

**THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
AT NEW DELHI**

**I.A. 1490/2020
IN
Company Petition No. (IB)-590 (PB)/2018**

In the matter of:

INVEST ASSET SECURITISATIONS &
RECONSTRUCTION PVT. LTD.

....APPLICANT

vs.

M/s. MOHAN GEMS & JEWELS PVT. LTD.

.....RESPONDENT

***Order Dictated on: 04.08.2020
Order Delivered on: 16.09.2020***

Coram:

**SH. B.S.V. PRAKASH KUMAR,
HON'BLE ACTG. PRESIDENT
SH. HEMANT KUMAR SARANGI,
HON'BLE MEMBER (TECHNICAL)**

For the Liquidator: Mr. Shashwat Parihar & Mr. Shashwat Anand, Advocates
For the Applicant/RP: Mr. Nitesh Jain, Ms. Shruti Pandey, Advocates
Me. Debashish Nanda

ORDER

PER-B.S.V. KUMAR PRAKASH , ACTG. PRESIDENT

1. It is an application filed by the Liquidator seeking for closure of the Liquidation Process as per Regulation 45(3) (a) of IBBI Liquidation Process Regulations, 2016 (the Regulations), on the premise the Corporate Debtor was sold as going concern in the E-auction held on 20.11.2019 declaring Mr. Vijay Verma is the highest bidder at a bid price of Rs.4,51,99,713. The asset of the Corporate Debtor is a jewellery shop, sold in the liquidation process. After admission of the case, since no expression of interest had come responding to the Invitation of Interest published, the RP, at the instance of the CoC, obtained liquidation order from this Bench. During liquidation, upon publication of E-Auction notice to sell the corporate Debtor as going-concern, the aforesaid person purchased the asset at the rate mentioned above. For the company was sold as going concern, now the liquidator is before this Bench seeking for closure of the liquidation process so that highest bidder, along with another will become directors, paid up capital shall stand reduced to Rs.4.50Crores divided into 45,00,00 shares of Rs10 each and balance consideration of Rs.1,99,737 to be treated as unsecured loan. That the redrawn share capital, reserves and share premium, if any, to form balance sheet, shall be in compliance with other provisions of the Companies Act and other applicable laws to properly represent the purchase consideration

after nullifying the debit balance of profit and Loss account from the present capital and reserves.

2. For us, this whole process has become mind boggling. We don't know where this arrangement has come from; one thing is for sure it is not compatible with the structural arrangement given under the Companies Act. This liquidator has not stated how this arrangement is in sync with the Companies Act. Moreover, there is no pleading in the application that CoC, while proposing for liquidation, recommended as per CIRP Regulation 39C that the liquidator may first explore sale of the corporate debtor as a going concern, then pool up the assets and liabilities by the liquidator and **the company ought to be sold as going concern** and that recommendation ought to be approved by this Bench at the time of ordering for liquidation. Assuming what this liquidator says is correct, then also, unless sale of the corporate debtor as a going concern as stated in Section 39C of CIRP Regulation is approved by the CoC and then by this Bench, the liquidator on his own cannot opt for sale of the corporate debtor as a going concern. He says he himself took a decision looking at the procedure laid under Liquidation Process Regulation 32A. Moreover it is a shop; it doesn't matter whether it continues as a company or as a proprietary concern.

3. As to the relief sought by the Liquidator for dispensation of dissolution, when this Bench has put it to the Liquidator counsel as to how the liquidation process could be closed without dissolving

the corporate debtor as stated u/s 54 of the Insolvency and Bankruptcy Code, 2016, the Liquidator counsel has referred Liquidation Regulations 32(e) and 32A (1) to say that Corporate Debtor could be sold as going concern and Liquidation Regulation 45(3)(a) to say that liquidation Process of the Corporate Debtor could be closed without opting for dissolution of the Corporate Debtor despite **Section 54 of the Insolvency and Bankruptcy Code** (the Code) says that **where the assets of the Corporate Debtor have been completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such Corporate Debtor and this Authority shall dissolve the Corporate Debtor and the copy be forwarded to the RoC concerned within seven days.**

For the sake of clarity, Section 54 is reproduced:

“Section 54 (1) Where the assets of the corporate debtor have been completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate debtor.

(2) The Adjudicating Authority shall on application filed by the liquidator under sub-section (1) order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.

(3) A copy of an order under sub-section (2) shall within seven days from the date of such order, be forwarded to the authority with which the corporate debtor is registered.”

4. By looking at this argument and section 54, it is clear that the mandate u/s 54 is to terminate the life of corporate debtors by dissolving them after liquidation of their assets. As against this statutory mandate, can IBBI pass Regulations directing dispensation of operation of section 54 by devising a concept not present in the Code, stating that to maximize the value of the Corporate Debtor the liquidator may sell the corporate debtor as a going concern or business of the corporate debtor as a going concern and close the liquidation process with the approval of this Adjudicating Authority bypassing dissolution mandate u/s 54? If it is selling business of the corporate debtor, we may not call for scrutiny of the Regulations because business will remain tied up with undertaking. But selling of a company is not envisaged either under IBC or in corporate jurisprudence. It is unknown to law and beyond the discretion given to IBBI under section 240 (2) (y) of the Code.

5. Regulating power in Section 240 (2) (y) is limited to manner of sale, but not to sell the company itself. In a company, assets come and go, but a company being a juridical person with perpetual succession, it cannot be sold. It can only be dissolved. This wisdom of parliament or jurisprudence developed over centuries cannot be wiped out by a Regulation. It may look good for eyes to sell the company to the purchaser along with the assets when it is shown as a going concern on the ground of maximization of value, but this is not in the hands of either this Authority or IBBI. We are not here

to decide what is right or what is not right. What is right is already decided by the Parliament. We are here only to implement.

6. The legal issue involved in the relief sought is whether the relief sought could be granted or not, if not why it could not be granted. Answer is – this being a Tribunal, it can exercise its powers only to the extent conferred upon in the statute. For there being no mandate in the statute to grant such relief, this Tribunal is barred from passing such relief. We must always remind ourselves Courts can pass any order unless it is specifically or impliedly barred; when it comes to Tribunals, they cannot exercise adjudicating powers beyond the power conferred upon. In this Code, this Tribunal is not conferred with general power to deal with any issue falling under this Code. That being the scenario, we can't even think of granting a relief repugnant to the mandate under section 54 of Code. For that matter no authority, no matter whether it is a court or Tribunal or any other authority bound by this Code, could grant relief repugnant to the provision of law unless such law is struck down.

7. In the Liquidation Regulation 45 (3), IBBI has given a peremptory direction to the liquidator to file an application for closure of the liquidation process of the Corporate Debtor where the Corporate Debtor is sold as a going concern. Owing to this direction, the liquidator, without even having approval under CIRP Regulation 39C, has filed it.

8. But the problem involved in this situation is, the peremptory direction given to the liquidator implicitly directs this Adjudicating Authority to grant this relief. These Regulations are flawed for many reasons, the one we immediately mention is, this Authority is not governed by IBBI, and it is governed by the Code. The Code in Section 54 says after completion of liquidation process, the Corporate Debtor shall be dissolved. We must with full responsibility state that so long as Regulations are in conformity with the provisions of the Code, and for implementation of the Code as stated in section 240 (1), this Authority will approve those actions. Now the Regulations not being in conformity with the Code, we must necessarily deal with the issue to come out of this tussle.

9. Before getting into this wrangle, we shall first put it to ourselves as to whether this Adjudicating Authority/Tribunal has competency to deal with this conflict, when IBBI conferred with Regulating Power under the same enactment has regulated liquidation process in a clear mandate (Regulation 45(3)(a)) that the liquidator **shall submit an application before this Authority along with final report for closure of liquidation where the corporate debtor is sold as a going concern.** But aforesaid regulation is repugnant to the mandate u/s 54, because after liquidation of the assets of the corporate debtor, an application shall be filed for dissolution of the corporate debtor and same shall be allowed.

10. With regard to the competency of this Tribunal to deal with subordinate/delegated legislation, we must visit the ratio decided by Hon'ble Supreme Court in ***L. Chandra Kumar vs. Union of India and Others (1997) 3 SCC 261 (para 93)*** to say that Tribunals cannot test the vires of the Parent Legislation, because the Tribunal itself is the creature of the said Statute, but they are competent to test the vires of subordinate/delegated legislation. We are aware that the source for establishment of Administrative Tribunals has come from Administrative Tribunals Act, 1985 deriving its strength from Article 323A of Constitution of India. However for this Adjudicating Authority is also a Tribunal akin to any other Tribunal, then this Tribunal is fastened with a duty not to get deviated from implementation of the provisions of the Statute by looking at the Regulations not consistent with the provisions of the Statute.

11. The twin test to be followed while dealing with subordinate legislation is –

1 Rules/Regulations shall not be framed in matters not contemplated under the Act,

2. Rule shall be in conformity with the statute because subordinate legislation cannot be violative of any plenary legislation made by Parliament or the State Legislature.

12. Now the point bothering this Bench to grant the relief sought above is, as to how this Bench could pass this relief asking for closure of the liquidation process without dissolving the Corporate

Debtor as long as Section 54 of the Code passed by the Parliament is in force. Can such a relief be passed by this Authority by looking at the liquidation Regulations issued with the power conferred upon IBBI under Section 240 (**Regulation making power**) and Section 196 (**Powers and Functions of IBBI**) of the Code?

13. If the Code is carefully read, it could be ascertained that wherever the Code felt that IBBI assistance is required, it has been specifically stated ***“as specified by the Board or in such manner as may be specified or prescribed”*** we must at the cost of repetition reiterate, this clause is indicative of the fact that beyond the procedure inbuilt in the Code, if additional mechanism or paraphernalia is required to accomplish implementation of the statute, there it has been mentioned as ***“as specified by the Board or in such manner as may be specified or prescribed”***. **The point to remember is, it is for supplementation, not for supplantation.**

14. To know what the relevant statutory provisions are saying, we shall reproduce all those provisions, which are as follows:

“Section 196 Powers and Functions of the Board

196. (1) The Board shall, subject to the general direction of the Central Government, perform all or any of the following functions namely:—

(a) register insolvency professional agencies, insolvency professionals and information utilities and renew, withdraw, suspend or cancel such registrations;

(aa) promote the development of, and regulate, the working and practices of, insolvency professionals, insolvency professional agencies and information utilities and other institutions, in furtherance of the purposes of this Code;

(b) specify the minimum eligibility requirements for registration of insolvency professional agencies, insolvency professionals and information utilities;

(c) levy fee or other charges for carrying out the purposes of this Code, including fee for registration and renewal of insolvency professional agencies, insolvency professionals and information utilities;

(d) specify by regulations standards for the functioning of insolvency professional agencies, insolvency professionals and information utilities;

(e) lay down by regulations the minimum curriculum for the examination of the insolvency professionals for their enrolment as members of the insolvency professional agencies;

(f) carry out inspections and investigations on insolvency professional agencies, insolvency professionals and information utilities and pass such orders as may be required for compliance of the provisions of this Code and the regulations issued hereunder;

(g) monitor the performance of insolvency professional agencies, insolvency professionals and information utilities and pass any directions as may be required for compliance of the provisions of this Code and the regulations issued hereunder;

(h) call for any information and records from the insolvency professional agencies, insolvency professionals and information utilities;

(i) publish such information, data, research studies and other information as may be specified by regulations;

(j) specify by regulations the manner of collecting and storing data by the information utilities and for providing access to such data;

(k) collect and maintain records relating to insolvency and bankruptcy cases and disseminate information relating to such cases;

(l) constitute such committees as may be required including in particular the committees laid down in section 197;

(m) promote transparency and best practices in its governance;

(n) maintain websites and such other universally accessible repositories of electronic information as may be necessary;

(o) enter into memorandum of understanding with any other statutory authorities;

(p) issue necessary guidelines to the insolvency professional agencies, insolvency professionals and information utilities;

(q) specify mechanism for redressal of grievances against insolvency professionals, insolvency professional agencies and information utilities and pass orders relating to complaints filed against the aforesaid for compliance of the provisions of this Code and the regulations issued hereunder;

(r) conduct periodic study, research and audit the functioning and performance of to the insolvency professional agencies,

insolvency professionals and information utilities at such intervals as may be specified by the Board;

(s) specify mechanisms for issuing regulations, including the conduct of public consultation processes before notification of any regulations;

(t) make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor; and

(u) perform such other functions **as may be prescribed.**

(2) The Board may make model bye-laws to be adopted by insolvency professional agencies which may provide for—

(a) the minimum standards of professional competence of the members of insolvency professional agencies;

(b) the standards for professional and ethical conduct of the members of insolvency professional agencies;

(c) requirements for enrolment of persons as members of insolvency professional agencies which shall be non-discriminatory;

Explanation.—For the purposes of this clause, the term "non-discriminatory" means lack of discrimination on the grounds of religion, caste, gender or place of birth and such other grounds as may be specified;

(d) the manner of granting membership;

(e) setting up of a governing board for internal governance and management of insolvency professional agency in accordance with the regulations specified by the Board;

(f) the information required to be submitted by members including the form and the time for submitting such information;

(g) the specific classes of persons to whom services shall be provided at concessional rates or for no remuneration by members;

(h) the grounds on which penalties may be levied upon the members of insolvency professional agencies and the manner thereof;

(i) a fair and transparent mechanism for redressal of grievances against the members of insolvency professional agencies;

(j) the grounds under which the insolvency professionals may be expelled from the membership of insolvency professional agencies;

(k) the quantum of fee and the manner of collecting fee for inducting persons as its members;

(l) the procedure for enrolment of persons as members of insolvency professional agency;

(m) the manner of conducting examination for enrolment of insolvency professionals;

(n) the manner of monitoring and reviewing the working of insolvency professional who are members; (o) the duties and other activities to be performed by members;

(p) the manner of conducting disciplinary proceedings against its members and imposing penalties;

(q) the manner of utilising the amount received as penalty imposed against any insolvency professional

(3) Notwithstanding anything contained in any other law for the time being in force, while exercising the powers under this Code, the Board shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:—

(i) the discovery and production of books of account and other documents, at such place and such time as may be specified by the Board;

(ii) summoning and enforcing the attendance of persons and examining them on oath;

(iii) inspection of any books, registers and other documents of any person at any place;

(iv) issuing of commissions for the examination of witnesses or documents.

240. Power to make Regulations.

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

(2) **In particular, and without prejudice to the generality of the foregoing power,** such regulations may provide for all or any of the following matters, namely: —

(a) the form and the manner of accepting electronic submission of financial information under sub-clause (a) of clause (9) of section 3;

(b) the persons to whom access to information stored with the information utility may be provided under sub-clause (d) of clause (9) of section 3;

(c) the other information under sub-clause (f) of clause (13) of section 3; (d) the other costs under clause (e) of sub-section (13) of section 5;

(e) the cost incurred by the liquidator during the period of liquidation which shall be liquidation cost under sub-section (16) of section 5;

(f) the other record or evidence of default under clause (a), and any other information under clause (c), of sub-section (3) of section 7;

[(g) * * *] (h) the period under clause (a) of sub-section (3) of section 10;

(i) the supply of essential goods or services to the corporate debtor under subsection (2) of section 14;

[(ia) circumstances in which supply of critical goods or services may be terminated, suspended or interrupted during the period of moratorium under sub-section (2A) of section 14;]

(j) the manner of making public announcement under sub-section (2) of section 15; 3 [(ja) the last date for submission of claims under clause (c) of sub-section (1) of section 15;]

(k) the manner of taking action and the restrictions thereof under clause (b) of sub-section (2) of section 17;

(l) the other persons under clause (d) of sub-section (2) of section 17; (m) the other matters under clause (d) of sub-section (2) of section 17;

(n) the other matters under sub-clause (iv) of clause (a), and the other duties to be performed by the interim resolution professional under clause (g), of section 18;

[(na) the number of creditors within a class of creditors under clause (b) of sub-section (6A) of section 21;

(nb) the remuneration payable to authorized representative under clause (ii) of the proviso to sub-section (6B) of section 21;

(nc) the manner of voting and determining the voting share in respect of financial debts under sub-section (7) of section 21;]

(o) the persons who shall comprise the committee of creditors, the functions to be exercised such committee and the manner in which functions shall be exercised under the proviso to sub-section (8) of section 21;

(p) the other electronic means by which the members of the committee of creditors may meet under sub-section (1) of section 24;

(q) the manner of assigning voting share to each creditor under sub-section (7) of section 24;

(r) the manner of conducting the meetings of the committee of creditors under subsection (8) of section 24;

(s) the manner of appointing accountants, lawyers and other advisors under clause (d) of sub-section (2) of section 25;

[(sa) other conditions under clause (h) of sub-section (2) of section 25;

(t) the other actions under clause (k) of sub-section (2) of section 25;

(u) the form and the manner in which an information memorandum shall be prepared by the resolution professional sub-section (1) of section 29;



(v) the other matter pertaining to the corporate debtor under the Explanation to subsection (2) of section 29;

(w) the manner of making payment of insolvency resolution process costs under clause (a), the manner of [payment of debts] under clause (b), and the other requirements to which a resolution plan shall conform to under clause (d), of subsection (2) of section 30;

[(wa) other requirements under sub-section (4) of section 30;]

(x) the fee for the conduct of the liquidation proceedings and proportion to the value of the liquidation estate assets under sub-section (8) of section 34;

(y) the manner of evaluating the assets and property of the corporate debtor under clause (c), the manner of selling property in parcels under clause (f), the manner of reporting progress of the liquidation process under clause (n), and the other functions to be performed under clause (o), of sub-section (1) of section 35;

(z) the manner of making the records available to other stakeholders under subsection (2) of section 35;

(za) the other means under clause (a) of sub-section (3) of section 36;

(zb) the other assets under clause (e) of sub-section (4) of section 36;

(zc) the other source under clause (g) of sub-section (1) of section 37;

(zd) the manner of providing financial information relating to the corporate debtor under sub-section (2) of section 37;

(ze) the form, the manner and the supporting documents to be submitted by operational creditor to prove the claim under sub-section (3) of section 38;

(zf) the time within which the liquidator shall verify the claims under sub-section (1) of section 39;

(zg) the manner of determining the value of claims under section 41;

(zh) the manner of relinquishing security interest to the liquidation estate and receiving proceeds from the sale of assets by the liquidator under clause (a), and the manner of realizing security interest under clause (b) of sub-section (1) of section 52;

(zi) the other means under clause (b) of sub-section (3) of section 52;

(zj) the manner in which secured creditor shall be paid by the liquidator under subsection (9) of section 52;

(zk) the period and the manner of distribution of proceeds of sale under sub-section (1) of section 53;

(zl) the other means under clause (a) and the other information under clause (b) of section 57;

(zm) the conditions and procedural requirements under sub-section (2) of section 59;

(zn) the details and the documents required to be submitted under sub-section (7) of section 95;

(zo) the other matters under clause (c) of sub-section (3) of section 105;

(zp) the manner and form of proxy voting under sub-section (4) of section 107;

(zq) the manner of assigning voting share to creditor under sub-section (2) of section 109;

(zr) the manner and form of proxy voting under sub-section (3) of section 133;

(zs) the fee to be charged under sub-section (1) of section 144;

(zt) the appointment of other officers and employees under sub-section (2), and the salaries and allowances payable to, and other terms and conditions of service of, such officers and employees of the Board under sub-section (3), of section 194;

(zu) the other information under clause (i) of sub-section (1) of section 196;

(zv) the intervals in which the periodic study, research and audit of the functioning and performance of the insolvency professional agencies, insolvency professionals and information utilities under clause (r), and mechanism for disposal of assets under clause (t), of sub-section (1) of section 196;

(zw) the place and the time for discovery and production of books of account and other documents under clause (i) of sub-section (3) of section 196;

(zx) the other committees to be constituted by the Board and the other members of such committees under section 197;

(zy) the other persons under clause (b) and clause (d) of section 200;

(zz) the form and the manner of application for registration, the particulars to be contained therein and the fee it shall accompany under sub-section (1) of section 201;

(zza) the form and manner of issuing a certificate of registration and the terms and conditions thereof, under sub-section (3) of section 201;

(zzb) the manner of renewal of the certificate of registration and the fee therefor, under sub-section (4) of section 201;

(zzc) the other ground under clause (d) of sub-section (5) of section 201;

(zzd) the form of appeal to the National Company Law Appellate Tribunal, the period within which it shall be filed under section 202;

(zze) the other information under clause (g) of section 204;

(zzf) the other grounds under Explanation to section 196;

(zzg) the setting up of a governing board for its internal governance and management under clause (e), the curriculum under clause (l), the manner of conducting examination under clause (m), of section 196;

(zzh) the time within which, the manner in which, and the fee for registration of 148 insolvency professional under sub-section (1) of section 207;

(zzi) the categories of professionals or persons, the qualifications and experience and the fields under sub-section (2) of section 207;

(zzj) the manner and the conditions subject to which the insolvency professional shall perform his function under clause (f) of sub-section (2) of section 208;

(zzk) the form and manner in which, and the fee for registration of information utility under sub-section (1) of section 210;

(zzl) the form and manner for issuing certificate of registration and the terms and conditions thereof, under sub-section (3) of section 210;

(zzm) the manner of renewal of the certificate of registration and the fee therefor, under sub-section (4) of section 210;

(zzn) the other ground under clause (d) of sub-section (5) of section 210;

(zzo) the form, the period and the manner of filing appeal to the National Company Law Appellate Tribunal under section 211;

(zzp) the number of independent members under section 212;

(zzq) the services to be provided by information utility and the terms and conditions under section 213;

(zzr) the form and manner of accepting electronic submissions of financial information under clause (b) and clause (c) of section 214;

(zzs) the minimum service quality standards under clause (d) of section 214;

(zzt) the information to be accessed and the manner of accessing such information under clause (f) of section 214;

(zzu) the statistical information to be published under clause (g) of section 214;

(zzv) the form, the fee and the manner for submitting or accessing information under sub-section (1) of section 215;

(zzw) the form and manner for submitting financial information and information relating to assets under sub-section (2) of section 215;



(zzx) the manner and the time within which financial information may be updated or modified or rectified under section 216;

(zzy) the form, manner and time of filing complaint under section 217;

(zzz) the time and manner of carrying out inspection or investigation under subsection (2) of section 218;

(zzza) the manner of carrying out inspection of insolvency professional agency or 149 insolvency professional or information utility and the time for giving reply under section 219;

(zzzb) the procedure for claiming restitution under sub-section (6), the period within which such restitution may be claimed and the manner in which restitution of amount may be made under sub-section (7) of section 220;

(zzzc) the other funds of clause (c) of sub-section (1) of section 222.

15. If these two provisions are read together, it could be understood that Section 196 is to confer powers and functions upon IBBI, Section 240 is to confer upon IBBI general power (subsection 1) to regulate and particular power (subsection 2) to regulate the areas mentioned in subsection-2. If section 240 (2) regulating powers are read along with other provisions of the Code, it is evident that in whichever Section it has been mentioned as **“as specified by the Board or in such manner as may be specified or prescribed”**, over those sections alone, regulating power is conferred upon IBBI in subsection 2 of section 240.

16. Of course implicit overriding effect is given in Section 240 (1) of the Code stating that regulating power over particular Sections

will not cause prejudice to the general regulating power of subsection 1, which is as follows:

*“(1). The Board may, by notification, **make regulations consistent with this Code and the rules** made there under, **to carry out the provisions of this Code**”*

17. By reading this sub section, it is understandable that IBBI is given discretion to notify regulations. But those regulations are qualified by later-part of the subsection above.

18. Those regulations shall be not only consistent with the Code but shall also be consistent with Rules issued u/s 239. So these Regulations shall be subordinate and supplemental to the Code as well as Rules.

19. The purpose and object of the Regulations issued by IBBI is to carry out the provisions of the Code, not for carrying out the purpose of the Code. It is in a way carrying out the provisions of Code will tantamount to carrying out the purpose of maximization of value as well. Here IBBI cannot jump the gun and say it has changed the procedure for maximization of value. As we all know, once the CIRP period is over, CoC will not remain in existence. Exercising commercial wisdom by the CoC has its own limitations. They can decide how much they get from the Resolution plan. The financial creditors converting into stakeholders during liquidation can express their wish in the meetings, but the liquidator is not bound by such decisions.

20. It is explicitly mentioned in subsection -1 of section 240, Regulations are to sub-serve sections of the Code in implementation. There are umpteen citations of Hon'ble Supreme Court saying though general power is given in one sub section and when the factors enumerated in another subsection are illustrative in nature, the rule making power mostly limited to those

illustrations only. In this case, IBBI is to regulate the working of insolvency professionals relating to the duties of them. IBBI regulating power is even subject to rule-making power of the central government u/s 239 of the Code. In ***Kerala Samsthana Chethu Thozhilali Union v. State of Kerala (2006) 4 SCC 327***, it has been held as follows:

“17. A rule is not only required to be made in conformity with the provisions of the Act where under it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any plenary legislation made by the Parliament or the State Legislature.

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37. Furthermore, the terms and conditions which can be imposed by the State for the purpose of parting with its right of exclusive privilege more or less has been exhaustively dealt with in the illustrations in sub-section (2) of Section 29 of the Act. There cannot be any doubt whatsoever that the general power to make rules is contained in sub-section (1) of Section 29. The provisions contained in sub-section (2) are illustrative in nature. But, the factors enumerated in sub-section (2) of Section 29 are indicative of the heads under which the statutory framework should ordinarily be worked out.

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43. The submission of Mr. Iyer that there exists a distinction between carrying out the provisions of the Act and the

purpose of the Act, is not relevant for our purpose. The power of delegated legislation cannot be exercised for the purpose of framing a new policy. The power can be exercised only to give effect to the provisions of the Act and not de hors the same. While considering the carrying out of the provisions of the Act, the court must see to it that the rule framed therefore is in conformity with the provisions thereof.

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46. In *Hotel Balaji and Others v. State of A.P. and Others* [1993 Supp (4) SCC 536], whereupon Mr. Iyer placed reliance, it is stated:

"The necessity and significance of the delegated legislation is well accepted and needs no elaboration at our hands. Even so, it is well to remind ourselves that rules represent subordinate legislation. They cannot travel beyond the purview of the Act. Where the Act says that rules on being made shall be deemed "as if enacted in this Act", the position may be different. (It is not necessary to express any definite opinion on this aspect for the purpose of this case.) But where the Act does not say so, the rules do not become part of the Act."

21. The same ratio is held in *I.T.C Bhadrachalam Paper Boards and another vs Mandal Revenue Officer, AP and others* (1996) 6 SCC 634, *Gupta Modern Breweries vs State of J&K and Others* (2007) 6 SCC 317, and *Cellular Operators Association of India and others vs Telecom Regulatory Authority of India and Others* (2016) 7 SCC 703.

22. In view thereof, delegated legislation shall not overreach Sections - When the dissolution is made explicit, IBBI ought not to have ignored the mandate u/s 54 of the Code. When something is said in preamble, it shall be assumed that a whole gamut of provisions of that enactment have come into existence to fulfill that policy alone. At the time when any Bill is laid before legislature, every clause/provision is weighed to balance the same with preamble of the Bill, if that balance is disturbed by outside agencies after enactment, that too without power, the inbuilt balance will be lost.

23. If any study is made by a recommending agency like the Law Commission or Committee set up to look into the efficacy of the enactment, it will recommend to the legislature. In this process, if any particular provision is found not workable and the result is not in conformity with the purpose and object of the enactment, it has to go back to the maker. Repairing is not the job of Regulating Authority. In fact, the Regulating Authority or Rule Making Authority shall provide a support system for effective implementation of the provisions of the Code, not to travel beyond the line of control.

24. In Section 196 **(t) & (u)** of the Code in clause (t), power is given to ***make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor; and (u) perform such other functions as may be prescribed.***

25. If these two clauses are read, it is apparent that time bound mechanism shall be framed for disposal of the assets of the corporate debtor and under clause (u), IBBI can perform such other functions as specified in the section. In this clause (t), whatever

mechanism framed for sale of assets shall be as required under the Code, in this clause the word “corporate debtor” related to liquidation, the word “debtor” related to bankruptcy. The manner of sale of assets cannot be misunderstood that corporate Debtor could also be sold in addition to sale of assets of the Corporate Debtor.

26. With regard to present relief asked for closure of liquidation process skipping dissolution, under section 35 (powers and duties of the liquidator) of the Code, in clause (c) and (f), the liquidator will evaluate the assets and sell the assets as directed by IBBI. The jurisdiction given to the liquidator and regulating power to IBBI is limited as to how to assess the assets and the manner of selling the assets. What is to be sold here is assets, selling as a going concern means the assets on ‘as is where is basis’, may be the unit in functioning condition. The discretion to the liquidator and IBBI Regulating power is confined to sell the assets, not the Corporate Debtor.

27. In section 240 (2) (y) also, IBBI is limited to regulate the manner of evaluating the assets and property of the corporate debtor under clause (c), the manner of selling property in parcels under clause (f), the manner of reporting progress of the liquidation process under clause (n), and the other functions to be performed under clause (o), of sub-section (1) of section 35. Therefore by reading all these, it is nowhere found in the Code that the corporate debtor could be alienated to the purchaser by dispensing with dissolution. If concessions are started providing, there won't be certainty, predictability, uniformity; nobody knows what decision will come tomorrow. This will lead to facelessness and discordancy.

28. Even in Section 240 (2) (zk), the regulating power is limited to the period and the manner of distribution of proceeds of sale under sub section 1 of Section 53, if it is seen juxtaposition to Section 53, it only deals with sale of the liquidation assets, it does not speak about sale of the Corporate

Debtor, sale of the Corporate Debtor is altogether different from sale of assets. The only power that is given under Section 53 is, to convert assets of the Corporate Debtor into sale proceeds, therefore it could not be construed that Section 53 envisages sale of the Corporate Debtor. When section itself has not conferred any right to sale of the Corporate Debtor, where is the question of IBBI setting out a new concept of sale of Corporate Debtor without any support of any of the Sections of IBC.

29. What all we say is, in Section 240 (2), regulating power is given to bring in supplementary procedure with regard to the sections mentioned therein, but not to the Sections not mentioned in Subsection 2 of Section 240. Section 54 is not included in Section 240 (2) of the Code In section 54 also, it has not been mentioned **“as specified by the Board or in such manner as may be specified or prescribed”**. When no discretion is given to IBBI to help out in implementation of section 54 of the Code, it should not have given an unsolicited go-by to the dissolution in the case of a business sold as a going concern.

30. In the follow up, if Regulations relating to Realization of assets (Chapter VI) is examined, the heading given is Realization of Assets, not realization of claims. It is realization of the assets of the Corporate Debtor, therefore whatever mechanism given there, it shall be only relating to realization of assets alone. Initially when these Regulations came into existence in the year 2016, heading to Regulation 32 was rightly given as **Manner of Sale**; it is right because IBBI can only decide the manner of sale of assets. But by amendment on 22.10.2018, the heading **Manner of sale** has become **Sale of assets**. May be realizing the incongruity lying in this Regulation to sell the corporate debtor as well, to reconcile heading with items for sale, IBBI changed it to sale of assets. To bring it in sync with the concept of sale set out in Regulation 32, Regulation 32A has brought into existence on 25.07.2019 with heading **“Sale as a going concern”**, which is as follows:

[32A. Sale as a going concern. (Inserted on 25-07-2019)

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

(2) For the purpose of sale under sub-regulation (1), the group of assets and liabilities of the corporate debtor, as identified by the committee of creditors under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 shall be sold 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.

(4) If the liquidator is unable to sell the corporate debtor or its business under clause (e) or (f) of regulation 32 within ninety days from the liquidation commencement date, he shall proceed to sell the assets of the corporate debtor under clauses (a) to (d) of regulation 32.]

31. This Regulation has been newly inserted on 25.07.2019, simultaneously along with this Regulation, CIRP Regulation 39C was inserted creating a right to CoC for approving a resolution to explore sale of the Corporate Debtor as a going concern under clause (e) of Regulation 32 of Liquidation Regulations in the event the corporate debtor goes into

liquidation, on this premise the liquidator **shall identify** and group the assets and liabilities and **ought to be sold as going concern, this RP shall place it before this Adjudicating Authority.**

CIRP Regulation 39C is as follows:

39C. Assessment of sale as a going concern. (Inserted on 25.07.2019)

(1) *While approving a resolution plan under section 30 or deciding to liquidate the corporate debtor under section 33, **the committee may recommend that the liquidator may first explore sale of the corporate debtor as a going concern under clause (e) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 or sale of the business of the corporate debtor as a going concern under clause (f) thereof, if an order for liquidation is passed under section 33.***

(2) *Where the committee recommends sale as a going concern, it shall identify and group the assets and liabilities, which according to its commercial considerations, ought to be sold as a going concern under clause (e) or clause (f) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.*

(3) *The resolution professional shall submit the recommendation of the committee under sub-regulations (1)*

and (2) to the Adjudicating Authority while filing the approval or decision of the committee under section 30 or 33, as the case may be.”.

32. On reading this CIRP Regulation, it appears at the outset, an effort has been strenuously made to rewrite IBC without amendment to the Code – the reasons for saying so is –

1. Foremost hurdle is, this Regulation is a new concept not backed by any provision of law in IBC. The Regulating Authority cannot stretch its muscle beyond its strength, if it does so, it is exercising jurisdiction not contemplated under IBC. No mention about this arrangement either in section 28 or section 30 or any other section of the Code.
2. The CIRP process is separate and the liquidation process is separate. Separate yardsticks have been set up by the Code.
3. How CoC, which would not remain in existence after liquidation order, will issue its dictum to be followed without any other recourse to the liquidator despite liquidator is to act independently during liquidation process.
4. CoC has not been endowed with powers to give mandate over the progress of liquidation foreclosing the functions of the liquidator as stated under section 35 of the Code.
5. Indeed actions of the liquidator under section 35 are subject to the directions of this Adjudicating Authority.
6. Liquidator is not bound by the directions of the stakeholders, who are mostly none other than Financial creditors i.e., CoC members.

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

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

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

10. As to the going concern concept, in CIRP, CoC will put its maximum efforts to derive maximum value from the corporate debtor. The ground reality is if value is there in the company and if the company can be run as going concern, people will come forward to take it as going concern. When the company has failed to resume its strength as a going concern after making all efforts, it will go to liquidation. When effort in the first phase has not yielded results, another window is left open in the liquidation stage to reorganize or amalgamate or merge the company through a scheme u/s 230-232 of the Companies Act 2013. There also if the company failed to reequip as a going concern, asset or undertaking could be sold as going concern, but not the corporate debtor itself. Assets could be valued and sold as going concern. Even in the case of selling the business as one lot, employees could be protected and other rights could also be protected.

Selling assets or undertakings shall not stretch out to the sale of the corporate debtor. If this process of sale of the corporate debtor is approved, it will become third window, besides that, it is in violation of company concept. In fact IBBI has made it almost like a mandate to try for sale of the company as a going concern. Is it that this process has to continue until the corporate debtor is sold as a going concern? If this is permitted, tomorrow somebody may suggest something else. Where is the end for it? It is a policy decision - which cannot be taken by IBBI particularly when no such concept is contemplated under the Code and more particularly when section explicitly given a mandate for dissolution.

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

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

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

14. Let us assume purchaser come forward to take the corporate debtor as going concern for a value less than liquidation value, as per this Regulation unless the liquidator has failed to get a purchaser under (e) and (f) of Regulation 32, cant he opt for another mode? In such a

conundrum, how could the liquidator sell the assets in a method other than the method mentioned in (e) and (f)? This will again protract the litigation.

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

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

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

(Inserted on 25.07.2019.)

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

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

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

34. Insolvency and Bankruptcy Code is an embodiment of substantial rights laced with procedural mandates. When procedure itself is part of the enactment, the Regulating Authority cannot rewrite the procedure obliterating the provisions of IBC. Yes, the

Regulating authority may bring in subordinate procedure for full implementation of the sections of the Code. What could be liquidated is the assets of the debtor company, this concept of liquidation of assets shall not be construed as inclusion of sale of the company.

35. The procedure is already set out under the Code for rearrangement under insolvency and resolution process thereafter another window under liquidation through Sec. 230 of the Companies Act, 2013, therefore there cannot be any other procedure which is militating the procedure set out under the Code. Accordingly this IA1940/2020 is hereby **dismissed as misconceived.**

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**(B.S.V PRAKASH KUMAR)
ACTG. PRESIDENT**

-Sd-

**(HEMANT KUMAR SARANGI)
MEMBER (TECHNICAL)**