

Insolvency and Bankruptcy Board of India

Subject: Amendment to the IBBI (Liquidation Process) Regulations, 2016

In the matter of M/s. Gujarat NRE Coke Limited]C.P.)L.B.(No. 182/KB/2017[, after failure of resolution even during the extended period, the AA appointed the RP as liquidator. An affidavit filed by workmen and employees emphasized that the regulations provide for slump sale of assets and, therefore, permit sale of the business of the corporate debtor, including all its assets and properties, as a going concern and the Hon'ble Supreme Court and High Courts have often directed sale of assets of the company as a going concern to preserve employment, particularly when corporate debtor is a going concern. Accordingly, the AA directed: "The Liquidator shall try to dispose off the Corporate Debtor company as a going concern after publication of notice in newspaper with the reserve price which shall be equal to the total debt amount including interest and maximum period applicable for trying the sale of the Corporate Debtor as a going concern will be only three month from the date of the order if the process of sale as a going concern is failed during this period, then process of the sale of the assets of the company will be according to the provisions of sale of asset of the Corporate Debtor prescribed under section 33, Chapter VI of the Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016. In case it is not concluded within this period, the order of this Court directing the sale of the company as a going concern shall stand set aside and corporate debtor to be liquidated in the manner as laid down in Chapter III of the Liquidation process provided in Insolvency & Bankruptcy Code. ”.

2. However, the sale could not happen. An application was filed under section 230 to 232 of the Companies Act, 2013 for obtaining the sanction of the NCLT to a scheme of compromise and arrangement between the petitioner and the secured / unsecured creditors, foreign currency convertible bond (FCCB) holders and shareholders of Guajrat NRE Coke Ltd. The NCLT passed an order directing separate meetings of the shareholders, FCCB holders, secured creditors, unsecured creditors to consider and, if thought fit, to approve with or without modification the scheme of compromise and arrangement.

3. A key benefit of selling the corporate debtor, as a going concern in liquidation, as against other manners of sale is it can preserve employment while maximising the returns for stakeholders.

Many viable companies may end up in liquidation in the absence of availability of adequate number of bidders in the market or non-approval of resolution plan by requisite voting share of its financial creditors or other reasons. Liquidation of such companies may be premature and can result in avoidable 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 stakeholders, loss of revenue to government due to drying up of collection of tax and other revenue from such enterprise. There is merit in attempting sale of corporate debtor as a going concern in liquidation process.

4. As stated in the status note on CIRP, relatively more corporate debtors are ending up in liquidation. Though this is for legacy reasons, it is important to avoid liquidation. In fact, the recent Ordinance explicitly promotes resolution over liquidation. 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.”.

5. One round table was held with stakeholders on 21st May, 2018 to understand difficulties in selling corporate debtor as a going concern. Several challenges were brought up. Section 52 read with section 33 (5) allows a secured creditor the 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 corporate debtor as a going concern by the liquidator. In order to sell the corporate debtor 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.

6. 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 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 corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

7. “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 corporate debtor without values being assigned to the individual asset or resource. In view of this, the following options are submitted for consideration:

a. The corporate debtor 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 was; 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 corporate debtor as a going concern and the AA may pass an order with respect to: -

- (a) Sale of the corporate debtor to the intended buyer as a going concern
- (b) Transfer of shares of the corporate debtor to the intended buyer
- (c) Transfer of the going concern of the corporate debtor 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 corporate debtor,
- (e) Payment to stakeholders 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 corporate debtor 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 corporate

debtor and not for the dissolution of the corporate debtor to the AA to be made under section 54.

b. The regulations may provide another option of sale, that is, sale of business of the corporate debtor as a going concern. It will be only sale of business, not the corporate debtor which will be liquidated in accordance with the regulations. In this case, the assets and liabilities relevant for the business are transferred to a new entity, and stakeholders are paid from proceeds of sale in accordance with section 53 and the corporate debtor will be dissolved.

8. Both the options require consent of the secured creditors to relinquish security interest. If security interest is not relinquished, other modes of sale will be used.

9. It is submitted for consideration of the Governing Board.