

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

I.A. NO. 5137/ND/2023 and I.A. NO-3446/ND/2022

IN

Company Petition No. (IB)-204(ND)/2019

IN THE MATTER OF:

M/s Pooran Trading Pvt. Ltd.

... Financial Creditor

Versus

M/s Apple Industries Ltd.

... Respondent/ Corporate Debtor

AND IN THE MATTER OF IA. NO. 5137/ND/2023 AND 3446/ND/2022:

Rakesh Kumar Singala

Liquidator of M/s Apple Industries Limited
1/6, Block X, Lane No.4,
Brahampuri, Delhi-110053

... Applicant

Order Delivered on: 21.03.2024

Under Section: Regulation 32(e) read with Regulation 45 (3)(a) of the
IBBI Liquidation Process, 2016

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)

PRESENT:

For the Respondent : Adv. Samiksha Godiyal

For the APSPDCL : Mr. Rakesh K. Sharma & Mr. Nishant Sharma, Advs.

For the Liquidator : Sr. Adv. P. Nagesh, Adv. Akshay Sharma, Dr. Anand Bajpai, Adv. Shubham Saxena, Adv. Rakesh Singla
Adv. Gaurav Gupta

ORDER

PER: SHRI ASHOK KUMAR BHARDWAJ, MEMBER(J)

The present IAs viz. IA No. 5137/ND/2023 and IA No. 3446 /ND/2022 have been preferred by Liquidator (hereinafter referred to as, the 'Applicant') under Regulation 32(e) read with Regulation 45(3)(a) of the IBBI (Liquidation Process) Regulations, 2016. Through IA 5137/ND/2023 the Applicant had sought amendment in the prayers of IA No. 3446 of 2022. The amended reliefs sought by the Applicant reads thus:-

"1) direct the authorities vide IA-1842/2021 & IA-6039/2021 to release the unlawfully withheld payment INR 25,00,000/- & INR 1,50,00,000/-

2) allow the application for closure of Liquidation Process as the Corporate Debtor has been sold out as a going concern under IBBI Regulation 32(e) of the Liquidation Process and record the sale certificates, share certificates duly issued thereof and other relevant documents.

3) That the order be passed that after distribution of the proceeds of the Sale of Corporate Debtor as a Going Concern as per the order of priority provided in Section 53 of the Insolvency and Bankruptcy Code, 2016, the remaining unpaid outstanding liabilities of the Corporate Debtor shall be extinguished.

4) All consequences of past non-compliances of the Corporate Debtor under applicable laws for the period prior to this E-Auction shall be waived.

5) allow to extinguish the existing share capital and inclusion of afresh share capital issued by the Ld. Liquidator in respect of acquisition of Corporate Debtor by the Successful Bidder.

6) allow to vacate the office of the existing Board of Directors and new/fresh appointment of the Board of Directors as recommended by the Successful Bidder.

7) discharge/relieve Mr. Rakesh Kumar Singala as a Liquidator for the Corporate debtor.

8) pass any other order as deem fit and proper to this Hon'ble Tribunal.”

2. To put the facts succinctly, the underlying main Petition CP (IB)-204/ND/2019 was filed by M/s Pooran Trading Pvt. Ltd. against the Corporate Debtor namely, M/s Apple Industries Limited under Section 7 of IBC, 2016, which was admitted in terms of the Order dated 13.03.2019 passed by this Adjudicating Authority. The CIRP could culminate in terms of the order dated 13.02.2020, whereby the CD was ordered to be liquidated. Currently, the Corporate Debtor is represented by Mr. Rakesh Kumar Singala, the Liquidator qua it.

3. As far as the prayer contained in Prayer clause 1 of the Application is concerned, the same has already been granted in terms of the order dated 16.09.2022 passed in IA-1842/ND/2021. IA-1842/2021 has already been disposed of vide order dated 16.09.2022. Subsequently, IA-6039/2021 was preferred for initiation of Contempt proceedings against the Respondents in the IA for giving false information in the report dated 29.10.2021, filed in compliance of the order dated 24.09.2021 as also for issuance of directions to the Respondents to release/refund the amount of Rs. 1,50,00,000 with interest @ 18% per annum to the Liquidator. The IA-6039/2021 (ibid) was disposed of in terms of the order dated 04.01.2021. Also, Hon'ble NCLAT vide order dated 04.01.2023 in Comp. App. (AT) (Ins.) No. 1215 of 2022, modified I.A. No. 5137 of 2023 and I.A. No.3446 of 2022 in (IB)-204(ND)/2019 M/s Pooran Trading Pvt. Ltd. vs. M/s Apple Industries Pvt. Ltd.

the directions issued in terms of the order passed in IA-1842/2021. The contents of which reads thus: -

“16. In view of the foregoing discussion, we partly allow this Appeal. The direction of the Adjudicating Authority to the Respondent of the Application (Appellant herein) to refund the amount of Rs.25,46,588/- is upheld whereas the direction for payment of Rs.1,08,797/- is set aside.”

4. Through the present application, the Liquidator has sought closure of Liquidation Proceedings and also extinguishment of outstanding liabilities of the Corporate Debtor after distribution of proceeds of sale in terms of Section 53 of IBC, 2016.

5. Before discussing the reliefs and concessions and other prayers made by the Liquidator I would like to examine the submissions put forth by the Liquidator in respect of closure of Liquidation Process and sale of the Corporate Debtor as going concern. The Liquidator has espoused thus: -

5.1 The Liquidator has issued an invitation of bids for sale of the Corporate Debtor as a going concern as specified under IBBI Regulation 32(e) of Liquidation Process through a public notice dated 08.02.2021 prescribing the timelines along with a document title ‘E-Auction Process Document’ dated 08.02.2021 containing further details of the E-Auction Process in a very comprehensive manner. The salient features of the notice as stated by the Liquidator reads thus:-

The public notice dated 08.02.2021 laid out the following: -

Submission of Confidential Undertaking by the prospective bidder	08/02/2021 to 17/02/2021
Sharing of relevant information of the corporate debtor with the prospective bidders and Site visit/Inspection by the prospective bidders post receiving confidential undertaking.	08/02/2021 to 17/02/2021

Last date Submission of requisite forms, affidavits, declarations, etc. by the prospective bidder Last date for receiving EMD and notifying ineligible Bidders if any.	22/02/2021- till 17:00 hours (IST)
Date and Time of Auction	24/02/2021 between 3:00 PM to 5:00 PM with unlimited extensions of "5 minutes" i.e., the end time of the e-auction will be extended by 5 minutes each time if bid is made within the last 5 minutes before closure of auction.
Reserve Price (INR)	INR 84,00,00,000/-
EMD	INR 10,00,00,000/-
Bid Incremental Value (INR)	INR 25,00,000/-

The following timeline was laid out: -

Public Advertisement of E-Auction E-auction process documents uploaded in the Site	08/02/2021	T
Submission of Confidential	08/02/2021 to	T+9 days
Undertaking by the prospective bidder	17/02/2021	
Sharing of relevant information of the corporate debtor with the prospective bidders post receiving confidential undertaking	08/02/2021 to 17/02/2021	T+9 days
Site visit/Inspection by the prospective bidders post receiving confidential undertaking	08/02/2021 to 17/02/2021	T+9 days
Last date Submission of requisite forms, affidavits, declaration, etc. by the prospective bidder Last date for receiving EMD and notifying ineligible Bidders if any.	22/02/2021	T+14 days
E-Auction date (3pm to 5pm)	24/02/2021	T+16 days
Declaration of Successful Bidder	25/02/2021	T+17 days
Issue of Letter of Intent (LOI)		As soon as reasonably possible
Payment of Balance consideration by successful Bidder		Within 30 days from date of issue of LOI
Return of EMD to unsuccessful Bidder		EMD of Unsuccessful bidders to be returned within 7 days of closer of e-auction process
Issue of Sale Certificate		Within 30 days of receipt of full bid amount

5.2 In respect of the timelines one Corrigendum was issued on 24.02.2021 and the same was duly published in 14 newspapers on Pan India basis.

5.3 Two qualified bidders namely M/s M S Agarwal Foundries and M/s RMY Industries LLP participated in the E-Auction Process as the E-Auction/bidding was conducted on the scheduled date & time i.e., 01.03.2021 from 3 pm to 5 pm by way of inter-se bidding amongst the two Qualified Bidders and finally M/s RMY Industries LLP (hereinafter referred to as H-1 bidder/Auction Purchaser) stood as a successful bidder by increasing its quote to Rs. 84,75,00,000/- (Eighty-Four Crores and Seventy-Five Lakh) and thereafter no other bid was received and the announcement of the Successful Bidder was made by the e-auction service provider i.e., M/s Linkstar Infosys Pvt. Ltd. through a message/email generated automatically sent also to successful bidder namely M/s RMY Industries LLP, the successful bidder and the e-auction outcome report qua each bidder had been sent to the Liquidator.

5.4 In terms of clause 6.10 of the E-Auction Process Document, the Liquidator issued a Letter of Intent (LoI) to the Successful Bidder, on 06.03.2021 which was duly accepted by Mr. Yogesh Kumar authorized signatory of RMY Industries LLP. In turn, the Liquidator called 9th SCC meeting. The relevant excerpts of the minutes of 9th SCC meeting reads thus:

“9th SCC Meeting:

Only one member i.e., PNB was present. Major discussion and decision:

- 1. Took note of the successfully e-auction process and declaration of*

M/s RMY Industries LLP as successful bidder.

2. Took note of the amount Rs. 30 crores deposited into the bank account during this e-auction.

3. took note disbursement/appropriation of the received sale consideration as PER section 53 of IBC and fee of the liquidator as per regulation 4(2)(b).”

5.5 The Successful Bidder made full payment against the sale of the Corporate Debtor as a going concern. The Liquidator has annexed the Form-H with the application, the relevant excerpts of which reads thus: -

FORM H COMPLIANCE CERTIFICATE <i>[Under Regulation 45(3) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016]</i>		
I, RAKESH KUMAR SINGALA , an insolvency professional enrolled with ICSI Insolvency Professional Agency and registered with the Board with registration number IBBI/PA-002/IP-N00581/2017-18/11744 , am the Liquidator for the Liquidation Process of APPLE INDUSTRIES LTD.		
2. The details of the Liquidation Process are as under:		
Sl. No.	Particulars	Description
(1)	(2)	(3)
1	Name of the corporate debtor	APPLE INDUSTRIES LTD
2	Case No. & NCLT Bench	204/2019 & NCLT BENCH-II
3	Date of initiation of liquidation	13.02.2020
4	Date of appointment of liquidator	13.02.2020
5	Date of commencement of CIRP	13.03.2019
6	Name of RP during CIRP and his registration No. as IP	RAKESH KUMAR SINGALA REGN NO. IBBI/PA-002/IP- N00581/2017-18/11744
7	Name of Liquidator and his registration No. as IP	RAKESH KUMAR SINGALA REGN NO. IBBI/PA-002/IP- N00581/2017-18/11744
8	Date of Publication of Public Announcement under Form B	15.02.2020
9	Date of Intimation to Registry and Information Utility, if any, about commencement of Liquidation	09.03.2020 (Registrar of Companies)
10	Date of handover of charge by RP	NA
11	Date of submission of compliance, if any, directed by AA in the liquidation order and its particulars	a. Public Announcement: dated 18.02.2020 b. Undervalued and preference transaction: transaction audit happened but could not determine c. Preliminary Report filing: 22.10.2020
12	Date of appointment of registered valuers, if any	19.08.2020
13	Date of notice for uncalled capital/unpaid capital contribution	NA

14	Date of realisation of uncalled capital/unpaid capital contribution	NA	
15	Date of opening of liquidation account with Bank A/c details	Opening of bank account 4.2.2021 Bank: Punjab National Bank ECE House, KG Marg, New Delhi-110001 Current A/c No.1120002102326932	
16	Date of constitution of Consultation Committee	02.09.2020	
17	No. of meetings of consultation committee held	9 (nine)	
18	Date of submission of list of stakeholders to AA	22.10.2020	

20	Date of filing of preliminary report & assets memorandum to AA	22.10.2020	
21	Fair value	68,57,95,947.00 (in CIRP)	
22	Liquidation value (realizable value)	54,97,26,228.00 (in Liquidation)	
23	Date of public notice for auction (please add additional rows, if required)	Public Notice dated 08.2.2021 Corregendum-1 dated 10.2.2021 Corregendum-2 dated 25.2.2021	
24	Date of order of AA to dispense with the public notice for Auction	NA	
25	Date of permission of AA for physical Auction	NA	
26	Date of permission of AA for private sale	NA	
27	Date of permission of AA for distribution of unsold assets to stakeholders	NA	
28	Date of permission of the liquidator to realise the unrelinquished security interest by the secured creditor	NA	
29	Modified list of stakeholders and date of submission to AA	NA	
30	Date of first realisation	Date of	Amount
31	Date of second realisation	Amount	Distributed
32	Date of first distribution	Realisation	On
33	Date of second distribution	5.3.2021	
		8.3.2021	02.12.2021
		13.12.2021	14.12.2021
		15.12.2021	15.12.2021
		23.12.2021	23.12.2021
		24.12.2021	24.12.2021
		31.12.2021	31.12.2021
		13.1.2021	
		15.1.2022	15.01.2022
		19.1.2022	
		20.1.2022	21.01.2022
		29.01.2022	29.01.2022
1.2.2022			
2.2.2022	07.02.2022		
34	Date of submission of Quarterly Progress Report-I (FY-1)	22.10.2020 (1 ST Progress Report for the period 13.2.2020 to 31.3.2020)	
35	Date of submission of Asset Sales Report to AA	NA (Sold as going concern no assets has been sold individually)	
36	Date of submission of Quarterly Progress Report-II	22.10.2020 (2 nd Progress Report for the period 01.4.2020 to 30.6.2020)	
37	Date of submission of Quarterly Progress Report-III	29.10.2020((3rd Progress Report for the period 01.7.2020 to 30.9.2020)	
38	Date of submission of Quarterly Progress Report-IV & Audit Report	20.3.2021(4th Progress Report for the period 01.10.2020 to 31.12.2020)	
39	Date of submission of Quarterly Progress Report-I (FY-2)	15.06.2021(5 th Progress Report for the period 01.1.2021 to 31.3.2021)	
40	Date of submission of Quarterly Progress Report-II	13.09.2021(6 th Progress Report for the period 01.4.2021 to 30.6.2021)	
42	Date of submission of Quarterly Progress Report-IV & Audit Report	09.03.2022(8 th Progress Report for the period 01.10.2021 to 31.12.2021)	

43	Date of intimation to statutory authority as applicable. a) PF b) ESI c) Income Tax Dept d) Inspector of Factory e) GST/VAT f) Others	a) PF: 30.05.2022 b) ESI: NA c) Income Tax Dept: 28.04.2022 d) Inspector of Factory: 30.05.2022 e) GST/VAT:27.05.2022 &30.5.2022 f) Others
44	Date of deposit of unclaimed dividends or undistributed proceeds and income and interest thereon, if any, under sub-regulations (2), (3) or (4) of regulation 46	NA
45	Amount deposited into Corporate Liquidation Account: (a) Amount of unclaimed dividends (b) Amount of undistributed proceeds (c) Income referred to in sub-regulation (2) and (3) of regulation 46 (d) Interest referred to in sub-regulation (4) of regulation 46 Total	NA
46	Date of submission to the Board and the Authority under sub-regulation (5) of regulation 46	NA
47	Date of Final Report to AA (prior to dissolution application)	NA

3. The details of the assets as per Asset Memorandum and Final Sale Report are as under:

Sl. No.	Assets	Mode of Sale	Estimated Liquidation Value	Realisation Amount (Rs.)	Date of Transfer to Liquidation Account	
(1)	(2)	(3)	(4)	(5)	(6)	
1.	142,50,90,762.84	E-Auction	54,97,26,228/-	84,75,00,000/-	5.3.2021	10,00,00,000
					8.3.2021	10,00,00,000
					13.12.2021	7,00,00,000
					15.12.2021	5,00,00,000
					23.12.2021	10,00,00,000
					24.12.2021	2,00,00,000
					31.12.2021	1,00,00,000
					13.1.2021	4,50,00,000
					15.1.2022	3,00,00,000
					19.1.2022	4,25,00,000
					20.1.2022	6,00,00,000
					29.01.2022	14,00,00,000
					1.2.2022	5,00,00,000
					2.2.2022	3,00,00,000
					TOTAL	84,75,00,000

4. (a) Liquidation value of the liquidation estate: 54,97,26,228/-

(b) Amount realised from sale of liquidation estate: 84,75,00,000/-

(c) The amounts distributed to stakeholders as per section 52 or 53 of Code are as under: 84,75,00,000/- less liquidator fee as per Liquidation Process Regulation 4(2)(b).

(Amount in Rs. lakh)

Sl. No.	Stakeholders* under section 53 (1)	Amount Claimed	Amount Admitted	Amount Distributed	Amount Distributed to the Amount Claimed (%)	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1	(a): CIRP Costs	Nil	Nil	nil		Being going concern all cost has been paid from revenue of the Corporate Debtor
2	(a): Liquidation Costs	20388439	20388439	20388439	100	Liquidator fee as per Reg. 4(2)(b), rest liquidation cost has been paid from revenue of Corporate Debtor
3	(b)(i) workmen's dues	Nil	Nil	Nil		
4	(b)(ii) Secured Creditor relinquished security	5981207617.49	5981207617.49	827111560	13.8285	PNB is the only secured creditor and get all sale consideration singly after liquidator fee
5	(c)					
6	(d)					
7	(e)(i)					
8	(e)(ii)					
9	(f)					
10	(g)					
11	(h)					
	Total					

*If there are sub-categories in a category, please add rows for each sub-category.

5. The Liquidation Process has been conducted as per the timeline indicated in regulation 47 under:

Section of the Code / Regulation No.	Description of Task	Timeline as per regulation 47	Actual Timeline
(1)	(2)	(3)	(4)
Section 33	Commencement of LCD and Appointment of Liquidator	13.02.2020	T
Section 33 (1) (b) (ii) /Reg. 12 (1, 2, 3)	Public announcement in Form B	T+5	T+3
Reg. 35 (2)	Appointment of registered valuers	T+7	T+187
Section 38(1), Reg. 17, 18, 19, 20 and 21A	Submission of claims; Intimation of decision on relinquishment of security interest	T + 30	T+20
Section 38 (5)	Withdrawal/ modification of claim	T+44	T+20
Reg. 30	Verification of claims received under regulation 12(2)(b)	T + 60	T+13
Reg. 31A	Constitution of SCC	T + 60	T+199
Section 40 (2)	Intimation about decision of acceptance/rejection of claim	T + 67	T-20
Reg. 31 (2)	Filing the list of stakeholders	T + 75	T+251
Section 42	Appeal by a creditor against the decision of the liquidator	T + 81	NA
Reg. 13	Preliminary report to the AA	T + 75	T+251
Reg. 34	Asset memorandum	T + 75	T+251
Reg. 15 (1), (2), (3), (4) and (5) and 36	Submission of progress reports to AA; Asset Sale report to be enclosed with every Progress Report, if sales are made	Within 15 days of each Quarter	First Progress report submitted in 205 days
Proviso to Reg. 15 (1)	Progress report in case of cessation of liquidator	Date of cessation + 15	NA
Reg. 37 (2, 3)	Information to secured creditors	Date of intimation + 21	NA
Reg. 42 (2)	Distribution of the proceeds to the stakeholders	Date of Realisation + 90	Within 17 days max after each realisation trench
Reg.10 (1)	Application to AA for Disclaimer of onerous property	T + 6 months	NA
Reg.10 (3)	Notice to persons interested in the onerous property or contract	At least 7 days before making an application to AA	NA
Reg. 44	Liquidation of corporate debtor	T + 365	Corporate Debtor has been sold on the going concern basis instead of liquidation/dissolution
Reg. 46	Deposit the amount of unclaimed dividends and undistributed proceeds	Before submission of application under sub-regulation (3) of regulation 45	NA
Sch-1 Sl. No 12	Time period to H1 bidder to provide balance sale consideration	Within 90 days of the date of invitation to provide the balance amount	Complete payment received in 339 days

6. The following are deviations /non-compliances with the provisions of the Insolvency and Bankruptcy Code, 2016, regulations made, or circulars issued there under (If any deviation/ non-compliances were observed, please state the details and reasons for the same):

Sl. No.	Deviation/Non-compliance observed	Section of the Code / Regulation No. / Circular No.	Reasons	Whether rectified or not
(1)	(2)	(3)	(4)	(5)
1	Appointment of registered valuers	Section 33 (1) (b) (ii) /Reg. 12 (1, 2, 3)	There was valuation reports already in hand valuation done during CIRP. However, Liquidator and SCC members later decided to valuation of Corporate Debtor in change business conditions post Covid-19 situations	Yes, 1 st SCC Meeting held on 9.9.2020. 98 days of Liquidation period till 30.06.2020 excluded by Hon'ble NCLT vide its order dated 15.2.2020, 90 days of liquidation period till 30.9.2020 was also excluded as per Reg. 2B(2)
2	Constitution of SCC	Reg. 31A	Covid-19 situation along with period of compromise and arrangement as per Reg. 2B(2)	98 days of Liquidation period till 30.06.2020 excluded by Hon'ble NCLT vide its order dated 15.2.2020, 90 days of liquidation period till 30.9.2020 was also excluded as per Reg. 2B(2)

3	Filing the list of stakeholders	Reg. 31 (2)	Covid-19 situation along with period of compromise and arrangement as per Reg. 2B(2)	98 days of Liquidation period till 30.06.2020 excluded by Hon'ble NCLT vide its order dated 15.2.2020, 90 days of liquidation period till 30.9.2020 was also excluded as per Reg. 2B(2)
4.	Preliminary report to the AA	Reg. 13	Covid-19 situation along with period of compromise and arrangement as per Reg. 2B(2)	98 days of Liquidation period till 30.06.2020 excluded by Hon'ble NCLT vide its order dated 15.2.2020, 90 days of liquidation period till 30.9.2020 was also excluded as per Reg. 2B(2)
5.	Asset memorandum	Reg. 34	Covid-19 situation along with	98 days of Liquidation period till
			period of compromise and arrangement as per Reg. 2B(2)	30.06.2020 excluded by Hon'ble NCLT vide its order dated 15.2.2020, 90 days of liquidation period till 30.9.2020 was also excluded as per Reg. 2B(2)
6.	Submission of progress reports to AA; Asset Sale report to be enclosed with every Progress Report, if sales are made	Reg. 15 (1), (2), (3), (4) and (5) and 36	Covid-19 situation along with period of compromise and arrangement as per Reg. 2B(2)	98 days of Liquidation period till 30.06.2020 excluded by Hon'ble NCLT vide its order dated 15.2.2020, 90 days of liquidation period till 30.9.2020 was also excluded as per Reg. 2B(2)
7.	Liquidation of corporate debtor	Reg. 44	-Decision of sale as going concern instead Liquidation/dissolution - COVID-19 situation	Yes, 1 st SCC Meeting held on 9.9.2020. 98 days of Liquidation period till 30.06.2020 excluded by Hon'ble NCLT vide its order dated 15.2.2020, 90 days of liquidation period till 30.9.2020 was also excluded as per Reg. 2B(2)
8.	Time period to H1 bidder to provide balance sale consideration	Sch-1 Sl. No 12	Process was stayed by Hon'ble NCLT vide its order dated 15.03.2021 post post balance sale consideration was asked by Liquidator through LOI dated 6.3.2021 and such stay vacated by Hon'ble NCLT vide its order dated 15.11.2021	- stayed by Hon'ble NCLT vide its order dated 15.03.2021. - such stay vacated by Hon'ble NCLT vide its order dated 15.11.2021

7. The dissolution application has been filed [before expiry of the period of one year] / [after expiry of one year]. Please state details of any extension sought with the reason and granted: NA

8. The details of application(s) filed / pending in respect of avoidance of transactions.

Sl. No.	Type of Transaction	Date of Filing with Adjudicating Authority	Date of Order of the Adjudicating Authority	Brief of the Order
(1)	(2)	(3)	(4)	(5)
1	Preferential transactions under section 43	NA		
2	Undervalued transactions under section 45	NA		
3	Extortionate credit transactions under section 50	NA		
4	Fraudulent transactions under section 66	NA		

9. All undischarged or matters pending before any Court or Tribunal relating to corporatedebtor, if any, have been reported to AA.

10. I Rakesh Kumar Singala, hereby certify that the contents of this certificate are true and correct to the best of my knowledge and belief, and nothing material has been concealed there from.

From a perusal of the Form H filed by the Liquidator, it is observed that the liquidation value of the Liquidation estate is Rs. 54,97,26,228/- and the amount realized from the Liquidation is Rs. 84,75,00,000/-. The admitted claim of Secured Creditor relinquished security interest is Rs. 5,98,12,07,617.49/-. The Amount Distributed to sole secured creditor as

per Section 53 is Rs. 82,71,11,560/-, which is 13.82% of the amount distributed to the claim amount.

5.6 The SCC had passed a Resolution to sell the Corporate Debtor as a going concern, in its 8th meeting held on 30.01.2021 the contents of which reads thus: -

B. ISSUES TO BE VOTED UPON AFTER DISCUSSION.

Resolutions to be passed, with or without modifications, at the meeting:

ITEM NO. 6

RECOMMENDATION OF SALE OF CORPORATE DEBTOR AS A GOING CONCERN THROUGH E-AUCTION PROCESS ALONG WITH RESERVE PRICE & EARNEST MONEY AMOUNT FOR E-AUCTION.

The matter discussed above at length at agenda item no. 4 & 5 and the following Resolution therefore placed before the Members of the committee for consideration and recommendation.

Resolution:
To consider and, if thought fit, to pass with or without modification the following resolution:

“RESOLVED THAT subject to provisions of the Insolvency and Bankruptcy Code, 2016, the recommendation of Stakeholder Consultation Committee be and is hereby accorded for sale of corporate debtor as a going concern by e-auction mode as per Regulation 33(1)”

“FURTHER RESOLVED THAT subject to provisions of the Insolvency and Bankruptcy Code, 2016, the recommendation of Stakeholder Consultation Committee be and is hereby accorded that Rs. 84 Crore shall be the Reserve Price and Rs. 10 Crore shall be the earnest money deposit (EMD) for this e-auction process.

“FURTHER RESOLVED THAT subject to provisions of the Insolvency and Bankruptcy Code, 2016 the liquidator be and is hereby authorized to take such acts, deed and thing as may be necessary to give effect to this resolution”

Resolution duly passed by the SSC member present in the meeting by confirmation sent by email dated Feb 1, 2021.

5.7 On 26.05.2022, the Share Certificates could be issued to the Successful Bidder as per the request letters dated 05.02.2022 & 28.04.2022 submitted by it, in consonance with letters dated 15.02.2022 and 17.02.2022 duly sent to the Registrar of Companies in respect of fresh share capital to the new shareholders and their shareholding pattern and further new board members were appointed. The details of which reads thus:

S. No.	Certificate No.	Name of Shareholders(Proposed)	No. of Shares
1.	1	RMY Industries Ltd.	2470000
2.	2	Rakesh Gupta	25000
3.	3	Parag Gupta	1000
4.	4	Neha Gupta	1000
5.	5	Mukesh Gupta	1000
6.	6	Uma Gupta	1000
7.	7	Mitali Agarwal	1000

5.8 The Applicant had given details of the pending litigation against the Corporate Debtor, which reads thus:

S. NO.	Case/Proceedings/TITLE/ Other/Court/Authority	Status	BY/ AGAINST CD
1.	<i>W.P.(C) 306/2019 Apple Sponge & Power Limited & Ors. Vs RBI & ANR, DELHI HIGH COURT</i>	<i>Pending Apple Industries is the Petitioner No. 2</i>	<i>BY</i>
2.	<i>(IB)-204 (ND)/2019 Pooran Trading Pvt. Ltd. Vs. Apple Industries Ltd. NCLT New Delhi Bench – II</i>	<i>Pending Hon'ble NCLT New Delhi Bench has ordered for Commencement of CIRP under IBC vide its order dated 13.03.2019 and later liquidation.</i>	<i>AGAINST</i>
3.	<i>RC NO. 543/2018, Recovery Officer-I, PNB Vs. Apple Industries Ltd., DRT-II, New Delhi</i>	<i>Pending OA was filed before DRT-II New Delhi Bench and pending Before Recovery Officer</i>	<i>AGAINST</i>
4.	<i>Office of the Assistance Commissioner of Central Tax GST Division, 3rd Fl. Thakai Tower, RF Road, Anantapur - 515001 Income Tax</i>	<i>Pending The central excise department has raised demand against the company of Rs.15.95 Lakh plus interest and further the demand order has been appealed before the appellate authority, however no further details were made available. Advocate detail: Name: G. Basavaraj Address: A Block Staal No.9,Saptagiri, Complex , K.C.Road Bellary, Karnataka -583101, Mob. No.: 9845838078</i>	<i>AGAINST</i>
5.	<i>Office of the Deputy Commissioner of Income Tax Central Circle, Noida, 2nd Floor, ARTO Complex, Sector-33, Noida for A.Y. 2009-10 RECOVERY OFFICER-I Income Tax</i>	<i>Pending Search u/s 132 was conducted by Income Tax authorities at the premises of the Corporate debtor on 11.11.2014 and pursuant to that the cases of 7 AY's have been opened by the IT department wherein the Income tax authorities have made additions, u/s 68 of Income Tax Act, to income of the Corporate Debtor and raised a demand against the Corporate Debtor. It has been explained that the demand orders have been appealed against by the Corporate Debtor before appellate authority, however no further details were available at this stage. Advocate Detail: P Bholusaria and Company Address:26/11, Block 26, Shakti Nagar, Delhi, 110007 Mobile: 9810271468</i>	<i>AGAINST</i>

6.	Office of the Deputy Commissioner of Income Tax Central Circle, Noida, 2 nd Floor, ARTO Complex, Sector-33, Noida for A.Y. 2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2015-16 Income Tax	Pending Search u/s 132 was conducted by Income Tax authorities at the premises of the Corporate debtor on 11.11.2014 and pursuant to that the cases of 7 AY's have been opened by the IT department wherein the Income tax authorities have made additions, u/s 68 of Income Tax Act, to income of the Corporate Debtor and raised a demand against the Corporate Debtor. It has been explained that the demand orders have been appealed against by the Corporate Debtor before appellate authority, however no further details were available at this stage. Advocate Detail: P Bholusaria and Company Address: 26/11, Block 26, Shakti Nagar, Delhi, 110007 Mobile: 9810271468	
7.	Assistant Director of Income Tax, CPC, Bangalore for A.Y. 2020-21, Income Tax	Intimation U/s 143(1) issued vide DIN CPC/2021/V6/200918470 and Demand Reference No 2021202037030771162C by Centralized Processing Centre of Income Tax Department, Bengaluru	
8.	Assistant Commissioner of Commercial Tax (Audit-1), Ballari Karnataka Commercial Tax Department	Pending Order Passed for non- submission of C Forms with respect to Interstate Sales Made during the period from 01st April 2017 to 30th June 2017	
9.	Outstanding Demand as Per Income Tax Portal for A.Y 2018-19 Income Tax	Pending Penalty U/s 272A(1)(d) as per Demand Reference No 2021201840409359932C	
10.	Outstanding Demand as Per Income Tax Portal for A.Y 2018-19 Income Tax	Pending Demand U/s 270A of Income Tax Act, 1961 having Demand Reference No 2021201840409170910C	
11.	Outstanding Demand as Per Income Tax Portal for A.Y 2013-14 Income Tax	Pending Demand U/s 147 of Income Tax Act, 1961 having Demand Reference No 2021201340409693103C	
12.	F.No.587/CE/103/POL/2017 /Pt.I/18866-72 The Additional Director-O/O Directorate General Of GST Intelligence, RK Puram, Delhi, Income Tax	Pending Search was conducted U/s Section 12F of Central Excise Act, 1944 and U/s 174 of Central Goods & Service Tax Act, 2017 on 09/01/2018 and a Show Cause Notice has been issued in respect thereof	
13.	IA-1842/2021 Liquidator Vs. Central Excise & Ors. Hon'ble NCLT New Delhi Bench - II	Pending Affidavit has been filed and final order is yet to be passed.	
14.	IA-1843/2021 Liquidator Vs. DGGSTI Hon'ble NCLT New Delhi Bench - II	Disposed off	By
15.	IA-6039/2021 Liquidator Vs. DGGSTI Hon'ble NCLT New Delhi Bench - II	Pending Notice Issued	
16.	IA-4489/2020 Pooran Trading Pvt. Ltd. Vs. Apple Industries Ltd. Hon'ble NCLT New Delhi Bench - II	Withdrawn	



17.	IA-416/2021 Successful Bidder Vs. Apple Industries Ltd. Hon'ble NCLT New Delhi Bench - II	Disposed off	Against
18.	IA-427/2022 Successful Bidder Vs. Apple Industries Ltd. Hon'ble NCLT New Delhi Bench - II	Disposed off	Against
19.	IA-880/2022 Successful Bidder Vs. Apple Industries Ltd. Hon'ble NCLT New Delhi Bench - II	Pending	Against
20.	IA-880/2021 Successful Bidder Vs. Apple Industries Ltd. Hon'ble NCLT New Delhi Bench - II	Pending	By Successful Bidder
21.	Demand Notice vide AAO No.ZH370622OD75179 TIN: 28262508929/CST by way of order for AY 2013-14 GOVERNMENT OF ANDHRA PRADESH COMMERCIAL TAXES DEPARTMENT PROCEEDINGS OF THE COMMERCIAL TAX OFFICER-II, ANANTAPURAMU PRESENT: K. Hussain Saheb	Pending	Against

6. I have heard the submissions of both the parties and have perused the documents placed on record. The requirements of filing application for closure of liquidation process is stipulated under Regulation 45(3)(a) of IBBI (Liquidation Process) Regulations, 2016, which reads thus:

“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”

7. As observed in Para 5.5 of the Application, the Form H has already been annexed by the Applicant. Further, the Final Report was filed through IA-3528/2022, which was already taken on record vide order dated 01.09.2022

8. In the wake, I am left with no option but to declare the Liquidation Process as closed. Accordingly, the **Prayer (2) of the application stands disposed of accordingly.** The Liquidator shall comply with the provisions of Regulation 45A of the IBBI (Liquidation Process) Regulations, 2016 in letter and spirit.

9. Besides the prayer for allowing the closure of the liquidation process, the applicant has also sought certain reliefs and concessions

10. Previously also, the H-1 bidder had filed an application bearing IA-880/2022 seeking certain reliefs and concessions, which was dismissed by this Adjudicating Authority vide order dated 01.08.2022. The order reads thus:

IA-880/2022: This application has been filed on behalf of the H-1 bidder/auction purchaser seeking certain reliefs and concessions. The Applicant is seeking reliefs and concessions after participating and securing in the bid as H-1 bidder which is usually on “as is whereis basis.” Hence, at this stage, no reliefs or concessions can be granted. Hence, the application is not maintainable.

Accordingly, the present application being not maintainable, stands dismissed.

11. Subsequently, the said order was challenged before the Hon’ble NCLAT in Company Appeal (AT) (Insolvency) No. 1114 of 2022, which was disposed of in terms of the order dated 12.10.2022 with the observation inter alia: -

“4. We are of the view that the Adjudicating Authority is empowered to consider any application filed by the Liquidator or Successful Auction Purchaser, which may arise with regard to terms and conditions of auction sale or sale as going concern as per the Liquidation Regulation. We, thus, are of the view that end of justice be served in giving liberty to the Appellant to file an appropriate application before

the Adjudicating Authority, which may arise from the terms and conditions of the auction sale or sale as going concern, which may be considered by the Adjudicating Authority. The Appeal is disposed of with liberty aforesaid.”

(Emphasis Supplied)

12. In view of the liberty granted by the Hon'ble NCLAT, the H-1 bidder filed the IA bearing No. 5602 of 2022, which was withdrawn by the applicant on 22.12.2023.

13. Nevertheless, I would like to examine the scope for allowing the reliefs or concessions that can be granted to the H-1 bidder in the present case. In this context, a reference could be made to the relevant excerpts from the E-Auction Process document which reads thus:

- 6.2 Cautions to Bidders:**
- a The auction is being conducted strictly on an “as is where is, and what is there is and non - recourse basis”.
 - b Bidders are advised to go through all the terms and conditions of sale given in this E-Auction Process Document and also in the Notice of Sale before participating in the online bidding/auction.
 - c The e-auction shall entitle the Successful Bidder to all the rights of the incumbent holder in respect of the properties. Details of the assets as stated in Annexure 5 of this E-Auction Process Document are as per the details available with the Liquidator and neither the Liquidator nor the Agency shall, in any way, be responsible for any variation in the extent of the properties due to any reason.
- 6.3 Inspection of the Assets Buyers Beware:**
- a Bidders are requested to inspect the Properties and satisfy themselves regarding the area, physical nature, condition, extent etc., of the Properties prior to submission of their online bids. All costs incurred in connection with such inspection shall be borne by the Bidders.
 - b Bidders advised / cautioned to verify with the sub-registrar's office as well as obtain and analyze the revenue records with respect to the Properties and to satisfy themselves regarding the existence, title, nature, description, condition, existing encumbrances, liens, charges, statutory dues, etc., over the Properties before submitting their bids.
 - c The Agency / the Liquidator shall not be responsible for rendering any assistance to the Bidder in connection with its independent inspection of the Properties.
 - d Bidders are bound by the principle of Caveat Emptor (buyer beware)
 - e Bidders are requested to submit their bids only after conducting their own independent due diligence exercise with respect to their title to the properties.
 - f Bidders are requested to submit Confidential Undertaking as per the format prescribed in Annexure 6 as Liquidator is required to share certain data, documents in relation to the Company for facilitating the prospective Bidder(s) in their due diligence to the effect that such bidder shall maintain confidentiality of the information received from the office of the liquidator and during the course of due diligence and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under IBC and Liquidation Process Regulations.

From a perusal of the above it is clear that the Principle of Caveat Emptor (Buyer Beware) was applicable to the Auction and Bidders were advised to submit their bid only after their independent due diligence.

14. I find no clause in the auction which had given assurance to the bidders that they could acquire the Corporate Debtor without any additional liability. Rather, from the terms of the auction it is clear that the Auction was “AS IS WHERE IS” Basis.

15. It was made clear by the liquidator in various documents referred to above that the sale would be on “AS IS WHERE IS” Basis. The auction purchaser had enough time to seek any clarification from the liquidator in this regard before applying for the purchase of the said asset. However, it is seen from the records that he had gone ahead with the offer for the purchase of the CD as a going concern and it was only through letter dated 05.02.2022 with the caption “Request for issuance of Sale Certificate and handing over possession” the auction purchaser raised certain issues with the liquidator:

16. In any case, the Liquidator issued the sale certificate which reads thus:

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
AND
IN THE MATTER OF: IBC, 2016
AND
IN THE MATTER OF: M/S APPLE INDUSTRIES LIMITED
(IN LIQUIDATION)
IA 1038 of 2020 in CP No. (IB) 204(ND) of 2019

CERTIFICATE OF SALE OF SALE OF APPLE INDUSTRIES LIMITED (A COMPANY UNDER LIQUIDATION) AS A GOING CONCERN UNDER REGULATION 32(E) OF IBBI (LIQUIDATION PROCESS) REGULATIONS, 2016

(Schedule -1 of IBBI (Liquidation Process) Regulation, 2016)

The undersigned Rakesh Kumar Singala aged 50 years being the Liquidator of **Apple Industries Limited** duly appointed vide NCLT order dated 13.02.2020 in C.P. No. **IB- 204(ND) OF 2019** under Section 34 of the Insolvency and Bankruptcy Code 2016 and in exercise of the powers conferred under Regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 has **transferred Apple Industries Limited (corporate Debtor) having CIN# U74120DL2008PLC175180 as a Going Concern entity as per Regulation 32 (e) of Insolvency and Bankruptcy Board Of India (Liquidation Process) Regulations, 2016** by way of issuing new shares in the name "RMY Industries LLP" and "Rakesh Gupta", the partner & nominee of RMY Industries LLP and the transfer is on "AS IS WHERE IS BASIS", on account of Corporate debtor being in Liquidation, Details are as follows:

Name of the Shareholders	Percentage of Holding	Number of shares	Amount in Rs.
RMY Industries LLP	99%	2475000	2,47,50,000
Mr. Rakesh Gupta (nominee RMY Industries LLP)	1%	25000	25,00,000

The undersigned acknowledge the receipt of the sale proceeds of **Rs. 84,75,00,000/- (Rupees Eighty Four Crores Seventy Five Lakh only)** Lump-Sum Consideration for the said transfer of Corporate Debtor as a going Concern along with all tangible and Intangible assets on "AS IS WHERE IS" basis (Including Business Operations and Trade Name). Physical possession of Assets is being handed over as on this day. The Acquirer(s) henceforth shall be solely responsible for the Company in its totality.

All Liabilities as on date of announcement of liquidation i.e. **13.2.2020** (constituting the admitted claims from the Stakeholders as received by the Liquidator and accordingly submitted to NCLT) shall be settled as per Section 53 of insolvency and Bankruptcy Code, 2016. Liabilities/ existing shares of Corporate Debtor/Stakeholders Claims as on date of announcement of liquidation i.e. **13.2.2020** not filed, rejected, left unpaid post application of Section 53 shall stand extinguished.

Given under my hand and seal at 14th day of February of 2022.



(Rakesh Kumar Singala)

Liquidator for Apple Industries Limited

IBBI Regn. No. IBBI/PA-002/IP-N00581/2017-18/11744

Regd. E-mail: csrakeshsingala@gmail.com

Place: Delhi

This sale certificate would be an integral part of the Acquisition Agreement

17. In the context of sale on "AS IS WHERE IS" Basis a refer to the Judgement of Hon'ble Apex Court in **K.C. Ninan vs. Kerala State Electricity Board and Ors.** (2023 SCC OnLine SC 663), decided on 19.05.2023 could be made. In the aforementioned case, the Hon'ble Supreme Court has analysed

the decision of the Hon'ble Gauhati High Court in the case of **Carbon Resources v. Assam Electricity Regulatory Commission**; SLP(C) No. 24502 of 2010. The facts of the case before the Hon'ble High Court are as under:

“319. The previous owner, Eastern Steel and Alloys Company Ltd, had electricity dues pending for the period 1988-1989, due to which electricity supply was disconnected in 1992. The Assam State Electricity Board filed a money suit before the District Judge against the previous owner, which was decreed in its favour for Rs. 2.07 crore on 24 February 1997. On account of the liabilities due to UCO Bank, a warrant of attachment was levied on 30 June 2004.

320. In 2002, UCO Bank preferred an application against the previous owner before the Debt Recovery Tribunal. On 16 March 2007, the Recovery Officer of the Debt Recovery Tribunal, Guwahati issued an auction sale notice for the land in question. Clause 7 of the notice of auction sale stipulated that the properties were being sold on “as is where is” basis and subject to other conditions prescribed in the Second Schedule of the Income Tax Act, 1961 and Rules made thereunder. The appellant was the highest bidder and was declared as an auction-purchaser on 20 February 2008. On 24 March 2008, a sale certificate was issued in favour of the appellant and possession was handed over to the Appellant by UCO Bank on 27 March 2008. The Recovery Officer confirmed the auction sale in favor of the appellant, who took over the possession of the property on 27 March 2008. On 21 January 2009, the appellant applied for a high-tension industries electricity connection, but ASEB denied it due to pending arrears of the previous owner.

321. Therefore, the Appellant filed a writ petition before the Gauhati High Court seeking: (i) an electricity connection without having to pay the arrears of the previous owner; and (ii) challenging the vires of Regulation No. 3.6.4 of the AERC Electricity Supply Code. On 2 June 2010, a Division Bench of the High Court delivered a judgment dismissing the petition.”

18. The Hon'ble Apex Court has considered the issue of "whether the Appellant, being a new owner of the premises, is liable to clear the dues of the previous consumer before getting a supply of electricity." Having considered the issue, Hon'ble Supreme Court observed as under:

"325. By the impugned judgment dated 2 June 2010, the High Court has upheld the validity of Regulation 3.6.4 of the AERC Electricity Supply Code. It held that the stipulation contained in the said Regulation is reasonable and within the ambit of the powers conferred by Section 50 of the 2003 Act. We are of the opinion that the impugned clause is reasonable and consistent with the provisions of the 2003 Act. Accordingly, the Appellant was obligated to check the bills for previous months and ensure that all the outstanding amounts are duly paid up and discharged. Therefore, we find no merit in the challenge to the decision of the High Court. However, to balance the interests of parties, we make it clear that if any arrears of electricity are received from the previous owner, the amount shall be adjusted with the power bills of the Appellant."

(Emphasis supplied)

19. In summary of its decision the Hon'ble Apex Court has held as under:

"i. The implication of the expression "as is where is" basis is that every intending bidder is put on notice that the seller does not undertake responsibility in respect of the property offered for sale with regard to any liability for the payment of dues, like service charges, electricity dues for power connection, and taxes of the local authorities;"

20. The Hon'ble NCLAT in **M/s Visisth Services Ltd. vs. S. V. Ramani and Ors.** (Company Appeal (AT) (Insolvency) No. 896 of 2020) dated 11.01.2022 discussed, inter alia, the issues of whether the sale of Corporate Debtor as a 'Going Concern', in liquidation proceedings includes its liabilities, and

observed that ‘it can be seen from the Regulation 32A of the IBBI (Liquidation Process) Regulations, 2016 that sale as a ‘going concern’ means sale of assets as well as liabilities and not assets sans liabilities’.

21. A reference may be made to the decision of Hon’ble High Court of Allahabad in the matter of **Palika Towns LLP vs. State of UP & Ors.** (Civil Misc. Writ (C) Petition No. - 10123 of 2021) wherein it was held that ‘merely because the petitioner is a bonafide auction purchaser who had purchased assets of Corporate Debtor through auction/bidding so conducted by orders of NCLT, will not absolve it from paying arrears of lease rental and interest thereon’.

22. The Mumbai Bench of NCLT in **Gaurav Jain vs. Sanjay Gupta, Liquidator of Topworth Pipes & Tubes Pvt Ltd**, (IA No. 2264 of 2020 in C.P. (IB) No. 1239/MB/2018) has observed that:

“26. The Corporate Debtor survives, only the ownership is transferred by the Liquidator to the purchaser. All the rights, titles and interest in the Corporate Debtor including the legal entity is transferred to the purchaser. After the sale as a ‘going concern’, the purchaser will be carrying on the business of the Corporate Debtor.”

23. Further I am aware of the decisions to the contrary, holding that the SRA can be made liable for prior liabilities. Hon’ble NCLAT in the matter of **Jasamrit Designers Private Limited vs. Mr. Gian Chand Narang, Liquidator of Apex Buildsys Limited and Anr.**, (Company Appeal (AT) (Insolvency) No. 258 of 2023) has held as under:-

“7.When the process document clearly contemplated such consequences the said consequences shall ensue on sale as going

concern and if any roadblocks come into ways of successful resolution applicant, necessary directions, clarifications can very well be issued by the Adjudicating Authority on an Application filed under Section 60(5)(c) of the Code.”

24. With the commencement of CIRP, and declaration of moratorium in terms of the provisions of Section 14(1) of IBC, 2016, as per explanation to Section 14(1) (ibid), a license, permit, registration, quota, concession, clearances or any other similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force shall not be suspended or terminated on the ground of insolvency, but would remain in operation, only subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearance or similar grant or right during the moratorium period. Thus, apparently, even during CIRP also, when in terms of the provision of Sections 17 and 18 of IBC, 2016, the affairs of CD are managed by the IRP, no relief and concession is available to the CD.

25. Besides, as per the provision of Section 31(3)(a) of the IBC, 2016, after the order of approval of Resolution Plan, in terms of the provisions of Section 31(1) of IBC, 2016, is passed, the moratorium order passed by this Adjudicating Authority under Section 14 cease to have effect. Section 31(3) (ibid) reads thus:-

“31. Approval of resolution plan.—

....

(3) After the order of approval under sub-section (1),—

(a) the moratorium order passed by the Adjudicating Authority

under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.”

26. Could the intention of the statute viz. IBC, 2016 be that, that after the CD change hands, it would be immune from all liabilities, there could be no reason to incorporate Section 31(3)(a) therein. In such situation, the statute could provide that the moratorium in terms of the provisions of Section 14(1) (a), (c) and (d), which obviously relates to the period prior to commencement of CIRP would become absolute on approval of plan. As can also be seen from Regulations 6, 6A, 7, 8, 8A, 9 and 9A of the IBBI (Resolution Process for Corporate Persons) Regulations, 2016, read with Section 13 and 15 of IBC, 2016, it is nowhere provided that in the event of non-submission of claim before IRP, the claim would vanish. I may also be not oblivious of the position that Section 14(1) of the IBC, 2016, does not provide that the proceedings referred to therein would be prohibited/stand terminated/ vanished for all times to come. The expression moratorium used in Section 14(1) of IBC, 2016, must have its object and intent. Indubitably, the moratorium is a temporary suspension of an activity or law until future consideration warrants lifting the suspension. As can be seen from Section 31(3)(a) of IBC, 2016, the life of moratorium declared under Section 14(1) of IBC, 2016 is till approval of the plan. Thus, on passing of order under Section 31(1) of IBC, 2016, the proceedings qua which the moratorium apply stands revived after order of approval of plan is passed.

27. One may also be not oblivious of the fact that while preparing the Information Memorandum, in terms of the provisions of Regulation 36 of IBBI (Resolution Process for Corporate Persons) Regulations, 2016, the RP shall include in it the details of all material litigation and on-going investigation or proceedings initiated by the Government and the statutory authorities as one of the highlighted key selling propositions. Could it be so that all rights to continue proceedings or to pursue remedies qua the CD on approval of plan would vanish in place of moratorium, the Code could provide for permanent prohibition or at least it should not have contained clause (a) in sub-section (3) in Section 31 of the Code. Besides, the Regulation 36 could not have provided for inclusion of details of all material litigation and on-going investigation or proceedings initiated by the Government and Statutory authorities as key selling propositions/relevant information required to be mentioned in Information Memorandum need to be prepared before invitation for expression of interest by the PRAs (Proposed Resolution Applicants).

28. Even, Section 32A of the IBC, which is a specific provision regarding liability for the period prior to commencement of CIRP, also provides only that the liability of the Corporate Debtor for an offence committed prior to the commencement of CIRP shall cease and the Corporate Debtor shall not be prosecuted for such an offence from the date of approval of the Resolution Plan by the Adjudicating Authority under Section 31 of the Code if the Resolution Plan results in change in management or control of the Corporate Debtor to a person who is not covered by clause (a) and (b) of Section 32A (1) of IBC, 2016. In terms of the provisions of Section 32A(2) of the Code, no action should be taken against the property of the CD in relation to an offence

committed prior to the commencement of CIRP, where such property is covered under the Resolution Plan approved by the Adjudicating Authority under Section 31, which results in the change in control of the Corporate Debtor to a person or sale of liquidation asset under the provision of Chapter III of Part-II of the Code to a person not covered by Clause (i) or (ii) of Section 32A(2) of the Code.

29. As can be seen from the aforementioned, when Section 32A(1) of the Code absolve the CD from criminal liability, subject to certain conditions. The sub-section (2) of Section 32A reserve immunity to the property of the CD from such action. There is no provision in the Code, which reserve immunity to CD or its property from civil liability. Section 32A of the Code reads thus:-

“32A. Liability for prior offences, etc.—*(1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not—*

- (a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or*
- (b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:*

Provided *that if a prosecution had been instituted during the*

corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who was a “designated partner” as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an “officer who is in default”, as defined in clause (60) of section 2 of the Companies Act, 2013 (18 of 2013), or was in any manner in-charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor’s liability has ceased under this sub-section.

(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not—

- (i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or*
- (ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.*

Explanation.—For the purposes of this sub-section, it is hereby clarified that,—

- (i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;*
- (ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.*

(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process.”

30. Apparently, regarding the invitation, submission and approval of Resolution Plan, a well knitted procedure is prescribed in Regulations 36, 36A, 36B, 37, 38 and 39 of IBBI (Resolution Process for Corporate Persons) Regulations, 2016 read with Section 25, 29A, 30 and 31 of IBC, 2016. On the contrary, as far as the sale of CD as on-going concern is concerned, as can be seen from Regulation 32A of IBBI (Liquidation Process) Regulations, 2016, where the CoC/SCC recommend the sale under Clause (e) or (f) of Regulation 32 of the Regulations or where the Liquidator is of the opinion that such sale would maximize the value of the Corporate Debtor, he shall endeavour to resort to sale of the CD under these clauses. As can be seen from Regulation

32A(3) where the Committee of Creditors has not identified the assets and liabilities qua the CD in terms of the provisions of Regulations 39C(2) of IBBI (CIRP) Regulations, 2016, the Liquidator should identify and group the assets and liabilities to be sold as a going concern in the consultation with the consultation committee. Thus apparently, while selling the CD as a going concern, the Liquidator also need to take into account its liabilities. Regulation 32A(3) of IBBI (Liquidation Process) Regulations, 2016 reads thus:-

“32A. Sale as a going concern.—

.....

(3) Where the committee of creditors has not identified the assets and liabilities under sub-regulation (2) of regulation 39C 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.”

31. Though in the present case the Liquidator took the steps to sell the CD as a going concern in consultation with the SCC and CoC is not involved but to keep the facts straight a reference maybe made to Regulation 39C of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which reads thus:

“39C. Assessment of sale as a going concern.—

.....

(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.”

32. A thought may also crop up that all the claim qua the CD need to be dealt with in terms of the provisions of Section 53 of IBC, 2016, which is also the one of the contention put forth by Mr. P. Nagesh, Ld. Senior Counsel for the Liquidator.

33. A reading of Section 53(ibid) would reveal that proceeds from the sale of the liquidation assets shall be distributed in the order of priority mentioned in Section 53(1) of IBC, 2016 which reads thus:-

“Section 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) workmens 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.”*

34. From the aforementioned it is clear that in terms of the provisions of Section 53(1) of the Code, what is to be seen is that in what manner the proceeds of the assets sold in terms of the provisions of Regulation 32 and 32A of IBBI (Liquidation Process) Regulations, 2016 need to be dealt with. The Section does not talk of the liability of the purchaser. Additionally, Section 53 talks of the manner in which the claims staked before the Liquidator, in terms of Regulation 16 of IBBI (CIRP) Regulations, 2016 are to be dealt with. The provision does not talk of the fate of the proceedings and outcome thereof, which have not yet culminated or the claims which are not staked in terms of the Regulation 16 (ibid).

35. When I talk of the relief and concession claimed by the CD through the Resolution Plan, I may not remain oblivious regarding the provisions of Section 31(4) of IBC, 2016, in terms of which the Resolution Applicant should pursuant to the Resolution Plan approved under Section 31(1) obtain the necessary approval required under any law for the time being in force within period of 1 year from the date of approval of the Resolution Plan by the Adjudicating Authority, under sub-section (1) or within such period as

provided for in such law, whichever is later. Section 31(4) (ibid) reads thus:-

“31. Approval of resolution plan.

.....

(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.”

36. From the aforementioned it is clear that the Code does not reserve any concession to the Resolution Applicant and it is for the Resolution Applicant to obtain the necessary approval to run the affair of the CD in accordance with law.

37. Quite often a reference to the Judgement given by Hon'ble Supreme Court in **Ghanashyam Mishra & Sons (P) Ltd. vs. Edelweiss Asset Reconstruction Co. Ltd.** (2021 SCC OnLine SC 313) decided on 13.04.2021, is made by the Liquidator to seek relief and concession in favour of the purchaser of the CD as going concern. At the outset I may note that while passing the order under Section 31(1) of IBC, 2016, the Adjudicating Authority need to see inter alia that the plan provide for its implementation and supervision. Thus, once the plan is approved by the Adjudicating Authority in order to ensure its implementation, this Tribunal/Adjudicating

Authority may accord such relief and concession to CD which maybe mandatory and unavoidable for the purpose of implementation of the plan. Such is not the position, when an action is taken under Regulation 32 and 32A(3) of IBBI (Liquidation Process) Regulations, 2016, by the Liquidator. There is no comparison with the situation envisaged by Section 30 and 31 of IBC, 2016 and Regulations 32 and 32A of IBBI (Liquidation Process) Regulations, 2016.

38. Coming back to the Judgement of Hon'ble Supreme Court in **Ghanashyam Mishra & Sons (P) Ltd.** (ibid), the important questions noted by their lordships in Para 2 of the Judgement are:-

- (i) As to whether any creditor including the Central Government, State Government or any local authority is bound by the resolution plan once it is approved by an adjudicating authority under sub-section (1) of Section 31 of the Insolvency and Bankruptcy Code, 2016 ("IBC")?
- (ii) As to whether the amendment to Section 31 by Section 7 of Act 26 of 2019 is clarificatory/declaratory or substantive in nature?
- (iii) As to whether after approval of resolution plan by the adjudicating authority a creditor including the Central Government, State Government or any local authority is entitled to initiate any proceedings for recovery of any of the dues from the corporate debtor, which are not a part of the resolution plan approved by the adjudicating authority?

39. Having referred to the facts of the case, Hon'ble Supreme Court could note that the Clause 2.1.3 of the plan submitted by EARC provided that all

the debts and dues, liability or obligation other than the one which are included in the Resolution Plan shall be deemed to have been irrevocably made and permanently extinguished. Para 32 of the Judgement reads thus:

“32. Dr Singhvi further submitted that perusal of the resolution plan submitted by EARC and particularly Clause 2.1.3 thereof would reveal that the said plan also provides that all the debts and all dues, liability or obligations other than the one which are included in resolution plan shall be deemed to have been irrevocably waived and permanently extinguished and written off in full with effect from the effective date. He submitted that a similar provision is also made in the resolution plan submitted by GMSPL.”

40. In Para 65 of the Judgement making reference to the provisions of Section 31 of I&B Code, Hon’ble Supreme Court noted that once the Resolution Plan is approved by the Adjudicating Authority, the same shall be binding on all concerned. The Para reads thus:-

“65. Bare reading of Section 31 of the I&B Code would also make it abundantly clear that once the resolution plan is approved by the adjudicating authority, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in sub-section (2) of Section 30, it shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of the I&B Code is revival of the corporate debtor and to make it a running concern.”

41. The ultimate view taken by Hon’ble Supreme Court in Ghanshyam Mishra (ibid) is with reference to the provisions of Section 31 of I&B Code. Hon’ble Supreme Court has ruled that as and when the Resolution Plan is approved by the NCLT, the claims which are not part of the Resolution Plan

stands extinguished and the proceedings related thereto stands terminated.

Para 138 of the judgment reads thus:-

“138. In the foregoing paragraphs, we have held that the 2019 Amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will have a retrospective operation. As such, when the resolution plan is approved by NCLT, the claims, which are not part of the resolution plan, shall stand extinguished and the proceedings related thereto shall stand terminated. Since the subject-matter of the petition are the proceedings, which relate to the claims of the respondents prior to the approval of the plan, in the light of the view taken by us, the same cannot be continued. Equally the claims, which are not part of the resolution plan, shall stand extinguished.”

42. As can be seen from Section 31 of the Code, the order approving the Resolution Plan make the plan binding on the Corporate Debtor, its employees, members, creditors (including the Central Government), State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the Resolution Plan. The Section 31(1) of the Code reads thus:-

“31. Approval of resolution plan.—(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, [including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues

are owed,] guarantors and other stakeholders involved in the resolution plan.

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.”

43. As has been noted hereinabove, there is no such condition in Regulation 32A of IBBI (Liquidation Process) Regulations, 2016, as are contained in Section 31 of IBC, 2016. There is marked difference between the approval of plan and sale as going concern. The order passed qua SRA may not be applicable to an auction purchaser. The plan approved by this authority in terms of the provisions of Section 31 of the Code in a way becomes the part of the order passed by this Tribunal and is in the nature of contract between Creditors and SRA, though not contract in real sense. In **Ebix Singapore Private Limited vs. Committee of Creditors of Educomp Solutions Limited & Anr.** (Civil Appeal No. 3224 of 2020), Hon’ble Supreme Court ruled thus:-

“104 To summarize the arguments of the parties, the appellants have argued that Resolution Plans are in the nature of an offer, which becomes binding as a concluded contract only once the Adjudicating Authority has approved the Resolution Plan. Section 7 of the Contract Act requires the acceptance of offer to be absolute, unconditional and unqualified. Since the approval by the CoC is effectively conditional upon the confirmation of the Plan by the Adjudicating Authority, it cannot be said that there is absolute acceptance of the Resolution Plan. Alternatively, it has been argued that Resolution Plans approved by the CoC are contingent contracts, whose enforceability is conditional upon the approval of the Adjudicating Authority in accordance with Section 32 of the Contract Act. The Respondents (RPs

and the CoCs) have argued that a concluded contract comes into being when the Resolution Plan is approved by the CoC and a successful Resolution Applicant cannot renege from their contractual obligation to implement the Resolution Plan. In furtherance of this argument, Mr Shyam Divan appearing for the E-CoC made a reference to the Specific Relief (Amendment) Act 2018, which has brought a change to the regime on contract enforcement in India by making specific performance the norm rather than the exception.

105 *The determination of the nature of the Resolution Plan would help us establish the source of the legal force of the Resolution Plan – whether it is the statute, i.e., the IBC or the law of contract. The insolvency process, as governed by the IBC, does not merely structure the conduct of all the participants in the process after finalization and approval of a Resolution Plan by a CoC, but also the conduct stemming from the very first steps of inviting prospective Resolution Applicants. The RP, with the approval of the CoC, invites prospective Resolution Applicants through an RFRP. Once an unconditional EOI has been received from prospective Resolution Applicants who are otherwise eligible under Section 29A, the RP prepares an IM as per the provisions of Section 29 which furnishes all relevant information of the Corporate Debtor to enable prospective Resolution Applicants to make an informed decision, before proposing a Resolution Plan. As a consequence of the IBC and its regulations, prospective Resolution Applicants, who are not disqualified under Section 29A, propose drafts of their Resolution Plans. The RP examines the Resolution Plan against the contours of Section 30(2) and submits only the eligible plans to the CoC. Prior to the IBBI (CIRP) (Fourth Amendment) Regulations 2020, which now requires the CoC to vote on all Plans simultaneously after recording its deliberations on the feasibility and viability of each Plan, Regulation 39(3) earlier enabled the CoC to approve a Resolution Plan with “such modifications as it deems fit”. This meant that the prospective Resolution Applicants and the CoC would indulge in several rounds of negotiations, within a strict time-*

frame, to arrive at a mutually agreeable Resolution Plan which was then subject to voting by the CoC. Subsequent to the voting, the RP would submit the plan to the Adjudicating Authority along with receipt of the PBG and a compliance certificate in the form of Form H. Each of the stages detailed above correspond to several rights and obligations on all parties that are specifically created by the statute.

106 *Since the interpretation of the IBBI (CIRP)(Fourth Amendment) Regulations 2020 and the impact on the Resolution Applicants and the CoC to negotiate the terms of the Resolution Plan is not before this Court and the present appeal essentially seeks to determine the nature of the Resolution Plan after its approval by the CoC and prior to its approval by the Adjudicating Authority, this Court will proceed to determine of the nature of such a Plan, on the assumption of the law as it stood then, i.e., Regulation 39(3) which directed that “[t]he committee shall evaluate the resolution plans received under sub-regulation (1) strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit” 64. This power of the CoC to suggest modifications invariably entailed an element of negotiation with the Resolution Applicants, who would make suitable revisions and re-submit their Resolution Plans. The scope of a commercial bargain with the Resolution Applicants evinces a sense of a negotiated agreement that is arrived between the parties, which resembles an exercise of contractual freedom by the CoC and the Resolution Applicant.*

107 *If this court were to hold that CoC-approved Resolution Plans are indeed contracts, their provisions would still have to conform to the statutory provisions of the IBC. However, such an interpretation would entail that CoC-approved Resolution Plans are at the intersection of the IBC and the Contract Act. This would mean that certain principles of contract law, for example those relating to discharge, penalties, remedies and damages would become applicable to CoC-approved Resolution Plans. For instance, in the*

*United States, plans confirmed by courts have been characterized as contracts, whose breach can even give rise to contractual remedies. In **In re Hoffinger Indus, Inc**, a bankruptcy court in Arkansas has held that “a confirmed plan should be enforceable and amenable to damages between contractually bound parties.” Indeed, it has been argued before us that Resolution Plans should be enforced through the contractual remedy of specific performance. Further, a determination that Resolution Plans are contracts in the period between approval by the CoC and the approval of the Adjudicating Authority would require us to analyse whether all elements of contract formation have been satisfied, including the question of whether the acceptance of the Resolution Plan by the CoC fulfils the criteria laid down under Section 7 of the Contract Act or whether the conditionality of seeking approval from the Adjudicating Authority makes the Resolution Plan a contingent contract. Our intent of laying down the consequences of our determination of Resolution Plans as contracts is to highlight the importance of ascertaining the nature of a CoC-approved Resolution Plan, prior to its approval by the Adjudicating Authority.*

108 *The text of the IBC does not specify whether Resolution Plans at the second stage of the process, i.e., in the intervening period of submission to and approval by the Adjudicating Authority, are pure contracts. As noted previously, by specifications such as eligibility for resolution applicants, the contents of the IM and duties of the RP to prospective Resolution Applicants and statutory procedures on timelines and voting, strictly govern the insolvency process even prior to the submission of the Plan to the Adjudicating Authority. The CoC, who the appellants allege is in the nature of a free contracting party, is governed by the binding principles of the statute with regard to the contents and nature of the statutory plan that it approves under Section 30(4) and even its own composition.*

109 *Section 30(4) provides that the consent of all the members of*

the CoC, though a unanimous vote is not required and a sixty-six per cent vote is sufficient for approval of a resolution plan. The constitution of the CoC is based on specific scenarios envisaged in the statute and accounts for varying compositions, based on factors such as the nature and quantum of debt owed. For example, if it comprises of operational creditors alone, the percentage of debt owed between the operational and financial creditors and other such variables impact voting thresholds inter se members of the CoC. A sixty-six per cent vote of the CoC is required to approve a Resolution Plan. The dissenting creditors are deemed to have given their approval and are bound by the decision of the majority of the CoC. The dissenting creditors are bound as a result of the statutory provision and not because they have actually consented to be parties to such an arrangement. Other elements governing the Resolution Plan indicate that the entire process from initiation and leading up to its acceptance by the CoC takes place within the framework of the IBC. In addition, the IBC provides penalties for non-compliance with the Resolution Plan after its approval under Section 31 and forfeiture of the PBG for failing to implement the Resolution Plan or contributing to the failure of its implementation. The violation of the terms of the Resolution Plan does not give rise to a claim of damages, rather it leads to prosecution and imposition of punishment under Section 74 of the IBC. On the contrary, a CoC's withdrawal of the CIRP under Section 12A is coupled with a requirement of payment of CIRP costs, but no damages are statutorily payable to the Resolution Applicant, irrespective of the stage of the withdrawal.

110 *The CoC even with the requisite majority, while approving the Resolution Plan must consider the feasibility and viability of the Plan and the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53 of the IBC. The CoC cannot approve a Resolution Plan proposed by an applicant barred under Section 29A of the IBC. Regulation 37 and 38 of the CIRP Regulations govern the contents of*

a Resolution Plan. Furthermore, a Resolution Plan, if in compliance with the mandate of the IBC, cannot be rejected by the Adjudicating Authority and becomes binding on its approval upon all stakeholders – including the Central and State Government, local authorities to whom statutory dues are owed, operational creditors who were not a part of the CoC and the workforce of the Corporate Debtor who would now be governed by a new management. Such features of a Resolution Plan, where a statute extensively governs the form, mode, manner and effect of approval distinguishes it from a traditional contract, specifically in its ability to bind those who have not consented to it. In the pure contractual realm, an agreement binds parties who are privy to the contract. In the context of a resolution Plan governed by the IBC, the element of privity becomes inapplicable once the Adjudicating Authority confirms the Resolution Plan under Section 31(1) and declares it to be binding on all stakeholders, who are not a part of the negotiation stage or parties to the Resolution Plan. In fact, a commentator has noted that the purpose of bankruptcy law is to actually solve a specific ‘contracting failure’ that accompanies financial distress. Such a contracting failure arises because “financial distress involves too many parties with strategic bargaining incentives and too many contingencies for the firm and its creditors to define a set of rules of every scenario.” Thus, insolvency law recognizes that parties can take benefit of such ‘incomplete contract’ to hold each other up for their individual gain. In an attempt to solve the issue of incompleteness and the hold-up threat, the insolvency law provides procedural protections i.e., “the law puts in place guardrails that give the parties room to bargain while keeping them from taking position that veer toward extreme hold up”.

111 It may be useful to refer to how this Court has analyzed instruments that are analogous to a Resolution Plan. **In SK Gupta v. KP Jain**, this Court while discussing the nature of compromise or arrangements entered between a company and its creditors or members observed that such a compromise or arrangement once

sanctioned by the court is not merely an agreement between parties because it binds even dissenting creditors or members through statutory force. This Court made the following observations:

“12...The scheme when sanctioned **does not merely operate as an agreement between the parties** but has statutory force and is binding not only on the company but even dissenting creditors or members, as the case may be. The effect of the sanctioned scheme is “to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity” [see *J.K. (Bombay) Pvt. Ltd. v. New Kaiser-i-Hind Spg. & Wvg. Co. Ltd.* [AIR 1970 SC 1041 : (1969) 2 SCR 866, 891 : (1970) 40 Com Cas 689] ..”

(emphasis supplied)

112 While the above observations were made in the context of a scheme that has been sanctioned by the Court, the Resolution Plan even prior to the approval of the Adjudicating Authority is binding inter se the CoC and the successful Resolution Applicant. The Resolution Plan cannot be construed purely as a ‘contract’ governed by the Contract Act, in the period intervening its acceptance by the CoC and the approval of the Adjudicating Authority. Even at that stage, its binding effects are produced by the IBC framework. The BLRC Report mentions that “[w]hen 75% of the creditors agree on a revival plan, this plan would be binding on all the remaining creditors”. The BLRC Report also mentions that, “the RP submits a binding agreement to the Adjudicator before the default maximum date”. We have further discussed the statutory scheme of the IBC in Sections I and J of this judgement to establish that a Resolution Plan is binding inter se the CoC and the successful Resolution Applicant. Thus, the ability of the Resolution Plan to bind those who have not consented to it, by way a statutory procedure, indicates that it is not a typical contract.

113 The BLRC Report, which furnished the first draft of the IBC and elaborated on the aims behind the overhaul of the insolvency

regime, refers to a CoC-approved Resolution Plan as a 'binding contract' in one instance and refers to it as a 'binding agreement' in other instances. The report also refers to a CoC-approved Resolution Plan as a 'financial arrangement', 'revival plan' or a 'solution'. The interchangeability of the terms – 'agreement', 'contract', 'financial arrangement', 'revival plan' and 'solution' indicates that there is no clear intention of the BLRC in characterizing the nature of the Resolution Plan as a contract. The binding effect of the Resolution Plan has the consequence of preventing the CoC or the Resolution Applicant to renege from its terms after the plan has been approved by the CoC through a voting mechanism. The fleeting mention of a 'binding contract' on one occasion in the BLRC Report (which was a pre-legislative text that underwent subsequent modifications by the Legislature) to indicate the binding nature of the Resolution Plan and the finality of negotiations once it is approved by the CoC, does not establish the legal nature of the document, especially when it is not complemented by the text and design of the IBC.

114 *Certain stages of the CIRP resemble the stages involved in the formation of a contract. Echoes of the process involved in the formation of a contract resonate in the steps antecedent to the approval of a Resolution Plan such as: (i) the issuance of an RFRP may be equated to an invitation to offer; (ii) a Resolution Plan can be considered as a proposal or offer; and (iii) the approval by the CoC may be similar to an acceptance of offer. The terms of the Resolution Plan contain a commercial bargain between the CoC and Resolution Applicant. There is also an intention to create legal relations with binding effect. However, it is the structure of the IBC which confers legal force on the CoC-approved Resolution Plan. The validity of the Resolution Plan is not premised upon the agreement or consent of those bound (although as a procedural step the IBC requires sixty-six percent votes of creditors), but upon its compliance with the procedure stipulated under the IBC.*

115 It was argued for the E-RP that a Resolution Plan is a contract executed in furtherance of a statutory regime under the IBC. A question arises whether a Resolution Plan can be classified as a 'statutory contract'. This Court has defined a statutory contract in **India Thermal Power Ltd. v. State of MP** in the following terms:

“11. Section 43 empowers the Electricity Board to enter into an arrangement for purchase of electricity on such terms as may be agreed. **Section 43-A(1) provides that a generating company may enter into a contract for the sale of electricity generated by it with the Electricity Board.** As regards the determination of tariff for the sale of electricity by a generating company to the Board, Section 43(1)(2) provides that the tariff shall be determined in accordance with the norms regarding operation and plant-load factor as may be laid down by the authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central Government by a notification in the Official Gazette. These provisions clearly indicate that the agreement can be on such terms as may be agreed by the parties except that the tariff is to be determined in accordance with the provision contained in Section 43-A(2) and notifications issued thereunder. **Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties.** Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43-A(2)...”

(emphasis supplied)

116 The above observations were in the context of a PPA entered

into under the provisions of Electricity Supply Act 1948. Section 43-A(1) of the Act stipulated that the generating company may enter into a contract with the Electricity Board. Thus, the judgement presupposes the existence of a subsisting contract. The controversy in the case was whether the PPA could be characterized as a statutory contract. To say that a Resolution Plan is a statutory contract, we must first consider whether the IBC envisages the CoC-approved Resolution Plan as a contract. There is no provision under the IBC referring to a Resolution Plan as a contract, unlike Section 43-A(1) of the Electricity Supply Act 1948 which mentions that a contract may be entered into between the concerned parties. The legal force of a Resolution Plan arises due to the framework provided under the IBC. The mechanisms of the IBC provide sufficient guidance on the conduct of all participants in the process and the binding effect of the CoC-approved Resolution Plan is evidenced by the execution of a PBG furnished by the successful Resolution Applicant, in compliance with the CIRP Regulations. This PBG is returnable once the Adjudicating Authority approves the Resolution Plan under Section 31 and makes it binding on all stakeholders. Therefore, the IBC and its regulations institute sufficient safeguards to ensure the binding effect of a CoC-approved Resolution Plan. In our discussion in Sections I and J below, we further elaborate on the nature of a CoC-approved Resolution Plan and the code of conduct that is permissible by the statutory framework.

117 While insolvency regimes are specific to each jurisdiction, it may be useful to analyze how Resolution Plans or similar instruments are characterized in foreign jurisdictions.

118 Certain precedents from other jurisdictions have been cited by Mr Nakul Devan for the E-RP, to argue that contracts entered into, in furtherance of a statutory regime have to be interpreted in accordance with the objective and intent of the concerned statute. It has been submitted that the Resolution Plan is one variety of such a statutory

contract. However, since we have arrived at the decision that Resolution Plans are not statutory contracts, it is not required for us to analyze whether terms of the Resolution Plan can be given effect to, as terms of a contract, as long as they further the statutory objective. It is also important to note that India adopts a unique insolvency framework where third-parties have the right to participate in an insolvency regime and acquire the Corporate Debtor as a going concern. In several jurisdictions, the insolvency arrangements are between the debtor and the creditors, which has a closer resemblance to ‘repayment plans’ by corporate debtors, as envisaged by the IBC under Section 105 and broadly prescribed under Chapter III as opposed to ‘resolution plans’ that are not proposed by debtors. In any event, an analysis of such arrangements is detailed below.

119 *In the United Kingdom, the UK Act allows the directors, administrator or liquidator of a company to propose a company voluntary arrangement or a ‘CVA (similar to Section 10 of the IBC), which has to be approved by creditors having seventy-five per cent of the vote share. Section 5(2)(b) of the UK Act provides that once the CVA is approved, the company and the creditors are bound by it. Professor Roy Goode in his authoritative treatise Principles of Corporate Insolvency Law observes that, “[t]he wording of s.5(2)(b), discussed below, has led the courts to characterise the relationship between the parties to a CVA as essentially contractual in nature and its scope and effect are determined by its terms, which fall to be interpreted by application of the ordinary principles of contractual interpretation.” In some judgements of the Court of Appeal, English Courts have held that a CVA creates a contractual obligation, is a statutory contract, or has a contractual effect and is subject to ordinary principles of interpretation applying to contracts. However, the position on this issue is not completely settled. In a recent decision of the High Court of Justice, it was held that the CVA is not a contract. Crucially the court made the following observations:*

“83. Further, and as noted by Mr Pymont QC in SHB

*Realisations Ltd, a voluntary arrangement is not formed or analysed as a contract. **Certain legal principles applicable to contracts, for example their interpretation, are applied to voluntary arrangements; that is no less true of other instruments which are not contracts. Other principles of contract law, for example those relating to penalties, are not applicable to voluntary arrangements.** Mr Pymont QC concluded that a voluntary arrangement is not a contract. Characterising a CVA as a hypothetical agreement or by reference to a statutory hypothesis neatly and accurately makes clear that a CVA is different from, and is not in fact, a contract.”*

(emphasis supplied)

120 In Singapore, under Section 210 (3AA and 3AB) of the Singapore Act, a compromise or arrangement between the company and its creditors becomes binding when the requisite majority of creditors agree to it and it is approved by the court. The Singapore Court of Appeal has referred to such a scheme of arrangement as a ‘contractual scheme’. Subsequently, a controversy arose before the Singapore Court of Appeal on whether a scheme can be substantially amended after it has been approved by the court. The court observed that the answer to this question depends upon the nature of schemes of arrangement; whether the schemes derived their efficacy from the order of the court or the statute. The court observed that under the English approach, a scheme approved by the majority of the creditors derives its efficacy from the statute and is a statutory contract. Thus, the court has a limited jurisdiction and cannot make substantial alterations to such a scheme. However, the court noted that in Australia, the scheme operates as an order of the court. The court held that its previous decision which referred to a scheme of arrangement as a ‘contractual scheme’ does not mean that in Singapore such schemes are considered as statutory contracts. The court chose to follow the Australian approach holding that a scheme takes effect as an order of the court and like any other court order, it can be altered, in certain circumstances. The court observed:

“66. We would also add, in respect of the latter concern, that a court order is in no way less binding than a statutory contract on the parties to a scheme of arrangement, and it is trite law as well as common sense that a court order cannot be altered at will by the parties who are subject to the order....”

121 In Australia, as noted above, the scheme of arrangement operates as a court order. The Supreme Court of New South Wales, rejecting the English approach of characterizing schemes (different from CVAs) as statutory contracts, observed:

“46

[...]

(b) In Australia, [the] authorities [namely, *Hill v Anderson Meat Industries Ltd* [1971] 1 NSWLR 868, *Caratti and Bond Corp Holdings Ltd v Western Australia* (1992) 7 ACSR 472] establish that an approved scheme does indeed derive its force from the court order, [and] not from the antecedent resolutions of members and creditors.”

122 Under the United States Bankruptcy Code, a restructuring plan becomes binding once it is confirmed by the court in terms of Section 1141. There are decisions of the bankruptcy courts in the United States which indicate that such restructuring plans are characterized as contracts. It has been held that a confirmed plan is binding on the debtor and the plan proponent and has the same effect as contract. However, commentators have noted that the United States Bankruptcy Code’s, “embrace of a contractual paradigm is somewhat inconsistent...Both bankruptcy courts and the Code itself are far more sympathetic to *ex post* than to *ex ante* contracting”. It has been further observed that, “there are a few provisions in the Bankruptcy Code inviting parties to “otherwise agree” by contract and in some contexts the Code explicitly overrides *ex ante* contracts”, these include provisions of the Code overriding *ipso facto* clauses in pre-bankruptcy contracts which stipulate that a necessary condition of default is filing of an insolvency or bankruptcy petition.

123 The above discussion indicates the law in other jurisdictions,

irrespective of differing frameworks, is not completely settled on whether instruments akin to Resolution Plans are pure contracts. To recapitulate, in the United Kingdom, while schemes of arrangement are characterized as statutory contracts, the law on CVAs, which are similar to the insolvency process initiated under Section 10 of the IBC, is not clear with the High Court of Justice noting that it is not a contract, even though principles of interpretation applicable to contracts may be used for constructing the language of such CVAs. In Singapore, the English approach of denoting schemes as statutory contracts was rejected and it was held that the schemes operate as orders of court. A similar position was taken under the Australian law. The Singapore and Australian courts specifically indicate that schemes are more than mere contracts with a “super-added imprimatur” by a court, rather they envisage an active role to be played by court in supervising the schemes to the extent of making substantial alterations to it, if required. In the United States, restructuring plans have been equated to contracts, but as noted above there has been some inconsistency in relation to upholding the contractual bargain.

124 *The lack of an apparent international consensus on the issue of whether instruments like CoC-approved Resolution Plans are contracts, prior to the Court’s sanction, is also attributable to the peculiarity of the insolvency regime in each jurisdiction. This Court will have to be wary of transplanting international doctrines that are evolved as responses to the specific features of a jurisdiction’s insolvency regime, without identifying an analogous framework in our insolvency regime.*

125 *The absence of any specific provision in the IBC or the regulations referring to a CoC-approved Resolution Plan as a contract and the lack of clarity in the BLRC report regarding the nature of such a Resolution Plan, constrains us from arriving at the conclusion that CoC-approved Resolution Plans will be governed by the Contract Act*

and common law principles governing contracts, save and except for the specific prohibitions and deeming fictions under the IBC. Regulation 39(3) of CIRP regulations, as it stood before the IBBI (CIRP) (Fourth Amendment) Regulations 2020 and applicable to the three appellants before us, enabled a framework where a draft Resolution Plan would involve several rounds of negotiations and revisions between the Resolution Applicant and the CoC, before it is approved by the latter and submitted to the Adjudicating Authority. However, this statutorily-enabled room for commercial negotiation is not enough to over-power the other elements of regulation that detract from the view that CoC-approved Resolution Plans are contracts. CoC-approved Resolution Plans, before the approval of the Adjudicating Authority under Section 31, are a function and product of the IBC's mechanisms. Their validity, nature, legal force and content is regulated by the procedure laid down under the IBC, and not the Contract Act. The voting by the CoC also occurs only after the RP has verified the contents of the Resolution Plan and confirmed that it meets the conditions of the IBC and the regulations therein. The amended Regulation 39(3) further regulates the conduct of the CoC on voting on Resolution Plans and has introduced the requirement of simultaneous voting. The IBBI's Discussion Paper issued on 27 August 2021 has invited comments on regulating the process on revisions that can be made to resolution plans submitted to the CoC. These developments bolster the conclusion that the mechanism prior to submission of a CoC-approved resolution plan is subject to continuous procedural scrutiny by the IBC and cannot be considered as a simple contractual negotiation between two parties. Section J below details how a common law remedies of withdrawal or modification on account of frustration or force majeure are not applicable to CoC-approved Resolution Plans owing to the nature of the IBC. Similarly, the whole host of remedies such as liquidated and unliquidated damages, restitution, novation and frustration, unless specifically provided by the IBC, are not available to a successful

*Resolution Applicant whose Plan has been approved by the CoC and is awaiting the approval of the Adjudicating Authority. The Insolvency Law Committee Report of February 2020 has recommended the CIRP process to mandate Resolution Plans to provide for the apportionment of the profit or loss accrued by the Corporate Debtor during the CIRP. These reports are periodically commissioned by the parliament to review the functioning of the Code and suggest amendments. However, if the intention was to view a CoC-approved Resolution Plan as a contract, the principles of unjust enrichment would have been sufficient to address the issue and an amendment may not be considered necessary. A Resolution Applicant, as a third party partaking in the insolvency regime, seeks to acquire the business of the Corporate Debtor without the entirety of its debts, statutory liabilities and avoiding certain transactions with third parties. These benefits are a function of the coercive mechanisms of the IBC which enable a third party to acquire the assets of a Corporate Debtor without its liabilities, for a negotiated amount of the debt that is owed by the Corporate Debtor. Typically, resolution amounts envisage payment of a fraction of debt that is owed to the creditors and the business is acquired as a going concern with its employees. The Resolution Plan is drafted in a way that it is implementable in the future and brings about a quietus to the CIRP. Enabling Resolution Applicants to seek remedies that are not specified by the IBC, by seeking recourse to the Contract Act would be antithetical to the IBC's insolvency regime. The elements of contractual interpretation can be relied upon to construe the language of the terms of the Resolution Plan, in the event of a dispute, but not to re-fashion and distort the mechanism of the IBC altogether. This Court in **Laxmi Pat Surana v. Union Bank of India** has held that the IBC is a self-contained Code. Thus, importing principles of any other law or a statute like the Contract Act into the IBC regime would introduce unnecessary complexity into the working of the IBC and may lead to protracted litigation on considerations that are alien to the IBC. To give an*

*example, the CoC can forfeit the PBG furnished by the successful Resolution Applicant under certain circumstances in terms of the RFRP and Resolution Plan including, inter alia, on the ground that the Resolution Applicant has failed to implement the resolution or has contributed to its failure. Regulation 36B (4A) of CIRP regulations provides for the furnishing of such performance security once the plan is approved by creditors. The Regulations do not provide that the performance security has to be a reasonable estimate of loss as is expected of penalty clauses under contract law, rather the explanation provides that the performance security should be of “such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor”. Further, in the event that the CoC enters into a settlement with the Corporate Debtor and withdraws from the CIRP under Section 12A, Regulation 30A provides for only payment of insolvency costs and not compensation or damages to Resolution Applicant for investing time and money in the process. The parties may resort to invoking principles of frustration or force majeure to evade implementation of the Resolution Plan leading to unnecessary litigation. This Court in **Amtek Auto** (supra), had curbed a similar attempt by a successful Resolution Applicant who had relied on a force majeure clause in its Resolution Plan to seek a direction compelling the CoC to negotiate a modification to its Resolution Plan. The Court held that there was no scope for negotiations between the parties once the Resolution Plan has been approved by the CoC. Thus, contractual principles and common law remedies, which do not find a tether in the wording or the intent of the IBC, cannot be imported in the intervening period between the acceptance of the CoC and the approval by the Adjudicating Authority. Principles of contractual construction and interpretation may serve as interpretive aids, in the event of ambiguity over the terms of a Resolution Plan. However, remedies that are specific to the Contract Act cannot be applied, de hors the over-riding*

principles of the IBC.”

44. A careful reading of Regulation 39C of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 would reveal that the sale as going concern maybe of the Corporate Debtor as a company and also that of its assets/ventures. Thus, it would be absolutely weird if the yardsticks applied to Resolution Plan are sought to be applied to the Sale as Going Concern. Here it would not be out of place to reproduce Regulation 39C(2) of the CIRP Regulations which reads thus:-

“39C. Assessment of sale as a going concern.

.....

(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.”

45. It may be contended that not passing the blanket order and absolving the purchaser of going concern from all liabilities may discourage the bidders. However, there may also be the converse situation viz, if the benefits given to SRA is allowed to Auction Purchaser of CD/Going Concern then the bidders may be discouraged as SRA and may like to purchase the plum assets/going concern of the Corporate Debtor. They may also make such choice to avoid the prolix process of submitting the Resolution Plan and waiting for approval of the same and may instead prefer to wait for CD to go into Liquidation. Besides the opaqueness cannot be intent or spirit of any law, as the principle of natural justice is the soul of the Administration of Justice by courts and Tribunals. It will also be not gainsaid that if blanket relief and concession are allowed instead of being resorted to for revival of CD, the process under IBC

maybe used to avoid Governmental dues and Tax Liabilities. As it is the IBC is broadly perceived as an effective mechanism for debt recovery.

46. In the aforementioned backdrop, particularly in the absence of there being any provision in law in this regard, I am unable to pass any order regarding blanket relief and concession to the purchaser of the CD as going concern. In **Arun Kumar Jagatramka vs. Jindal Steel and Power Ltd. & Anr.** [Civil Appeal No. 9664 of 2019] Hon'ble Supreme Court viewed thus:-

“67. What emerges from the above discussion is that the provisions of the IBC contain a comprehensive scheme, first, for the initiation of CIRP at the behest of financial creditor under Section 7 or at the behest of the operational creditor under Section 9 or the corporate debtor under Section 10. Chapter II provides for the appointment of an interim resolution professional (“IRP”) in Section 17 and the constitution of a CoC under Section 21. Chapter II contemplates the submission of a resolution plan in Section 30 and the approval of the plan in Section 31. Liquidation forms a part of a distinct Chapter — Chapter III. Liquidation under Section 33 is contemplated in specific eventualities which are adverted to in sub-section (1) and sub-section (2) as noted above.

68. Now, it is in this backdrop that it becomes necessary to revisit, in the context of the above discussion the three modes in which a revival is contemplated under the provisions of the IBC. The first of those modes of revival is in the form of CIRP elucidated in the provisions of Chapter II IBC. The second mode is where the corporate debtor or its business is sold as a going concern within the purview of clauses (e) and (f) of Regulation 32. The third is when a revival is contemplated through the modalities provided in Section 230 of the 2013 Act. A scheme of compromise or arrangement under Section 230, in the context of a company which is in liquidation under the IBC, follows upon an order under Section 33 and the appointment of a

liquidator under Section 34. While there is no direct recognition of the provisions of Section 230 of the 2013 Act in the IBC, a decision was rendered by NCLAT on 27-2-2019 in *Y. Shivram Prasad v. S. Dhanpal* (herein referred to as “*Y. Shivram Prasad*”). NCLAT in the course of its decision observed that during the liquidation process the steps which are required to be taken by the liquidator include a compromise or arrangement in terms of Section 230 of the 2013 Act, so as to ensure the revival and continuance of the corporate debtor by protecting it from its management and from “a death by liquidation”. The decision by NCLAT took note of the fact that while passing the order under Section 230, the adjudicating authority would perform a dual role: one as the adjudicating authority in the matter of liquidation under the IBC and the other as a tribunal for passing an order under Section 230 of the 2013 Act. Following the decision of NCLAT, an amendment was made on 25-7-2019 to the Liquidation Process Regulations by IBBI so as to refer to the process envisaged under Section 230 of the 2013 Act.

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74. In order to amplify the line of submissions as recorded above, the following points have been urged:

74.1. Though eight amendments have been brought about to the IBC between November 2017 and September 2020, the ineligibility contemplated by Section 29-A and Section 35(1)(f) has not been expressly incorporated in Section 230 of the 2013 Act even after the amendment to the IBC.

74.2. Under Section 230, the persons competent to submit a scheme are:

- (a) the company or its liquidator;
- (b) the creditors; or
- (c) a member.

Section 230 does not prohibit a promoter or a person belonging to the ex-management, from proposing a scheme of compromise or arrangement. This creates a “front door opportunity” to the erstwhile

management to come forth and save the company.

74.3. *Under Section 30(1) IBC, a resolution plan can be submitted by a person who is not ineligible with reference to Section 29-A. Under sub-section (4) of Section 30, for the approval of the resolution plan, a 66% voting share only of the financial creditors is required. Sub-section 2(b) of Section 30 requires the resolution professional to examine whether the resolution plan provides for the payment of the debt of operational creditors which shall not be less than the amount which is payable to them in the event of liquidation. On the other hand, the provisions of Section 230 of the 2013 Act are far more stringent in that they require a voting share of 75% and, where the company is in liquidation, a settlement with all creditors including the operational creditors.*

74.4. *Section 35(1)(f) applies to the liquidator but does not apply to NCLT, acting as either the adjudicating authority or as the tribunal.*

74.5. *A resolution plan upon being approved becomes binding on all stakeholders and is attended with all benefits unlike Section 230 of the 2013 Act.*

74.6. *Under Regulation 32 of the Liquidation Process Regulations, two modes are contemplated for the sale of the corporate debtor as a “going concern”, while four modes are contemplated for the sale of the assets of the corporate debtor. The prohibition under Section 35(1)(f) will apply only to a sale which is governed by Regulation 32, and will have no application to a scheme of compromise or arrangement which is proposed under Section 230.*

74.7. *There is no mechanism in the IBC for effecting a compromise or arrangement, and since the only provision is contained in Section 230, there is no inconsistency with the IBC.*

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80. *The benefit under Section 31, following upon the approval of the resolution plan, is that the successful resolution applicant starts running the business of the corporate debtor on “a fresh slate”. The scheme of compromise or arrangement under Section 230 of the 2013*

Act cannot certainly be equated with a withdrawal simpliciter of an application, as is contemplated under Section 12-A IBC. A scheme of compromise or arrangement, upon receiving sanction under sub-section (6) of Section 230, binds the company, its creditors and members or a class of persons or creditors as the case may be as well as the liquidator (appointed under the 2013 Act or the IBC). Both, the resolution plan upon being approved under Section 31 IBC and a scheme of compromise or arrangement upon being sanctioned under sub-section (6) of Section 230, represent the culmination of the process. This must be distinguished from a mere withdrawal of an application under Section 12-A. There is a clear distinction between these processes, in terms of statutory context and its consequences and the latter cannot be equated with the former.

81. *Additionally, there is no merit in the submission that Section 35(1)(f) applies only to a liquidator who conducts a sale of the property of the corporate debtor in liquidation but not to NCLT, acting as the Tribunal, when it exercises its powers under Section 230 of the 2013 Act. The liquidator appointed under the provisions of Chapter III IBC is entrusted with several powers and duties. Sections 37 to 42 IBC are illustrative of the powers of the liquidator in the course of the liquidation. The liquidator exercises several functions which are of a quasi-judicial in nature and character. Section 35(1) itself enunciates that the powers and duties which are entrusted to the liquidator are “subject to the directions of the adjudicating authority”. The liquidator, in other words, exercises functions which have been made amenable to the jurisdiction of NCLT, acting as the adjudicating authority. To hold therefore that the ineligibility prescribed under the provisions of Section 35(1)(f) can be disregarded by the Tribunal for the purpose of considering an application for a scheme of compromise or arrangement under Section 230 of the 2013 Act, in respect of a company which is under liquidation under the IBC, would not be a correct construction of the provisions of law.*

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95. *At this juncture, it is important to remember that the explicit recognition of the schemes under Section 230 into the liquidation process under the IBC was through the judicial intervention of NCLAT in Y. Shivram Prasad. Since the efficacy of this arrangement is not challenged before us in this case, we cannot comment on its merits. However, we do take this opportunity to offer a note of caution for NCLT and NCLAT, functioning as the adjudicatory authority and appellate authority under the IBC respectively, from judicially interfering in the framework envisaged under the IBC. As we have noted earlier in the judgment, the IBC was introduced in order to overhaul the insolvency and bankruptcy regime in India. As such, it is a carefully considered and well thought out piece of legislation which sought to shed away the practices of the past. The legislature has also been working hard to ensure that the efficacy of this legislation remains robust by constantly amending it based on its experience. Consequently, the need for judicial intervention or innovation from NCLT and NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the IBC. This conscious shift in their role has been noted in the report of the Bankruptcy Law Reforms Committee (2015) in the following terms:*

“An adjudicating authority ensures adherence to the process

At all points, the adherence to the process and compliance with all applicable laws is controlled by the adjudicating authority. The adjudicating authority gives powers to the insolvency professional to take appropriate action against the Directors and management of the entity, with recommendations from the creditors committee. All material actions and events during the process are recorded at the adjudicating authority. The adjudicating authority can assess and penalise frivolous applications. The adjudicator hears allegations of violations and fraud while the process is on. The adjudicating authority will adjudicate on fraud, particularly during the process resolving bankruptcy. Appeals/actions against the behaviour of the insolvency professional are directed to the Regulator/Adjudicator.”

47. Also, in **Collector of Central Excise vs. M/s Alnoori Tobacco Products and Anr.** (Civil Appeal 4502-03 of 1998) passed on 21.07.2004, Hon'ble Supreme Court ruled that the reliance on a judicial precedence should be placed only after analysing the facts of the case in which the judgment relied upon is delivered and the facts of the case before the Court and only after when the facts of the case in which the judgement is delivered fits into the facts of the case in which a decision is to be taken, the reliance on the judgment cited as judicial precedence should be placed. The relevant excerpt of the judgment reads thus:-

“11. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid’s theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark on lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. V. Horton (1951 AC 737 at p.761), Lord Mac Dermott observed: (All ER p.14 C-D)

“The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge....”

12. In Home Office v. Dorset Yacht Co. Lord Reid said, (All ER p. 297g-h) "Lord Atkin’s speech ... is not to be treated as if it were a statutory definition It will require qualification in new circumstances." Megarry,

J. in Shepherd Homes Ltd. v. Sandhan (No. 2) observed: "One must not, of course, construe even a reserved judgment of Russell, L.J. as if it were an Act of Parliament." And, in British Railways Board v. Herrington Lord Morris said: (All ER p. 761c)

"There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."

13. *Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.*

14. *The following words of Hidayatullah, J. in the matter of applying precedents have become locus classicus: (Abdul Kayoom v. CIT, AIR p. 688, para 19)*

"19. ... Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

* * *

"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

48. Present is not a case where any Resolution Plan taking note of the claims of the parties has been approved. In the present case, as can be seen from the notice inviting bid, the CD was sold as going concern on as is where is basis. In the absence of there being any specific provision in law to enable us to pass an order that the auction purchaser/the CD sold as going concern

in liquidation would be immune from all liabilities and on the face of Regulation 32A of IBBI (Liquidation Process) Regulations, 2016, I am not persuaded to pass blanket order declaring that the auction purchaser is immune from all liabilities, whatsoever. My such view is supported by the order passed by the Principal Bench of this Tribunal in **IDBI Bank Limited vs. Jaypee Infratech Limited** (IA. No. 2836/PB/2021, IA. No. 3457/PB/2021, IA No. 3306/PB/ 2021 and IA. No. 2521/PB/2022 in Company Petition No. (IB)-77(ALD)/2017. The relevant excerpt of the judgment reads thus:-

“132. Nevertheless, we would like to examine each of the reliefs and concessions asked for. The first relief and concession sought in the Annexure-II of the Resolution Plan are:

“1. All the existing legal proceedings relating to Income Tax shall stand irrevocably and unconditionally abated, settled and all liability/ obligations of the Corporate Debtor vis-a-vis the Income Tax authority in relation to such matters shall stand extinguished in perpetuity.”

*Through this relief, the SRA is seeking irrevocable and unconditional abatement/settlement in perpetuity of all Income Tax proceedings of the Corporate Debtor. Thus, the relief sought being abatement/settlement of all legal proceedings relating to Income Tax in perpetuity, we are not inclined to grant such a blanket relief. In our view, it is the duty of the SRA to seek termination of such litigations, pending before the relevant Authorities, in accordance with the law. **It would not be apt for this Adjudicating Authority to interfere with the jurisdiction of various legal forums on a blanket basis and therefore, the relief is declined.**”*

49. Also, in **Jasamrit Designers Private Limited vs. Mr. Gian Chand Narang and Anr.** (Company Appeal (AT) (Insolvency) No. 258 of 2023), as

recently as on 04.07.2023, Hon'ble NCLAT ruled that the general and elaborate prayer for according relief and concession cannot be countenanced.

Paras 7 and 10 to 12 of the judgment reads thus:-

“7. From the facts brought on record, it is clear that sale of Corporate Debtor was sale as a going concern. E-Auction Process Document on the basis of sale as a going concern plays an important role and clarificatory role. Other terms and conditions of the e-auction as extracted above states that all known or unknown, claimed or unclaimed, disclosed or undisclosed liabilities/ obligations, risks as on the cut-off date including prior claims of all creditors whether secured, unsecured, workers, employees, statutory authorities on account of Income Tax, Sales Tax, GST, Service Tax, DGFT, Excise, Customs etc. are required to be dealt with as per Section 53 of the Code as full and final settlement of their claims. When the process document clearly contemplated such consequences the said consequences shall ensue on sale as going concern and if any roadblocks come into ways of successful resolution applicant, necessary directions, clarifications can very well be issued by the Adjudicating Authority on an Application filed under Section 60(5)(c) of the Code.

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10. In view of the subsequent facts and notices brought on record by the Appellant and other terms and conditions of the process document as extracted, we are of the view that ends of justice will be served in granting liberty to file an Application before the Adjudicating Authority claiming reliefs/concessions/directions which may be necessary for operationalisation of the Corporate Debtor as per terms and conditions of the process document.

11. We may also observe that prayers which were included in I.A. No. 3207 of 2022 were too elaborate and general prayers which cannot be made by a Successful Bidder who have been declared as

Successful Bidder. Successful Bidder on e-Auction of the Corporate Debtor as a going concern can make only such prayers for reliefs/concessions which are commensurate and in accordance with the terms and conditions of the process document. Prayers in general in a very wide term as contained in I.A. No. 3207 of 2022 may not require any consideration by the Adjudicating Authority.

12. *We while granting such liberty to the Appellant observe that law is well settled, a successful bidder who is declared as successful bidder of sale as going concern can seek access of the Adjudicating Authority and may pray for necessary directions in accord with and in consonance with the process document in the liquidation proceedings. In result, we partly allow this Appeal and hold that applicant's prayers i.e. relief/concessions/directions needs consideration by the Adjudicating Authority for which we grant liberty to the Applicant to make a fresh Application containing prayers which may be commensurate and in accord with terms and conditions of the process document of e-auction process document. The Appellant may submit a fresh application praying for reliefs, concessions and directions which may be considered and decided by the Adjudicating Authority in accordance with law. The Appeal is disposed of, accordingly.”*

50. Even otherwise also, when in IA(IBC)331/KOB/2022 in IBA/38/KOB/2019, in terms of the order dated 26.10.2022, the Kochi Bench of this Tribunal declared the order dated 25.02.2021 passed by Deputy Commissioner (WC) State Goods and Services Tax Department, Ernakulam as non-est in WP(C) No. 39185 of 2022 (**Deputy Commissioner (Works Contract), Kerela State Goods and Services Tax Department, vs. National Company Law Tribunal and Anr.**), Hon'ble High Court of Kerela ruled thus:-

“6. This Court finds the impugned order passed by the National Company Law Tribunal, Kochi Bench, as preposterous and

untenable. The Company Law Tribunal has no power and authority under the IBC to declare an assessment order as void ab initio and non-est in law. Such an order only reflects the competence of the persons who are manning such an important Tribunal. The Order shows the lack of basic understanding of the law. Instead of considering the application by the 2nd respondent for permission to file an appeal against the assessment order, the National Company Law Tribunal, Kochi Bench, has assumed the jurisdiction of the Constitutional Court to declare the assessment order as void ab initio.

7. In view thereof, the impugned order is unsustainable, and the same is set aside. The writ petition is allowed. The matter is remitted back to the National Company Law Tribunal, Kochi Bench, to consider and pass an order on the application of the 2nd respondent in IA(IBC) 331/KOB/2022 in IBA/38/KOB/2019 at an early date.”

51. Also, in **Collector of Central Excise, Bombay and Anr. vs. M/s Parley Export (P) Ltd.**, AIR 1980 SC 644, the Hon’ble Supreme Court observed that the words used in the provision should be understood in the same way in which they have been understood in ordinary parlance in the area in which the law is in force. Thus, when there is no provision contained in IBC, 2016 providing that in case of sale of CD as going concern, this Tribunal may pass blanket order declaring the purchaser immune from all liabilities qua the CD, it would not be advisable to pass any such order. One may not be oblivious of the fact that the liquidation value, fetched by disposal of the assets of the CD is less than fair market value. In **D. Stephen Joseph v. Union of India** and Ors., (1997) 4 SCC 753, the Hon’ble Supreme Court has held that “past practice should not be upset provided such practice confirms to the rules” but must be ignored if it is found to be de hors the rules. In the present case, my I.A. No. 5137 of 2023 and I.A. No.3446 of 2022 in (IB)-204(ND)/2019 M/s Pooran Trading Pvt. Ltd. vs. M/s Apple Industries Pvt. Ltd.

attention could not be drawn to any such provision of law, which enable the Adjudicating Authority to grant reliefs and concessions to the CD, when it is purchased in auction as going concern. As is said, 'Dura lex sed lex' which means "the law is hard but it is the law." Even if the statutory provision causes hardship to some people, Court has to implement the same. Such is the view taken by Hon'ble Allahabad High Court in **Vijay Singh and Anr. vs. State of Uttar Pradesh and Ors. 2005** LAB.I.C. 505. Para 75 to 80 of the judgment reads thus: -

“75. As is said, ‘Dura lex sed lex’ which means “the law is hard but it is the law. Even if the statutory provision causes hardship to some people, Court has to implement the same.

76. In Mysore State Electricity Board v. Banglore Woolen, Cotton and Silk Mills Ltd. a Constitution Bench of the Hon'ble Apex Court held that “inconvenience is not” a decisive factor in such matters.

77. In Martin Burn Ltd. v. The Corporation of Calcutta, the Hon'ble Supreme Court while dealing with the same issue observed as under:—

“A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a Court likes the result or not.”

78. Similar view has been reiterated by the Hon'ble Supreme Court in The Commissioner of Income Tax, West Bengal I, Calcutta v. Vegetables Products Ltd. and Prafulla Kumar Das v. State of Orissa.

79. Therefore, it is evident that hardship to an individual cannot be ground of not giving the effective to the statutory provisions.

80. More so, it is settled principle of law that the Court would lean in favour of upholding constitutionality of a Statute unless it is manifestly discriminatory.”

52. Also, in **Chandra Kishore Jha v. Mahavir Prasad & Ors.** in [(1999) 8 SCC 266], Hon'ble Supreme Court ruled that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. The view was followed in **Union of India and Ors. vs. Mahendra Singh** in (Civil Appeal No. 4807 of 2022). Para 15 and 16 of the judgment reads thus:-

*“15. A three Judge Bench of this Court in a judgment reported as **Chandra Kishore Jha v. Mahavir Prasad & Ors.**, held as under:*

“17.....It is a well-settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. (See with advantage: Nazir Ahmad v. King Emperor [(1935-36) 63 IA 372 : AIR 1936 PC 253 (II)], Rao Shiv Bahadur Singh v. State of V.P. [AIR 1954 SC 322 : 1954 SCR 1098], State of U.P. v. Singhara Singh [AIR 1964 SC 358 : (1964) 1 SCWR 57].) An election petition under the rules could only have been presented in the open court up to 16-5-1995 till 4.15 p.m. (working hours of the Court) in the manner prescribed by Rule 6 (supra) either to the Judge or the Bench as the case may be to save the period of limitation. That, however, was not done.....”

*16. The said principle has been followed by this Court in **Cherukuri Mani v. Chief Secretary, Government of Andhra Pradesh & Ors.** wherein this Court held as under:*

“14. Where the law prescribes a thing to be done in a particular manner following a particular procedure, it shall be done in the same manner following the provisions of law, without deviating from the prescribed procedure.....”

53. Here, it would not be out of context, to refer to Section 33(5) of IBC, 2016, which provides that subject to Section 52 of the Code, when a liquidation order has been passed, no suit or other liquidation proceedings shall be instituted by or against the Corporate Debtor. Section 33(5) (ibid)

reads thus: -

“Section 33. Initiation of liquidation.

.....

(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.”

54. Thus, when the CD is ordered to be liquidated and the order of liquidation declare moratorium, no legal proceedings can be instituted against CD. In the wake, if any, proceedings are instituted after the order passed by this Tribunal under Section 33(1) to (4) of IBC, 2016, the remedy available to the affected party would be to institute execution/contempt proceedings. No plea for passing sweeping order to grant relief and concession qua the CD sold as on-going concern can be found tenable.

55. In view of the aforementioned, recording liberty to auction purchaser to resort to appropriate remedy available to it in accordance with law, after impleading the necessary parties qua the claims/demands raised against it, as and when such claims/demands are raised, **I nix the prayer to pass blanket order, having the effect of declaring the revenue demand/liabilities of the CD sold as going concern as non-est. Ordered accordingly. The application stands disposed of. No cost.**

**ASHOK KUMAR BHARDWAJ
MEMBER(J)**

ORDER

PER: SH. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)

The present IAs viz. IA No. 5137/ND/2023 and IA No. 3446 /ND/2022 have been preferred by the Liquidator (hereinafter referred to as the 'Applicant') under Regulation 32(e) read with Regulation 45(3)(a) of the IBBI (Liquidation Process) Regulations, 2016. Through IA 5137/ND/2023, the Applicant had sought amendment in the prayers of IA No. 3446 of 2022. The amended reliefs sought by the Applicant reads thus:

- 1) direct the authorities vide IA-1842/2021 & IA-6039/2021 to release the unlawfully withheld payment INR 25,00,000/- & INR 1,50,00,000/-*
- 2) allow the application for closure of Liquidation Process as the Corporate Debtor has been sold out as a going concern under IBBI Regulation 32(e) of the Liquidation Process and record the sale certificates, share certificates duly issued thereof and other relevant documents.*
- 3) That the order be passed that after distribution of the proceeds of the Sale of Corporate Debtor as a Going Concern as per the order of priority provided in Section 53 of the Insolvency and Bankruptcy Code, 2016, the remaining unpaid outstanding liabilities of the Corporate Debtor shall be extinguished.*
- 4) All consequences of past non-compliances of the Corporate Debtor under applicable laws for the period prior to the E-Auction shall be waived.*
- 5) allow to extinguish the existing share capital and inclusion of afresh share capital issued by the Ld. Liquidator in respect of acquisition of Corporate Debtor by the Successful Bidder.*
- 6) allow to vacate the office of the existing Board of Directors and new/fresh appointment of the Board of Directors as recommended by the Successful Bidder.*
- 7) discharge/ relieve Mr. Rakesh Kumar Singala as a Liquidator for the Corporate debtor.*

8) *pass any other order as deem fit and proper to this Hon'ble Tribunal.*"

2. By an order dated 16.09.2022, this Adjudicating Authority has allowed the first prayer and the said order has been modified by the Hon'ble NCLAT by its order dated 04.01.2023. Thus, the said prayer becomes infructuous.

2.1. The Hon'ble Member (J) has already allowed prayer no. 2 for the closure of the Liquidation Process as the Corporate Debtor has been sold out as a going concern under Regulation 32(e) of the IBBI (Liquidation Process) Regulations, 2016. I am in agreement with the same.

2.2. After going through the Order of the Hon'ble Member (J), I find myself mostly in agreement with the said order except on the issue of considering the prayers of the Applicant concerning certain reliefs and concessions mentioned in Item No. 3 onwards in its amended prayers.

3. Before taking up the prayers at Item No. 3 to 6 in Para 1 above, the relevant provisions of the Code are extracted below for the sake of clarity:

IBBI (Liquidation Process) Regulations, 2016

“Regulation 32. Sale of Assets, etc.

The liquidator may sell-

(e) the corporate debtor as a going concern; or

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.]

X X X

Regulation 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”

4. The prayers under consideration are made under Section – 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016 The issues falling for our consideration in the present case are as under:-

i. Whether this tribunal has the jurisdiction to adjudicate upon the claims of the Applicant(s) for relief and concession arising out of the terms and conditions of the sale of the corporate debtor as a going concern?

ii. Whether under the provisions of the code, the ‘clean slate’ policy, which is held to be applicable to the resolution process, can also be applied to the sale of an asset through auction during the liquidation process?

5. Regarding the issue of the jurisdiction of this tribunal to consider the claim for certain reliefs and concessions sought by the Successful Auction Purchaser in a sale as a going concern, as per the IBBI (Liquidation Process) Regulations, 2016, it is noted that in the present case, on an earlier occasion, the H-1 bidder in the E-auction in the present liquidation process had filed an application bearing IA -880/2022 seeking certain reliefs and concessions. The said application, was dismissed by this Adjudicating Authority, vide order dated 01.08.2022, with the following observation:

“IA-880/2022: *This application has been filed on behalf of the H-1 bidder/auction purchaser seeking certain reliefs and concessions. The Applicant is seeking reliefs and concessions after participating and securing in the bid as H-1 bidder which is usual on “as is where is basis”. Hence, at this stage, no reliefs or concessions can be granted. Hence, the application is not maintainable.*

Accordingly, the present application being not maintainable, stands dismissed.”

5.1 Subsequently, on an appeal, Hon'ble NCLAT in its order i.e., **RMY Industries LLP Vs. Apple Industries Pvt. Ltd. through its Official Liquidator** in Company Appeal (AT) (Insolvency) No. 1114 of 2022 dated 12.10.2022, observed as under: -

*“Learned counsel for the Appellant has relied on judgment of this Tribunal in **“Company Appeal (AT) (Ins.) No. 650 of 2020, M/s Shiv Shakti Inter Globe Exports Pvt. Ltd. vs. M/s KTC Foods Private Limited”**. In the aforesaid case with regard to liquidation sale as going concern Liquidator has filed an application for certain relief which was related to the past dues and prayer for extinguishment of past/ remaining unpaid outstanding liabilities, which was permitted.*

We are of the view that the Adjudicating Authority is empowered to consider any application filed by the Liquidator or Successful Auction Purchaser, which may arise with regard to terms and conditions of auction sale or sale as going concern as per the Liquidation Regulation. We, thus, are of the view that end of justice be served in giving liberty to the Appellant to file an appropriate application before the Adjudicating Authority, which may arise from the terms and conditions of the auction sale or sale as going concern, which may be considered by the Adjudicating Authority.”

(Emphasis Supplied)

5.2 For the sake of clarity, the relevant observation of the Hon'ble NCLAT in the referred order of **M/s Shiv Shakti Inter Globe Exports Pvt. Ltd.**(supra) is extracted below:

“ it is no longer Res Integra that while approving a Corporate Debtor sale as a going concern in Liquidation Proceedings without its dissolution in terms of Regulation 32(e) of the Liquidation Process

Regulations, 2016, it is essential to see that the Corporate Debtor is not burdened by any past or remaining unpaid outstanding liabilities prior to the sale of the Company as a going concern and after payment of the sale proceeds distributed in accordance with Section 53 of the Code.”

(Emphasis Supplied)

5.3 Furthermore, on identical facts, the Hon’ble NCLAT in *Chinar Steel Segments Centre Pvt. Ltd. vs. Samir Kumar Agarwal Company Appeal (AT) (Insolvency) No. 1355 of 2022* has also held that the application filed by the Successful Auction Purchaser is fully entertainable under Section 60(5) since it arose out of the liquidation proceeding of the Corporate Debtor and has observed as under:

“16. What has been laid down by the Hon’ble Supreme Court in the above case is that the NCLT has jurisdiction to adjudicate dispute which arise solely from or which relate to the insolvency of the Corporate Debtor. When we look into Section 60(5), the provision clearly provides that NCLT shall have jurisdiction to entertain or dispose of any application or proceeding by or against the Corporate Debtor or corporate person or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the Corporate Debtor. Thus, essential ingredients for maintainability of application are that:-

(i) In the Application, any question of law or facts arising out of or in relation to the insolvency resolution;

(ii) for any question of law or facts arising out of or in relation to the liquidation proceedings.

XXXXX

18. The law is settled that an application can be entertained only when it raises a question which arises or relates to the insolvency of the Corporate Debtor.”

(Emphasis Supplied)

6. In the case at hand, the liquidation was initiated by an order dated 13.02.2020 and subsequently Liquidator has issued an invitation for bids for sale of the Corporate Debtor as a going concern as specified under Regulation 32(e) of the IBBI (Liquidation Process) Regulations, 2016 through a public notice dated 08.02.2021. In respect of the timeline, one corrigendum was issued on 24.02.2021 and the same was duly published in the newspapers on PAN India basis. Out of their 02 debtor respondents, the Liquidator, in terms of Clause 6(1)(e) of the e-auction process documents, issued a Letter of Intent (LOI) to the successful bidder on 06.03.2021.

6.1 The SCC in its 9th meeting took note of the successful e-auction process and declaration of RMY Industries, as the successful bidder. The latter has made the full payment of the auction amount. The amount realised in the e-auction during the liquidation process is Rs. 84,75,00,000/- as against the liquidation value of Rs. 54,97,26,228/.

6.2 Subsequent to being declared as Successful Auction Purchaser, the latter by its letter dated 05.02.2022 to the Liquidator under the subject “Request for issuance of sale certificate and handing over possession” informed that liquidator as under:

“Please also ensure that the Liabilities (constituting the admitted claims from the Stakeholders as received by the Liquidator and accordingly submitted to NCLT) is settled as per Section 53 of Insolvency and Bankruptcy Code, 2016, Liabilities/Claims not filed, rejected, left unpaid post application of Section 53 shall stand extinguished.

Further ensure the transfer/acquisition of Corporate Debtor shall be free from any liability(ies) due to the Corporate Debtor and/or against its assets but not limited to Income Tax, GST, Value Added Tax, Electricity, HSIDC, APSIDC, PF, Pension, Gratuity, ESI, workers' wages, Employees Salary, Claims from any state and Central Government including Local Bodies/Non Government/Semi Government/ Semi Government Bodies, Body Corporate, Banks, Financial Institutions or any kind etc.

All the liabilities/dues towards lenders or any other Claimant against the lands owned by the Corporate Debtor should be treated as NIL. The land to be resumed enabling smooth transfer of rights and title.

To allow Carry Forward business losses and unabsorbed depreciation and other losses and credited entitlement of the Corporate Debtor till the Date of LOI as per the provisions of the Income Tax Act.”

6.3. In response, the Liquidator issued the following Sale Certificate dated 14.02.2022:-

**IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
AND
IN THE MATTER OF: IBC, 2016
AND
IN THE MATTER OF: M/S APPLE INDUSTRIES LIMITED
(IN LIQUIDATION)
IA 1038 of 2020 in CP No. (IB) 204(ND) of 2019**

**CERTIFICATE OF SALE OF SALE OF APPLE INDUSTRIES LIMITED (A COMPANY
UNDER LIQUIDATION) AS A GOING CONCERN UNDER REGULATION 32(E) OF IBBI
(LIQUIDATION PROCESS) REGULATIONS, 2016**

(Schedule -1 of IBBI (Liquidation Process) Regulation, 2016)

The undersigned Rakesh Kumar Singala aged 50 years being the Liquidator of Apple Industries Limited duly appointed vide NCLT order dated 13.02.2020 in C.P. No. IB- 204(ND) OF 2019 under Section 34 of the Insolvency and Bankruptcy Code 2016 and in exercise of the powers conferred under Regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 has transferred Apple Industries Limited (corporate Debtor) having CIN# U74120DL2008PLC175180 as a Going Concern entity as per Regulation 32 [e] of Insolvency and Bankruptcy Board Of India (Liquidation Process) Regulations, 2016 by way of issuing new shares in the name "RMY Industries LLP" and "Rakesh Gupta", the partner & nominee of RMY Industries LLP and the transfer is on "AS IS WHERE IS BASIS", on account of Corporate debtor being in Liquidation, Details are as follows:

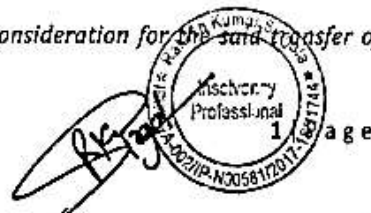
Name of the Shareholders	Percentage of Holding	Number of shares	Amount in Rs.
RMY Industries LLP	99%	2475000	2,47,50,000
Mr. Rakesh Gupta (nominee RMY Industries LLP)	1%	25000	25,00,000

The undersigned acknowledge the receipt of the sale proceeds of Rs. 84,75,00,000/- (Rupees Eighty Four Crores Seventy Five Lakh only) Lump-Sum Consideration for the said transfer of

Received

For RMY INDUSTRIES LLP

14/2/2022 Yogesh Kumar
Designated Partner



Corporate Debtor as a going Concern along with all tangible and Intangible assets on " AS IS WHERE IS" basis (Including Business Operations and Trade Name). Physical possession of Assets is being handed over as on this day. The Acquirer(s) henceforth shall be solely responsible for the Company in its totality.

All Liabilities as on date of announcement of liquidation i.e. 13.2.2020 (constituting the admitted claims from the Stakeholders as received by the Liquidator and accordingly submitted to NCLT) shall be settled as per Section 53 of insolvency and Bankruptcy Code, 2016. Liabilities/ existing shares of Corporate Debtor/Stakeholders Claims as on date of announcement of liquidation i.e. 13.2.2020 not filed, rejected, left unpaid post application of Section 53 shall stand extinguished.

Given under my hand and seal at 14th day of February of 2022.



(Rakesh Kumar Singala)

Liquidator for Apple Industries Limited

IBBI Regn. No. IBBI/PA-002/IP-N00581/2017-18/11744

Place: Delhi

Regd. E-mail: csrakeshsingala@gmail.com

This sale certificate would be an integral part of the Acquisition Agreement

6.4 Now coming to the facts of the present case, it is noticed that in the sale certificate issued by the Liquidator, there is a clear mention of exemption from outstanding liability.

6.5 Thus, the issue of reliefs and concessions as sought by the Successful Auction Purchaser is not coming up for the first time before this Authority. It has been a part of the terms and conditions in the Sale Certificate issued by the Liquidator, who sold the corporate debtor as a going concern.

6.6 Thus, in the light of these facts, provisions of IBC, 2016 and the Liquidation Process Regulations, 2016 and, in terms of the ratios of the aforementioned decisions of the Hon'ble NCLAT, this authority is held to be empowered to consider the prayer for relief and concession by the successful auction purchaser as those squarely arise from the terms and conditions of the auction sale.

6.7 Thus, the first question raised in para – 4 above is thus answered in the affirmative.

7. Now coming to the relief claimed under item no 3 extracted at para 1 above, it is noted that Section 53 mentions the order in which various claims against corporate debtor are to be paid after laying down that –

“(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.....”.

It stands to reason that after the value is realized through the sale of the corporate debtor in a going concern sale, and the proceeds are distributed as per the hierarchy of payment, laid down in Section 53 of the Code, there can still be unpaid outstanding liabilities against the corporate debtor. The issue that arises here is whether the Corporate Debtor is still required to meet these unpaid liabilities after the e-auction sale proceeds are distributed.

7.1 Before analyzing the implications of such a prayer, it would be appropriate to refer to the para 95 of the decision of the Hon'ble Supreme

Court in the matter of **“Ghanshyam Mishra and Sons Pvt. Ltd. Vs.**

Edelweiss Asset Reconstruction Company Limited” in Civil Appeal No. 8129 of 2019 where the Hon’ble Supreme Court dealt with various questions and answered the same as under:-

“95. In the result, we answer the questions framed by us as under:

(i) That once a resolution plan is duly approved by the Adjudicating Authority under subsection (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

(ii) 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect;

(iii) Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under Section 31 could be continued.”

7.2 Thus, it is settled law as enunciated in **Ghanshyam Mishra and Sons Pvt. Ltd. (supra)** that the liabilities of the corporate debtor stand frozen after it is taken over by the successful resolution applicant in a resolution process. The issue, however, is whether the “clean slate” principle is

applicable to the assets sold under the e-auction process in Liquidation. In this connection, it is observed that the Code is divided into two distinct parts, wherein Chapter – II deals with the Corporate Insolvency Resolution Process and Chapter – III deals with the Liquidation Process. However, one of the guiding principles of the Code namely the maximization of the value of the assets of the Corporate Debtor runs through the entire Code- both the Resolution and Liquidation Processes included. Denying reliefs and concessions required to keep the Corporate Debtor a going concern after it is sold under the liquidation process would certainly affect its value adversely.

7.3 This issue has been extensively analyzed in the below-mentioned decisions of the Hon'ble NCLAT.

7.3.1 In **“Shiv Shakti Inter Globe Exports Pvt. Ltd. vs. KTC Foods Pvt. Ltd. & Anr.”** C.A.(AT)(Ins.) No. 650 of 2020 decided on 25.02.2022 and has taken a view that it is essential to see that the ‘Corporate Debtor’ is not burdened by any past or remaining unpaid outstanding liabilities in a going concern sale under liquidation.

7.3.2 Furthermore, while dealing with the issue of liability of the successful auction purchaser to pay unpaid outstanding electricity dues, the Hon'ble NCLAT, New Delhi in the case of Paschimanchal Vidyut Vitran Nigam Ltd. vs. HSA Traders and Ors. In Company Appeal (AT) (Insolvency) No. 527 of 2023 dated 05-Dec-23, the Hon'ble NCLAT has referred to on the decision of the Hon'ble Apex Court in the case of **“Tata Power Western Odisha Distribution Limited (TPWODL) & Anr. vs.**

Jagannath Sponge Private Limited, Civil Appeal No.5556 of 2023”

and its own order in “**Chinar Steel Segments Centre Pvt. Ltd. vs.**

Samir Kumar Agarwal” and has observed as under:

“15. In the case of “Chinar Steel Segments Centre Pvt. Ltd. vs. Samir Kumar Agarwal” (Supra), this Tribunal has noticed the judgment of Hon’ble Supreme Court in “Telangana State Southern Power Distribution Company Ltd. & Anr. vs. Srigdhaa Beverages” as well as “Eastern Power Distribution Company of Andhra Pradesh Limited vs. Maithan Alloys Limited & Ors.- Company Appeal (AT) (Ins.) No.961 of 2021” of this Tribunal which judgment has also been relied by the Adjudicating Authority in the impugned order. The Judgment of this Tribunal in “Shiv Shakti Inter Globe Exports Pvt. Ltd. vs. KTC Foods Pvt. Ltd. & Anr., Company Appeal (AT) (Ins.) No. 650 of 2020” decided on 25.02.2022 also support the submission made by learned counsel for the Respondent. This Tribunal took view that when the Corporate Debtor is sold in the liquidation proceeding, Corporate Debtor cannot be burdened by any past or remaining unpaid outstanding liabilities.

xxxxxx

17. The Hon’ble Supreme Court in “Tata Power” (Supra) clearly held that Tata Power cannot insist on payment of arrears for granting electricity connection. This Tribunal in “Chinar Steel Segments Centre Pvt. Ltd.” after noticing the judgment of Hon’ble Supreme Court and this Tribunal has ultimately allowed the appeal.”

7.3.3 The point to note here is that the Hon’ble NCLAT in the aforementioned matter of “Paschimanchal Vidyut Vitran Nigam Ltd” (Supra), has extended the ‘clean slate’ principle followed by the Hon’ble Supreme Court in a case of Resolution of the Corporate Debtor, to grant

relief to the Successful Auction Purchaser with respect to payment of arrears of electricity dues of the erstwhile Corporate Debtor.

7.4 Furthermore, the Hon'ble NCLAT in the case of "**Haryana State Industrial and Infrastructure Development Corporation Ltd. Through its Estate Manager vs. M/s. AAR Technoplast Private Limited & Ors.**" in COMPANY APPEAL (AT) (INSOLVENCY) No. 606 of 2021 vide order dated 12.11.2020 has considered the applicability of the 'clean slate' principle to the liquidation process and held, inter alia, that:

"The principle of 'clean slate' laid down in the Judgement of the Hon'ble Apex Court in 'Committee of Creditors Essar Steels Standard Chartered Bank' is applicable to the facts of this case, though it pertains to a successful Resolution Applicant. The scope and purpose of this Code and the ratio of the Judgement is to be interpreted in its truest sense, i.e., not to saddle the 'purchaser' with any 'hydra head' popping up.

16. We are of the considered view that once the Liquidation sale has been completed and the Certificate of Sale has been executed followed by handing over possession to the Auction Purchaser, any claim relating to such property for dues prior to the Auction cannot be raised against the Auction Purchaser specifically when the Company is in Liquidation and the dues were already claimed by the said party as an 'Operational Creditor', during the CIRP process as the Company was in Liquidation" **(Emphasis Supplied)**

7.5 The importance of process documents as well as the sale certificate and determining the unpaid liability of the Corporate Debtor by the successful auction purchaser has been considered by the Hon'ble NCLAT in the case of in the matter "**Jasamrit Designers Pvt. Ltd. vs. M/s Gian Chand Naran**

Liquidator and Anr.” in Company Appeal (AT) (Ins.) No. 258 of 2023 with the following observations:

“it is clear that sale of Corporate Debtor was sale as a going concern. E-Auction Process Document on the basis of sale as a going concern plays an important role and clarificatory role. Other terms and conditions of the e-auction as extracted above states that all known or unknown, claimed or unclaimed, disclosed or undisclosed liabilities/ obligations, risks as on the cut-off date including prior claims of all creditors whether secured, unsecured, workers, employees, statutory authorities on account of Income Tax, Sales Tax, GST, Service Tax, DGFT, Excise, Customs etc. are required to be dealt with as per Section 53 of the Code as full and final settlement of their claims. When the process document clearly contemplated such consequences the said consequences shall ensue on sale as going concern and if any roadblocks come into ways of successful resolution applicant, necessary directions, clarifications can very well be issued by the Adjudicating Authority on an Application filed under Section 60(5)(c) of the Code.”

(Emphasis Supplied)

7.6 It is reiterated that the sale certificate issued by the Liquidator clearly states ‘all the Liabilities as on date of announcement of liquidation i.e. 13.02.2020 (constituting the admitted claims from the stakeholders as received by the Liquidator and accordingly submitted to NCLT) shall be settled as per Section 53 of Insolvency and Bankruptcy Code, 2016. Liabilities/existing shares of Corporate Debtor/Stakeholders Claims as on date of announcement of liquidation i.e. 13.02.2020 not filed, rejected, left unpaid post application of Section 53 shall stand extinguished.’

7.7 A reference is also made to the decisions of the coordinate Benches of NCLT at Chennai and Kolkata in the matters of **“BKR Hotels & Resorts Private Limited ,M K Rajagopalan, Vs S.R.Shriram Shekar(Order dated 31.08.2023), and In the matter of “Sauria Construction Vs. Kohinoor Pulp & Paper Private Limited And In the matter of Universal Tech Paper LLP Vs Mr. Krishnaswami CVR (order dated 10.01.2024) wherein similar prayers have been considered and appropriate relief granted to the Applicant s after detailed discussion.**

7.8 Thus, the answer to issue no. 2 raised in para 4 above is also answered in the affirmative.

7.9 Keeping in view the relevant provision in the Code and the rules made thereunder, ratios of the aforementioned decisions, the prayer for extinguishing the remaining unpaid outstanding liabilities of the corporate debtor after distribution of the proceeds of the sale of the corporate data as a going concern as per section 53 of the IBC 2016, is hereby allowed.

8. Now, coming to the prayer made at item no. 2 extracted at Para 1 above for exemption from all consequences of past non-compliances by the Corporate Debtor under applicable laws, a reference is made to the decision of the Hon’ble NCLAT, New Delhi vide order dated 04.07.2023 in the matter of **“Jasamrit Designers Pvt. Ltd. vs. M/s Gian Chand Naran Liquidator and Anr.”** in Company Appeal (AT) (Ins.) No. 258 of 2023 wherein it is held that:

“11. We may also observe that prayers which were included in I.A. No. 3207 of 2022 were too elaborate and general prayers which

cannot be made by a Successful Bidder who have been declared as Successful Bidder. Successful Bidder on e-Auction of the Corporate Debtor as a going concern can make only such prayers for reliefs/concessions which are commensurate and in accordance with the terms and conditions of the process document. Prayers in general in a very wide term as contained in I.A. No. 3207 of 2022 may not require any consideration by the Adjudicating Authority.”

(Emphasis supplied)

8.1 On an analysis, the prayer under consideration seeking waiver of all consequences of past non-compliance of the CD appears to be too general in nature and the relief sought is too wide and non-specific and they fall under the power and jurisdiction of different government authorities/departments. As such, the same should be dealt with the respective competent authorities/forums/offices, Government or Semi Government of the State or Central Government, who will consider the same keeping in view the spirit of the Code. Hence, the prayer is not granted. The Applicant, however, is at liberty to approach the concerned authority(ies) with its prayer for exemption and the authority will consider the same in the spirit of the ‘clean slate’ policy laid down by the Hon’ble Apex Court.

9. As regards, the prayer item no. 5 quoted in para 1 above, the Applicant is directed to approach the concerned authority who will consider the same keeping in view the principle laid down by the Hon’ble Supreme Court and relevant provisions of the respective laws. The prayer at Item No. 6 for vacation of the office of the existing Board of Directors etc. is allowed as the same flows from the sale as a Going concern.

10. The liquidator is directed to cooperate with the successful auction purchaser in completing critical compliances and other urgent matter, if any, before being discharged with effect from 10 days of this order.

11. The liquidator is directed to send the copy of this order within 7 days from the date of pronouncement to the Jurisdictional Registrar of Companies

12. The Registry is directed to communicate this order to the Jurisdictional Registrar of Companies for updating the Master Data.

13. In terms of the above, I.A. No. 5137/2023 filed by the Applicants stands disposed of accordingly.

**(SUBRATA KUMAR DASH)
MEMBER (T)**

VIEW/ORDER OF THE BENCH

In the wake of the aforementioned two separate and independent orders authored by the Members of the Bench, a difference of opinion has cropped up between them on the issue as to whether the blanket relief of extinguishing the unpaid outstanding liabilities of CD after distribution of the proceeds of the sale of the CD as going concern as per Section 53 of the IBC, 2016 can be granted by this Adjudicating Authority. Such situation can be addressed by referring to Rule 60(2) & (3) of NCLT Rules, 2016, which provides that in case the Members who have heard the case are equally divided in passing the order or judgment, then the Hon'ble President may constitute a Bench as referred to in sub-section (5) of Section 419 of the Companies Act, 2013. When in Para

7.9 of the separate dissenting opinion authored by Member(T), the extinguishment of the liabilities (ibid) has been ordered, the Member(J) holds a different view.

2. The view of Member(J) is that when no blanket order of extinguishment can be passed, and as and when the auction purchaser or liquidator approach the Adjudicating Authority for any specific relief qua the demand/liability pertaining to the past period, the relief can be considered, after putting the authority/party against whom the relief is sought to notice.

3. In the wake, when there is concurrence between the Members qua the order/directions other than the extinguishment of the unpaid outstanding liabilities, it is directed that the parties concerned shall act in terms of such order/directions, qua which there is no difference of opinion between the Members, the point stated below is referred to Hon'ble President, in terms of the provisions of Section 419(5) of the Companies Act, 2013 r/w Rule 60(3) of the NCLT Rules, 2016:-

“whether in the facts and circumstances of the present case, where the Corporate Debtor has been sold as going concern under Regulation 32(e) of IBBI (Liquidation Process) Regulations, 2016, and the proceeds of the sale of Corporate Debtor as a going concern has been distributed as per the order of priority provided in Section 53 of the IBC, 2016, the remaining unpaid outstanding liabilities of the Corporate Debtor shall be extinguished without putting the individual/authority concerned to notice.”

Sd/-
(SUBRATA KUMAR DASH)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)