the issue in NCLAT was whether an auction purchaser can wriggle out of its contractual obligations after accepting the bid on the ground that the sale as going concern was with liability. The question involved was whether the sale of the corporate debtor as a going concern in liquidation proceedings includes its liabilities or not. The NCLAT order is not a precedent for the issue as to whether electricity dues should be imposed on the successful purchaser, since in the said judgment it was held that liabilities can also be included in a going concern sale. In *Shiv Shakti Inter Globe Exports Pvt. Ltd. Vs. KTC Foods Private Limited [(2022) SCC Online NCLAT 85]*, the same Bench which decided *M/s. Visisth Services Limited* (supra) on the issue of electricity dues, did not refer to its earlier judgment in *M/s. Visisth Services Limited* (supra) as it was not a case on the point of electricity dues and successful auction purchaser.

19. The Supreme Court, it is submitted, held in *Telengana State Southern Power Distribution Vs. Srigdhaa Beverages*, reported at (2020) 6 SCC 404, relied on by the respondent, in respect of a sale under the provisions of the SARFAESI Act, which, thus, differs from the present liquidation proceeding under the IBC.
20. The case of *Dollar Industries Vs. The Assistant Commissioner, Central Excise Customs and Service Tax, Dindigul and others*, reported at *MANU/TN/5978/2020*, relied on by the petitioners, it is argued, is directly on the issue of a liquidation sale under the Company Law. It was also a sale under the SARFAESI Act and therefore the principle does not apply to IBC. The NCLT Bombay judgement of *Harsh Vinimay Pvt. Ltd. IA*

1253/2021 in CP(IB) 2521 (MB)/2018, it is submitted, has clearly proceeded on the wrong basis by following *M/s. Visisth Services Limited* (supra).

21. Lastly, learned counsel for the petitioners places reliance on *Isha Marbles* (supra) to reiterate the proposition that a genuine auction purchaser cannot be saddled with the responsibilities of previous dues.
22. By placing reliance on *AI Champdany Industries Limited Vs. Official Liquidator and another* [(2009) 4 SCC 486], which refers to *Isha Marbles* (supra), it is submitted that if previous dues were transferable, then it would give the dishonest consumers an opportunity to transfer the same to the future purchaser. Further, dues of the Municipality would also not even otherwise come within the purview of “crown debt”, which can only be discharged after the secured creditors stand discharged. Hence, it is submitted that in the present case, the petitioners cannot be penalized for past dues of respondent no.3 and cannot give an upper hand to the respondent no.1 for claiming its dues when it has already submitted its claim to the liquidator, which was admitted.
23. Learned counsel for the respondent no.1-Distribution Licensee submits that the electricity supply to the premises of respondent no.3 was disconnected on May 23, 2019 under Section 56 of the 2003 Act owing to non-payment of electricity charges. Such disconnection took place much prior to commencement of CIRP which has been suppressed in the writ petition. By an order dated January 5, 2021, the NCLT directed the liquidation of respondent no.3-Company upon which an e-Auction notice was issued on May 26, 2021 by the liquidator for sale of the respondent

no.3-Company as a going concern. In the said e-Auction notice, it was categorically mentioned that the assets of the Company were proposed to be sold on “as is where is basis”, “whatever there is basis”, “without recourse basis”, etc.

- 24.** The petitioner was declared to be the successful bidder by the liquidator and the petitioner was handed over possession of the assets of the respondent no.3-Company in liquidation at Haldia and Bishnupur on August 16, 2021.
- 25.** A sale agreement dated September 30, 2021 was executed in favour of the petitioner with regard to the assets of the respondent no.3-Company acquired by the petitioner, which categorically provided that the assets of the Company in liquidation were being sold as a going concern on as is where is basis, as is what is basis, whatever there is basis and without recourse basis. On obtaining such possession the petitioner applied for fresh electricity connection on December 17, 2021.
- 26.** Learned counsel for the respondent no.1 contends that, under Section 3 of the West Bengal Electrical Undertakings Recovery of Dues, 2000, when any dues are payable by a consumer to an electrical undertaking, the prescribed authority after expiry of thirty days of such due, may issue notice of demand on the defaulting consumer demanding the amount payable by him. By virtue of Section 5 of the said Act, in the event of failure of the consumer to make such payment, he would be treated as defaulter with penalty and cost of recovery, which would be recoverable as arrears of land revenue.

- 27.** Again, a notice for recovery of dues was issued by the respondent no.1 for filing a suit under the Bengal Public Demands Recovery Act, 1913 but immediately thereafter the CIRP started and, by order of moratorium, respondent no.1 was precluded from filing the suit. Thereafter, the matter was referred for liquidation.
- 28.** It is submitted that after the completion of the liquidation process, on January 4, 2022 an order was passed by the Tribunal in an application under Section 60(5) of the IBC, granting certain concessions and reliefs to the petitioners.
- 29.** It is thus argued by the respondent no.1 that the question which acquires relevance is whether sale as a going concern in liquidation extinguishes past dues. In *Dollar Industries* (supra) of the Madras High Court, insofar as properties are concerned, they are two-fold – the properties of ongoing concern along with business sold, in other words, the transfer of business or taking over of sick industry or revival of the closed industry, or continuing the same business. Such continuance involves employees, plant and machinery, benefit of tax exemption or concession, goodwill and also the old and new customers. In such case, by the transfer or revival or taking over, the business, as such, is continued with its advantages and disadvantages, the profits and liabilities going with the benefits and goodwill of the business.
- 30.** Learned counsel for the respondent no.1 stresses the expression “going concern on as is where is basis” in the said notice to argue that all liability of the Corporate Debtor prior to initiation of CIRP or liquidation process will be saddled with the purchaser.

31. It is submitted that liquidation does not extinguish dues. The Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019, introduced Regulation 32A with effect from July 25, 2019 which defines sale as going concern for maximization of value of assets. Regulation 32A (3) provides that where the Committee of Creditors has not identified the assets and liabilities under Regulation 39C (2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons' Regulation), 2016, the liquidator shall identify and group the assets and liabilities to be sold as a going concern in consultation with the Committee, after which the sale of the corporate debtor as going concern, including assets and liabilities, takes place. Learned counsel harps on the NCLT judgments cited in the case to contend that the sale of a going concern includes assets as well as liabilities. In *Telengana State Southern Power Distribution* (supra), the liability of electricity dues have been held to be included in sale, as going concern on as is where is basis.
32. Learned counsel also seeks to distinguish the judgments cited by the petitioners. *Isha Marbles* (supra) is sought to be distinguished on the ground that it was pronounced in 1995, that is, 21 years prior to enactment of the IBC and setting up of NCLTs and as such, cannot apply to IBC cases.
33. The grant of reliefs and concessions by the NCLT, Kolkata *vide* order dated January 4, 2022, it is submitted, was without any authority of law and in exercise of excess jurisdiction not vested upon the NCLT.
34. In the affidavit-in-reply, the petitioner has admitted that they are not praying for order directing reconnection but challenging the liability prior to

initiation of CIRP for outstanding electricity charges. Since the claim arose for non-payment prior to the initiation of the CIRP, the issue cannot come under the scope of adjudication of the NCLT, it is submitted. The NCLT, it is argued, has no jurisdiction to extinguish the rights of property of any other person/creditor without any authority of law as guaranteed under Article 300A of the Constitution.

- 35.** NCLT was established by drawing reference from recommendation of the Insolvency Law Committee dated March 26, 2018, which is nothing but merely a recommendation for new enactment or amendment for implementation of the IBC.
- 36.** Relying on *M/s. Visisth Services Limited* (supra), it is argued that the sale of company in liquidation as going concern means sale of assets as well as liabilities and not assets sans liabilities. The petitioner no.1 places reliance on *Gujarat Urja Vikash Limited Vs. Amit Gupta and others* [(2021) 7 SCC 209], *Embassy Property Developments Private Limited Vs. State of Karnataka and others* [(2020) 13 SCC 308] and *Tata Consultancy Services Limited Vs. Vishal Gishul Jain* [(2022) 2 SCC 583].
- 37.** It is submitted that the application for grant of reliefs and concessions and the order dated January 4, 2022 on the same happened upon suppression of material facts and misrepresentation with regard to liabilities of the petitioner.
- 38.** It is contended that the submissions of the petitioner in respect of approval of resolution plan and its effects are totally different from liquidation proceedings and the judgments cited thereon are not relevant in the present proceedings. In respect of the liquidation process, in the Regulation

of 2016, Regulation 32A(3) clearly introduces identification of assets and liabilities by the Committee of Creditors, thereby including liabilities with assets with regard to sale of assets in a going concern. Such introduction was within the wisdom of the legislature and cannot be ignored, unless declared *ultra vires* by a competent court.

39. The proposition advanced by the petitioner that if the sale of assets is made with liabilities, a claim of equity holders and other creditors will be carried on, is an absurd proposition, due to which *M/s. Visisth Services* (supra) did not consider the amended Regulation 32A (3). As such, subsequent orders against the proposition of the earlier order dated January 11, 2021 in *M/s. Visisth Services* (supra) are misconceived inasmuch as interpretation of law is concerned.
40. The sale of the corporate debtor implies that the equities of the shareholders become nil and there will be no liabilities in favour of the shareholders.
41. The other judgments cited by the petitioner were passed before the amendment of Regulation 32A (3) of the Liquidation Process Regulation, 2016 came in force.
42. The amendment made on July 25, 2019, was with effect from July 25, 2017, which is the date of commencement of evaluation of insolvency proceeding under the IBC.
43. Learned counsel seeks to cite instances in support of his proposition. In any event, it is argued that the purchaser-Company carries the liabilities with the sale as a going concern, payable subsequent to the said sale in liquidation. Thus, the quantum of sale proceeds would be lesser than the

actual consideration if it was sold without liabilities. Hence, the said lesser quantum of sale proceeds is being paid on auction sale as going concern, which will be distributed amongst the list of creditors in terms of Section 53 of the IBC, to bypass which there is no scope.

44. The doctrine of clean slate relied on by the petitioner was pronounced without considering Regulation 32A (3) and has no application in the present case. *M/s. Shiv Shakti* (supra) is relied on by respondent no.1 in support of his proposition in respect of sale of corporate debtor as a going concern including both assets and liabilities. With regard to *Bhatpara Municipality Vs. Nicco Eastern Private Limited and others*, it is argued that the NCLAT, Delhi did not consider the amended provision of the Liquidation Process Regulation, 2019 made on July 25, 2019. Thus, the said judgment is not attracted to the present case. The respondent no.1, thus, seeks to distinguish the judgments cited by the petitioner on the above score.
45. The IBC is a self-sufficient Code and provides a complete mechanism in respect of Corporate Insolvency Resolution and Liquidation.
46. Liquidation, as envisaged in the IBC, is not a mere isolated offshoot of Insolvency Resolution proceeding but is one of the logical conclusions of a resolution proceeding. The procedure as contemplated in the IBC is an integrated continuum.
47. In order to examine the scheme of liquidation under the IBC in such context, Section 5(18) of IBC is required to be considered first. The said sub-section provides that “liquidator” means of an insolvency professional appointed as a Liquidator in accordance with the provisions of Chapter III or Chapter V of Part-II, as the case may be. Section 5(20) stipulates that

“operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. Section 5(21), on the other hand, defines “operational debt” as a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

- 48.** Section 33, IBC provides for initiation of liquidation. It is clear from a plain reading of Section 33 that liquidation begins where a Corporate Insolvency Resolution fails.
- 49.** Section 35 stipulates the powers and duties of the liquidator. Clauses (a) to (d), (f) and (j) of Section 35, sub-section (1) are relevant in the context. Clause (a) empowers the liquidator to verify claims of all the creditors, Clause (b) to take into custody or control all the assets, property, effects and actionable claims of the corporate debtor, Clause (c) to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report and Clause (d) to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary. Clause (f) confers power on the Liquidator, subject to Section 52, to sell the immovable and movable property 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. The proviso thereto says that the liquidator shall not sell immovable and movable property or actionable claims of the corporate

debtor in liquidation to any person who is not eligible to be a resolution applicant. Clause (j) empowers the liquidator to invite and settle claims of the creditor and claimants and distribute proceeds in accordance with the provisions of the Code.

- 50.** Section 38 of the IBC provides for consolidation of claims by the liquidator, Section 39 the verification of claims and Section 40 deals with the admission or rejection of claims by the liquidator.
- 51.** Hence, the powers of the liquidator are on a similar footing as those of a Resolution Professional in a resolution proceeding. It is also noteworthy that Section 5 (18) of the IBC stipulates that a Liquidator has to be a Resolution Professional in the first place.
- 52.** Section 53 provides for distribution of assets in liquidation and sets out the order of priority of distribution of proceeds from the sale of the liquidation assets. The sixth category in such pecking order is Section 53(1)(f), “any remaining debts and dues”. Clause (f) is the only provision in Section 53 which confers rights on the operational creditors to recover their dues.
- 53.** As such, Section 53 is the culmination of the entire endeavour of the Liquidator and the order of priority given therein cannot be overridden by any of the operational creditors of the corporate debtor by jumping the queue in contravention of the priorities enumerated in Section 53.
- 54.** What is next relevant is Regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. The different types of sale of asset have been enumerated therein. Up to Clause (d) of Regulation 32, sale of assets is dealt with. Clause (e) provides for sale of the

corporate debtor as a going concern. Again, Clause (f) contemplates the business of the corporate debtor being sold as a going concern.

55. Regulation 32-A of the said Regulations provides for sale as a going concern. Sub-regulation (2) of Rule 32-A stipulates that for the purpose of sale under Sub-regulation (1), the group of assets and liabilities of the corporate debtor, as identified by the committee of creditors under sub-regulation (2) of Regulation 39-C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, shall be sold as a going concern.
56. On the other hand, Regulation 32-A (3) provides that where the committee of creditors has not identified the assets and liabilities under sub-regulation (2) of Regulation 39-C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall identify and group the assets and liabilities to be sold as a going concern, in consultation with the consultation committee.
57. It is evident from the scheme of the IBC, in respect of Liquidation, is that the pecking order as stipulated in Section 53 of the IBC cannot be superseded by any of the categories as provided therein. The said provision is set out below for convenience:

“53. Distribution of Assets. – (1) *Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely:-*

- (a) *the insolvency resolution process costs and the liquidation costs paid in full;*
- (b) *the following debts which shall rank equally between and among the following:-*
 - (i) *workmen’s dues for the period of twenty-four months preceding the liquidation commencement date; and*

- (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
 - (c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
 - (d) financial debts owed to unsecured creditors;
 - (e) the following dues shall rank equally between and among the following:-
 - (i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
 - (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
 - (f) any remaining debts and dues;
 - (g) preference shareholders, if any; and
 - (h) equity shareholders or partners, as the case may be.
- (2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.
- (3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.- For the purpose of this section—

- (i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and class of recipients, if the proceeds are insufficient to meet the debts in full; and class off recipients, if the proceeds are insufficient to meet the debts in full; and
- (ii) the term “workmen’s dues” shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013.”

58. Thus, the operational creditors, who fall within category (f), that is, “any remaining debts and dues”, cannot claim any priority over the preceding categories in having their debts paid off.

- 59.** However, that is precisely what will happen if the argument of the WBSEDCL is accepted, that is, if the expression “sale of going concern”, as used in the IBC and connected Regulations in respect of liquidation, is construed to include transfer of pre-CIRP liabilities of the corporate debtor.
- 60.** Regulation 32-A of the Liquidation Process Regulations of 2016 clearly specifies that “liabilities” for the purpose of going concern sales in liquidation are only those liabilities which have been identified and earmarked for the going concern sale by the committee of creditors, if not, by the liquidator.
- 61.** The said provision, read with Regulation 39-C of the Corporate Persons Regulations, 2016, is unambiguous and leaves no scope of construing that all the liabilities, including pre-CIRP liabilities, are transferred to the successful Resolution Applicant in a going concern sale.
- 62.** It is well-settled that the debts of the power distribution licensee do not operate as charge on the assets of the corporate debtor.
- 63.** Hence, both sale of the corporate debtor and the business(es) of the corporate debtor as a going concern, as envisaged in Regulation 32, Clauses (e) and (f) respectively, do not contemplate automatic transfer of all pre-CIRP liabilities of the corporate debtor to the auction purchaser.
- 64.** In any event, the Regulations framed under the authority conferred by the IBC cannot be construed to override the provisions of the Code itself. Hence, no interpretation contrary to Section 53 of the IBC which, again, is preceded by a non obstante clause, can be attributed to the expression “going concern sale”, as contemplated in Rule 32 of the Liquidation Process Regulations, 2016.

- 65.** In the present case, the distribution licensee had made its claim during the resolution process as well as before the liquidator. Thus, whatever claim was allowed by the liquidator and sanctioned by the NCLT as Adjudicating Authority would be payable to the WBSEDCL from the sale proceeds in the ratio and order of priority as stipulated in Section 53. The WBSEDCL cannot, thus, have a double claim on the sale proceeds on the one hand and again from the auction purchaser merely on the strength of the expression “going concern sale” as used in the EOI.
- 66.** Hence, the arguments of the WBSEDCL on such score cannot be accepted.
- 67.** Thus, WPA 6327 of 2022 is allowed, thereby turning down the claim of the WBSEDCL against the petitioners for the electricity dues left by the erstwhile owners/management of the petitioner no.1-company prior to commencement of the CIRP. The WBSEDCL is directed to process the application of the writ petitioners for new electricity connection at the earliest and to give such electricity connection to the petitioners, without insisting upon payment of such dues within a month from compliance of all other formalities by the petitioners in that regard.
- 68.** There will be no order as to costs.
- 69.** Urgent certified copies, if applied for, be issued by the department on compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)