National Company Law Appellate Tribunal, New Delhi

Principal Bench

COMPANY APPEAL (AT) (INSOLVENCY) No. 849 of 2020

(Arising out of Order dated 16th September, 2020 passed by National Company Law Tribunal, Principal Bench, New Delhi, I.A. No. 1490 of 2020 in CP(IB) No.-590(PB)/2018).

IN THE MATTER OF:

M/s. Mohan Gems & Jewels Private Limited
Through its Liquidator
Debashish Nanda
Office at: C-304, Paradise Apartments,
40 – I.P. Extension
New Delhi – 110092
Email: dnanda.cma@gmail.com **...Appellant**

Versus

1. Vijay Verma
Office at: 5C/88 New Rohtak Road
New Delhi 110005
Email: viju_242001@yahoo.com **...Respondent No. 1**

2. Insolvency and Bankruptcy Board of India
Office at: 2nd Floor, Jeevan Vihar Building,
Parliament Street, New Delhi – 110001

Also at: 7th Floor, Mayur Bhawan,
Shankar Market, Cannaught Circus,
New Delhi – 110001
Email: kra.kumar@nic.in
anshul.agrawal05@ibbi.gov.in **...Respondent No. 2**

Appellant: **Mr. Sumant Batra, Mr. Rahul Mendiratta and Ms. Niharika Sharma, Advocates.**

Respondents: **Mr. Abhishek Parmar, Advocate for R-1.**
Ms. Madhavi Divan (ASG), Mr. Sahil Monga, Mr. Vikas Mehta and Ms. Apoorva Khatur, Advocates for R-2.

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Challenge in this Appeal is to the Impugned Order dated 16.09.2020 passed by the Learned Adjudicating Authority, (National Company Law Tribunal, Principal Bench, New Delhi) in I.A. No. 1490 of 2020 in CP(IB) No. 590(PB)/2018. I.A. No. 1490 of 2020 is an Application filed by the Liquidator seeking for closure of the Liquidation Process as per Regulation 45(3)(a) of IBBI Liquidation Process Regulations, 2016 (hereinafter referred to as the **'Liquidation Process Regulations'**), as the 'Corporate Debtor' was being sold as a going concern in the e-Auction held on 20.11.2019 declaring Mr. Vijay Verma/the first Respondent as the highest bidder at a bid price of Rs. 4,51,99,713/-. By the Impugned Order, the Adjudicating Authority has dismissed this I.A. observing as follows:-

> *"32. On reading this CIRP Regulation, it appears at the outset, an effort has been strenuously made to rewrite IBC without amendment to the Code- the reasons for saying so is-*
>
> > *"1. Foremost hurdle is, this Regulation is a new concept not backed by any provision of law in IBC. The Regulating Authority cannot stretch its muscle beyond its strength, if it does so, it is exercising jurisdiction not contemplated under IBC. No mention about this arrangement either in section 28 or section 30 or any other section of the Code.*
> >
> > *2. The CIRP process is separate and the liquidation process is separate. Separate yardsticks have been set up by the Code.*
> >
> > *3. How CoC, which would not remain in existence after liquidation order, will issue its dictum to be followed without any*

other recourse to the liquidator despite liquidator is to act independently during liquidation process.

4. CoC has not been endowed with powers to give mandate over the progress of liquidator foreclosing the functions of the liquidator as stated under section 35 of the Code.

5. Indeed actions of the liquidator under section 35 are subjection to the directions of this Adjudicating Authority.

6. Liquidator is not bound by the directions of the stakeholders, who are mostly none other than Financial creditors i.e., CoC members.

7. Moreover, the Regulating Authority is implicitly goading this Adjudicating Authority to approve actions not contemplated under the Code.

8. The right given to CoC is to make an effort to keep the assets intact and pass a resolution taking compromises against the right of recovery against the Corporate Debtor.

9. We don't want to get into the anxiety to ensure the company remains a going concern and also not supposed to get into the veracity of it, but one thing we need to emphasize is that when enactment has come into force, we must respect it. If the Code goes in the pace and direction given by the Parliament, it will go well otherwise only chaos will remain.

10. As to the going concern concept, in CIRP, CoC will put its maximum efforts to derive maximum value from the corporate debtor. The ground reality is if value is there in the company and if the company can be rung as going concern, people will come forward to take it as going concern. When the company has failed to resume its strength as a going concern after making all efforts, it will go to liquidation. When effort

in the first phase has not yielded results, another window is left open in the liquidation stage to reorganize or amalgamate or merge the company through a scheme u/s 230-232 of the Companies Act 2013. There also if the company failed to reequip as a going concern, asset or undertaking could be sold as going concern, but not the corporate debtor itself. Assets could be valued and sold as going concern. Even in the case of selling the business as one lot, employees could be protected and other rights could also be protected. Selling assets or undertakings shall not stretch out to the sale of the corporate debtor. If this process of sale of the corporate debtor is approved, it will become third window, besides that, it is in violation of company concept. In fact IBBI has made it almost like a mandate to try for sale of the company as a going concern. Is it that this process has to continue until the corporate debtor is sold as a going concern? If this is permitted, tomorrow somebody may suggest something else. Where is the end for it? It is a policy decision- which cannot be taken by IBBI particularly when no such concept is contemplated under the Code and more particularly when section explicitly given a mandate for dissolution.

11. In most of the cases, these companies remain as going concerns on the records of RoC, but if ground situation is taken into account, these companies are gone cases, companies where only two computers, or companies with one landed property. Not really any business, except in a few companies.

12. The benefit in these liquidation cases mostly go to the buyer, because real value of the asset will not come out, only distress value will come out in the form of liquidation value, in most cases will be far less than real market value or entrepreneur value.

13. Today what is the yardstick to categorize which corporate debtor is a going concern and which one is not a going concern?

14. Let us assume purchase come forward to take the corporate debtor as going concern for a value less than liquidation value, as per this Regulation unless the liquidator has failed to get a purchaser under (e) and (f) of Regulation 32, can't be opt for another mode? In such a conundrum, how could the liquidator sell the assets in a method other than the method mentioned in (e) and (f)? This will again protract the litigation."

33. After examining these two Regulations, one from CIRP Regulations and another from Liquidation Regulations, we have not found any merit in either of these regulations, which are set up as foundation to say that by virtue of liquidation Regulation 45 (3), dissolution shall be dispensed with for closure of liquidation.

"45. Final report prior to dissolution. *(1) When the corporate debtor is liquidated, the liquidator shall make an account of the liquidation, showing how it has been conducted and how the corporate debtor's assets have been liquidated.*

(2) if the liquidation cost exceeds the estimated liquidation cost provided in the Preliminary Report, the liquidator shall explain the reasons for the same.

(Inserted on 25.07.2019)

(3) The Liquidator shall submit an application along with the final report and the compliance certificate in form H to the Adjudicating Authority for –

(a) Closure of the liquidation process of the corporate debtor where the corporate debtor is sold as a going concern.

(b) for the dissolution of the corporate debtor, in cases not covered under clause (a)."

34. Insolvency and Bankruptcy Code is an embodiment of substantial rights laced with procedural mandates. When procedure itself is part of the enactment, the Regulation Authority cannot rewrite the procedure obliterating the provisions of IBC. Yes, the Regulation authority may bring in subordinate procedure for full implementation of the sections of the Code. What could be liquidated is the assets of the debtor company, this concept of liquidation of assets shall not be construed as inclusion of sale of the company.

35. The procedure is already set out under the Code for rearrangement under insolvency and resolution process thereafter another window under liquidation through Sec. 230 of the Companies Act, 2013, therefore there cannot be any other procedure which is militating the procedure set out under the code. Accordingly, this IA 1940/2020 is hereby dismissed as misconceived."

2. The main issues which arise for consideration are:-

- Whether the Liquidator is authorized to sell the 'Corporate Debtor' as a going concern pursuant to Regulation 32 of IBBI (Liquidation Process) Regulations, 2016.
- Whether Adjudicating Authority was correct in concluding that Regulations 39C of CIRP Regulations and 32A, 45(3) of the Liquidation Process Regulations are inconsistent with Section 54 of the Code.
- Whether the interpretation by the Adjudicating Authority of the provisions of the Code and 'Liquidation Process Regulations' in the Order impugned is contrary to the scope and spirit of the I&B Code.

Submissions on behalf of Learned Counsel appearing for Appellant/ Liquidator:

3. The Learned Sr. Counsel submitted as follows:-

- The Learned Adjudicating Authority has failed to appreciate that the Liquidator is authorized to sell the 'Corporate Debtor' or its business as a going concern pursuant to Regulations 32(e)&(f) of the Liquidation Process Regulations; that such a sale is consistent with the objective of the Code as affirmed by the Hon'ble Supreme Court in several Judgements and that the Liquidation should be the last resort as it results in loss of daily bread for the workmen.
- The Hon'ble Supreme Court in ***'Arcelormittal India Private Limited' Vs. 'Satish Kumar Gupta and Others' (2019) 2 SCC 1,*** in para 86, relying on Regulations 32(e), held 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. The Learned Counsel also relied on the ratio of the Hon'ble Apex Court in ***'Swiss Ribbons Private Limited & Anr.' Vs. 'Union of India & Ors.' (2019) 4 SCC 17.***
- Regulations 32A and 45(3) were inserted in the Liquidation Process Regulations after the decision in ***'Arcelormittal India Private Limited' (Supra)*** and ***'Swiss Ribbons Private Limited & Anr.' (Supra);*** that 32A is in the nature of a drop down provision of Regulation 32(e)&(f) to define the process for sale of the 'Corporate Debtor' or its business as a going concern; that Regulation 45(3) is sequel to Regulation 32(e)&(f), that is to provide the process for closure

of Liquidation Proceedings in the event the business of the 'Corporate Debtor' is sold as a going concern and that such an action would prevent the 'Corporate Debtor' from consequential dissolution.

- Section 54 of the Code provides that whether the assets of the 'Corporate Debtor' have been completely liquidated, the Liquidator shall make an Application for dissolution before the Adjudicating Authority, that there is no provision in the Code which prohibit the closure of the Liquidation Process in the event the 'Corporate Debtor' is sold as a going concern pursuant to Regulation 32(e) following a closure report filed under Regulation 45(3)(a) of the Liquidation Process Regulations as done in this case and it would be a contradiction to hold that only dissolution is envisaged under the Code.
- A harmonious reading of Section 240 and Section 35(o) of the Code makes it abundantly clear that IBBI has the jurisdiction to frame the Regulations with regard to functions of the Liquidator including in respect of sale of the 'Corporate Debtor' as a going concern.
- The sale of 'Corporate Debtor' was carried out by the Liquidator in accordance with the Liquidation Process Regulations; that Regulation 39C was inserted in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), Regulations, 2016, with effect from 25.07.2019, but, by then the Application under Section 33 of the Code seeking Liquidation of the 'Corporate Debtor' had already been filed before the Adjudicating Authority and therefore passing of Resolution of CoC under Regulation 39C was not possible.

- The Adjudicating Authority has erroneously rejected I.A. No. 1490 of 2020 on the ground that Regulation 32A and 45(3) are inconsistent with the Code and framed without jurisdiction by IBBI.
- Learned Sr. Counsel drew our attention to the Notice issued by this Tribunal on 28.09.2020, wherein the Impugned Order was stayed only to avoid the death of the 'Corporate Debtor'.

4. **Submissions on behalf of the Learned Counsel appearing for the first Respondent/Successful Bidder:**

- The auction was successfully conducted on 20.11.2019, the first Respondent/Mr. Vijay Verma emerged as the highest successful bidder at a bid price of Rs. 4,51,99,737/- and was immediately intimated by the Liquidator to execute the sale document.
- The entire amount was deposited within the period from 18.12.2019 to 16.01.2020 into the Liquidator account of the 'Corporate Debtor' and if the 'Corporate Debtor' is put into dissolution, then there would be no purpose in purchasing the Company at such a high price for the same asset.
- The bidder suffered a huge loss by way of interest since the bid price was already submitted one year ago and hence sought for payment of interest at 12% per annum on account of the loss suffered.

5. **Submissions on behalf of the Learned Counsel appearing for the second Respondent/IBBI:**

- Learned Counsel strenuously contended that sale 'as a going concern' at the Liquidation stage achieves the principle objects of the Code which are as follows:-

a) maximization of value of assets
b) promotion of entrepreneurship
c) balancing the interest of stakeholders

- The sale of 'Corporate Debtor' as a going concern even at the Liquidation stage achieves all the aforenoted objects and the employees remain in employment keeping the goodwill intact. There is no inconsistency between the objective of the Code and the provisions of the Code and the Learned Adjudicating Authority has overstepped its jurisdiction in trying to segregate the two.
- Sections 281(3), Sections 280(2), Sections 290(1)(d) of the Companies Act, 2013, make it clear that a Company can be sold as a going concern at the Liquidation stage, the Hon'ble Supreme Court in ***'Arcelormittal India Private Limited' (Supra)*** and ***'Swiss Ribbons Private Limited & Anr.' (Supra)*** has observed that dissolution of the Company is to be carried out only as the last resort.
- Upon enactment of the IBC in the year 2016, under Section 255 read with the XI schedule of the Code, certain provisions of the Companies Act, 2013 were amended and made harmonious with provisions of the Code. Sub-Section (94A) was inserted in Section 2 to define the term 'winding up' as follows:-

> *"**(94a)** "winding up" means winding up under this act or Liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable."*

As noted above, under the Companies Act, 2013, it is permissible to sell the Company undergoing winding up as a going concern and since winding up is nothing but Liquidation under the

IBC, it is also permissible to sell the 'Corporate Debtor' as a going concern at the Liquidation stage.

Assessment:

6. The Code is an economically beneficial Legislation which aims to put the 'Corporate Debtor' back on its feet maximizing the value of assets of the 'Corporate Debtor' and promotes entrepreneurship. The long title to the legislation indicates the objective:-

> *"An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and bankruptcy Board of India, and for matters connected therewith or incidental thereto."*
>
> *(Emphasis Supplied)*

7. The regime under the IBC is positively progressive as can be seen from several amendments that were brought forth. Having regard to the observations made by the Adjudicating Authority in the Order impugned, we find it significant to detail the discussion by IBBI on this issue.

8. **Discussion Paper dated 30.01.2019 on 'Corporate Liquidation Process by IBBI:-**

> *"A. Sale as a Going Concern:-*
>
> *2. The Insolvency and Bankruptcy Code, 2016 (Code) provides a market mechanism for rescuing, failing but viable corporate debtors (CD) and liquidating, failing and unviable ones. There is no mathematical formula to identify a CD as viable and another as unviable. If correct identification is not made, a viable CD will be*

liquidated and unviable one will be rescued. If an unviable CD is rescued, it is bad. But it can be rectified. However, if a viable one is liquidated, it is disastrous for an economy and cannot be rectified. That is why the Code envisages the market to make an endeavor first to rescue the CD and liquidate it after arriving at a conclusion that it is not viable. It also envisages course correction, if the market wrongly proceeds to liquidate a viable CD. The law does not envisage the State to intervene in wrong identification but provides a flexibility to market to make course correction if it so wishes. The provisions in the law and judicial pronouncements support this, as explained hereunder:

….2.6 The Code does not enable a stakeholder to file an application for liquidation. It enables filing an application for initiating corporate insolvency resolution process. Only after a resolution fails to yield resolution plan, the CD is ordered into liquidation. As evident from section 33 of the Code:

> *"33. Initiation of liquidation. –*
>
> *(1) Where the Adjudicating Authority, -*
> *(a) before the expiry of the insolvency resolution process period ….. does not receive a resolution plan …… or*
> *(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, it shall –*
> *(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down*
> *in this Chapter;*
> *(ii) …*
> *(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating*

Authority of the decision of the committee of creditors approved by not less than sixty-six per cent. of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order....
(3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order ...."

2.7 The Companies Act, 2013 (Act) envisages compromise or arrangements. Section 230 thereof, as amended by the Code, enables compromise or arrangement on the application by a liquidator appointed under the Code, as under:

"230. Power to compromise or make arrangements with creditors and members.—

(1) Where a compromise or arrangement is proposed—

(a) between a company and its creditors or any class of them; or
(b) between a company and its members or any class of them, the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs...."

....2.15 The Bankruptcy Law Reforms Committee (BLRC) drew on the liquidation experiences both in India as well as other countries and listed two other

ways, in addition to sale of assets, in which higher economic value can be realised other than just sale of assets. It provided the following drafting instruction:

> ***"Box 5.21: Drafting instructions for regulations on realisation in Liquidation other than through sale of assets***
>
> *a. There could be two sources of additional value in Liquidation other than sale of assets. These include:*
>
> *(a) Proposals for sale of the business as a whole or in parts.*
> *(b) Value recovered from vulnerable transactions.*
>
> *b. In proposals for sale of the business:*
>
> *(a) The liquidator will call for proposals to buy the business, either in parts or as a whole, to maximise economic value.*
> *(b) The proposals in Liquidation will be evaluated on both:*
>
> *i. Value offered, and*
> *ii. Ranking of the proposal in terms of impact on non-secured creditors, including operational creditors.*
>
> *(c) The creditors committee as the board of the erstwhile entity will select the best of the proposed solutions.*
> *.....*
> *....."*

2.16 The BLRC made a distinction between business and firm. The business is the underlying structure whose operations generate revenue, either as a whole or in parts. The firm includes management, ownership and financial elements around this core business. In the liquidation phase, the liquidator can coordinate proposals from the market on sale of the business, in parts or even as a whole. The evaluation of these proposals come under matters of business. The

selection of the best proposal is, therefore, left to the creditors' committee which form the board of the erstwhile firm in liquidation.

3. It thus emerges that rescuing the CD or its business, even after liquidation order has been passed under section 33 of the Code, has certain advantages and is the preferred choice of the law, the authorities and the stakeholders. Many recent decisions of the Appellate Authority and the AA have directed the liquidators to make efforts to sell the CD as a going concern. The BLRC anticipated this for realisation of higher value. It helps in realisation of higher value, value preservation, and rescuing a viable business. It minimises disruption to business and prevents loss of employment. The law enables broadly two options in this regard:

3.1 Compromise or arrangement under section 230 of the Companies Act, 2013: If there is a proposal for a compromise or arrangement, the Liquidator should make an application to the NCLT under the Act (not the Adjudicating Authority under the Code) and then proceed in the manner directed by the NCLT in accordance with the Act. While compromise or arrangement under section 230 of the Act is proposed, it must be utilised first and only on its failure, liquidation under the Code should commence. The Code read with regulations may provide that where a credible proposal is made to the Liquidator under section 230 of the Act for compromise or arrangement of the CD within three days of the date of order under section 33 of the Code for liquidation, the Liquidator shall file an application under the said section within

seven days of the order of liquidation. If approved by the NCLT, the Liquidator shall complete the process under section 230 within 90 days of the order of liquidation. The Regulations may provide that liquidation process under the Code shall commence at the earliest of the four events (a) there is no proposal for compromise or arrangement within three days, (b) the NCLT does not approve the application under section 230 of the Act, (c) the process under section 230 is not completed within 90 days or such extended period as may be allowed by the NCLT, or (d) the process under section 230 is not sanctioned under section 230(6) of the Act. A tight time schedule is necessary to ensure that the liquidation process is concluded in view of provision in the regulation 44(1) of the Regulations which requires the Liquidator to liquidate the CD within a period of two years.

3.2 ***Going Concern Sale under regulation 32 of the Regulations:*** *The Liquidator has the option to explore Going Concern Sale (GCS) - sale of the CD as a going concern or sale of the business of the CD as going concern - alongside other available modes for sale. It is necessary to provide a complete framework to enable him to exercise this option. Sale of CD as a going concern under regulation 32(e) and sale of business of CD as a going concern under regulation 32(f) are different.*

3.2.1 ***Sale under regulation 32(e):*** *In this GCS, the CD will not be dissolved. It will form part of liquidation estate. It will be transferred along with the business, assets and liabilities, including all contracts, licenses, concessions, agreements, benefits,*

privileges, rights or interests to the acquirer. The consideration received from sale will be split into share capital and liabilities, based on a capital structure that the acquirer decides. There will be an issuance of shares by the CD being sold to the extent of the share capital. The existing shares of the CD will not be transferred and shall be extinguished. The existing shareholders will become
claimants from liquidation proceeds under section 53 of the Code.

3.2.2 ***Sale under regulation 32(f):*** *The business(s) along with assets and liabilities, including intangibles, will be transferred as a going concern to the acquirer, without transfer of the CD, and therefore, the CD will be dissolved. The existing shares will be extinguished. The remaining assets, other than those sold as part of business will be sold and the proceeds thereof will be used to meet the claims under section 53 of the Code.*
……

4. Both the options under the Act and the Code have some common threads:
4.1 ***Employment:*** *In terms of section 33(7) of the Code, the order for liquidation is deemed to be a notice of discharge to the officers, employees and workmen of the CD, except when the business of the CD is continued during the liquidation process by the Liquidator. Section 35(1)(e) allows the Liquidator to carry on the business of the CD for its beneficial liquidation. Since both the options require continuation of business in beneficial interest, the*

employees may not be discharged. They should be transferred along with the CD or the business of the CD.

4.2 ***Continuation of Going Concern:*** *The issue of an order under section 33 of the Code for liquidation does not mean cessation of business immediately. The classic jurisprudence of liquidation laws suggests that the Liquidator can keep the entity as a going concern for the benefit of stakeholders. Even section 35 (1) (e) of the Code requires the Liquidator to carry on the business of the CD for its beneficial liquidation as he considers necessary. He may carry on business to the extent necessary for realization of better value from GCS……."*

(Emphasis Supplied)

9. Section 240(1) empowers IBBI with the power to make regulations in the following terms:

> *"(1) The Board may, by notification, make regulations consistent with this Code and the rules made thereunder, to carry out the provisions of this Code."*

Under Sub-Section (1) of Section 240, the power to frame regulations is conditioned by two requirements: first, the regulations have to be consistent with the provisions of the IBC and the rules framed by the Central Government; and second, the regulations must be to carry out the provisions of the IBC.

10. The Learned Counsel appearing for the IBBI has filed an Affidavit detailing the reasons for the aforenoted amendment, in the IBBI agenda dated 28.09.2018. Keeping in view the facts of this case and the comments made by the Adjudicating Authority, we find it fit to reproduce the Agenda at this juncture:-

"4. A key benefit of selling the CD, as a going concern in liquidation, as against other manners of sale, is that it can preserve employment while maximizing the returns for stakeholder. In some cases, viable companies may end up in liquidation in the absence of availability of suitable resolution plans in the market or non-approval of resolution plan by requisite voting share of the CoC or other reasons. Liquidation of such companies may be premature and can result in avoidable loss of going concern value and loss of employment, critical disruption for trade creditors who are dependent on the enterprise for their survival, reduction in returns for secured and unsecured creditors and other stakeholder, loss of revenue to government due to drying up of collection of tax and other revenue from such enterprise. Therefore, there is a need to attempt sale of CD as a going concern in liquidation process.

5. It is observed that till June 2018, the CIRPs under the Code have resulted in 32 resolutions and 136 liquidations. Of the 136 liquidations, 112 CDs were either not going concerns or under previous BIFR regime, and thus may be attributed to legacy reasons. Nevertheless, it is important to avoid liquidation. In fact, the Ordinance of 6th June, 2018 explicitly aims to promote resolution over liquidation.

6. Regulation 32(c) aims to save a company from liquidation, even though CIRP has failed to yield resolution. It reads as under:

> *"32. Manner of sale.*
> *The liquidator may*
> *(a) sell an asset on a standalone basis; or*
> *(b) sell*
> *(i) the assets in a slump sale,*
> *(ii) a set of assets collectively, or*
> *(iii) the assets in parcels; or*
> *(c) sell the corporate debtor as a going concern."*

7. Stakeholders have been expressing difficulty as to how to use the option to sell the CD as a going concern. A round table was held with them on 21st May, 2018 to understand the difficulties in selling the CD as a going concern. Several challenges were brought up. Section 52 read with section 33 (5) allows a secured creditor option to (i) relinquish its security interest to the liquidation estate and receive proceeds

from the sale of assets by the liquidator in the manner specified in section 53; or (ii) realise its security interest in the manner specified in section 52 of the code read with regulation 37. Thus, a secured creditor may opt to realise its security interest outside the liquidation, foreclosing the option of sale of CD as a going concern by the liquidator. In order to sell the CD as a going concern in liquidation process, either the secured creditors opt in favour of relinquishing their security interest in favour of liquidation estate; or the secured creditors postpone exercise of their option under section 52 to realise security interest outside liquidation process to allow the liquidator to explore the possibilities of sale as a going concern.

8. Further, liquidation is the process that entails disposal of the assets of the entity. A Liquidator does not run the company; his task is to liquidate, though the law has always empowered the liquidator to carry on the business of the company to the extent required for its beneficial liquidation. The liquidator may do only such things, and carry on only such activities, as are conducive to liquidation. Section 33 (7) mandates that the order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the CD, except when the business of the CD is continued during the liquidation process by the liquidator.

9. "Going Concern" means all the assets, tangibles or intangibles and resources needed to continue to operate independently a business activity, which may be whole or a part of the business of the CD without values being assigned to the individual asset for resource. In view of this, the following options are submitted for consideration:

I. The CD may be sold as a going concern, as provided in the extant regulations. As the company survives, there will be no need for dissolution of the company in terms of section 54 of the Code. The assets, along with all attendant claims, limitations, licenses, permits or business authorizations remain in the company. The company survives as it is; the ownership of the company is transferred by the liquidator to the acquirer. The liquidator shall make an application to the AA for approval of the sale of the CD as a going concern and the AA may pass an order with respect to:-

(a) Sale of the CD to the intended buyer as a going concern
(b) Transfer of shares of the CD to the intended buyer
(c) Transfer of the going concern of the CD to the buyers
(d) Continuation of the authority, powers and obligations of the Liquidator to complete the liquidation process as provided under the Code and the regulations including the control, operations and continuation of the liquidation bank account of the CD,
(e) Payment to stakeholder in accordance with section 53 from the liquidation bank account, and
(f) Protection of the intended buyer from all claims and liabilities pertaining to the period prior to the sale of the CD as a going concern.

In such a case, the final report of liquidator, as required under clause (3) of regulation 45, shall form part of the application for the closure of the liquidation process of the CD and not for the dissolution of the CD to the AA to be made under section 54."

(Emphasis Supplied)

The Law laid down by the Hon'ble Supreme Court on 'Sale of 'Corporate Debtor' as a going concern':

11. The Hon'ble Supreme Court in ***'M/s. Innoventive Industries Ltd.' Vs. 'ICICI Bank and Anr.', Civil Appeal Nos. 8337-8338 of 2017*** has observed as follows:-

From the viewpoint of creditors, a good realization can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realization is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay."

(Emphasis Supplied)

12. The Hon'ble Supreme Court in ***'Arcelormittal India Private Limited' (Supra)*** in paragraph 86, noted thus:-

"86. *Given the fact that both the NCLT and NCLAT are to decide matters arising under the Code as soon as possible, we cannot shut our eyes to the fact that a large volume of litigation has now to be handled by both aforesaid Tribunals. What happens in a case where the NCLT or the NCLAST decide a matter arising out of Section 31 of the Code beyond the time-limit of 180 days or the extended time-limit of 270 days? Actus curiae neminem gravabit – the act of the court shall harm no man – is a maxim firmly rooted in our jurisprudence (see jang Singh v. Brij Lal, SCR at p. 149 and A.R. Antulay v. R.S. Nayak, SCR at p. 71). It is also true that the time taken by a Tribunal should not set at naught the time-limits within which the corporate insolvency resolution process must take place. However, we cannot forget that the consequence of the chopper falling is corporate death. The only reasonable construction of the Code is the balance to be maintained between timely completion of the corporate insolvency resolution process, and the corporate debtor otherwise being put into liquidation. We must not forget that the corporate debtor consists of several employees and workmen whose daily bread is dependent on the outcome of the corporate insolvency resolution process. 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 that this is made possible. A reasonable and balance construction of this statute would therefore lead to the result that, where a resolution plan is upheld by the appellate authority, either by way of allowing or dismissing an appeal before it, the period of time taken in litigation ought to be excluded. This is not to say that the NCLT and NCLAT will be tardy in decision-making. This is only to say that in the event of the NCLT, or the NCLAT, or this Court taking time to decide an application beyond the period of 270 days, the time taken in legal proceedings to decide the matter cannot possibly be excluded, as otherwise a good resolution plan may have to be shelved, resulting in corporate death, and the consequent displacement of employees and workers.*

(Emphasis Supplied)

13. It is clear from the aforenoted observations that if there is a Resolution Applicant who can continue to run the 'Corporate Debtor' as a going concern, every plausible effort must be made to ensure the same.

14. The Hon'ble Supreme Court in ***'Swiss Ribbons Private Limited & Anr.' (Supra)*** in paras 27 & 28 has reiterated the same principle:-

> ***"27.*** *As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme – workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then cases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. (See Arcelor Mittal [Arcelor Mittal (India) (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1] at para 83, fn 3).*
>
> ***28.*** *It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor*

from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

(Emphasis Supplied)

15. It is seen that the Hon'ble Apex Court in a catena of Judgements has time and again observed that 'Liquidation' should be the last resort only if the Resolution Plan submitted is not up to the mark and even in Liquidation, the Liquidator can sell the business of the 'Corporate Debtor' as a 'going concern'.

16. Regulations 32A and 45(3) which were inserted in the Liquidation Process Regulations subsequent to ***'Arcelormittal India Private Limited' (Supra)*** and ***'Swiss Ribbons Private Limited & Anr.' (Supra)*** specifically define the *process for sale of 'Corporate Debtor' or its business as a going concern.*

17. This Tribunal in the matter of ***'S.C. Sekaran' Vs. 'Amit Gupta & Ors.' in Company Appeal (AT) (Insolvency) No. 495 & 496 of 2018,*** directed as under:-

> *" .. we direct the 'Liquidator' to proceed in accordance with law. He will verify claims of all the creditors; take into custody and control of all the assets, property, effects and actionable claims of the 'corporate debtor', carry on the business of the 'corporate debtor' for its beneficial liquidation etc. as prescribed under Section 35 of the I&B Code.... Before taking steps to sell the assets of the 'corporate debtor(s)' (companies herein), the Liquidator will take steps in terms of Section 230 of the Companies Act, 2013. The Adjudicating Authority, if so required, will pass appropriate order. Only on failure of revival, the Adjudicating Authority and the Liquidator will first proceed with the sale of company's assets wholly and thereafter, if not possible to sell the company in part and in accordance with law.*
> *.. The 'Liquidator' if initiates, will complete the process under Section 230 of the Companies Act within 90 days...".*

18. This Tribunal in the matter of ***'Y. Shivram Prasad' Vs. 'S. Dhanapal & Ors.' in Company Appeal (AT) (Insolvency) No. 224 of 2018,*** observed as under:-

> *".. we hold that the liquidator is required to act in terms of the aforesaid directions of the Appellate Tribunal and take steps under Section 230 of the Companies Act. If the members or the 'Corporate Debtor' or the 'creditors' or a class of creditors like 'Financial Creditor' or 'Operational Creditor' approach the company through the liquidator for compromise or arrangement by making proposal of payment to all the creditor(s), the Liquidator on behalf of the company will move an application under Section 230 of the Companies Act, 2013 before the Adjudicating Authority i.e. National Company Law Tribunal, Chennai Bench, in terms of the observations as made in above. On failure, as observed above, steps should be taken for outright sale of the 'Corporate Debtor' so as to enable the employees to continue.".*

Conclusion:

19. IBBI in furtherance of its delegated power has framed the regulations in accordance with the objectives and also as empowered under Section 240 of the Code. As per Section 241 of the Code, every rule and regulation made

under the Code will be placed before the Parliament. For a total period of 30 days for both Houses to make any modification or annulment.

20. Initially Regulation 32 provided the manner of sale as hereunder:-

> ***"32. Manner of sale.***
> *The liquidator may*
> *(a) Sell an asset on a standalone basis; or*
> *(b) Sell*
> *(i) the assets in a slump sale,*
> *(ii) a set of assets collectively, or*
> *(iii) the assets in parcels."*

21. Thereafter vide a notification dated 22.10.2018, Regulation 32 was amended as hereunder:-

> ***"32. Sale of Assets, etc.***
> *The liquidator may sell-*
> *(a) an asset on a standalone basis;*
> *(b) the assets in a slump sale;*
> *(c) a set of assets collectively;*
> *(d) the assets in parcels;*
> *(e) the corporate debtor as a going concern; or*
> *(f) the business(s) of the corporate debtor as a going concern:*
>
> *Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate."*
>
> *(Emphasis Supplied)*

22. **Regulation 32-A(1) stipulates:-**

> *"32A. Sale as a going concern.*
> *(1) Where the committee of creditors has recommended sale under clause (e) or (f) of regulation 32 or where the liquidator is of the opinion that sale under clause (e) or (f) of regulation 32 shall maximize the value of the corporate debtor, he shall endeavor to first sell under the said clauses."*

Regulation 32-A(1) emphasizes the importance placed on the transfer of the 'Corporate Debtor' or its business on a going concern basis.

23. Regulation 45(3) of Liquidation Process Regulations and 39C of the CIRP Regulations, the main subject matter of the Order impugned, read as follows:-

> ***"45. Final report prior to dissolution.***
> ***(3)*** *[The liquidator shall submit an application along with the final report and the compliance certificate in form H to the Adjudicating Authority for –*
> *(a) closure of the liquidation process of the corporate debtor where the corporate debtor is sold as a going concern; or*
> *(b) for the dissolution of the corporate debtor, in cases not covered under clause (a).]"*
>
> ***"39C. Assessment of sale as a going concern.***
> *(1) While approving a resolution plan under section 30 or deciding to liquidate the corporate debtor under section 33, the committee may recommend that the liquidator may first explore sale of the corporate debtor as a going concern under clause (e) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 or sale of the business of the corporate debtor as a going concern under clause (f) thereof, if an order for liquidation is passed under section 33.*
>
> *(2) Where the committee recommends sale as a going concern, it shall identify and group the assets and liabilities, which according to its commercial considerations, ought to be sold as a going concern under clause (e) or clause (f) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.*
>
> *(3) The resolution professional shall submit the recommendation of the committee under sub-regulations (1) and (2) to the Adjudicating Authority while filing the approval or decision of the committee under section 30 or 33, as the case may be.".*
> *.....*
>
> *(Emphasis Supplied)*

24. As per Regulation 39C of the CIRP Regulations, the Committee of Creditors may recommend that the Liquidator may first explore the sale of the 'Corporate Debtor' as a going concern or sale of business of the

'Corporate Debtor' as a going concern under Regulation 32 of the Liquidation Process Regulations.

25. Regulation 39C of CIRP Regulations read with Regulations 32, 32A and 45(3) of Liquidation Process Regulations, it is clear that under Regulation 39C, the CoC may recommend that the Liquidator may first explore sale of the 'Corporate Debtor' as a going concern under Clause (e) of Regulation 32 or Sale of the business of the 'Corporate Debtor' under Clause (f) of Regulation 32. 32A provides that if the Liquidator is of the opinion that sale under Clause (e) or (f) of Regulation 32 shall maximize the value of the 'Corporate Debtor', he shall endeavor to sell under the said Clauses 32-(A)-2 provides that for the purpose of sale under Sub-Regulation (1) the group of assets and liabilities of the 'Corporate Debtor', as identified by the CoC under Sub-Regulation (2) of Regulation 32C of the CIRP Regulations, shall be sold as a going concern. As can be seen from the agenda filed before us by way of on Affidavit by IBBI, Regulation 45(3) and Regulation 39C were inserted by IBBI to facilitate/strengthen the objectives of the Code. Any Order of dissolution is completely unnecessary in such cases. Having regard to the fact that the Code does not prevent the closure of Liquidation Process in the instance the 'Corporate Debtor' is sold as a going concern pursuant to Regulation 32(e) following a closure report filed under Regulation 45(3)(a) of the Liquidation Process Regulations it would be contradictory to observe that closure of Liquidation Proceedings cannot be done and only dissolution is provided for under the Code. This would demolish the very spirit and objective of the Code. *It can be safely construed that before the completion of 270 days, if no decision under Regulation 39C is taken by the CoC, only*

Regulation 32A is to be followed. Additionally, in the instant case, the Application under Section 33 of the Code seeking Liquidation was filed prior to 25.07.2019 (on which date Regulation 39C was inserted), therefore, the question of CoC passing any Resolution does not arise. We are of the considered view that the Liquidator has rightly followed the procedure specified in Regulation 32A of the Liquidation Process Regulations.

26. It is a well settled proposition that the legality and propriety of any Regulation/Notification/Rules/Act cannot be looked into by NCLT or NCLAT. The Tribunal can only ascertain whether the procedures provided for under the Code/Companies Act, 2013 are being followed or not. The Adjudicating Authority cannot go beyond this.

27. In ***'Arun Kumar Jagatramka' Vs. 'Jindal Steel Power Ltd. & Anr.' reported in Civil Appeal No. 9664 of 2019,*** the Hon'ble Apex Court while discussing the issue, *'whether in a Liquidation Proceeding under the Code, a person ineligible under Section 29A of the Code, is permitted to propose a scheme for revival under Section 230 of the Companies Act, 2013, has noted in the Epilogue that 'the need for judicial intervention or innovation from the NCLT & NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the IBC'.*

28. Keeping in view the scope and spirit of the Code, read with Section 54 of the Code, Regulation 39C of CIRP Regulations, Regulations 32(e)&(f), 32A and 45(3) of the Liquidation Process Regulations, we are of the view that the sale of the 'Corporate Debtor Company' was carried out by the Liquidator in accordance with the Regulations and we are constrained to observe that the Adjudicating Authority, has, apart from travelling beyond its jurisdiction in

making observations regarding the power and functions of framing of Regulations by IBBI, has also not appreciated the ratio laid down by the Hon'ble Supreme Court in a catena of Judgements that the Liquidation of the Company is to be seen only as a last resort and every attempt should be made to revive the Company and to continue it as a 'going concern'.

29. For all the aforenoted reasons this Appeal is allowed and the Impugned Order dismissing the Application I.A. 1940/2020 is set aside. No Order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
24th August, 2021

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