

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
DIVISION BENCH – I, CHENNAI**

**IA/1205/2020 (SR No.1267 of 2020) in  
CP/1053/IB/2018**

*(filed under Section 60 (5) of IBC, 2016)*

In the matter of **M/s. Krishna Industrial Corporation Limited**

**ANDHRA PRADESH STATE FINANCIAL CORPORATION,**  
Plot OS No.2, 2<sup>nd</sup> Cross,  
3<sup>rd</sup> Road, Industrial Park,  
Vijayawada – 520 007

*... Applicant/Secured Creditor*

-Vs-

**S. RAJENDRAN,**  
Liquidator of M/s. Krishna Industrial Corporation Limited,  
71/1, Mc Nicholas Road,  
2<sup>nd</sup> Floor, Hari Krupa Building,  
(off Poonamallee High Road),  
Chetpet, Chennai 600 031.

*... Liquidator / Respondent*

**Present:**

*For Applicant/Secured Creditor : Anirudh Krishnan, Advocate*

*For Respondent / Liquidator : Vijay Kumar, Advocate  
S. Rajendran, Liquidator*

**And**

**IA/39/2021 in CP/1053/IB/2018**

*(filed under Section 60 (5) of IBC, 2016)*

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-Vs-

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Plot OS No.2, 2<sup>nd</sup> Cross,  
3<sup>rd</sup> Road, Industrial Park,  
Vijayawada – 520 007

... Respondent / Secured Creditor

**Present:**

For Applicant/Liquidator : Vijay Kumar, Advocate  
S. Rajendran, Liquidator

For Respondent : Anirudh Krishnan, Advocate

Order pronounced on 4<sup>th</sup> June 2021

CORAM :

**R. VARADHARAJAN, MEMBER (JUDICIAL)**  
**ANIL KUMAR B, MEMBER (TECHNICAL)**

**ORDER**

**Per: R. VARADHARAJAN, MEMBER (JUDICIAL)**

1. This is an Application moved by a Secured Creditor of the Company in liquidation viz., M/s. Krishna Industrial Corporation Limited under Section 60 (5) r/w Section 52 (5) of the Insolvency & Bankruptcy Code, 2016 (IBC, 2016).

2. The facts in brief as can be culled out from the Application are to the effect that the Applicant is a Financial Corporation providing financial assistance to the MSME Sectors since 1956.

3. The Company in liquidation viz., the Corporate Debtor is stated to be a Public Limited Company incorporated under the Companies Act, 1956 and engaged in the business of manufacturing chemicals in its Unit established in a piece of land measuring an extent of 44.64 cents situated at Canal Road, Basivireddypeta, Nidadavole Village and Mandal, West Godavari District, Andhra Pradesh.

4. As between the Applicant and the Company under liquidation, it is averred that there was a long standing relationship and that the Corporate Debtor / Company under liquidation has availed multiple loans since the year 1963.

5. The Corporate Debtor had defaulted in repayment of Medium Term Loans granted to it by the Applicant in a sum of Rs.7,15,00,000/- and in relation to which security has been created by the Corporate Debtor by way of a Memorandum of Deposit of Title Deeds dated 05.04.2012, 30.03.2013 and 31.01.2014 in relation to the property as described in Paragraph supra.

6. In addition, deeds of hypothecation were also created in favour of the Applicant with respect to Plant & Machinery of SSP Plant, NKP Granulated Mixture Plant, Bio-Fertilizer Plant etc.

7. In view of the default which had arisen, it is averred that the Applicant had issued letters dated 04.04.2019 and 08.04.2019 in relation to the arrears outstanding and thereby intimated the Corporate Debtor that the Applicant would be constrained to proceed under Section 29 of the State Financial Corporation Act, 1951 (SFC Act). Since the Corporate Debtor / Company under liquidation had failed to come forward to pay the amount due, the Applicant under Section 29 of the SFC Act, acted by sending a Demand Notice on 23.01.2019 and thereafter the Applicant was pursuing its remedies under the SFC Act. The loan which stood outstanding as on the date of liquidation of the Corporate Debtor is stated to be in an extent of Rs.4,52,15,993/- under the financial facilities granted to it and that as on 31.10.2020, the same stood at Rs.4,78,03,242/-.

8. While so, on 18.12.2019 it is averred, a notice was received by the Applicant from the Respondent herein that he was appointed as the Interim Resolution Professional (IRP) by this Tribunal to conduct the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor pursuant to the order dated 16.12.2019 passed in the main Company Petition filed by Maximus ARC Limited and it was requested by the Respondent / IRP at the relevant point of time to file its claim in Form C.

9. Pursuant to the same, claim was filed by the Applicant which was accepted to the extent of Rs.3,48,42,797/- based on the financial accounts of the Corporate Debtor as on 31.03.2019 and in the circumstances the Applicant became a part of the Committee of Creditors (CoC) formed by the IRP, in view of its being a Financial Creditor having a voting share of 12.43% and on the other hand Maximus ARC Limited being the other Financial Creditor having a voting share of 87.57%.

10. Having the majority voting strength, the Corporate Debtor was pushed into liquidation in the CoC by Maximus ARC Limited under Section 33 (2) of IBC, 2016. Pursuant to the decision taken by the CoC, an Application was moved before this Tribunal in Application No.MA/376/2020 under Section 33 (2) of IBC, 2016 and this Tribunal vide order dated 27.07.2020 ordered for liquidation of the Corporate Debtor and also appointed the Respondent herein as the Liquidator.

11. Upon liquidation of the Corporate Debtor, the Respondent herein issued a public announcement in Form B calling for the claims from the stake-holders consequent to which the Applicant being the Secured Creditor having the 1<sup>st</sup> charge filed its claim under Form D on

25.08.2020 within the time allowed and also sought for the enforcement of its security interest mortgaged to the Applicant.

12. The response from the Respondent came forth for the above, vide e-mail dated 11.09.2020, in relation to the receipt of the claim wherein it was intimated to the Applicant that the claim is under verification. Thereafter, it was also communicated by the Applicant that the Applicant will realize the security interest of not less than Rs.25 Crore vide e-mail dated 15.09.2020.

13. In the meanwhile, on 09.09.2020, a communication was received from the Respondent to the Applicant and Maximus ARC Limited, the other Financial Secured Creditor, disclosing the liquidation cost budget for the period between 27.07.2020 and 31.12.2020 and also sought from the Applicant to transfer a sum of Rs.1,55,375/- towards liquidation cost for the above period.

14. The Applicant submits that in relation to the demand of the liquidation cost with a view to ensure a smooth and speedy closure of the issues on hand, the same was remitted.

15. However, it is contended by the Applicant that being a person standing outside the liquidation process in relation to the security

interest and its realization, the Applicant in fact is not required to meet out the liquidation cost as demanded by the Liquidator.

16. While things stood thus, the Applicant had received a communication dated 08.10.2020 from the Respondent by way of an e-mail which the Applicant terms as the impugned letter in and by which a sum of Rs.31,07,500/- was directed to be contributed by the Applicant in relation to the liquidation costs and workmen dues, though the Applicant has already contributed towards the CIRP cost.

17. Further it was also pointed out vide the communication dated 21.10.2020 that the realization of the security interest was to take place within a period of 180 days of the liquidation commencement date and the said date namely the cut off date being 22<sup>nd</sup> January 2021, and that any excess amount realized by the Applicant is to be remitted to the Respondent within 180 days of the liquidation commencement date by citing the provisions of Section 53 of IBC, 2016 and Regulation 21 (A) of IBBI (Liquidation Process) Regulations, 2016.

18. In relation to the reliance placed by the Respondent to the provisions as given above, it is the contention of the Applicant that

Regulation 21 (A) has been relied on citing Section 53 of IBC, 2016 which according to the Applicant has been quoted out of context and in isolation and further Regulations being a subordinate legislation cannot override the provisions of the IBC, 2016 and thus taking into consideration the above, it is averred in the Application that the Applicant is under no obligation to pay the liquidation cost, since its being a secured Creditor which had exercised an option to enforce its security interest thereby the said assets not forming part of the liquidation estate, the Applicant cannot be asked to pay the liquidation cost from the Applicant as demanded by the Liquidator.

19. Primarily based on the above legal submissions, the following prayers have been sought for viz.,

- a) *Declare that Regulation 21 A of the IBBI (Liquidation Process) Regulations, 2016 is ultra vires since the same is in contravention of Section 34, 36, 52, 53 and 240 of the Insolvency and Bankruptcy Code, 2016 and consequently strike it down as ultra vires to Insolvency and Bankruptcy Code, 2016*
- b) *Stay the Operation of the letter dated 08.10.2020 from the Respondent and the e-mail dated 28.10.2020 from the Respondent as the same are based on Insolvency and Bankruptcy Code, 2016 which is ultra vires.*
- c) *Declare that letter dated 08.10.2020 from the Respondent and the e-mail dated 28.10.2020 from the Respondent is untenable and unlawful.*



- d) *Injunct the Respondent from going ahead and enforcing the Applicant's security interest and realise the proceeds from the sale of the security interest.*
- e) *Injunct the Respondent from obstructing the Applicant from enforcing its security interest u/s 52 (1) (b) of IBC.*
- f) *Injunct the Respondent from proceeding to conduct 1<sup>st</sup> SCC on 17.11.2020.*
- g) *Pass any such further orders as this Hon'ble Tribunal may deem fit in the circumstances of the case.*

20. In relation to the legal issue as sought to be raised by the Applicant to avoid payment of portion of the liquidation cost as directed by the Respondent, a counter statement has been filed by the Respondent to the effect that Regulation 21 (A) of the Liquidation Process Regulations, 2016 as sought to be projected by the Applicant is not inconsistent with the provisions of the Code and in the circumstances not *ultra vires* the provisions of the code.

21. In this connection, the provisions of Section 34, 36, 52, 53 and 240 of the Code is brought into play in the counter statement and upon a detailed analysis of these Sections it is insisted by the Respondent that even with the secured creditor who stands outside the liquidation process for realizing its security interest, however will be required to pay its share of the liquidation cost which comprises of items as detailed in sub section(16) of Section 5 of IBC, 2016 and the amendment carried out by IBBI in relation to the definition of the

liquidation cost in Regulation 2 (1) (e) (a) and that the said amendment was made in consequence of the decision passed by the Hon'ble NCLT, Mumbai in **Asmi Enterprises –Vs-Yog Industries Ltd.**, which in effect left the Liquidator without any remuneration, in the event a financial creditor exercising its option to stand outside the liquidation process.

22. In this connection the admission of liquidation cost as contained in Regulation 2 (1) (ea) pursuant to the amendment to the Regulations made by the IBBI of (Liquidation Process) Regulations, 2016 with effect from 25.07.2019 is referred.

23. Taking into consideration the above definition of liquidation costs and also the duties as required to be performed by the Liquidator, as enjoined by IBC, 2016 as well as the relevant Regulations as framed by the IBBI, it is pointed out by the Liquidator in the counter that in case a sole creditor viz., a Secured Creditor to whom an entire charge of assets has been created decides to stand outside winding up, even under the said circumstances the Liquidator will be required to perform the following duties viz.,

- (1) To verify all claims and determine as to whether they are genuine;
- (2) Ascertain dues to workmen; and

- (3) Ensure the undertaking as a going Concern and incur costs for the same – all of which form part of the liquidation costs.

24. Thus, if the contention of the Applicant, despite the Liquidator in performing all the above functions, is left without any payment made by such a Secured Creditor like the Applicant in relation to the liquidation costs as well as workmen dues is left without any redress to the above problems in view of the order passed in **Asmi Enterprises -Vs- Yog Industries Ltd.**, referred supra, the result is an undue advantage to a single Creditor prejudicing the interest of the Corporate Debtor and its other stakeholders and as a consequence of which the amendment as proposed to the Liquidation Regulations which have been notified on 25.07.2019.

25. However, in the above context, Regulation 2 (A) was introduced under which Regulation the Liquidator is required to call upon the Financial Creditors, being Financial Institutions to contribute to the excess of the Liquidation Costs over the liquid assets of the Corporate Debtor and further it is in relation to the above said context, Regulation 21A also was notified.

26. Taking into consideration the power vested with the Board viz., IBBI u/s 240 of IBC, 2016 to issue such Regulations, an attempt is

also made in the counter as filed by the Respondent / Liquidator to make a distinction between liquidation assets as given under Section 53 (1) of IBC, 2016 and the liquidation estate as defined under Section 36 of IBC, 2016 and that consciously the legislature had been careful in using the term "liquidation asset" under Section 53 of IBC, 2016 and "not liquidation estate" and in the circumstances both cannot be equated to as one and the same.

27. Further it is contended that a reading of Regulation 21 (A) of (Liquidation Process) Regulations also discloses that IBBI has provided specific time line

- a) within which a secured creditor is required to take a decision for standing outside the liquidation
- b) time limit within which the secured creditor is required to take steps to liquidate the assets
- c) specifying the time within which the liquidation cost is required to be deposited in view of Regulation 2 (A) of the Regulations, 2016 and
- d) in the event of default as to when the asset viz., secured asset will become part of the liquidation estate.

28. The power of the Board in making the Regulations cannot be questioned, it is contended by the Respondent, as the Board is empowered u/s 240 of IBC, 2016 to make Regulations concerning the manner of distribution of proceeds of sales under sub-section (1) of Section 53. Thus, the Regulations it is contended, namely, Regulation 2 (A), Regulation 2 (1) (ea), Section 5 (16), Section 53 (1), Section 34, Section 36 and Section 240 are to be read together. It becomes evident from a combined reading as per the Liquidator that the Regulations have been issued by the Board, is with a view to protect the process of liquidation and also to ensure that the same be completed in a time bound manner and since the Applicant has not contradicted the liquidation costs it is required to be made under Regulation 21 (A). The listing of assets in the liquidation estate by virtue of Regulation 21 A is sought to have been made as per liquidator and during the course of submissions made on the part of the Liquidator, from the discussion papers of Corporate Liquidation Process along with draft Regulations of IBBI, it is also pointed out as to how the amendment to the Regulations came about in the circumstances from a reading of paragraph 5.1.5 which is sought to be relied upon for this purpose and which reads as follows:-

5.1.5 Where the secured creditors decide to realize their security interest, the workmen would recover lesser amount or nothing depending upon the realisation during the liquidation process.

The stakeholders feel that there is a need to make necessary changes in section 52 of the Code on the lines of section 529 (1) of the Companies Act, 2015 or in the Regulations to protect the dues of workmen. The said section entitled the Liquidator to recover the cost of preservation of security if the secured creditors sell assets independently. The secured creditor was liable to pay his portion of the expenses incurred by the Liquidator for the preservation of the security before its realisation by the secured creditor. Regulation 21 of the Regulations may provide that if a secured creditor, instead of relinquishing his security and proving for his debt, proceeds to realise his security, he shall be liable to pay his share of the expenses incurred by the Liquidator for the preservation of the security before its realisation by the secured creditor.

29. Further during the course of submissions it is also brought to the notice of this Tribunal, the report of the Insolvency & Bankruptcy Board of India pertaining to the Regulation 21 (A) in relation to payment for liquidation expenses as given in paragraph Nos. 7.6 to 7.8 of the said report which are relevant for the instant case and it is reproduced as below:-

7.6 The Committee discussed whether a secured creditor that opts to stand outside the liquidation process under Section 52 should be mandated to bear a share of the liquidation costs as well, as is currently provided for in the Liquidation Regulations.

7.7 It was brought to the Committee that in cases where a secured creditor chooses to realise their security interest instead of relinquishing it to the liquidation estate, they opt to stand out of the collective process of liquidation, and they should not be required to bear the costs of liquidation as they do not participate in the collective process of liquidation.

7.8 However, the Committee noted that the requirement of having secured creditors contribute to liquidation costs arose since

“if a CD has only secured assets and all security holders decide to realise their security interests outside the liquidation assets, there will be no liquidation proceeds and hence there will be no resource to meet the liquidation costs. It is necessary to provide that the liquidation costs must be met out of proceeds from sale of secured assets whether these are sold as part of liquidation asset or security interests are realised outside”.

**Noting this rationale, the Committee agreed that at present, no legal changes are required.**

30. Taking into consideration the above, it is represented on the part of the Liquidator that the liquidation expenses are required to be treated as liquidation costs as defined under Section 5 (16) r/w Regulation 2 (ea) of the Liquidation Process Regulations and is required to be factored by the Financial Creditor including the Applicant herein and in the circumstances the proportionate cost is required to be borne despite opting for realising the security interest as decided by it outside the liquidation process being conducted under the purview of the Liquidator, appointed by this Tribunal.

31. It is further stated in the counter that since the Applicant did not contribute to the liquidation cost as it is required under Regulation 21 (A) of Liquidation Process Regulations as directed by the Liquidator as a consequence of which the vesting of asset in the liquidation estate

by virtue of Regulation 21 (A) is automatic since the Applicant has not acted in a timely manner as is required in terms of the Regulations to pay the liquidation cost and to enforce the security and further the Applicant is also aware about the stakeholders committee meeting which the Applicant, despite being a stakeholder did not choose to attend and in the circumstances the Applicant has chosen to challenge the said meeting.

32. In view of the above, it is stated that the present Application has been filed by the Applicant/Secured Creditor is not maintainable and is liable to be dismissed and for this purpose the Respondent/Liquidator also seeks to rely on the submissions made in the counter filed to I.A/1205/2020 (SR No.1267/2020) as well as its Application in Application IA.No.39 of 2021 seeking inter alia for a declaration on his part that the Auction Notice dated 01.01.2021 issued by the Respondent/Secured Creditor as null and void and injunct it from proceeding in terms of the auction notice in view of the Asset described therein having become a part of the Liquidation estate with effect from 24.10.2020 taking into consideration Regulation 21A(2)(a) of the IBBI (Liquidation Process) Regulations, 2016.



33. Since the facts leading to the filing of the respective applications are in common, both the applications are taken together and is sought to be disposed of accordingly.

34. Before going into the merits of the applications, it is required to be noted that a prayer has been sought for by the Applicant in IA.No.1205 of 2020 seeking for a declaration that Regulation 21A of the IBBI (Liquidation Process) Regulations, 2016 is ultra vires and the same is in contravention of the several sections cited in the relief portion of the said application, of the provisions of IBC, 2016, and in the circumstances to strike it down as ultra vires. In this connection Ld. Counsel for the Applicant/Secured Creditor relies on the judgement of the Hon'ble Supreme Court rendered in **L.Chandra Kumar vs. Union of India reported in (1997) 3 SCC 261** in support of his argument put forth that this Tribunal has the power to strike down the Regulations as ultra vires as sought for in the application. However, even though the submissions made in this connection by Learned Counsel for the Applicant/Secured Creditor are vehement and persuasive, we are unable to subscribe to his views on the said point L. Chandra Kumar's case, it is required to be noted, is applicable in relation to a Tribunal constituted under Article 323A or Article 323B of the Constitution of India and not to a Tribunal

constituted by virtue of and in terms of the provisions of a Statute for instance in the case of this Tribunal under the Companies Act, 2013 and notified in terms of the provisions of IBC, 2016 as Adjudicating Authority to deal with the CIRP/Liquidation of corporates. This distinction has been brought forth by the Hon'ble Supreme Court repeatedly in numerous decisions including the one passed in the matter of **Tamil Nadu Pollution Control Board vs. Sterlite Industries (India) Limited and Others reported in (2019) 19 SCC 479** wherein the Hon'ble Supreme Court after a detailed consideration of several precedents had drawn a distinction between a Tribunal constituted under Article 323A or 323B of the Constitution of India, say like Administrative Tribunals as compared to the one set up under a Statute like National Green Tribunal and that unlike the former the one set up under a statute, it has been held has no general powers of judicial review as those vested in a High Court under Article 226 of the Constitution and that as a Tribunal constituted under a Statute, namely under the NGT Act the National Green Tribunal neither exercise the jurisdiction of all Courts except the Supreme Court nor can the said Tribunal strike down rules or regulations made under the concerned Act.

35. Taking into consideration the above decision rendered by the Hon'ble Apex Court in the Sterlite Industries case referred to supra and also as held by the Hon'ble Supreme Court in the matter recently decided of **Embassy Property Developments Ltd vs. State of Karnataka** concerning this very own Tribunal that it cannot be considered as a 'Court', we are of the considered view that this Tribunal does not have the power to strike down any provisions of the Statute nor the Rules and Regulations framed thereunder. In the circumstances this Tribunal is not required to delve any further on the said relief sought for striking down Regulation 21A of IBBI (Liquidation Process) Regulations, 2016 any further and the same stands rejected.

36. However, it is required to be noted that this will not detract of this Tribunal from going into the issue of any inconsistency, if any prevalent as between the Statute, namely IBC, 2016 and the Rules and Regulations framed thereunder by virtue of the delegated legislation either to the Central Government or to the Regulator, namely IBBI as sought to be portrayed by the Applicant/Secured Creditor and if that were so in relation to the limited purpose of its interpretation.

37. For this purpose a requirement of the concerned provisions as sought to be relied on by the parties taken together with the consideration of appropriate Regulations as framed by IBBI is required to be seen. Since the issue is concerning the Liquidation Cost as sought to be demanded by the Liquidator which is sought to be off ended by the Secured Creditor/Applicant/Financial Institution as not payable for the reasons elucidated in paragraphs supra, a consideration initially of the definition of 'Liquidation Cost' will be appropriate as defined in IBC, 2016. Section 5(16) of IBC, 2016 defines '**liquidation cost**' as follows:-

"5(16) "liquidation cost" means any cost incurred by the liquidator during the period of liquidation subject to such regulations, as may be specified by the Board."

From the definition as provided above it is seen that the Board, namely Insolvency & Bankruptcy Board of India (IBBI) has been empowered to specify by way of Regulations as to what constitutes a 'liquidation cost'.

38. By virtue of this delegated legislation, IBBI has framed regulations 2(1)(ea) under IBBI (Liquidation Process) Regulations, 2016, which read as follows:-

'(ea) "liquidation cost" under clause (16) of section 5 means-

- (i) fee payable to the liquidator under regulation 4;
- (ii) remuneration payable by the liquidator under sub-regulation (1) of regulation 7;
- (iii) costs incurred by the liquidator under sub-regulation (2) of regulation 24;
- (iv) costs incurred by the liquidator for preserving and protecting the assets, properties, effects and actionable claims, including secured assets, of the corporate debtor;
- (v) costs incurred by the liquidator in carrying on the business of the corporate debtor as a going concern;
- (vi) interest on interim finance for a period of twelve months or for the period from the liquidation commencement date till repayment of interim finance, whichever is lower;
- (vii) the amount repayable to contributories under sub-regulation (3) of regulation 2A;
- (viii) any other cost incurred by the liquidator which is essential for completing the liquidation process:

**Provided** that the cost, if any, incurred by the liquidator in relation to compromise or arrangement under section 230 of the Companies Act, 2013 (18 of 2013), if any, shall not form part of liquidation cost.’.

Prima facie perusal of the above said Regulation 2(1)(ea) of Liquidation Process Regulations, 2016 demonstrates that the Liquidation cost has several components in it and as can be incurred by the Liquidator during the process of Liquidation.

39. With a view to secure the Liquidation Costs and thereby not to leave the Liquidator high and dry for want of funds in carrying out the Liquidation Process which he had agreed to undertake for the benefit

of the stakeholders concerned predominantly of the creditors, IBBI has framed regulations, both under IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 (for short hereinafter called as `IRCP Regulations') prior to Liquidation under Regulation 39B of the said Regulations for meeting the Liquidation Cost and the fees of the Liquidator as provided under Regulation 39D of the said Regulations as a situation has been envisaged by the Regulator in framing these Regulations taking into consideration that the companies covered under the CIRP are predominantly commercially Insolvent Companies and in the circumstances short of liquid assets. Both the Regulations referred above, namely 39B and 39D of the IRCP Regulations are reproduced hereunder for ready reference:-

**39B. Meeting liquidation cost.**

- (1) While approving a resolution plan under sub-section (4) of section 30 or deciding to liquidate the corporate debtor under sub-section (2) of section 33, the committee may make a best estimate of the amount required to meet liquidation costs, in consultation with the resolution professional, in the event an order for liquidation is passed under section 33.
- (2) The committee shall make a best estimate of the value of the liquid assets available to meet the liquidation costs, as estimated in sub-regulation (1).
- (3) Where the estimated value of the liquid assets under sub-regulation (2) is less than the estimated liquidation costs under sub-regulation (1), the committee shall approve a plan providing for contribution for meeting the difference between the two.

(4) The resolution professional shall submit the plan approved under sub-regulation (3) to the Adjudicating Authority while filing the approval or decision of the committee under section 30 or 33, as the case may be.

**Explanation.-** For the purposes of this regulation, 'liquidation costs' shall have the same meaning as assigned to it in clause (ea) of sub-regulation (1) of regulation (2) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

### **39D. Fee of the liquidator**

While approving a resolution plan under section 30 or deciding to liquidate the corporate debtor under section 33, the committee may, in consultation with the resolution professional, fix the fee payable to the liquidator, if an order for liquidation is passed under section 33, for –

(a) the period, if any, used for compromise or arrangement under section 230 of the Companies Act, 2013;

(b) the period, if any, used for sale under clauses (e) and (f) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016; and

(c) the balance period of liquidation.

40. It is required to be noted from a reading of Regulation 39B of IRCP Regulations that the Committee of Creditors is required to approve a Plan for contribution for meeting the difference between the two, namely estimated value of the liquid assets if it is less than estimated liquidation costs and the Resolution Professional, the process being prior to Liquidation, shall submit the Plan in relation to sharing of liquidation cost to this Adjudicating Authority both in the case of an application seeking approval of a Resolution Plan or for

seeking Liquidation of the Corporate Debtor. At this stage, it is required to be noted that there is no distinction being made between a Financial Creditor having a charge over the assets or not and the term used is 'COC' in general.

41. Now coming to the stage where the Corporate Debtor is ordered to be liquidated, then Regulations concerning liquidation, namely IBBI (Liquidation Process) Regulations, 2016 become applicable and it is required to be noted that the said Regulations contemplate a situation in the absence of Plan being proposed in relation to Liquidation Costs under Regulation 39B of IRCP Regulations, 2016 of which we have already noted as above, under Regulation 2A of the Liquidation Process Regulations as framed by IBBI. The said Regulations as well, for ready reference is reproduced below:-

**2A. Contributions to liquidation costs.**

(1) Where the committee of creditors did not approve a plan under sub-regulations (3) of regulation 39B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall call upon the financial creditors, being financial institutions, to contribute the excess of the liquidation costs over the liquid assets of the corporate debtor, as estimated by him, in proportion to the financial debts owed to them by the corporate debtor.

Illustration

Assume that the excess of liquidation costs over liquid assets is Rs.10, as estimated by the liquidator. Financial creditors will be called upon to contribute, as under:



SL. NO.	FINANCIAL CREDITORS	AMOUNT OF DEBT DUE TO FINANCIAL CREDITORS (Rs.)	AMOUNT TO BE CONTRIBUTED TOWARDS LIQUIDATION COST (Rs.)
(1)	(2)	(3)	(4)
1	Financial institution A	40	04
2	Financial institution B	60	06
3	Non-financial institution A	50	00
4	Non-financial institution B	50	00
Total		200	10

(2) The contributions made under the plan approved under sub-regulation (3) of regulation 39B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 or contributions made under sub-regulation (1), as the case may be, shall be deposited in a designated escrow account to be opened and maintained in a scheduled bank, within seven days of the passing of the liquidation order.

(3) The amount contributed under sub-regulation (2) shall be repayable with interest at bank rate referred to in section 49 of the Reserve Bank of India Act, 1934 (2 of 1934) as part of liquidation cost.

Regulation 2A of the Liquidation Process Regulations, 2016 specifically provides that the Liquidator is required to call upon the financial creditors, being financial institutions, to contribute the excess of the liquidation costs over the liquid assets of the Corporate Debtor, as estimated by him i.e., the Liquidator in proportion to the financial debts owed to them by the Corporate Debtor. Again, it is required to be noted from Regulation 2A as extracted above that the Liquidator can call upon those financial creditors who are financial

institutions, like the Applicant Secured Creditor in IA/1205/2020 to contribute in proportion to the financial debts, whether it is secured or not and whether an option had been exercised to realise the security interest on its own or to make it a part of the Liquidation Estate by way of relinquishment on the part of such secured creditor.

42. Thus, up to this stage, it is quite evident no distinction has been made in relation to contribution to Liquidation Cost as defined under Section 5(16) of IBC, 2016 read with Regulation 2(1)(ea) of Liquidation Process Regulations as framed by IBBI, be that by a secured financial creditor who chooses to exercise its option to realise on its own its security interest or a secured creditor who relinquishes its security to be aggregated to the Liquidation Estate for realisation and distribution by the Liquidator in accordance with Section 53 of the IBC, 2016 and the water fall mechanism provided thereunder or in relation to a financial creditor not secured at all who will also be covered under Section 53 of IBC, 2016.

43. At this stage, it will also be appropriate to consider the provisions of Section 52 of IBC, 2016 on which much reliance was placed by the Ld. Counsel for the Applicant/ Secured Creditor in relation to contribution to Liquidation Cost by a Secured Financial

Creditor opting to realise the security on its own. Section 52 of IBC, 2016 is also extracted hereunder, viz.,

**52. Secured creditor in liquidation proceedings:**

(1) A secured creditor in the liquidation proceedings may (a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or

(b) realise its security interest in the manner specified in this section.

(2) Where the secured creditor realises security interest under clause (b) of subsection (1), he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.

(3) Before any security interest is realised by the secured creditor under this section, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either –

(a) by the records of such security interest maintained by an information utility; or

(b) by such other means as may be specified by the Board.

(4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.

(5) If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing off the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.

(6) The Adjudicating Authority, on the receipt of an application from a secured creditor under sub-section (5) may pass such order as may be necessary to permit a secured creditor to realise

security interest in accordance with law for the time being in force.

(7) Where the enforcement of the security interest under sub-section (4) yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall-

(a) account to the liquidator for such surplus; and

(b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.

(8) The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

(9) Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in clause (e) of sub-section (1) of section 53.

Perusal of Section 52 of IBC, 2016 shows that a secured creditor having a security interest may either realise such security on its own or relinquish its security interest to be made form part of the Liquidation Estate Assets as constituted under Section 36 of IBC, 2016 and await for the same to be realised and proceeds distributed under Section 53 of IBC, 2016.

44. A careful analysis of Section 52 of IBC, 2016 as extracted above also demonstrates that under the situation where a surplus arises after realisation of the security interest and adjustment of the

proceeds against the amount due from the corporate debtor by the Secured creditor opting out, the same is required to be accounted to the Liquidation Estate by such Secured Creditor. However, in case of deficit arising after adjustments of proceeds after realisation of security interest against the debt due then in such a situation Section 52 itself provides that such a Secured Creditor can look to the Liquidator in relation to balance amounts due in terms of the provisions of Section 53 of IBC, 2016 which deals with the waterfall mechanism. A further careful analysis of Section 52, more particularly sub-section (8) of the said section brings forth that the Insolvency Resolution Process Costs is required to be deducted and deposited to the Liquidation Estate out of the proceeds realised by the secured creditor who had chosen to exercise the option of realising the security on its own without recourse to the Liquidator. It is required to be keenly noted that Section 52(8) speaks only about Insolvency Resolution Process Costs and not of the Liquidation costs and the same has not been referred to at all. However, the Regulator, namely IBBI while framing the Regulations in exercise of the powers contained under Section 240 of IBC, 2016, both prior to and during the Liquidation Process as already seen in the absence of Liquid Assets available to meet out the estimated Liquidation costs, has incorporated Regulation 39B to the IRCP Regulations, 2016 as well as

Regulation 2A to the Liquidation Process Regulations, 2016. Do all these mean that the Liquidation cost is not required to be shared at all by a Financial Creditor having a security interest opting to realise the security on its own?

45. This stance might prove counterproductive not only to the Liquidation Process, but also to the secured creditor who had opted to realise the security interest on its own as it is evident from perusal of Section 52 of IBC, 2016 as above, both in case of surplus or in the case of deficit arising out of the realisation of the security interest and its appropriation towards debt due to the secured creditor concerned, who is required to take the assistance of the Liquidator. Thus, in the case of surplus arising out of appropriation to have the surplus included in the Liquidation Estate as maintained by the Liquidator and in the case of deficit to stand in line Under Section 53 of IBC, 2016 and look to the hands of the Liquidator after the Liquidator realises after sale of remaining liquidation estate asset. Hence it will be self - defeating for a secured creditor to take such a stance.

46. Does it mean that the Liquidator can mulct all the components of the Liquidation Costs as defined under Section 5(16) of IBC, 2016

read with Regulation 2(1)(ea) framed pursuant to it by IBBI in the Liquidation Process Regulations, 2016 upon the secured creditor seeking to realise the security interest on its own? This will also lead to inequitable situation which the Regulations, namely IRCP Regulations, 2016 as well as Liquidation Process Regulations, 2016 seem to address as at two stages, namely the Resolution Professional under Regulation 39B of the IRCP Regulations during the CIRP stage itself and thereafter immediately after the commencement of Liquidation Proceedings by the Liquidator under Regulation 2A of Liquidation Process Regulations, 2016 an estimate of liquidation cost is required to be ascertained and also to ascertain the available liquid asset, meaning Cash at Bank and at the hands of the RP/Liquidator. Since this is required to be approved in the COC meeting or the Stakeholders committee meeting depending upon the stage at which the corporate debtor is undergoing the process, the creditors, more particularly the financial creditors including the financial institutions are put on advance notice for it to effectively raise objections about the Liquidation Costs payable by it or the quantum which it is bound to pay taking into consideration the option which it seeks to exercise. Additionally, the RP/Liquidator is also required to report on the estimated liquidation cost in Form H depending on the stage i.e., CIRP or Liquidation Process and subsequently immediately after

Liquidation every quarter during the Liquidation Process in case where Liquidation is ordered, the divergence between the estimated liquidation cost on the one hand and the actual costs incurred.

47. Thus, effectively the meetings initially as well as subsequently based on the reporting by the Liquidator, IBBI has sought to create a check and balance upon the Liquidator concerned and also to put on notice the creditors concerned including the secured creditors. Regulation 21A as framed by IBBI under Liquidation Process Regulations should also be treated as a part of these checks and balances taking into consideration the time lines prescribed upon the Secured Creditor having a security interest, where presently the Liquidation Process itself to be completed within a period of 1 year in a normal situation, leaving aside the abnormal situation as prevalent due to COVID pandemic, which has made timely compliances topsy turvy making all concerned to intervene including the Apex Court, the Central and State Governments as well as the Regulator for extending the time lines. Thus, taking into consideration the statement of objects and reasons for the enactment of IBC, 2016 and the provisions contained thereunder and for adhering to the time lines in the interest of stakeholders concerned, particularly the creditors of the Corporate Debtor and also the Regulations framed thereunder by



IBBI a balance is required to be struck what with the provisions of IBC is still being considered to be in a nascent stage of its evolution since, December 2016 and the Regulations framed thereunder. In this respect, in relation to the vexatious issue raised before this Tribunal in the present instance, this Tribunal is adopting in harmoniously construing the provisions on the one hand and the Regulations framed by the IBBI on the other by adopting a pragmatic approach instead of making the Liquidation process itself come to a stand-still as presently the parties find themselves in and where neither party is able to move ahead in relation to realization of the assets of the corporate debtor and thereof disburse to the stakeholders or appropriate in the case of the applicant towards its dues.

48. In this regard, a perusal of the documents and pleadings filed by both the parties in their respective IA shows taking into consideration the steps required to be taken under the provisions of IBC, 2016 by either of the parties as follows:-

<b>DATE</b>	<b>DESCRIPTION</b>
05.03.2020	Resolution passed for liquidation of the CD. Applicant Dissenting. As per Reg.39B of IRCP Regulations fees of Rs.2 lakhs as fixed monthly fee and a variable amount based on realization and distribution fixed in view of absence of Liquid Asset in CD. Applicant in IA/1205/2020 again opposing it and thereby any plan.
27.07.2020	Liquidation ordered by this Tribunal in terms of Section 33 of IBC, 2016.

25.08.2020	Claim lodged by the Applicant/Secured Creditor in Form "D" claiming an overall sum of Rs.4,52,15,993/- under Regulation 18 of Liquidation Process Regulations, 2016 framed by IBBI and exercising the option to realize Security of its own.
09.09.2020	Intimation of the Liquidation cost budget in a sum of Rs.12,50,000/- for the period between 27.7.2020 to 31.10.2020 and also the proportionate share payable in a sum of Rs.1,55,375/- on the basis of 12.43% voting share by the applicant/secured creditor.
11.09.2020	Intimation from the Liquidator by virtue of Reg.37 of IBBI(Liquidation Process) Regulations, 2016 for realization of security interest by a secured creditor seeking for the price at which the secured creditor at which it proposes to realize the security.
15.09.2020	Applicant/secured creditor intimates a sum of Rs.25 Crores at which it seeks to realize the security interest.
22.09.2020	Liquidator acknowledging the price quoted of Rs.25 Crores and reserving the right to bring in a buyer within a period of one month at a price higher of the said amount
---	No evidence of any buyer being brought forth for a Price in excess of Rs.25 crores available on record by the Liquidator.
08.10.2020	<p>Liquidator suo motto conveying under Regulation 2A of Liquidation Process Regulations that for the period between 27.07.2020 to 22.01.2021 the estimated Liquidation cost to be in a sum of Rs.250 lakhs and that the proportionate cost to be paid in a sum of Rs.31,07,500/- by the applicant/secured creditor.</p> <p><b>Further the Liquidator has also communicated the cut off date for realization of security by the Applicant/Secured creditor as 22.01.2021 which is to be, according to the Liquidator reckoned to be within 6 months of the commencement of Liquidation ordered by this Tribunal.</b></p>
21.10.2020	Applicant/Secured Creditor intimating that already a sum of Rs.1,55,375/- stands paid as demanded earlier as its share towards liquidation cost and refusing to pay

	the demand of estimated liquidation cost and the share of the applicant/secured creditor vide communication dated 08.10.2020.
07.11.2020	In terms of Reg.31A of Liquidation Process Regulations 2016 Stakeholders Consultation Committee (SCC) Meeting to be convened on 12.11.2020 and intimation sent Thereof.
09.11.2020	Communication regarding the said meeting postponed to 17.11.2020.
17.11.2020	1 <sup>st</sup> meeting of the SCC held and the non-attendance of the Applicant/Secured Creditor noted despite notice and also about the present application.
18.11.2020	Application in IA/1205/2020 lodged before this Tribunal by the Applicant seeking for reliefs prayed thereof.
30.12.2020	Liquidator issues public notice for sale of assets of the corporate debtor including the security interest available in favour of the Applicant/Secured Creditor pending adjudication of the application filed by the applicant/secured creditor.
01.01.2021	In the meanwhile public notice issued for the sale of Secured Interest by the applicant/secured creditor.
29.01.2021	IA 39 of 2021 filed by the Liquidator as an applicant to declare the notice dated 01.01.2021 issued by the secured creditor as null and void.

49. From the above list of dates *in ad seriatim* it is quite evident that the cut-off date for realization of the security interest had been specified by the Liquidator itself as 22.01.2021 available to applicant/secured creditor, however, seems to have resiled from the position in view of rebuff on the part of the applicant/secured creditor of his demand in relation to sharing the estimated liquidation cost,

raised in terms of Regulation 2A of IBBI (Liquidation Process) Regulations, 2016 vide communication dated 21.10.2020. Even though the Liquidator claims that he had only exercised his right in view of Regulation 21A of Liquidation Process Regulations, 2016 as framed by IBBI, however, we are of the view that the Liquidator has acted with undue haste in this regard by claiming that in terms of Regulation 21A, the security interest in favour of the applicant/secured creditor has become part of the Liquidation Estate in view of the demand made by the Liquidator in terms of sub regulation (2) of Regulation 21A read with sub regulation (3) of the said Regulations.

50. As already seen the main provision concerning realization of a security interest by the secured creditor with whom it is available as per Section 52 does not contemplate, as in the case of Insolvency Resolution costs, to set aside any amount for the Liquidation costs prior to the appropriation to the debt owed to such secured creditor. However, the Board, namely IBBI has sought to exercise its delegated powers granted under IBC, 2016 to fill in the omission or gap taking into consideration the difficulties in implementing the provisions by detailing the several components which can constitute the Liquidation cost under Regulation 2(1)(ea) of the Liquidation Process

Regulations, 2016 as well as the consequences of not paying the estimated amount by the secured creditor who has sought to realize the security on its own. In this regard, it is required to be noted that as in the case of Insolvency Resolution Process costs there cannot be any principles of equity being applied other than relatable to the amount of debts owed to the total debt, irrespective of a creditor despite being unsecured having no success of receiving it as compared to a creditor having security standing in line first under the waterfall mechanism provided under Section 53 of IBC, 2016. Similarly in the case of sharing of Liquidation Costs the principles which can be applied is the one given under Regulation 2A of the IBBI (Liquidation Process) Regulations, 2016 taking into consideration the demand being made from the financial institution in proportion to the debts due to them, whether secured or not as even in the instant case a financial creditor having a 87.57% stake is required to bear a major portion of the estimated liquidation costs as compared to the amount claimed from the applicant/secured creditor with a 12.43% stake, however enjoying almost virtually the entire security interest, being the first charge holder. Thus, a secured creditor having a security interest over the entire realizable assets of the Corporate Debtor cannot claim that it would not make a contribution to the estimated liquidation costs on the premise that it had opted to realise

the security on its own. However, in this regard, it is also required to be noted that the Liquidator cannot demand fanciful sums and any amount claimed, even a single rupee is required to be properly justified with adequate proof or justification being produced in advance to the financial creditors concerned from whom the amounts are demanded as estimated liquidation costs in terms of Regulations 2A particularly read with Regulation 21A of IBBI (Liquidation Process) Regulations, 2016 from a secured creditor envisaged thereunder as a serious consequence follows in view of its non-adherence.

51. To sum up, based on the above elaborate discussions which we thought necessary, this Tribunal chooses to issue the following directions, namely:-

- i) Taking into consideration the saying that `no person is to be prejudiced by the actions of the court (in this case the Tribunal) in view of application pending all along before this Tribunal in IA/1205/2020 as filed by the applicant/secured creditor of which the Liquidator was fully aware as demonstrated by the minutes of the 1<sup>st</sup> SCC meeting held on 17.11.2020, the action of the Liquidator in making the security interest as part of the Liquidation Estate is unjustified and further totally unjustified by virtue of his actions taken to sell those security interest as evident from the action taken by way of paper publication dated

30.12.2020 which under the circumstances is required to be set aside and accordingly set aside and any action taken in furtherance of the above sale notice dated 30.12.2020 on the part of Liquidator is also set aside.

- ii) We find the attitude of the applicant/secured creditor totally unjustified in refusing to contribute to the estimated liquidation cost as sought for by the Liquidator, when the amount claimed by it is only in a sum of Rs.4,78,03,242/- as due from the Corporate Debtor as compared to the value of the Security Interest it holds which even according to it is estimated to fetch Rs.25 crores and further without going into the merits of each of the components of the said liquidation cost raised vide correspondence dated 08.10.2020 and hence we direct the applicant/secured creditor to contribute its share of the liquidation cost in a sum of Rs.31,07,500/- within a period of 30 days from the date of the receipt of this order failing which the consequences as envisaged under Regulation 21A of IBBI (Liquidation Process) Regulations, 2016 shall follow. However, proportionate share of Liquidation cost paid pursuant to the directions of this Tribunal under the present order by the Applicant/Secured Creditor shall not be appropriated by the Liquidator immediately and will be required to be kept only in a special escrow account and to await the realization of the security interest held by the Secured Creditor/Applicant in IA/1205/2020.

- iii) In view of elapse of much time, taking into consideration the date of the order of liquidation and the applicant/secured creditor had approached this Tribunal, we deem it fit that a further period of 3 months be granted to the applicant/secured creditor to complete the sale of security interest for which an option had been exercised by it for a sum not less than Rs.25 crores as intimated at the time of exercising the option by it to realize the security on its own. The above direction is given in terms of Section 52(6) of IBC, 2016 in IA/1205/2020 filed in terms of Section 52(5) of IBC, 2016.
- iv) Upon realization of the security interest, the applicant/secured creditor shall act in terms of Section 52 read with other appropriate provisions, if any and the Regulations framed thereunder. Accordingly, the IA/1205/2020 stands **ordered**.
- v) The Application in IA/39/2021 hence filed by the Liquidator stands **dismissed**.
- vi) No order as to costs.

-Sd-  
**(ANIL KUMAR B)**  
MEMBER (TECHNICAL)

-Sd-  
**(R. VARADHARAJAN)**  
MEMBER (JUDICIAL)

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