

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I**

IA No. 1749/MB/C-I/2024

In

C.P (IB) No.292/MB/C-I/2017

An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016

Filed by

Exicom Technologies India Private Limited ...Applicant

Versus

Mr. VijayKumar Iyer and Ors.

...Respondents

In the matter of

Edelweiss Assets Reconstruction Company Limited

...Financial Creditor

Versus

Bharati Defence and Infrastructure Limited

... Corporate Debtor

Order Pronounced on: 27.082024

Coram:

Hon'ble Member (Judicial)	:	Justice V.G. Bisht (Retd.)
Hon'ble Member (Technical)	:	Mr. Prabhat Kumar

Appearances:

For the Applicant	:	Mr. Gaurav Joshi, Senior Advocate
For Respondent No.1/Liquidator	:	Mr. Abhishek Swaroop, Advocate
For Respondent No. 4	:	Mr. Suraj Chaudhary, Advocate
For Respondent No. 3	:	Ms. Arusha Bapat a/w Ms. Prachi Wazalwar, Advocates

ORDER

Per: Prabhat Kumar, Member (Technical)

1. The present Application is filed by the Successful Bidder i.e. M/s Exicom Technologies India Private Limited to approve and take on record the acquisition plan dated 19.03.2024

and grant of certain reliefs, concessions, waivers and exemptions.

2. Respondent No.1 issued a Public Announcement for sale of Corporate Debtor as going concern in Liquidation on 14.11.2023 and it describes the Assets Parcel under the Bid Process :

BDIL as a whole, on a going concern basis, excluding the Excluded Assets:

Including

- *Drawings and design of vessels*
- *Licenses and Certifications- Shop establishment certificate, Industrial License, etc.*
- *Financial assets including trade receivables, loans and advances and security deposits*
- *Part A Litigations [as specified under the Process Document]*
- *Assets at N N Shipbuilders and Assets at Mannu Carriers*

Excluding:

- *Cash and Cash Equivalents;*
- *Assets at Bhoir Warehouse;*
- *Kolkata Shipyard;*
- *Mangalore Shipyard;*
- *Assets at Goa;*
- *Dabhol Shipyard;*
- *Assets at Ratnagiri Shipyard;*
- *Head office of Corporate Debtor;*
- *Assets at Gultare Yard;*
- *Part B Litigations (as specified under the Process Document)*

Further details in relation to the above shall be provided in the Process Document and the Data Room.

3. Respondent No.1 issued a Letter of Intent (“LOI”) upon the Applicant, in terms of the process document on 20.12.2023. The said LOI contemplated sale of the Corporate Debtor as a whole on a going concern basis along with Part A Litigations and the assets as more particularly provided in Annexure IV of the Process Document were kept outside this sale.
4. The Applicant accepted the said LOI on 21.12.2023. Pursuant to the said documents, the Applicant deposited Rs.3,44,95,935/- i.e. 25% of the Total Sale Consideration. The Applicant states that Liquidator had filed an Application bearing IA No. 1108 of 2024 seeking approval of sale of the Corporate Debtor as a going concern and for grant of reliefs, which was disposed of vide Order dated 29.04.2024 granting certain reliefs and concessions. The Applicant submits that the present Application is filed for the purpose of placing on record the acquisition plan and seeking certain additional reliefs and concessions.
5. The Applicant submits that the Acquisition Plan dated 19.03.2024 submitted by the Applicant is akin to a Resolution Plan under Section 31 of the Code. Accordingly, the argument canvassed by the Applicant is that, under sale as going concern under Liquidation Process the Successful Bidder is entitled to reliefs and concessions as the Successful Resolution Applicant under Resolution Plan.
6. Primarily, the Applicant submits that since the Corporate Debtor was a public listed company, the reliefs and concessions sought by way of the present Application, amongst others, are relating to SEBI and security laws.

Submissions advanced by Respondent No. 4 (SEBI):

7. It is submitted that it is the case of the Applicant that the CD is presently a listed company and the listing status of the CD is merely suspended as the CD was under insolvency proceedings. During the course of the hearing, the Applicant submitted that it wishes to

continue its listed status. However, the Applicant had sought for exemptions under Regulation 3(2) of SEBI (Substantial Acquisition of shares and Takeover) Regulation 2011 ('SAST Regulations, 2011 Takeover Code') and Rule 19A(5) of Securities Contracts (Regulation) Rules, 1957 ("SCRR"). The aforesaid exemptions relate to 'relisting' i.e. a company which is delisted from a particular stock exchange seeks re-listing on a particular stock exchange. Since the company is listed and will continue to be listed the question of granting the aforesaid exemptions does not arise.

8. Further, it is submitted that as the Corporate Debtor went into insolvency proceedings the listing was merely suspended. The provision for relisting is applicable only when a company has been de-listed for a period of time and later pursuant to a resolution plan is relisted. Additional relaxation of the restriction contained in the first proviso to Regulation 3(2) of Takeover code is not applicable for the Corporate Debtor as same pertains to a follow up offer given at the time of re-listing and furthermore such offer does not form a part of the sale proceedings of the Corporate Debtor. Furthermore, such exemptions, waiver, and relaxation are applicable for acquisition pursuant to resolution plan under Section 31 of the Insolvency Bankruptcy Code, 2016 and not in case when the Corporate Debtor is sold as a going concern.
9. The Applicant is entitled to file for an exemption under Regulation 11 of the Takeover Code and not under the second proviso to Regulation 3 and Reg 10(1)(da) of the Takeover Code. The design of these three pathways is to provide for three different kinds of exemptions for the three different modes under which the exemption may be claimed. In respect of Resolution of the Corporate Debtor through a Scheme of arrangement, or a Resolution Plan passed under Section 30(1) of the Code is concerned, these provide for automatic exemption by law. However, in respect of other cases, such as a resolution of the Corporate Debtor through a sale as a going concern by the Liquidator, the Applicant

is required to make an application under Regulation 11(1) of the Takeover Code. It is therefore humbly submitted that in order to avail such reliefs, concessions, dispensation and exemption as prayed by the Applicant in the IA, an Application is required to be filed by the Applicant along with all the necessary forms and a payment of requisite fees needs to be made before SEBI and thereafter, a panel of experts after providing due opportunity for hearing on its discretion will pass an order granting/rejecting such reliefs, concessions, dispensation and exemption as it deems fit subject to merits of the application made.

10. It is submitted that the Applicant is attempting to short-circuit the entire process under Regulation 11 of the Takeover Code by submitting that a 'sale in going concern' is akin to a Resolution Plan and therefore the automatic provision in relation to Resolution Plan applies to the Applicant. It is submitted that the CD is being sold as a going concern which is under liquidation and is governed under a separate provision i.e., the Regulation 32 and 32A of the Liquidation Regulations. The sale of Corporate Debtor as a going concern in liquidation is governed as per the Liquidation Regulation and not as a resolution plan under Section 31 of the Code.
11. The Respondent No. 4 submits that the outcome cannot be equated with the process. If it were so, then there would be no need to provide for a specific exemption under Regulation 10(1)(da) of Takeover Code for Resolution Plans introduced in 2018 as the earlier exemption for Scheme of Arrangement in Regulation 10(1)(d) of the Takeover Code would have sufficed. It is therefore clear that the legislature has not wasted any words, and the exemptions in Regulation 10(1)(d) [Scheme of Arrangement] of the Takeover Code, Regulation 10(1)(da) [Resolution Plan in CIRP] of the Takeover Code and Regulation 11(1) [Other cases, not specifically provided for] of the Takeover Code are mutually exclusive and the Applicant is required to make an application for the same.

Thus, the principle of "expressio unius est exclusion alterius, " meaning 'the express mention of one thing excludes all others,' applies here. Thus, the explicit provision for exemptions under the Takeover Code', SCRR and the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('LODR') regarding a resolution plan approved under Section 31 of the IBC implies the exclusion of such exemptions in the context of the Liquidation.

12. As far the relaxation for maintaining the minimum public shareholding is concerned, the Respondent No.4 has submitted that in general, a listed company is required to maintain a public shareholding of at least 25%. However, various specific exemptions are provided for public sector units, etc as well as for companies undergoing CIRP. In particular, a company undergoing Resolution under CIRP has to (i) maintain at least 5% public shareholding immediately on undergoing Resolution; and (ii) within 18 months ensure at least 10%; and (iii) achieve the 25% target within three years. In addition to the above, there is a general power vested in SEBI to grant exemptions under the "Rules", which is not limited to any specific rule or sub-rule of the SCRR Rules. Similar to the stand with respect to exemptions under the Takeover Code, it is the stand of SEBI that the Applicant cannot under the guise of interpretation argue that the "sale in liquidation" falls within the meaning of the term "resolution plan approved under section 31 of the Insolvency and Bankruptcy Code,2016" as doing so will be contrary to the express conditions of the securities laws and the Code itself which specifically defines "resolution plan". The Applicant is required to apply for exemption to SEBI under Rule 19(7) of the SCRR Rules and cannot short-circuit the process by the means adopted.
13. The Applicant has sought for waiver of fees and penalty by SEBI and Stock Exchanges for violations of Listing Agreement, etc. prior to confirmation of sale. It is submitted that the Liquidator's "sale of CD as a going concern" is effected by extinguishment of existing

share-holding and issue of fresh securities, rather than by any sale of assets of the CD. The Applicant Bidder will gain control of the Corporate Debtor by acquiring shares in the CD. The assets and liabilities of the CD are neither individually or collectively sold to the Acquirer/Bidder and nor does the Acquirer/Bidder acquire any right in them. The Applicant/Bidder does not acquire any "asset of the CD" but only acquires "shares of the CD". It is clear from Section 32A that the immunity is confined only to the "property of the CD" acquired in a "sale of liquidation assets". The Applicant/Bidder does not acquire any "property of the CD", rather he acquires freshly issued "shares" i.e, an interest in the CD. Furthermore, since these shares are freshly issued, they are not even part of any liquidation estate as they come into existence only against fresh infusion of capital into the CD after the confirmation of the sale. The immunity under Section 32A, and consequently the 'clean slate' principle enshrined therein in relation to past violations, does not extend to Liquidator's sale of the CD as a 'going concern'.

Submissions advanced by Respondent No.3 Income Tax Department:

14. In a nutshell, the Respondent No.3 With regard to para C of part B of Annexure C, it is submitted that the reliefs sought qua tax concessions may be granted subject to the provisions of Income Tax Act. However, with respect to exemption of tax to the successful bidder and the corporate debtor, from the date of applicability of and payment of all taxes under the Income Tax Act, it is submitted that the Department has already submitted its claim before the Liquidator with respect to tax dues on the corporate debtor.

Findings:

15. We have heard the submissions advanced by the learned counsel and perused the record.
16. This Tribunal had allowed the sale of Corporate Debtor as going concern pursuant its order dated 29.04.2024 passed in IA 1108 of 2024 filed by the Liquidator of the

Corporate Debtor as well as certain relief and concessions as prayed by the Liquidator. More particularly, this Tribunal had ordered that *“The existing paid-up capital of the Company shall be extinguished subject to necessary consents, approvals, waivers, no objections from the Securities and Exchange Board of India ("SEBI") and / or the relevant stock exchanges. The issuance of fresh share capital shall be permissible; however, the Successful Buyer shall seek necessary approval from SEBI and / or the relevant stock exchanges for listing of shares so issued”*.

17. We note that the Process note contemplated for sale of 100% of assets and the Liquidator also transferred 100% of interest in the Corporate Debtor to the Applicant herein. This is also evident from the prayer of Liquidator in IA 1108 of 2024 seeking extinguishment of whole of capital of the Corporate Debtor, which was allowed by this Tribunal vide order dated 29.04.2024. Accordingly, the prayer of the Applicant vide the acquisition plan dated 19.03.2024 contemplating that 95% of the issued share capital of the Company shall vest in the Applicant and remaining 5% in public cannot be granted at this stage because it shall be contrary to the LOI and process document issued by the Liquidator as well as order dated 29.04.2024 passed by this Tribunal allowing full extinguishment of the capital. In view of this, this Tribunal cannot consider the prayer of Applicant for exemption from the provisions of 19A(5) Securities Contracts (Regulation) Rules, 1957. However, the Applicant shall be at liberty seek specific exemption from SEBI in terms of Regulation 19(7) of SCRR.
18. It is pertinent to note that the Applicant is a Successful Bidder acquiring the remnant of Corporate Debtor as a ‘going concern’ under Regulation 32A of the Liquidation Regulations. The contention of the Applicant is that the said reliefs ought to be granted as a going concern sale under Liquidation process is akin to a Resolution Plan under Section 31 of the Code. In furtherance of the said submission the Applicant has relied on

the following judgments:

- i. *Arun Kumar Jagatramka vs Jindal Steel Ltd. [(2021) 7 SCC 474]*
 - ii. *Swiss Ribbons (P) Ltd vs Union of India [(2019) 4 SCC 17]*
 - iii. *Duncans Industries Limited vs A.J. Agrochem [(2019) 9 SCC 725]*
 - iv. *Gaurav Jain vs Sanjay Gupta [2021 SCC Online NCLT 489]*
 - v. *M/s Shiv Shakti Globe Exports Private Limited vs M/s KTC Foods Private Limited [Company Appeal (AT) (Ins.) No. 650 of 2020]*
 - vi. *Rankini Power Generation Private Limited vs Abhijeet MADC Nagpur Energy Private Limited and Anr.*
 - vii. *Maithan Alloys Limited vs Samir Kumar Bhattacharya, Liquidator of Impex Metal & Ferro Alloys Ltd.*
19. Per contra, the Respondent No.4 submitted that sale cannot be equated with the resolution of the Corporate Debtor via a Resolution Plan. Firstly, it is stated that concessions for re-listing is not applicable as the Corporate Debtor was never de-listed and therefore, the question of granting the listing exemptions does not arise. Secondly, the Respondent No. 4 submits that the exemptions sought to be availed by the Applicant under Regulation 10(1)(da) of the Takeover Code are only applicable to scheme of arrangement and acquisition pursuant to a resolution plan under Section 31 of the Code. For the purpose of availing exemption under Sale as going concern, the Applicant can apply under Regulation 11(1) of the Takeover Code.
20. The Applicant has emphasized that the acquisition plan dated 19.03.2024 submitted by him under Liquidation Process of the Corporate Debtor is akin to a Resolution Plan submitted by the Successful Resolution Applicant. The learned counsel for Applicant mentioned a decision in the case of *Nikhil Jain and Ors. vs Anil Goel (liquidator of Birla Cotsyn India Limited) and Anr. Company Appeal (AT) 148 of 2024 (2024) ibclaw.in 501*

NCLAT wherein the Hon'ble NCLAT has held that -

“The scheme in question in the present matter is akin to a Resolution Plan under Section 31 of the Code and it complies with the requirement of Resolution Plan under Section 30(2) of the Code and Regulation 37 and 38 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The scheme contemplates full payment of CIRP and liquidation cost, dues of workmen, payment of settlement value to creditors, extinguishment of all liabilities filed or not filed/admitted or not admitted, ouster of the erstwhile promoters, inducting of the acquirers as new promoters, constitution of monitoring committee, payment of EMD and performance security etc. If a restrictive literal interpretation of Regulation 37(7) of LODR is accepted then the same will lead to manifest absurdity in as much as while the Resolution Plan and the Scheme seek to achieve the same objective i.e. to prevent civil death of the company, and are also similar in form, the mode of revival by way of Scheme of Arrangement under liquidation would be more onerous than a Resolution Plan under Section 31 of the Code. The interpretation argued by the Respondent would run contrary to the entire objective of the Code to provide multiple modes of revival at various stages in order to resolve the indebtedness of the Corporate Debtor and revive the company. The Courts have time and again held that every effort must be made to revive the business of the company as the same is in the interest of all the stake holders.”

21. The facts in the present case are distinguishable as in that case it was a case of revival of the Corporate Debtor under a scheme of arrangement in Liquidation and Hon'ble NCLAT took note the fact that the scheme contemplates full payment of CIRP and liquidation cost, dues of workmen, payment of settlement value to creditors, extinguishment of all liabilities filed or not filed/admitted or not admitted, ouster of the erstwhile promoters, inducting of the acquirers as new promoters, constitution of

monitoring committee, payment of EMD and performance security etc. The Hon'ble NCLAT further emphasized that every effort must be made to revive the business of the company as the same is in the interest of all the stake holders and the scheme of arrangement in that case contemplated the revival of the Corporate Debtor and its business as a whole. It is pertinent to note that, concept of going concern has been defined either in Code or regulations framed thereunder. However, the Insolvency Law Committee Report dated 26.03.2018 refers to this concept and states that the phrase "as a going concern" imply that the Corporate Debtor would be functional as it would have been prior to initiation of CIRP, other than the restrictions put up the Code.

22. In the present case the remnant of Corporate Debtor, which is not more than the shell entity consisting of the drawings, receivables and certain litigation, while all its business undertakings and the assets comprised therein have already been liquidated in separated parcels to third persons. Further, the process note contemplated submission of only bids for acquisition and not an acquisition plan which has been submitted before us after finalization of the bid. The resolution plan and scheme of arrangement are in nature of complete package placed before CoC/creditors respectively whereas in case of sale of Corporate Debtor as a going concern in its present form, such sale has taken place only in pursuance of financial bid.
23. Under Regulation 3(2) of SEBI (Substantial Acquisition of shares and Takeover) Regulation 2011 ('SAST Regulations, 2011 Takeover Code'), an acquirer is under obligation to make public announcement of its acquisition beyond the threshold limit. In the present case, this Tribunal has already allowed the sale of 100% equity of the Corporate Debtor under the Liquidation, hence SEBI shall grant appropriate exemption from making any public announcement of an open offer, considering that 100% of the existing capital of the Corporate Debtor stands extinguished and there remains no public

shareholding entitled for such public offer.

24. We have already provided the reliefs and concession on the clean slate principle vide order dated 29.04.2024 passed in IA No. 1108 of 2024, accordingly fine or penalty levied or leviable by Respondent No. 4 for the period upto the date of issuance of sale certificate shall stand extinguished.
25. The sale as a 'going concern'/ acquisition/transactions contemplated herein shall not be treated as void under Section 281 of the Income Tax Act, 1961 and / or Section 81 and / or 85 of Central Goods and Services Act, 2017 for any claims in respect of Tax or any other sum payable by the Corporate Debtor or any shareholder of the Corporate Debtor.
26. The brought forward Tax losses and unabsorbed depreciation of the Corporate Debtor will be dealt with in accordance with the provisions of Income Tax Act, 1961. Tax (including withholding Tax) including but not limited to on: (a) Capital Reduction of the Corporate Debtor; and (b) the issue of securities of the Corporate Debtor; (c) write-back of liability / payables by the Corporate Debtor; (d) any benefits being granted and/ or received to and/or by the Corporate Debtor or the Successful Bidder; under the Income Tax Act, 1961 and rules made thereunder shall be leviable on the Corporate Debtor and/or the Successful Bidder or exempted in accordance with the provisions contained in the Income Tax Act, 1961.
27. The payment of all Taxes under the Income Tax Act, 1961 (including section 115JB/Section 56(2)(x) etc.) or Central Goods and Services Tax Act, 2017, including any liability under the minimum alternate tax (MAT) which may arise on account of the transactions envisaged for giving effect to the Acquisition Plan of the Corporate Debtor shall be in accordance with the provision of respective law and any exemption or concession shall be subject to the provision of respective law.
28. The Successful Bidder shall be allowed to utilize the MAT credit available under Income

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Tax Act, 1961, input credit available in the books of the Corporate Debtor under the relevant GST Act and relevant authority shall provide relief as to the said effect, if permissible under the respective law in present circumstances.

29. Further, the reliefs sought by the Applicant pertaining to clean slate basis were already granted in order dated 29.04.2024 and the said reliefs are tabulated hereinbelow reference.

S. No.	Particulars of the reliefs and concessions	Comments of the Adjudicating Authority
1.	All liabilities or debts of the Corporate Debtor, whether crystalized or uncrystallized, contingent (including bank guarantees and letters of credit issued by the Corporate Debtor), monetary, non-monetary, known or unknown, filed, not filed, verified or not verified, admitted or not admitted, disputed or undisputed or otherwise for the period prior to the liquidation commencement date, shall be deemed to be extinguished, fully discharged and settled in accordance with the provisions of the Code and Corporate Debtor and Successful Bidder will not be liable for the same.	Allowed on Clean Slate Principle
2.	The sale of Corporate Debtor as a going concern basis shall be binding on all stakeholders including utility providers and all utility providers shall continue to supply the utilities as may be required and as per applicable law(s), for the operation of the Corporate Debtor as a going concern.	Allowed, however, utility providers shall continue the supply provided the necessary formalities in relation to procedure as well as prescribed payments are complied with.
3.	The benefit of Section 32A of the Code be granted to the Successful Bidder, i.e., Exicom Technologies India Private Limited.	Allowed on Clean Slate Principle

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4.	No action by the government authorities against the Corporate Debtor for any non-compliance relating to the period prior to liquidation commencement date shall be maintainable under the applicable law(s).	Allowed on Clean Slate Principle
5.	The Successful Bidder or the Corporate Debtor shall not be liable for any violations, penalties or fines relating to the period prior to the commencement of the liquidation proceedings, with respect to or pursuant to the Corporate Debtor not having in place requisite licenses or approvals required to undertake its business as per applicable law, or for any non-compliance of applicable law by the Corporate Debtor.	Allowed.
6.	Successful Bidder be allowed to obtain / renew any requisite approvals as per procedure set out under applicable law(s) within a reasonable time period and liberty may be granted for the Successful Bidder to approach the relevant authority for the same with request for not imposing any costs / fine for the same.	requisite approvals shall be granted by the concerned authorities after fulfilment of necessary procedural formalities as well as payment of prescribed fee/cost.
7.	All investigations / inquiry / assessments, regulatory or administrative proceedings (including show cause notices), proceedings initiated in relation to any tax related liabilities (including but not limited to income tax, sales tax, goods and services tax, duties / costs / charges related to customs) before any court, tribunal, authority or office, pending against the Corporate Debtor pertaining to the period prior to the liquidation commencement date, shall stand abated / withdrawn / cancelled / settled	Allowed

	and / or extinguished in accordance with the applicable laws.	
8.	Extinguishment of the existing paid-up share capital of the Corporate Debtor and issuance of fresh share capital at par value to the Successful Bidder, be allowed, provided that the Successful Bidder obtains the necessary consents, approvals, waivers, no-objections from the Securities and Exchange Board of India ("SEBI") and / or the relevant stock exchanges (being the National Stock Exchange of India Limited and BSE Limited). The Corporate Debtor, the Successful Bidder and / or the Liquidator, as relevant, be authorized, to undertake all the necessary actions for extinguishment of the existing share capital of the Corporate Debtor, to the extent and in the manner permitted by the SEBI and the relevant stock exchanges, on and from the later of the date of such approvals / consents waivers etc. from the SEBI or the relevant stock exchanges or the date of the order passed by this Hon'ble Tribunal in this Application.	The existing paid-up capital of the Company shall be extinguished subject to necessary consents, approvals, waivers, no-objections from the Securities and Exchange Board of India ("SEBI") and / or the relevant stock exchanges. The issuance of fresh share capital shall be permissible; however, the Successful Buyer shall seek necessary approval from SEBI and / or the relevant stock exchanges for listing of shares so issued.
9.	The suspended board of directors of the Corporate Debtor would stand removed / discharged from date of issuance of the sale certificate and such persons as nominated by the Successful Bidder be deemed to be appointed on the board of the Corporate Debtor. The Successful Bidder be directed to make all such filings and compliances as are needed in relation to the removal of existing directors and appointment of new directors on the board of	Allowed

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	directors of the Corporate Debtor, as the case maybe in accordance with the applicable law(s).	
10.	The relinquished security interest created in favour of secured creditors of the Corporate Debtor shall stand extinguished as on the date of issuance of certificate of sale and such security cannot be enforced by the secured creditors except for any right to enforce third party security including personal guarantee, corporate guarantee, letter of comfort etc., as may be provided by promoter group and / or any third party for securing the debt provided by the secured creditors of the Corporate Debtor.	Allowed

30. Accordingly, IA No. 1749 of 2024 is partly allowed and disposed of with above directions.

Sd/-

PRABHAT KUMAR

MEMBER (TECHNICAL)

27.08.2024

Sd/-

JUSTICE V.G. BISHT

MEMBER (JUDICIAL)