

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-II

IA. 412/ND/2021

IN

Company Petition No. (IB)-575(ND)/2017

IN THE MATTER OF:

Small Industrial Development Bank of India

...Financial Creditor

Versus

M/s Delicious Coco Water Private Limited

...Corporate Debtor

AND IN THE MATTER OF:

**Mr. Rajnish Gupta
Promoter and Shareholder
House No. 3, New Rohtak Road,
Karol Bagh, New Delhi-110005**

...Applicant

Versus

**Sh. K.G. Somani
M/s. K.G Somani Insolvency Professionals Pvt. Ltd.
Third Floor, Asaf Ali Road,
New Delhi-110002**

...Respondent

Order Delivered on: 04.10.2021

SECTION: 60(5) of IBC, 2016 read with Rule 11 of NCLT Rules, 2016

CORAM:

SH. ABNI RANJAN KUMAR SINHA, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENTS:

For the Applicant : Mr. Deepak Vohra, Adv.

For the Liquidator : Mr. Rahul Kumar, Adv.

ORDER

PER SHRI L. N. GUPTA, MEMBER (T)

The present I.A. No. 412 of 2021 is filed under Section 60(5) of IBC, 2016 read with Rule 11 of NCLT Rules 2016 by Mr. Rajnish Gupta, (hereafter referred to as **“Applicant”**), who is the suspended Director of M/s Delicious Coco Water Pvt. Ltd., against Shri K.G. Somani (Liquidator) of the Corporate Debtor (hereinafter referred to as **“Respondent/ Liquidator”**) seeking the following reliefs :

“1. Direct the Respondent to abide by the NCLAT order dated 05.09.2019 in Company Appeal (AT) (Ins) No. 628/2019, and objectively, and impartially consider the scheme of arrangement proposed by the Applicant, in terms of Section 230 of the Companies Act, 2013.

2. Restrain the Respondent from proceeding with the auction of the Corporate Debtor's property situated at D-13, Peera Garhi, New Rohtak Road, Delhi 110041 on 05.02.2020.

3. Fix the reserve price at Rs. 77.77 Crores, in consonance with the market value of the property and other similarly placed commercial plots in close vicinity of the Corporate Debtor's property, or

4. Pass any other order/grant any relief as the Hon'ble Tribunal may deem fit, in the interest of justice, equity and good conscience...”

2. That during the course of hearing on 06.08.2021, it was submitted by the Ld. Counsel for the Applicant that the Applicant does not wish to press the prayer no. 2 and 3. Therefore, the only prayer, which requires to be adjudicated is the prayer no. 1.

3. To put succinctly, facts of the case are that the Financial Creditor, M/s Small Industrial Development Bank of India (SIDBI) had filed an application bearing no IB-575(ND)/2019 under Section 9 of IBC 2016 for initiation of CIR Process against the Corporate Debtor M/s. Delicious Coco Water Pvt. Ltd. That vide Order dated 05.03.2018, this Adjudicating Authority had initiated the CIR Process against the Corporate Debtor. Keeping in view that no Resolution Plan came through and the CoC approved the Liquidation process to be proceeded with, the then RP filed an Application registering CA-237/2018 under Section 33 of the Code. Accordingly, the Liquidation proceeding was initiated vide order dated 31.05.2019 passed by this Adjudicating Authority. Sh. K.G. Somani (Respondent herein) was appointed as the Liquidator of the Corporate Debtor.

4. In support of its prayer at Serial No.1, the Applicant has submitted the following that -

- (i) On 11.02.2019, the Applicant submitted before this Hon'ble Tribunal that he was willing to pay the entire amount claimed by the SIDBI, whereafter this Tribunal directed that the cut-off value would include the Claim amount and the CIRP costs amounting to a total of Rs. 30.1 Crore.
- (ii) SIDBI rejected the Applicant's proposal. Later, vide order dated 24.04.2019, this Adjudicating Authority observed that entering into a settlement with the Applicant was the COC's prerogative, and since the COC was not inclined to settle the matter with the Applicant, the Adjudicating Authority would not intervene.
- (iii) The Respondent failed to submit any resolution plan within the time frame stipulated for completion of the CIRP Process. It is

further submitted that this Adjudicating Authority passed an order dated 31.05.2019 allowing Respondent's application for liquidation of the Corporate Debtor and thereby, appointing the Respondent as Liquidator.

- (iv) The Applicant preferred an appeal against the order dated 24.04.2019 before the Hon'ble NCLAT. The Hon'ble NCLAT vide order dated 05.09.2019 directed the Applicant herein to follow the procedure laid down in **Y. Shivram vs. S. Dhanpal**, and gave liberty to the Applicant to approach the Respondent U/s 230 of the Companies Act, 2013 for any Arrangement or Scheme.
- (v) In compliance of the abovementioned order passed by the Hon'ble NCLAT, the Applicant sent his proposal dated 09.09.2019 to the Respondent and thereafter, sent reminders vide letter dated 17.09.2019 and email dated 28.09.2019, calling upon the Respondent to convene a meeting of creditors, members, shareholders etc. as provided under Section 230. However, no response from the Respondent was received thereto.
- (vi) On 07.02.2020, this Tribunal, on being apprised by the Applicant about non-cooperation of the Respondent, granted liberty to the Applicant to submit a Scheme of Arrangement to the Liquidator.
- (vii) That while the Applicant was under the process of concluding a Scheme of Arrangement for submission to the liquidator, this Tribunal vide order dated 04.03.2020, allowed the Respondent/Liquidator to proceed with the Liquidation proceedings.
- (viii) The Respondent thereafter, issued advertisement for the e-auction of the Corporate Debtor's property at D-13, Peera Garhi, New Rohtak Road, Delhi 110041. However, due to Covid-19 pandemic and consequent lockdown, the auction could not be held successfully.

- (ix) Thereafter, the applicant filed I.A. No. 2111 of 2020 before this Tribunal seeking restraint on the liquidation proceedings, as the Respondent had miserably failed to comply with the Order dated 05.09.2019 passed by the Hon'ble NCLAT in Company Appeal (AT) (Ins) No. 628/2019 and the reserve price of Rs.46 Crore fixed for the auction was much lower than the fair market value of the property, which is approximately around Rs.94 Crore.
- (x) That the additional documents filed in I.A. No. 2111 of 2020 substantiates the fact that the actual market value of the Corporate Debtor's property is much higher than the circle rate fixed by the government. The same is fortified by the fact that as per the tender document issued by the Delhi Development Authority for an e-auction of commercial plots in close vicinity of the Corporate Debtor's property, the approximate proportionate value of the said property would come around Rs. 67.55 Crore, and further, upon including the value of construction on the said property, the value would be in excess of Rs. 77 Crore.
- (xi) Vide order dated 26.06.2020, this Tribunal dismissed the I.A. No. 2111 of 2020, observing that there is no reason for interfering with the auction process set in motion by the liquidator.
- (xii) Since the NCLAT was not functioning from 26.06.2020 to 03.07.2020 on account of Covid-19, the Applicant filed a Writ Petition before Hon'ble Delhi High Court, challenging the order dated 26.06.2020 passed by this Adjudicating Authority in I.A. No. 2111 of 2020, wherein the Hon'ble High Court directed the Liquidator not to proceed with the auction for 15 days.
- (xiii) The Respondent once again issued an advertisement for sale of the aforementioned property via an auction scheduled on 27.11.2020, at an inexplicably low price of Rs. 40 Crore.

- (xiv) Since the auction of the property of the Corporate Debtor was being done without consultation with any of the stakeholders, as provided for in the IBC (Liquidation) Regulations, 2016 and without giving any consideration whatsoever to the fact that selling off of the Corporate Debtor's assets would eventually result in its Corporate Death, which has been frowned upon by Courts, and has consistently been held to be a last resort, when there is other option viable, the Applicant filed an application before this Tribunal under Section 60 (5) of the Code, seeking inter alia, a stay on the auction dated 27.11.2020 and requesting that the reserve price for the auction of the Corporate Debtor's property be fixed at Rs. 77 Crore, a fair market value.
- (xv) The above-mentioned application came to be listed before this Tribunal on 08.12.2020. Since the date of auction had already passed by then, the application became partially infructuous. Thus, the Application was dismissed as withdrawn with a liberty to the Applicant to file an appropriate application in accordance with the provisions of law.
- (xvi) On 18.12.2020, the Respondent yet again issued an advertisement for sale of the aforementioned property via an auction scheduled on 05.02.2021, at a terribly low price of Rs. 37,50,00,000/-. It is submitted that the said amount is less than half of the fair market value of the property.
- (xvii) The auction of the Corporate Debtor's assets at such a throwaway price goes against the objective of the IBC, being maximization of the assets of the Corporate Debtor. Further, the primary duty entrusted to a Resolution Professional is to ensure that the Corporate Debtor remains a going concern and is sold as such, when the resolution process fails, thereby preventing massive loss of employment and ensuring continuity of business.

- (xviii) The doubts on the conduct and efficiency of the Respondent has been noticed even by this Tribunal, which in the order dated 21.10.2019 observed as follows:

“CAs 115272019, 115372019 has been filed by the claimants aggrieved by the rejection of the claim by the Liquidator. No cogent explanation has been given. It appears that the liquidator has not carried out his duty diligently. Mail has been sent to the applicant to send documents. This Bench is unable to comprehend as to what other documents are required, since the banking transactions have been duly filed in support of the loans granted. Ld. Counsel appearing for the liquidator submits that since the Corporate Debtor has no record, they shall not be able to ascertain the documents. It appears that the liquidator has not even procured the statement of account of the Corporate Debtor’s bank. The same would have reflected and corroborated the transaction. As no cogent explanation is forthcoming, last opportunity is being given to the liquidator to file his reply justifying the grounds this claim is being rejected by him”

This clearly shows that the Liquidator, also being the erstwhile Resolution Professional has worked hand in glove with SIDBI, the Financial Creditor, and failed to faithfully discharge his duty as the custodian of the Corporate Debtor.

- (xix) Such conduct on the part of a Resolution Professional /Liquidator strikes at the root of the IBC, which was enacted to ensure that while the claims of creditors are paid, the Corporate Debtor survives and remains a going concern. In the present case, if the Respondent had followed the directions of the Hon’ble NCLAT and considered the Scheme of arrangement or settlement proposal offered by the Applicant herein, the Financial Creditor’s dues would have been paid, and the Corporate Debtor would have survived to continue its business. However, the liquidator unilaterally killed every attempt of reconciliation and with a pre-meditated, single-track approach, proceeded towards

liquidation, intending to sell the assets of the Corporate Debtor at a very low value.

- (xx) Since the interest of the Sole Financial Creditor is merely the recovery of the loan amount, the Liquidator be directed to honestly and objectively consider the Scheme of Arrangement proposed by the Applicant herein, so that the dues of the corporate debtor may be cleared without resulting in closure of the corporate debtor, which is akin to corporate death.

5. That the Respondent/Liquidator has filed its reply and has objected to the prayer made by the Applicant. The Liquidator in its reply has submitted that :

- (i) The CIRP of the Corporate Debtor was commenced vide an order of this Tribunal dated 06.03.2018 and the Liquidator was appointed the IRP, who was later confirmed as the RP. The original applicant / Financial Creditor, Small Industries Development Bank of India ('SIDBI') is the sole financial creditor having 100% share in the CoC.
- (ii) Since the inception of the CIRP, the Applicant, against the true spirit of the Insolvency and Bankruptcy Code, 2016 ('Code'), has been trying to interfere with the process of CIRP and now, with the process of liquidation. That a transaction audit conducted has made scathing remarks against the Applicant in terms of fraudulent transactions and availing the present loan by concealing material facts, so much so that in relation to the only asset of the corporate debtor and the loans taken by the Applicant from the sole financial creditor SIDBI, an FIR was registered against the Applicant by the Central Bureau of Investigation u/S. 420, 467, 468, 471 IPC r/w S. 120B IPC and S. 13(2) and 13(1)(d) of the Prevention of Corruption Act on 31.12.2018, specifying the

fraud conducted by the Applicant, inter alia, in relation to the asset of the Corporate Debtor.

- (iii) When the Applicant realized that due to the state of the Corporate Debtor, no viable resolution plan was forthcoming, the Applicant started realizing that by virtue of the provisions under liquidation, the Applicant could take advantage and delay the entire process of liquidation. It is their attempt to take the Corporate Debtor back into his control by floating an idea that he is willing to settle all dues with the Financial Creditor, SIDBI.
- (iv) The sequence of events below would give a clear picture of the conduct of the Applicant in the entire process since the liquidation was approved by the CoC/SIDBI.

S.No	Date	Particular	Comments	Annexure
1.	20.11.2018	Liquidation approved by CoC after expiry of 270 days of CIRP	Appropriate application moved	
2.	04.02.2019	The Ex-Director applicant informed the bench that he is willing to liquidate the outstanding dues and was given 2 days to give a proposal to the RP	No proposal was received	Order dated 04.02.19 annexed as R1
3.	11.02.2019	Ex-Director makes another statement that he is willing to pay entire claim of creditors	Matter adjourned for consideration. No proposal received from Ex Director	Order dated 11.02.2019 annexed as R2
4.	24.04.2019	Offer of ex director to CoC not acceptable and accordingly rejected	Plea of ex director rejected and liquidation to be considered. This ordered was challenged before NCLAT	Order dated 24.04.2019 is annexed as R3

S.No	Date	Particular	Comments	Annexure
5.	31.05.2019	NCLT notes that no concrete proposal submitted by Ex Director and liquidation cannot be kept pending indefinitely	Bench allows Liquidation of CD	Order dated 31.05.2019 annexed as R4
6.	08.08.2019	An OTS from the Ex director is sent to SIDBI	The same is rejected vide letter dated 30.01.20	OTS is annexed as R5 .
7.	05.09.2019	NCLAT states that appeal is infructuous as Liquidation has been ordered. Appellate Tribunal states that RP/Liquidator has to follow the law as laid down in Y Shivram's Case	The NCLAT had granted a time of 90 days to take steps under S. 230 of CA 2013. However, no proposal was ever received within the time period	Copy of NCLAT order already annexed as Annexure A/1 of CA 412/2021
8.	09.09.2019 17.09.2019	Emails received from Ex Director asking the Liquidator to facilitate a settlement between the parties.	No proposal given, the OTS dated 08.08.19 is annexed to email.	Email already annexed as Annexure A/2 to CA 412/2021
9.	23.09.2019	Email from Liquidator to Ex Director stating that no proposal has been received and if he is interested, he should submit a proposal under S. 230 of CA 3102		Email already annexed as Annexure A/2 to CA 412/2021

S.No	Date	Particular	Comments	Annexure
10.	26.09.2019	Email from ex director asking the Liquidator to call a meeting with creditors and shareholders of the CD 'so that terms and conditions of the scheme of compromise can be finalised'	For over 10 months the Ex-Director has not given any proposal under S. 230 CA 2013 other than the OTS which was rejected	Email already annexed as Annexure A/2 to CA 412/2021
11.	07.02.2020	Noting the NCLAT order, the NCLT records that no scheme has been given by the Ex-Director and grants him another opportunity to submit a scheme within 1 week	Still no scheme is received by the Liquidator	Copy of order dated 07.02.2020 is annexed as R6
12.	04.03.2020	The NCLT categorically stated that the only proposal received was an OTS which has been rejected by the sole financial creditor and therefore, liquidation must proceed.	Despite repeated extension by NCLAT and NCLT to submit a 230 CA 2013 proposal, no proposal was received	Copy of order dated 04.03.2020 annexed as R7 .
13.	19.06.2020	After over 9 months from the NCLAT order, the Ex-Director submits a scheme under S. 230 CA 2013 for the first	The scheme was not tied up in terms of payment and was time barred	Copy of the scheme is already annexed as Annexure A/12 to CA 412/2021

S.No	Date	Particular	Comments	Annexure
		time, disregarding all directions and laws.		
14.	26.06.2020	NCLT dismisses application of Ex Director challenging the auction and the reserve price, categorically stating that the auction must go ahead.	NCLT passed the order being aware of the scheme and the orders passed by NCLT and NCLAT. Further no appeal against the said order is preferred and order attains finality	Copy of order dated 26.06.20 is annexed and marked as R8 .
15.	27.07.2020	Meeting of the stakeholder committee called to consider the 'scheme' under 230 CA, 2013	That the scheme proposed by the Ex-Director, from a bare perusal could not be classified as a scheme. The funding was not tied up, the scheme was time barred and the only creditor was not interested. Accordingly, scheme was rejected	Copy of the minutes of the Stakeholders Committee dated 27.07.20 is annexed herewith and annexed as R9

(v) It is averred by the Liquidator that :

“i) From the above it is evident that despite the order of the NCLAT dated 05.09.2019 containing a direction to submit and consider a proposal in 90 days from liquidation, the Applicant never filed a proposal. As late as 07.02.2020 this Hon’ble Tribunal noting the order of the Hon’ble NCLAT recorded that no proposal has been given by the Applicant. This conduct and material concealment by the Applicant itself bars him from any relief. The conduct of the Applicant and a lack of proposal was further reiterated in order dated 04.03.2020 where this Hon’ble Tribunal noted that only an OTS has been received which has been rejected and in these circumstances Liquidation must proceed.”

(vi) The only ‘proposal’ or ‘scheme’ submitted by the Applicant was on 19.06.2020 and during the submission of the scheme, a similar application IA 2111/2020 was pending before this Hon’ble Tribunal. The said IA was disposed of on 26.06.2020 by the NCLT, rejecting all claims of the Applicant and specifically stating that the auction must go ahead. This Tribunal directed that:

“Therefore, the plea of the applicant being devoid of merits, we hereby reject the application of the applicant. Liquidator is directed to proceed with the auction as scheduled in accordance with the laid down procedure. In terms of the above the application stands dismissed.”

The aforesaid order was passed in presence of all parties with the knowledge that a ‘scheme’ under section 230 of Companies Act, 2013 had been filed. Despite the same, this Tribunal dismissed the plea of the Applicant and directed the respondent to proceed with the auction. The said order attained finality as the Applicant went to the Delhi High Court, which granted 15 days’ time to approach the NCLAT, but no such appeal was filed as the scheme stood time barred and rejected by the sole financial creditor.

(vii) The Ex-Director has only a single intention to stall the process of liquidation and ensure that the asset becomes completely

unviable and the efforts of the Liquidator and Creditor are nullified. The Liquidator has no personal stake in the present matter. Even today, subject to the order of the Hon'ble Bench, suitable steps may be taken for liquidation of outstanding amount of the sole financial creditor.

(viii) The Hon'ble NCLAT has directed the Liquidator to follow the provisions of law and it is submitted that the Liquidator in accordance with provisions of law has awaited for a Scheme to be submitted by the Applicant, but none came till June 2020. It is not a duty of the Liquidator to formulate a scheme or even to facilitate creation of the said 'scheme'. Once the Liquidator receives a Scheme which is viable, the liquidator is to approach the Tribunal for appropriate orders under section 230 of Companies Act, 2013. However, in the absence of a scheme within 90 days period as prescribed by the NCLAT in **SC Sekaran**, and **Y. Shivram's** case, the hands of the Liquidator are tied. It is an admitted position by the Applicant that the scheme was given in June 2020 much after the extended timelines by the Hon'ble NCLT and NCLAT. The ruling of the Hon'ble NCLAT has now been incorporated in the IBBI (Liquidation Process) Regulations, 2016, Regulation 2B(1) (w.e.f. 25.07.2019) and proviso to Rule 2B was inserted vide amendment dated 06.01.2020, prior to the section 230 Scheme was submitted, which bars the Applicant from submitting a scheme under section 230. The rule 2B(1) and the proviso thereto state as below :

2B. Compromise or arrangement.

(1) Where a compromise or arrangement is proposed under section 230 of the Companies Act, 2013, it shall be completed within ninety days of the order of liquidation under subsections (1) and (4) of section 33.

Provided that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement.

Therefore, the Liquidator has followed the provisions of law in dealing with the scheme submitted after the expiry of 90 days and after multiple extensions that were granted to the Applicant.

- (ix) Prior to June 2020, the only offer that was made by the applicant was the offer of OTS, which was duly rejected by the sole financial creditor including the one as recently as on 01.02.2021. In the absence of the consent of the Sole Financial Creditor, the process of compromise under Section 230 cannot proceed. Therefore, the prayer of the Applicant to direct the Liquidator to follow the order of the Hon'ble NCLAT is infructuous as no scheme was presented as per directions of the NCLAT. Even the scheme presented was duly placed before the sole financial creditor, who rejected the same.
- (x) As far as the 'scheme' itself is concerned, a mere perusal of the scheme would show that the same is not in fact a scheme under Section 230. The Applicant is proposing to pay the Financial Creditor, a total of Rs. 32 Crore including the liquidation cost by (sources of fund - page 114 of CA 412/2021) :
- (i) paying Rs. 3 crore, lying in the account of the CD, received as rent from the tenant at the only asset of the Corporate Debtor; and
 - (ii) balance 29 crore, to be arranged from 'friends and family'. There is not a whisper on how the said funds will be arranged or letter of intent from anyone thereof.

Earlier too, the Applicant had given OTS to the sole financial creditor with similar sources of funds (being HNIs, family friends) and the sole financial creditor had rejected the proposal.

- (xi) The proposal or scheme of the Applicant is not a scheme under the Companies Act 2013. That further, the Liquidator cannot be compelled to move the Tribunal pursuant to mere submission of a document that may be titled scheme under Section 230 CA 2013. There has to be a concrete proposal and the same must be

approved by the financial creditor. In its present form the 'scheme' cannot be considered and has to be disregarded at the threshold. For the Liquidator or any member to move an application under S. 230 CA 2013, it is a requirement as per the CA 2013 and the rules therein that an affidavit showing the consent of 75% of the creditors is required. Reference is made to S. 230 (2) [in particular 230(2)(c)(i)] of CA 2013 and Rule 3 (1) (iii) read with and rule 4 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, wherein a statement from the creditors is required that they are agreeable to the scheme prior to approaching the Tribunal.

- (xii) Even if the contentions of the Liquidator are disregarded and the contentions of the Applicant are believed to be true as far as the scheme and its handing is concerned, nothing prevented the Applicant from moving an appropriate application before the Tribunal under S. 230 CA 2013. The Section clearly states that the company, or any of the creditors or members of the company may approach the tribunal for an order to conduct a meeting. However, the basic threshold requirement has not been met, that of the creditors agreeing to the scheme and in the absence of the same, an application under S. 230 CA 2013 cannot be moved or be maintainable. It is the submission of the Liquidator that he has proceeded in accordance with provisions of law. The present 'scheme' cannot be treated as a scheme under the provisions of CA 2013 as it has no details as to the funding and availability of funds. Further, even if funds are available, a pre-requisite of the scheme under S. 230 CA 2013 is that 75% of the secured creditors agree to the scheme. In the present case, there is only one creditor with 100% share and the said creditor, SIDBI has rejected the 'scheme' earlier given in the form of 'OTS' on multiple occasions. Therefore, as far as the 'scheme' is concerned, nothing remains.

- (xiii) Notwithstanding anything to the contrary, the Applicant is at liberty to show his bona fides and convince the Tribunal and the sole financial creditor and respondent in the present applications to agree to the 'scheme' as the two-year time period for liquidation does not expire till May 2021. However, it is the submission of the Liquidator after having interacted with the Applicant through the entire process that the Applicant is not in a position to arrange funds and offer a workable solution to the outstanding. While it is entirely up to SIDBI, the sole financial creditor to agree to the scheme, it is pertinent that in relation to the asset in question, SIDBI has filed a complaint which has been converted to an FIR by the CBI against its own officials and the Applicant. One of the grievances of SIDBI is that the tenancy of the property was never disclosed to them. In such circumstances, it is not reasonable for a scheme of compromise to be accepted and therefore, this Tribunal may direct the Liquidation process to proceed.
- (xiv) The sole asset of the Corporate Debtor in liquidation is a Banquet Hall at D-13, Udyog Nagar, Peera Garhi, New Delhi. The said property is being run by Respondent No. 1, M/s RPM Banquet under their name and Style of 'Lavanya Dreams' built on Plot area of approx.3171.40 sq. yds. having a superstructure/covered area of approx. 77,000 sq. ft (hereinafter the **“sole asset”**).
- (xv) The Respondent/Liquidator has made multiple attempts to sell the property of the Corporate Debtor via public auction. However, the same got failed. It is added that the Reserve price of the property was fixed in accordance with Schedule 1 of the Liquidation Rules. The Liquidator, acknowledging the value of the asset, has reduced the reserve price lesser than the maximum extent permissible under the Liquidation Rules. Liquidator has placed the following tabular representation, indicating change in EMD and the reserve price of the property.

Date of Auction	Reserve Price	Reduction (percentage)	EMD	Reduction (percentage)
28-03-2020	46,50,00,000.00		2,00,00,000.00	
29-06-2020	46,50,00,000.00	0%	2,00,00,000.00	0%
21-09-2020	42,00,00,000.00	9.68%	50,00,000.00	75%
27-11-2020	40,00,00,000.00	4.76%	50,00,000.00	0%
05-02-2021	37,50,00,000.00	6.25%	40,00,000.00	20%

6. That the Applicant has filed its written submissions and has added the following additional submissions:

- (i) There is no time prescribed in law to propose compromise/arrangement. Reading of 90 days from the date of liquidation is incorrect, as Regulation 2B of IBBI (Liquidation Process) Regulation 2016, does not prescribe a timeline for submission of a scheme but for disposal thereof.
- (ii) Emails dated 09.09.2019 and 17.09.2019 to Liquidator contained compromise/arrangement from the Ex-director, pursuant to the order of NCLAT and therefore there was no delay from side of Ex-Director.
- (iii) From any angle, the timeline is not mandatory but directory as even in the matter of **Y. Shivram vs. S. Dhanpal**, the Hon'ble NCLAT has observed that:

“In case, for any reason the liquidation process u/s 230 takes more time, it is open to the AA to extend the period, if there is chance of the approval of arrangement of Scheme”

7. After hearing submissions of both the parties and perusing application, documents and written submissions placed on record, this Bench notes that before approaching the Hon'ble NCLAT, the Promoters of the Corporate Debtor had made an attempt to settle the matter. That the order dated 11.02.2019 passed by this authority records that the Corporate Debtor “is ready and willing to pay the entire admitted claim to SIDBI.” However, next order dated 24.04.2019 records that “...even though the corporate debtor is ready and willing to liquidate all outstanding dues, the same is not acceptable to them.....” (SIDBI), the sole member of CoC.

8. That the Applicant has made prayer for considering the Scheme in the light of the order dated 05.09.2019 passed by Hon'ble NCLAT in **Company Appeal (AT) (Ins) No. 628/2019**. It is, therefore, necessary to visit the operative part of the order, which is reproduced below:

“The Appellant, member of the ‘Corporate Debtor’, may approach the ‘Liquidator’ in terms of Section 230 of the Companies Act, 2013 for making Arrangement and Scheme by liquidating the outstanding dues. In such case, the ‘Liquidator’ will consider the same in accordance with the guidelines laid down by this Appellate Tribunal in ‘Y. Shivram vs. S. Dhanapal & Ors.’ in ‘Company Appeal (AT) (Insolvency) No. 224 of 2018’ after calling for such schemes offered by creditors/class of creditors (Committee of Creditors).”

9. That it is pointed out by the Liquidator in its reply that the scheme was submitted by the applicant on 19.06.2020. The Liquidator did not consider the ‘Scheme’ mainly on the ground that the Applicant did not submit the scheme within 90 days from the order of Liquidation as prescribed by the Hon'ble NCLAT in **SC Sekaran**, and **Y. Shivram’s** case. Therefore, it was submitted by the Liquidator that the hands of the Liquidator are tied. The Liquidator/Respondent has further placed emphasis on the Regulation 2B(1) of IBBI (Liquidation Process) Regulations, 2016, which is reproduced below :

2B. Compromise or Arrangement

(1). Where a compromise or arrangement is proposed under section 230 of the Companies Act, 2013, it shall be completed within ninety days of the order of liquidation under subsections (1) and (4) of section 33.

Provided that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement.

In the light of the aforesaid provision, it has been submitted by the Liquidator that it has followed the provisions of law in dealing with the Scheme submitted by the Applicant after expiry of the period of 90 days.

10. Here, it is felt necessary to recapitulate the sequence of relevant events. The Liquidation of the Corporate Debtor was ordered on 31.05.2019. The Hon'ble NCLAT had permitted the Applicant to submit the Scheme under Section 230 on 05.09.2019. Evidently, the period of 90 days from the date of commencement of Liquidation had already passed on the date when the liberty was granted by the Hon'ble NCLAT to the Applicant to submit the Scheme under Section 230.

11. That in the same order, the Hon'ble NCLAT has also held that the Liquidator shall follow the procedure laid down under **Y. Shivram vs. S. Dhanpal & Ors. Company Appeal (AT) (Insolvency) No. 224 of 2018 dated 27.02.2019 case**. Therefore, it is necessary to visit the Judgement dated 27.02.2019 in Y. Shivram vs. S. Dhanpal & Ors. Company Appeal (AT) (Insolvency) No. 224 of 2018, wherein the following is observed with regard to timeline for taking steps under Section 230 of the Companies Act, 2013.

“17. Normally, the total period for liquidation is to be completed preferably within two years. Therefore, in “S.C. Sekaran v. Amit Gupta & Ors.” (Supra), this Appellate Tribunal allowed 90 days’ time to take steps under Section 230 of the Companies Act, 2013. In case, for any reason the liquidation process under Section 230 takes more time, it is open to the Adjudicating Authority (Tribunal) to extend the period if there is a chance of approval of arrangement of the scheme.”

12. Here, we observe that the IBC does not prescribe any such timeline as prescribed in the Regulations for submission of the Scheme. However, the judgement in the case of Y. Shivram vs. S. Dhanpal & Ors. (Supra) allows the Adjudicating Authority (Tribunal) to extend the period/timeline if there is a chance of approval of arrangement of the scheme. Thus, it could be inferred that the timeline prescribed in the Liquidation regulations is directory in nature.

13. That in the instant case, the OTS proposals made by Applicant were rejected by SIDBI. However, the Scheme proposed by the Applicant on 19.06.2020 has neither been placed by the Liquidator before the COC nor has been considered by the sole financial creditor, SIDBI.

14. That it is also a matter of record that the Liquidator has made multiple attempts to sell the assets of the Corporate Debtor via Public Auction. However, these attempts have not yielded results. The Liquidator has not been successful in selling the assets of the Corporate Debtor. It is also a fact that the Liquidator, who was also the RP, had failed to bring a Resolution Plan for the Corporate Debtor resulting in Liquidation of Corporate Debtor. That as on date, there is a situation of a deadlock and no progress has been made by the Corporate Debtor in the last 2 years. That the Liquidator has neither been able to auction the assets of the Corporate Debtor nor it has placed the Scheme of the Corporate Debtor before the COC or the sole financial creditor SIDBI.

15. That in the circumstances, the only route available to the Corporate Debtor to come out of the clutches of the Liquidation is via the Scheme of Compromise and Arrangement proposed under Section 230 of Companies Act, 2013. That here, it is worthwhile referring to the Judgment of Hon'ble Supreme Court in '**Meghal Homes Pvt. Ltd. vs. Shree Niwas Girni K.K. Samiti & Ors. - (2007) 7 SCC 753**', where it is observed and held that:

“33. The argument that Section 391 would not apply to a company which has already been ordered to be wound up, cannot be accepted in view of the language of Section 391(1) of the Act, which speaks of a company which is being wound up. If we substitute the definition in Section 390(a) of the Act, this would mean a company liable to be wound up and which is being wound up. It also does not appear to be necessary to restrict the scope of that provision considering the purpose for which it is enacted, namely, the revival of a company including a company that is liable to be wound up or is being wound up and normally, the attempt must be to ensure that rather than dissolving a company it is allowed to revive. Moreover, Section 391(1)(b) gives a right to the liquidator in

the case of a company which is being wound up, to propose a compromise or arrangement with creditors and members indicating that the provision would apply even in a case where an order of winding up has been made and a liquidator had been appointed. Equally, it does not appear to be necessary to go elaborately into the question whether in the case of a company in liquidation, only the Official Liquidator could propose a compromise or arrangement with the creditors and members as contemplated by Section 391 of the Act or any of the contributories or creditors also can come forward with such an application.”

16. Further, the Hon’ble Supreme Court in the matter of **Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. in Writ Petition (Civil) No. 99 of 2018**’ dated 25th January, 2019, has also observed that :

*“11.What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. **Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern.**”*

17. In nutshell, from the aforesaid analysis, we find that -

- (i) There is no timeline prescribed under the Code to submit the Scheme of Compromise and Arrangement Act 2013,
- (ii) Liquidator in its reply has admitted that the Scheme was submitted by the applicant on 19.06.2020,
- (ii) The Hon’ble NCLAT vide its order dated 05.09.2019 has directed the ‘Liquidator’ to consider the same in accordance with the guidelines laid down by this Appellate Tribunal in ‘Y. Shivram vs. S. Dhanapal & Ors.’
- (iii) The Regulation 2B(1) of IBBI (Liquidation Process) Regulations, 2016 is directory in nature,
- (iv) The Scheme proposed by the Applicant has not been considered on merits by the Creditors, and
- (v) Liquidator has not succeeded in selling the assets of the Corporate despite Debtor despite multiple attempts.

Since the objective of the IBC is to prefer resolution over liquidation and maximisation of the value of assets of the Corporate Debtor at any stage, it would be in fitness of the scheme of IBC to make all possible efforts to revive the Corporate Debtor.

18. **In sequel to the above, we hereby allow the Application** and direct the Liquidator to place without further delay, the Scheme in accordance with Section 230 of the Companies Act, 2013 submitted by the Applicant, before the Creditors in compliance of the directions of the Hon'ble NCLAT.

19. That the Liquidator shall file its status report in compliance of this order within 30 days from today. In case the scheme is rejected by the Creditors on merits, the reason therefor shall be recorded in writing.

20. That the Liquidator shall maintain the status quo with respect to assets of the Corporate Debtor till the time, the decision on the Scheme on merits is taken by Creditors.

Sd/-
(L. N. Gupta)
Member (T)

Sd/-
(Abni Ranjan Kumar Sinha)
Member (J)