S.No.102

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1

ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON **07-02-2022** AT 10:30 A.M. THROUGH VIDEO CONFERENCE.

IA(IBC)/ 387, 638,714/2021
CP(IB) No.265/9/HDB/2017
U/s 9 of IBC, 2016

IN THE MATTER OF:

Murali Krishna Power Controls Pvt Ltd ...**Operational Creditor**

Vs

Servomax India Private Limited ...**Corporate Debtor**

CORAM:-

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. VEERA BRAHMA RAO AREKAPUDI, HON'BLE MEMBER (TECHNICAL)

ORDER

Orders in IA (IBC) 387/2021 in CP(IB) No.265/9/HDB/2017 pronounced and detailed order is recorded vide separate sheets. In the result, this IA(IBC) 387/2021 is dismissed without costs.

Orders in IA (IBC) 638/2021 in CP(IB) No.265/9/HDB/2017 is allowed.

Orders in IA (IBC) 714/2021 in CP(IB) No.265/9/HDB/2017 is also allowed.

SD/- SD/-

MEMBER (T) **MEMBER (J)**

Srinivas

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH-1

IA No. 387 of 2021

In

CP (IB) No. 265/9/HDB/2017

Application under Section 60 (5) of IBC, 2016, R/w Rule 11, 13 & 32 of NCLT Rules, 2016

(In the matter of M/s SERVOMAX INDIA PRIVATE LIMITED)

Between

Ekambareswara Rao Manne
R/o Plot No.8, Subhashnagar
Opp: N.N. Colony, Kushaiguda
Hyderabad – 500062

Applicant/
Member of Stakeholders Consultation Committee

VERSUS

1. Mr. Gonugunta Madhusudhan Rao
Liquidator – M/s Servomax India Private Limited
7-1-285, Flat No. 103
Sri Sai Swapnasampada Apartments
Balkampet, Sanjeev Reddy Nagar
Hyderabad – 500038

2. Avasarala Venkateswara Rao
Promoter and Erstwhile Director of CD
R/o Flat No. 201, Sri Veeranjaneya Residency
Radhika, Hyderabad – 500062

3. Insolvency and Bankruptcy Board of India
7th Floor, Mayur Bhawan, Shankar Market
Connaught Circle, New Dehi – 110001

4. The Registrar of Companies
Complaints and Grievance Cell
2nd Floor, Corporate Bhavan
Bandlaguda, Nagole
Hyderabad – 500 068

5. The Indian Institute of Insolvency Professional of ICAI
Complaints and Grievance Cell
ICAI Bhawan, 8th Floor, Hostel Block
A-29, Sector-62, Noida, UP – 201309

...Respondents

Date of order: 07.02.2022

Coram:

Dr. N. Venkata Ramakrishna Badarinath, Hon'ble Member (Judicial)
Shri Veera Brahma Rao Arekapudi, Hon'ble Member (Technical)

Appearance:

For Applicant: Shri V.K. Sajith, Advocate

For Respondent: Shri S. Ravi, Senior Advocate for Liquidator

PER: BENCH

ORDER

1. The Applicant, who is one of the Members of the Stakeholders Committee of M/s Servomax India (P) Ltd (Corporate Debtor under Liquidation), has assailed actions of the Liquidator Mr Gonugunta Madhusuan Rao with respect to the e-auction proceedings dated

15.07.2021, inter-alia, contending that the same is not in conformity with mandatory provisions of Insolvency & Bankruptcy Code, 2016 (herein after referred to as Code) and IBBI (Liquidation Process) Regulations, 2016 and sought indulgence of the Tribunal to pass the following reliefs,

i) Directions to Respondent No.1 herein to produce the record before this Tribunal as to how the realizable value arrayed and the same reduced in every auction.

ii) Directions to Respondent No.1 to place the records/registers maintained by him with respect to the e-auctions conducted by him.

iii) Directions to Respondent No.1 to file an affidavit with respect to the difference in realizable value of ongoing concern and realizable value of collective price of individual assets mentioned from item no.2 in all sale notice.

iv) Restrain Respondent No.1 in taking any further actions to conclude the BID with respect to E-auction proceedings dated 15.07.2021 which is in violation of Regulation 32A of Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016 to sell the Company as "ongoing concern".

v) Directions to Respondent No.1 to place the records and documents submitted by all the bidders with respect to the above e-auction dated 15.07.2021.

vi) Directions to Respondent No.1 to produce the records maintained by him regarding deposit of bids vis-à-vis all the e-auctions conducted by him.

viii) Directions to Respondent No.1 herein not to take any coercive steps with respect to the above e-auction dated 15.07.2021, declaring the successful bidder or to issue letter of intent etc.

ix) Directions to Respondent No.1 to place on record with respect to the permission sought in terms of Regulation 10 of IBBI (Liquidation Process) Regulations, 2016.

x) Directions to Respondent 2 to 4 to look into the acts and activities done by Respondent No.1 during the CIRP and Liquidation period for gross violation of provisions under IBC and its rules and regulations.

xi Restraint order against the Liquidator/Respondent No.1 herein or such other order as the Tribunal may deem fit and proper.

2. The facts that lead to the filing of this application in brief are that:

(i) M/s Servomax India (P) Ltd/ Corporate Debtor Applicant was ordered to be liquidated vide this Tribunal order dated 04.02.2019 and R-1 herein was appointed as Liquidator for conducting the liquidation process of the Corporate Debtor.

(ii) Pursuant to the aforesaid order, the Liquidator, made publication in leading newspapers on 08.02.2019 inviting claims from the stakeholders of the Corporate Debtor. In response to the publication, the Applicant filed its claim, which was admitted by the Liquidator and the Applicant became a member of Stakeholders Committee. The Stakeholders Consultation Committee Meeting was convened by the Liquidator on 10.10.2019 wherein the timeline was set as 90 days from the liquidation commencement date to sell the Corporate Debtor as an ongoing concern and the Reserve Price was fixed at Rs. 72 crores. Subsequently, the Reserve Price was reduced from time to time and ultimately fixed at Rs. 24.59 crores for auction to be held on 15.07.2021, post realization of sale of some of the assets of the Corporate Debtor.

(iii) The Applicant states that, the Liquidator, instead of taking action to sell the assets as per provisions of Regulation 32 of the IBBI (Liquidation Process) Regulations, 2016 i.e. to sell the assets of the Company as standalone basis, slump sale, set of assets collective or in parcels, continued making efforts to sell it as an ongoing basis even beyond 90 days from liquidation commencement date, which is against the provisions of law, when in the instant case, the Corporate Debtor is not a going concern company at the time of issuance of notice for e-auction. The Applicant accused the Liquidator of doing so, with an ulterior motive to facilitate the Promoters of the Corporate Debtor or his associates to purchase the assets at a cheap rate. It is stated that the Liquidator instead of taking action to sell the Corporate Debtor or its assets for maximization of the value of CD, had decreased the value as per his whims and fancies and acted against the provisions of the Code. The Applicant has tabulated the e-auction notices issued by the Liquidator and the realization value quoted by him vis-à-vis the value quoted for asset wise sale, which is as under:-

(in crores)

S.No.	Date of auction	Reserve price fixed for ongoing Concern sale	Collective reserve price of individual asset mentioned in sale notices	Status
1.	27.11.2019	72.00		Failed
2	16.12.2019	65.00		Failed
3.	06.01.2020	60.00		Failed
4.	17.02.2020	54.00		Failed
5.	18.08.2020	48.60	86.95	Failed
6.	18.09.2020	39.90	71.51	Failed
7.	20.11.2020	37.91	68.07	Failed
8.	26.12.2020	27.24	55.02	Failed
9.	12.02.2021	27.24	55.02	Failed
10.	19.03.2021	27.24	55.02	Failed
11	24.04.2021	27.24	55.02	Failed
12	15.07.2021	24.59	49.73	----

iv. It is further contended that, the Liquidator has failed to explain as to how the said amount of realizable value has decreased from the collective value of total assets individually. The Liquidator, on a couple of occasions, has entertained some of the parties/bidders either before or after the timeline specified in the e-auction notices, which created an apprehension in the mind of the Applicant that Liquidator is in collusion with the promoters of the Corporate Debtor or their associates only to aid and assist them to participate in the e-auction process. The Applicant further brought to the attention of the Tribunal, alleged discrepancies in the e-auction notices and submitted that all the assets which are mentioned in the e-auction sale notice are not actually in possession of the Liquidator.

v. It is stated that the recently the Applicant gained knowledge about granting permission to the promoter of the Corporate Debtor for using the Brand and Credentials of the Company illegally by the Liquidator and allowing him to incorporate the company using the similar name i,e, "SERVOMAX INDUSTRIES PRIVATE LIMITED". It is also alleged that the website of the company is being used by the Promoter for doing business for the reasons best known to the Liquidator.

vi. The Liquidator has been hiding the circular dated 26.08.2019 issued by Chief General Manager, IBBI which says the ongoing sale concern and statutory period of 90 days is not applicable in the current case. The Regulation 32 along with other regulations stand amended by IBBI on 25.07.2019 vide notification and publication in the Gazette of India Part III Section 4 vide no. IBBI/2019-20/GN/RE047. There was no appointed day nor did the notification explain whether it is retrospective of prospective regarding any of the amended regulations.

vii. In the Statute the powers and duties of the Liquidator is under Section 35 of IBC, 2016, the same is placed here for the ease and convenience of this Tribunal:

35.Powers and duties of liquidator. -

(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely: -

Sub Clause f of Sub Section 1 of Section 35 recites as follows:

(f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:

[Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.]

(n) to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation may be specified by the Board; and

viii. The above provision is very clear that, the Ld. Liquidator need to take permission either in the form of direction or orders from this Tribunal before taking any action with respect to sale in any manner during the Liquidation Process. This is the statutory command and requirement legislated to avoid arbitrary actions of the liquidator by conducting the sale process in any manner detrimental to the interest of all the stakeholders. An application filed thus will give opportunity for the stakeholders to bring to the notice of the Adjudicating Authority any illegality in a sale in which ever manner prescribed by law. By not obtaining a direction either before the initiation of sale or prior to its confirmation the liquidator disobeyed the law in letter and spirit and against the direction of the speaking order of this Hon'ble

Tribunal while appointing him as liquidator. There is no law regulation or exception known to this applicant which exempts the liquidator from obtaining a direction from this Adjudicating Authority for sale of the assets of the corporate debtor. The Liquidator cannot at his will, wish, caprice and desire dispose away the assets in any manner and seek a mere ratification. The vary act of the liquidator of not seeking any direction when he decided to proceed under section 35(f) of the code and hence the sale is illegal under the eyes of law.

ix It is stated that there is no powers vested with IBBI to issue any such circulars under Section 196 of the code nor this Hon'ble Tribunal which is the Adjudicating Authority under IBC bound or directed by the IBBI to take note of such circulars or this Hon'ble Tribunal is not bound by any such circular by virtue of pronouncement of the Hon'ble Supreme Court.

x. It is stated that the IBBI circular has been stuck down by National Company Law Appellate Tribunal, Delhi bench in the matter of Sunderesh Bhat vide its judgment dated 20.09.2021 in Company Appeal (Insolvency) No.398 of 2021. Hence the act of the liquidator conducting sale as ongoing concern after 600 days is bad in law as law mandates only 90 days for such sale.

xi. It is stated that a **mere circular** cannot have a force of law or sub-legislation. Section 241 of the code emphasis that, every rule and regulation made hereunder has to be placed before parliament of India. Since circular is not a regulation or enactment it will not suffer parliamentary scrutiny nor such circulars are binding on any judicial or quasi-judicial body including this Tribunal a creation of the constitution of India, vide Article 323B of Constitution of India. While IBBI as an institution only the creation of statute i.e., IBC, 2016. The Explanatory Circular date 26.08.2019 issued under Section 196 of the code is only applicable to the persons mentioned therein i.e., Insolvency Professionals, Insolvency Professional Entities and all registered Insolvency Professional Agencies. IBBI has no supervisory or administrative powers vest with it to control any judicial or quasi-judicial body and hence the circular fails for any purpose to adjudicate the matter pending before this Hon'ble Tribunal.

xii. Lastly, it is submitted that the Ld. Liquidator is fully aware that, he cannot conduct sale as "ongoing concern" which is one among the Agenda Item (No.5) in 1st Stakeholders Committee (Kindly refer page No.24 of the Application) conducted on 10.10.2019 whereas the circular was issued in 26.08.2019 (Attached as Annexure-II), a fact which was aware and available with the Ld. Liquidator that, fact was informed to the stake holders by him with respect to timelines for sale of the corporate debtor company as going concern. Bringing in the Circular is an afterthought by the Ld. Liquidator as he had enough and more time from 25.07.2019 (the day of the notification amending regulations i.e., 32A of IBBI (Liquidation Process) Regulations) to sell the Corporate Debtor as "Ongoing Concern".

xiii. Reliance also has been placed on the following rulings by the Applicant.

(1) National Company Law Appellate Tribunal, Delhi Bench's ruling in the matter of Sunderesh Bhat, dated 20.09.2021 in Company Appeal (Insolvency) No.398 of 2021.

(2) NCLT Principal Bench, in Invest Asset Securitization and Reconstruction Pvt Ltd Vs M/s Mohan Gems & Jewelers.

(3) M/s Sandoor Micro circutes Ltd vs Commissioner of Central Exice Belagam in civil appeal no.7177 of 2005.

(4) Hon'ble Supreme Court of India, in Bengal Iron Corporation Vs CTO Civil Appeal No.44775 of 1992.

(5) Madras Bar Association Vs Union of India & another in Writ Petition (Civil) No.502 of 2021, where in Hon'ble Supreme Court, clarified on the Legislation and its functions.

3(i) The Liquidator in his counter while strongly refuting the averments/ allegations as made, contended *inter-alia*, that, pursuant to order passed in the Company Appeal (AT) No. 252 of 2019 on 06.08.2019, preferred by Applicant herein, the Hon'ble NCLAT directed the Liquidator to first take steps u/s 230 of the Companies Act, read with IBC, to liquidate the CD. Despite efforts to comply with the aforesaid order, he was unable to arrive at any effective compromise or arrangement, and hence decided to proceed with the liquidation process following the decision taken in the 1st Stakeholders Consultation Committee which the Applicant was also a part of, without any objection at that point of time.

(ii) According to the Liquidator he has issued prior notices and participated in all the Stakeholders Consultation Committee meetings, the reserve price at the auctions were fixed and reduced. The Liquidator further contends that though in response to the sale notice issued on 03.02.2021, the successful bidder agreed to purchase the Company as a going concern, the said successful bidder had subsequently backed out because of threats allegedly received from the Applicant. It is further stated the Applicant never raised any objection to the sale of the Corporate Debtor as a going concern nor about the reserve price in any of the stakeholders' meetings. The Liquidator, in all, has published auction notice 16 times in leading newspapers.

(iii) The Liquidator further submitted that Clause 4 of IBBI Liquidation Process Regulations, 2016 empowers the Liquidator to reduce the reserve price up to 25% for conducting the subsequent auctions. However, the Liquidator has reduced only 8% of the value in order to explore the possibilities of selling the Corporate Debtor at a maximum price. The Liquidator stated that as per the Liquidation Regulations, the reserve price will be the realizable/liquidation value only. But the Liquidator along with SBI and IOB fixed higher Reserve Price rather than minimum reserve price, enabling them to raise 183% of the minimum Liquidation value by selling three individual assets in two e-auctions and remaining CD as going concern basis in one of the auctions.

(iv) The Liquidator further submits that, Regulation 32 A (4) was inserted by Notification No. IBBI/2019-20/GN/REG047 dated 25.07.2019 but the Liquidation order in respect of the Corporate Debtor Company was passed by this Tribunal much prior to the amendment i.e. on 04.02.2019. Hence there is no time line fixed to sell the CD as a going concern before the said amendment.

(v) With regard to disclaiming the onerous properties as per Regulation 10 (1)(5) of IBBI Liquidation Process Regulation as averred by the Applicant, the Liquidator submits that the properties mentioned therein are secured properties of Kotak Mahindra Bank and the Bank has not relinquished its security to the Liquidation Estate, hence, he does not have any right over the said properties.

(vi) The Liquidator further assailed the Applicant for floating a company in the name and style of "Lohitha Power Products Private Limited which is into similar business to that of the Corporate Debtor Company and the Applicant is opposing the sale of CD as a going concern with an intention to grab the business of the Corporate Debtor.

(vii) The Liquidator stated that he has regularly filed Progress reports, Asset sale reports, Asset Memorandum to this Tribunal and to the Regulatory Authority IBBI and had made all disclosures well within the timeline fixed. The successful bidder has accepted the Letter of Intent and had already paid 25% of the sale consideration amount as per the terms and conditions set out in the e-auction process document.

(viii) According to the Liquidator he has placed all the relevant records/information before the Tribunal in the form of progress reports, Asset Sale reports, Asset Memorandum and further contends that has made all disclosures to the Insolvency Professional Agency well within the timeline. He further brought to the attention of the Bench that the successful bidder has paid the entire sale consideration along with applicable interest well within due date, pursuant to which the liquidator had issued sale certificate to the successful bidder.

(ix) The Liquidator has relied on the following citations wherein the Liquidators were directed by to make efforts to sell the CD as a going concern: -

1. Hon'ble Supreme Court order in Swiss Ribbons Pvt Ltd vs. Union of India has observed at para 27,
2. Hon'ble Supreme Court order in Swiss Ribbons Pvt Ltd vs. Union of India.
3. Hon'ble Supreme Court order in M/s Innoventive Industries Ltd Vs ICICI Bank and Anr in civil appeal no. 8337-8338 of 2017.
4. Hon'ble Supreme Court order in 'ArcelorMittal India Private Limited" .
5. Ruling of NCLT Kolkata Bench in the matter of Gujarat NRE Coke Limited.

4. Written submissions are filed by both sides reiterating the contentions raised in their respective pleadings.

5. In the light of contest put-forth by the parties, the Tribunal framed the following point for its consideration?

Whether the sale of the Corporate Debtor as a going concern held on 11.02.2021, is contrary to 32A of IBBI (Liquidation Process) Regulations? If so, whether the impugned sale is liable to be set aside?

6. We have heard Shri V.K. Sajith, Learned Counsel for Applicant, Shri S. Ravi, Learned Senior Counsel for Liquidator Shri G. Madhusudan Rao, perused the written submissions and the case law.

7. **Point**

Whether the sale of the Corporate Debtor as a going concern held on 11.02.2021 is contrary to 32A of IBBI (Liquidation Process) Regulations? If so, whether the impugned sale is liable to be set aside?

(i) Before we advert to the discussion on the points above, we refer here in certain important and undeniable facts and events.

(a) On 04.02.2019 this Tribunal ordered liquidation of the Corporate Debtor, and appointed the Liquidator.

(b) On 06.08.2019 Hon'ble NCLAT in Company Appeal (AT) No. 252 of 2019, directed the Liquidator to first take steps u/s 230 of the Companies Act, read with IBC, before resorting to liquidation of the CD.

(c) On 10.10.2019 the Stakeholders Consultation Committee held its first meeting, wherein the petitioner also participated and unanimously agreed to sell the Corporate Debtor as a going concern.

(d) On 15/07/2021 after 15 unsuccessful sale notices the 16th sale notice fructified however on a reduced reserve price.

(e) On 22.10.2018, Regulation 32 of IBBI (Liquidation Process) (Amendment) Regulations, 2018 has been introduced.

(f) On 27.07.2019, Regulation 32 has been amended and a new Regulation 32A has come into effect.

(g) On 26th August, 2019 IBBI issued CIRCULAR No. IBBI/LIQ/024/2019

(ii) Shri V.K. Sajith Ld. Counsel for the applicant, placing reliance on the ruling of Hon'ble NCLAT, in Sunderesh Bhat, supra, strongly, contended that, in view of the said ruling, IBBI Regulation 32A shall be treated as an open ended provision relating to procedural law which in no way states that it will not apply to pending liquidation besides that the Power of IBBI, under Section 196(1) (p) or (t) to issue guidelines cannot be expanded to interpreting provisions made and the same is the job of Courts to interpret and apply law, the circular dated 26th August, 2019, *supra*, issued by IBBI, is not at all sustainable under law or binding on this Tribunal, *consequently,* the sale in the instant case since held beyond 90 days from the date of liquidation commencement date , is violative of the newly inserted Regulation 32A, as such, on this score alone, the sale is liable to be set aside.

(iii) According to the Ld. Counsel, a mere circular cannot have a force of law or sub-legislation. Section 241 of the code emphasizes that, every rule and regulation made hereunder has to be placed before parliament of India. Since circular is not a regulation or enactment it will not suffer parliamentary scrutiny nor such circulars are binding on any judicial or quasi-judicial body including this Tribunal a creation of the constitution of India, vide Article 323B of Constitution of India. While IBBI as an institution only the creation of statute i.e., IBC, 2016. The Explanatory Circular date 26.08.2019 issued under Section 196 of the code is only applicable to the persons mentioned therein i.e., Insolvency Professionals, Insolvency Professional Entities and all registered Insolvency Professional Agencies. IBBI has no supervisory or administrative powers vest with it to control any judicial or quasi-judicial body and hence the circular fails for any purpose to adjudicate the matter pending before this Hon'ble Tribunal.

(iv) In support of his submissions, Ld. Counsel, also placed reliance on the following rulings: -

(a) Hon'ble NCLT, Principal Bench ruling in, Mr. Sundaresh Bhat Liquidator of ABG Shipyard Limited, wherein para 13 of the order it was held that;

> "13. Perusing the Liquidation Regulations and Clause 12 of Schedule I as was subsequently introduced on 25.07.2019, the substituted Regulation which has been brought by way of amendment does not show that the Regulation is to be applied only prospectively. It is open ended provision relating to procedural law which in no way states that it will not apply to pending liquidation processes on the date of substitution. In our view, the Circular dated 26.08.2019 could not interpret the Regulations in the manner it is done. Power of Board under Section 196(1) (p) or (t) to issue guidelines cannot be expanded to interpreting provisions made. That is job of Courts to interpret and apply law.

Reading the Regulation as amended we find it must be held to be applicable to liquidation process which are pending, and the provision can be applied considering stage of the process, irrespective of the date whether the liquidation process started before 25.07.2019 or on or after 25.07.2019 when Clause 12 Schedule I of the Regulations was substituted. This is not to say that sales already cancelled before 25.07.2019 for default of payment under earlier existing clause 12 can be reopened. Liquidators can rely on the amendment at the time of issue of Auction Notice being issued, irrespective of date of liquidation order of Adjudicating Authority. The Circular dated 26.08.2019, we hold is not legally enforceable to interpret applicability. Such Circular cannot be in the nature of substituting existing Regulation in the name of guidelines. The guidelines which are inconsistent with the subordinate legislation would not be enforceable. If provision is clear, external aid, that too inconsistent, cannot be applied. The provision has to be enforced by Tribunal as it is".

(b) In M/s Sandoor Micro circutes Ltd vs Commissioner of Central Excise Belagam in civil appeal no.7177 of 2005 wherein Para No.4 & 5 of the above Judgment it was held that

"The issue relating to effectiveness of a Circular contrary to a Notification statutorily issued has been examined by this Court in several cases. A Circular cannot take away the effect of Notifications statutorily issued. In fact in certain cases, it has been held that the Circular cannot whittle down the Exemption Notification and restrict the scope of the Exemption Notification or hit it down. In other words, it was held that by issuing a circular a new condition thereby restricting the scope of the exemption or restricting or whittling it down cannot be imposed. The principle is applicable to the instant cases also, though the controversy is of different nature."

(c) Hon'ble Supreme Court of India, in Bengal Iron Corporation Vs CTO Civil Appeal No.44775 of 1992 wherein Para No.18 of the said Judgment it is stated

"So far as clarifications/circulars issued by the Central Government and/or State Government are concerned, they represent merely their understanding of the statutory provisions. They are not binding upon the courts. It is true that those clarifications and circulars were communicated. It is doubtful whether such clarifications and circulars bind the quasi-judicial functioning of the authorities under the Act. While acting in quasi-judicial capacity, they are bound by law and not by any administrative instructions, opinions, clarifications or circulars. Law is what is declared by this Court and the High Court to wit, it is for this Court and the High Court to declare what does a particular provision of statute say, and not for the executive. Of course, the Parliament/Legislature never speaks or explains what does a provision enacted by it mean. (See Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.4)" .

d) Madras Bar Association Vs Union of India & another in Writ Petition (Civil) No.502 of 2021, where in Hon'ble Supreme Court clarified the Legislation and its functions.

(v) *Per Contra*, Shri S. Ravi Ld. Senior Counsel appearing for the liquidator would contend that, the intention of the legislature has to be understood in a broader perspective and the going concern sale is not barred by the legislature after completion of the prescribed period, rather it only intended in directing the liquidator to explore the options of selling the Corporate Debtor as a going concern mandatorily in the first instance in 90 days since the objective of the code is to revive not to liquidate, after that only the Liquidator has to opt for the sale of individual assets of the CD also.

(vi) Ld. Senior Counsel, further submitted that the time line prescribed in Regulation 32A (4) of IBBI, does meet the objectives of the IB Code, besides the ruling of Hon'ble Supreme Court, in Swiss Ribbons Pvt Ltd vs. Union of India. *Supra*, wherein it has observed at para 27 that:

"What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the Liquidator can sell the business of the Corporate Debtor as a going concern.... It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the Corporate Debtor by protecting the Corporate Debtor form its own management and from a corporate death by liquidation".

(vii) Ld. Senior Counsel also similarly relied on the following rulings:

(a) Hon'ble Supreme Court order in M/s Innoventive Industries Ltd Vs ICICI Bank and Anr in civil appeal no. 8337-8338 of 2017 has held that;

"From the viewpoint of creditors, a good realization can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realization is lower when there are delays. Hence, delays cause value destructions. Thus, achieving a high recovery rate is primarily abut identifying and combating the sources of delay".

(b) Hon'ble Supreme Court order in 'ArcelorMittal India Private Limited" in para 86 has held that

"We must not forget that the Corporate Debtor consists of several employees and workmen whose daily bread is dependent on the outcome of the Corporate Insolvency Resolution Process. If there is a resolution applicant who can continue to run the Corporate Debtor as a going concern, every effort must be made to try and see that this is made possible".

8. Before we proceed further, for better appreciation of the submissions of the Ld. Counsels for both, we profitably rely on Regulations 32, and 32A of IBBI (Liquidation Process) Regulations, besides the IBBI Circular dated 26/08/2021, which are as follows.

i. **32 Sale of Assets, etc.** (came in to force on 22/10/2018.)

The liquidator may sell-
(a) an asset on a standalone basis;
(b) the assets in a slump sale;
(c) a set of assets collectively;
(d) the assets in parcels;
(e) **the corporate debtor as a going concern; or**
(f) **the business(s) of the corporate debtor as a going concern:**

Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate.

ii. 32A. Sale as a going concern (amended came in to force w.e.f.27/7/2019).

(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.

(iii) On 26th August, 2019 IBBI has issued the following circular.

CIRCULAR No. IBBI/LIQ/024/2019 26th August, 2019

To

All Registered Insolvency Professionals
All Recognised Insolvency Professional Entities
All Registered Insolvency Professional Agencies (By mail to registered email addresses and on website of the IBBI)

Dear Madam / Sir,

Sub: Applicability of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 notified on 25th July, 2019.

The Insolvency and Bankruptcy Board of India notified the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 (Amendment Regulations) on 25th July, 2019. They came into force on the date of their publication in the Official Gazette, that is, on 25th July, 2019. 2. The stakeholders have expressed a difficulty in applying the Amendment Regulations to a liquidation process, which commenced before 25th July, 2019. It is reiterated that the provisions of the Amendment Regulations are not applicable to the liquidation processes, which had commenced before coming into force of the said Amendment Regulations and that they are applicable only to liquidation processes, which commenced on or after 25th July, 2019. 3. This Circular is issued in exercise of the powers under section 196 of the Insolvency and Bankruptcy Code, 2016.

Yours faithfully,
Sd/- (I. Sreekara Rao)
Chief General Manager
Email: sreekararao@ibbi.gov.in

9. Admittedly, the order of liquidation of corporate debtor in this case has been passed on 04.02.2019. It is pertinent to note that by the date of commencement of liquidation in the case on hand, no time limit was set under IBBI Regulation No 32 for sale of the CD as going concern. The amended Regulation 32A, which has come in to force subsequent to passing of liquidation order in this case i.e., on 27/7/2019, states that, *"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".

10. (i). The 1st Stakeholders Consultation Committee Meeting was held on 10.10.2019, in which meeting the Applicant also took part. Under the agenda item No. 5, it stated as follows: -

> Item-5: Discussion on the reserve price for the company as a whole as a going concern or asset-wise
>
> Liquidator apprised the stakeholders about the fair value, realisable value and liquidation value as defined in the IBC, 2016.
>
> Liquidator informed the stakeholders that as per amendment to the liquidation process regulations, 2016 under regulation 32A, 'the Liquidator shall identify and group the assets and liabilities to be sold as a going concern, in consultation with the consultation committee". Liquidator discussed with the stakeholders about the sale as a going concern and all the stakeholders unanimously agreed to sell the Corporate Debtor as a going concern as one of the separate line items only. The stakeholders advised the Liquidator to issue the sale notice for sale of the Corporate Debtor as a going concern and also for the divisions and other assets of the Corporate Debtor. **Liquidator also informed the stakeholders about the timeline of 90 days from the commencement of liquidation to sell the Corporate Debtor as a going concern.**
>
> SCC members also advised the liquidator that sale notice should contain the sale of plant and machinery as one of the separate line item apart from another line items for sale of the company as a going concern and for individual assets of the Corporate Debtor. Liquidator noted the same.
>
> All the stakeholders unanimously agreed to keep the Reserve Price by taking the average of 2 fair market values arrived by the registered valuers during the liquidation process.
>
> All the stakeholders unanimously agreed to keep the Earnest Money Deposit at 10% of the value of the reserve price and the balance sale consideration to be paid as laid down under the Liquidation Process Regulations. Liquidator noted the same.

(ii). Thus, it is manifestly clear, that the Stakeholders Consultation Committee unanimously and consciously, decided to sell the corporate debtor company as a whole as a going concern, despite being sensitized of the 90 days' time line for sale of the corporate debtor or the business of the corporate debtor as going concern, set under *sub clause* 4 of IBBI Regulation 32A, by the Liquidator as the minutes of the above meeting clearly disclose that the Liquidator informed the stakeholders about the timeline of 90 days which commences the date of commencement of liquidation, to sell the Corporate Debtor as a going concern.

11. The first E Auction sale publication was made on 13/11/2019. However, the sale under this sale notification besides 15 subsequent sale notifications despite reduction in reserve price from time to time, did not fructify. However, the 16th sale notice published on 1/7/2021 notifying that the sale of the CD as going concern scheduled on 15th July 202, has fructified. Pursuant there to LOI was issued to Mrs. Raji Dinesh and Mr. Akash Agarwal, the successful bidders on 15/07/2021 whereby the successful bidders were mandated to depot 25% of the bid amount i.e., Rs 7,89,75,000.00 on or before 21/07/2021 and the balance on or before 13/08/2021 and the balance can also be paid within 90 days with interest 12% if not paid within 30 days. Since the successful bidder has paid the entire sale consideration along with applicable interest well within due date and the Liquidator on 9/10 2021 issued sale certificate to the successful bidder.

12. In this undeniable factual backdrop, *having carefully examined* the contentions of the Petitioner, mostly based on the ruling in re,

Sundaresh Bhat, *supra*, that, the IBBI Regulation 32A, since held to be an open ended provision relating to procedural besides that the Power of IBBI, under Section 196(1) (p) or (t) to issue guidelines cannot be expanded to interpret the provisions made, the circular dated 26th August, 2019, *supra*, issued by IBBI, is un sustainable under law *consequently,* the sale in the instant case since held beyond 90 days from the date of liquidation commencement date is violative of the newly inserted Regulation 32A, as such, on this score alone, the sale is liable to be set aside, *we are unable to subscribe* to the above submission of the Ld. Counsel for the Petitioner, for the reasons we state hereunder:

(a) The Petitioner, is a member of the Stakeholders Consultation Committee which has unanimously and consciously accepted for the sale of the corporate debtor company as a whole as a going concern, despite being sensitized by the of the liquidator about the 90 days' time line for sale of the corporate debtor or the business of the corporate debtor, set under sub clause 4 of IBBI Regulation 32A which has been in vogue by that time.

(b) Therefore, the petitioner having accepted for sale of the corporate debtor as a going concern, even though it was open to the petitioner to oppose the sale of the corporate debtor as a going concern, on the ground that more than 90 days' time envisaged under sub rule 4 of Regulation 32A has lapsed, is *estopped* under law by his very conduct and acquiescence from invoking the jurisdiction of this Tribunal, by challenging the sale of the corporate debtor as a going concern alleging breach of sub rule 4 of Regulation 32A. Thus, the very *locus standi,* of the petitioner is very much at stake.

(c) The amended Regulation 32A, relating to the sale as a going concern, was not in existence when the liquidation process commenced on 04.02.2019 against the corporate debtor, as the said amendment came in to force w.e.f.27/7/2019.

(d) The IBBI on 26th August, 2019 has issued circular clarifying that the Regulation 32A, is not applicable to the liquidation if commenced by 26th August, 2019.

(e) That apart, in the light of the ruling of Hon'ble Supreme Court, in *Swiss Ribbons Pvt Ltd vs. Union of India*, wherein it was observed at para 27 that "what is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the Liquidator can sell the business of the Corporate Debtor as a going concern.... **the primary focus of the legislation is to ensure revival and continuation of the Corporate Debtor by protecting the Corporate Debtor form its own management and from a corporate death by liquidation"** (Emphasis is ours), the word 'shall" used in sub clause 4 of IBBI Regulation 32A, necessarily be construed or read as **"may"**, lest **the** the purpose and object that the statute seeks to achieve gets defeated.

(f) In Ashok Lanka & Anr vs Rishi Dixit & Ors, *2005, 5 SCC Page598*, Hon'ble Supreme Court held that, "The question as to whether a statute is mandatory or directory would depend upon the statutory scheme. It is now well known that use of the expression "shall" or "may" by itself is not decisive. The court while construing a statute must consider all relevant factors including the purpose and object the statute seeks to achieve".

(g) In Gvindlal Chhaggan Lal Patel vs The Agricultural Produce Market 1976 AIR 263, Hon'ble Justice Chandrachud, Y.V. has held that,

"But the little complexity that there is in this matter arises out of a known phenomenon, judicially noticed but otherwise disputed, that sometimes the legislature does not say what it means. That has given rise to a series of technical rules of interpretation devised or designed to unravel the mind of the law-makers. If the words used in a statute are ambiguous, it is said, consider the object of the statute, have regard to the purpose for which the particular provision is put on the statute-book and then decide what interpretation best carries out that object and purpose. The words of the concluding portion of section 6(1) are plain and unambiguous rendering superfluous the aid of artificial guide-lines to interpretation. But the matter does not rest there. The appellant has made an alternative argument that the requirement regarding the publication in Gujarati in a newspaper is directory and not mandatory, despite the use of the word "shall". That word, according to the appellant, really means "may".

"Maxwell, Crawford and Craies abound in illustrations where the words "shall" and "may" are treated as interchangeable, "Shall be liable to pay interest" does not mean "must be made liable to pay interest", and "may not drive on the wrong side of the road" must mean "shall not drive on the wrong side of the road". But the problem which the use of the language of command poses is: Does the legislature intend that its command shall at all events be performed? Or is it enough to comply with the command in substance? In other words, the question is: is the provision mandatory or directory?"

"Plainly, "shall" must normally be construed to mean "shall" and not "may", for the distinction between the two is fundamental. Granting the application of mind, there is little or no chance that one who intends to leave a lee-way will use the language of command in the performance of an act. But since, even lesser directions are occasionally clothed in words of authority, it becomes necessary to delve deeper and ascertain the true meaning lying behind mere words."

"Crawford on 'Statutory Construction' (Ed. 1940, Art. 261, p. 516) sets out the following passage from an American case approvingly: "The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other." (Emphasis is ours).

"Thus, the governing factor is the meaning and intent of the legislature, which should be gathered not merely from the words used by the legislature but from a variety of other circumstances and considerations. In other words, the use of the word 'shall' or 'may' is not conclusive on the question whether the particular requirement of law is mandatory or directory. But the circumstance that the legislature has used a language of compulsive force is always of great relevance and in the absence of anything contrary in the context indicating that a permissive interpretation is permissible, the statute ought to be construed as pre-emptory".

(h) Even in the ruling in, *Sunderesh Bhat*, *supra*, relied on by the Petitioner herein, Hon'ble NCLAT, while holding that, "Reading the Regulation as amended we find it must be held to be applicable to liquidation process which are pending, and the provision can be applied considering stage of the process, irrespective of the date whether the liquidation process started before 25.07.2019 or on or after 25.07.2019" .... further categorically held that the "Liquidators can rely on the amendment at the time of issue of Auction Notice being issued, irrespective of date of liquidation order of Adjudicating Authority". (Emphasis is ours), thereby clearly indicating that it is ***discretionary*** but **not mandatory** for the Liquidator to apply *sub rule* 4 of Regulation 32A, at the time of issuance of the sale notices in the cases of the present nature.

Furthermore, Hon'ble NCLAT, in the above appeal ultimately held that:

"The Liquidator would be at liberty to apply and enforce amended Clause 12 of Schedule I of the Liquidation Regulations to the liquidation process even though initiated before 25.07.2019", which once again confirms that the liberty has been conferred on the liquidators whether to apply or not the Regulation under 32A, in cases where the Liquidation process has already commenced. Therefore , *sub rule* 4 of Regulation 32A, is only directory but not mandatory.

(i) Moreover, as the consequences of non- compliance of *sub clause* 4 of IBBI Regulation 32A, are not spelt out in the said Regulations, the word `**shall**' used in Regulation 32A raises a *presumption* that the particular provision is ***directory*** but not mandatory.

(j) It is not at all the case of the Petitioner that the sale in question has defeated any of the laudable objects of IBC, which has been well explained by Hon'ble Supreme Court, in in the following rulings.

(i) ArcelorMittal India Private Limited, supra, in para 86,

> "we must not forget that the Corporate Debtor consists of several employees and workmen whose daily bread is dependent on the outcome of the Corporate Insolvency Resolution Process. <u>If there is a resolution applicant who can continue to run the Corporate Debtor as a going concern, every effort must be made to try and see that this is made possible</u>".

(ii) M/s Innoventive Industries Ltd Vs ICICI Bank and Anr in civil appeal no. 8337-8338 of 2017 ,

> "From the viewpoint of creditors, a good realization can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realization is lower when there are delays. Hence, delays cause value destructions. Thus, achieving a high recovery rate is primarily abut identifying and combating the sources of delay".

(iii) Hon'ble NCLAT, Principal Bench, vide its order dated August 24, 2021[13], has upheld the validity of a GCS during liquidation by dismissing the order given by the Hon'ble NCLT, Principal bench in Invest Asset Securitisations &

Reconstruction Pvt. Ltd , which is relied on by the petitioner herein, and stated as follows:

> "The Supreme Court has in a catena of judgements observed that liquidation should be the last resort only if the Resolution Plan submitted is not up to the mark and even in liquidation, the liquidator can sell the business of the corporate debtor as a 'going concern'.
>
> "The Appellate Authority and the Adjudicating Authority, too, in many recent decisions, have directed the liquidators to make efforts to sell the corporate debtor as a going concern. It helps in realisation of higher value, value preservation, and rescuing a viable business."

13. As regards the reserve price, it may be stated that in terms of Clause 4 Schedule-I of IBBI Liquidation Process Regulations, 2016, the Liquidator is entitled to reduce the reserve price up to 25% whenever the auction fails. The record placed before us viz. minutes of the Stakeholders Consultation Committee meetings clearly disclose that the Liquidator discussed fixation of reserve price in every meeting and the members of the committee, which admittedly includes the Petitioner herein, have unanimously agreed for the reduced reserve price proposed by the Liquidator. According to the Liquidator, despite the Regulation allowing 25% reduction, the average of the reduced reserve price from time to time was only 8%.

14. It may be stated that it is natural that when there are no bids to take the property in auction at a particular minimum reserve price, the auction fails and unless the reserve price is altered suitably as per the norms, there might be no fresh bids. As already stated, in the case on hand, 15 times, the auction has failed and therefore, it became inevitable for the SCC to accept reduction in the reserve price, lest the sale can never happen and further delay result in deterioration of the asset value. We

have perused the records and found that the reduction was around 8%, though the Regulations provide for reduction up to 25%. That aprt, the Applicant herein, is part of the committee that agreed unanimously for the reduction in the reserve price from time to time, and allowed the sale notices to be published.

15. Under these circumstances we find no reason at all in entertaining the plea of the Petitioner that too, when the sale ultimately fructified pursuant to the 16th sale notice, that the reserve price as fixed was low. If really, the Applicant had any material information enabling fixation of the reserve price higher than the what was agreed, it was always open for the Applicant to place the same before the Stakeholders Consultation Committee meeting enabling the members to consider the same while fixing the reserve price. Mere oral contention that too after the sale fructified ultimately, that the reserve price is low, we hold that the same is devoid of any substance.

16. Last but not the least, nowhere the petitioner has pleaded as to how cancellation of this sale and a going for a *fresh sale* of the corporate debtor other than as a going concern, will benefit the Petitioner or the corporate debtor, when the subject sale itself, did not even receive bids until the 16th sale notice.

17. Therefore, in the light of our discussion above mentioned, upon careful consideration of the submissions made by the Ld. Counsels for both sides and on perusal of the written submissions and the case laws, we are of the firm conclusion that the pleas raised in the application

are neither tenable nor substantiated and the same are devoid of any merit or substance. Hence, the application deserves to be dismissed.

18. We accordingly, dismiss the application. No order as to costs.

SD/-

SD/-

(Veera Brahma Rao Arekapudi)
Member (Technical)

(Dr. N.V.Ramakrishna Badarinath)
Member (Judicial)

Binnu

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH-1

IA No. 638 of 2021
IN
CP (IB) NO.265/9/HDB/2017

Application under Section 35(1)(n) R/w Section 60 (5)(c) of IBC,2016

IN THE MATTER OF M/S SERVOMAX INDIA PRIVATE LIMITED

Between:

G. Madhusudan Rao
Liquidator of M/s Servomax India Private Limited,
(IBBI/IPA-001/IP-P00181/2017-18/10360)
7-1-285, Flat No 103, Sri Sai Swapna Sampada Apts
Balkampet, Hyderabad 500038

.... Applicant/
Liquidator

versus

Employees Provident Fund Organization
Represented by its,
Regional Provident Commissioner – II
Bhavishyanidhi Bhavan,
Regional Office – I,
Hyderabad – 500027

......Respondent

Date of order: 07.02.2022

Coram

Dr. N. Venkata Ramakrishna Badarinath, Hon'ble Member (Judicial)
Shri Veera Brahma Rao Arekapudi, Hon'ble Member (Technical)
Appearance:

For Applicant: Shri Mummaneni Vazra Laxmi, Advocate

PER: BENCH

ORDER

1. The Liquidator appointed by this Tribunal vide order dated 04.02.2019 has filed this Application under Section 35(1)(n) R/w Section 60 (5)(c) of Insolvency and Bankruptcy Code, 2016 praying to declare that only the dues payable under Section 7A (Determination of moneys due from employers) and under Section 7Q (Interest payable by the employer) of EPF & MP Act, 1956 are the sums due to any workmen or employee from the provident fund under Section 36 (4) (iii) of IBC, 2016, and the penal damages u/s 14B of EPF & MP Act, 1956, are the dues to the Central Government and to direct the Respondent Organization to waive short remittances, damages and penal damages levied u/s 14B of EPF & MP Act.
2. It is stated that pursuant to issuance of public notice inviting stakeholders to submit the claims as on the liquidation commencement date, the Respondent herein submitted their claim in Form F under regulation 19 of Voluntary Liquidation Process, Regulations, 2017 instead of **Form G** of Liquidation Process Regulations which the Respondent was informed and was requested by the Liquidator to submit the claim in appropriate form, but till date the Respondent failed to submit their claim in the requisite form.
3. It is further stated that the Respondent in their claim form demanded the following amounts from the Corporate Debtor (CD).

a. 7A current demand as per enquiry period from 05/2015 to 05/2016 summons vide No. AP/ENF/RO/Hyd/28082/C-IV/T-2/2016/820 dated 30-06-2016 and as per EO'S report 7A proceedings vide No. TS/Hyd/28082/C-I/T-2/2020/1560 dated 05-03-2020 for Rs. 15,86,239/-.

b. Penal Damages and Interest under Section 14B and 7Q of EPF & MP Act, 1956 for the period of 05/2015 to 05/2016 (provisional) summons vide No. AP/Hyd/0028082/000/Enf/damages dated 17-02-2021 for Rs.25,69,634/.

c. Penal Damages and Interest under Section 14B and 7Q of EPF & MP Act, 1956 for the period 01/2009 to 01/2019 summons vide No. AP/Hyd/0028082/000/Enf/damages dated 17-02-2021for Rs. 16,93,454/-.

d. Short remittance made up to Feb/2020 vide account section U.O Note No. AP/Hyd/28082/AG-19(2) dated 16-02-2021 for Rs.5,82,809/-.

4. It is the contention of the Liquidator that Respondent made a claim for Rs. 64,32,136/- . But the total amount the determined under Section 7A of the EPF & MP Act, 1956 as due from employer is only Rs.15,86,239/- are already paid by the Applicant/Liquidator and the PF Organization levied interest for period 22/04/2009 to 17/02/2021 but the date of Liquidation of the Company is on 04-02-2019 and from that day as per Section 33 (7) of IBC Liquidation order shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor therefore levy of interest till 17/02/2021 is not acceptable and the Applicant requested the Respondent to submit the revised interest

calculation but the Respondent PF Organization failed furnished the same till date.

5. It is further averred by the Liquidator that PF, Pension & Gratuity are terminal benefits that are basically employees' dues under statutory provisions which are provided through contributions to the dedicated funds, out of expenditure head – "workmen/employees cost" by a company. For PF, the contributions are placed with the EPFO or with the exempted PF Trust, and that for the purpose of liquidating the Corporate Debtor, the Liquidator has to form estate of the assets of the CD as per Section 36 of the Insolvency and Bankruptcy Code, 2016. The said Section 36 reads as under:

Section 36 Liquidation Estate:

"(1) For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor.

(2) The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

(3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following: -

(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;

(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;

(c) tangible assets, whether movable or immovable;

(d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;

(e) assets subject to the determination of ownership by the court or authority;

(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;

(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;

(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and

(i) all proceeds of liquidation as and when they are realized.

(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation: -

(a) assets owned by a third party which are in possession of the corporate debtor, including -

(i) assets held in trust for any third party;
(ii) bailment contracts;

(iii) all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

6. The Liquidator emphasised on provision of Section 36 (4) (a) (iii) of IBC, 2016 and submitted that dedicated funds created internally (plan funds) for PF, Gratuity Pension, leave encashment etc., i.e dues to workmen and employee from Provident fund, Pension fund and Gratuity fund do not form part of Liquidation Estate.

7. The Liquidator has categorised the different components of EPFO fund as follows:

a. Workmen & employees' contribution towards provident fund deducted from the salary but not deposited by the employer (CD) with EPFO / Exempted PF Trust / NPS.

b. Dues in respect of employer's (CD's) contribution for Provident Fund / pension fund for paid salaries, not deposited with EPFO / Exempted PF Trust / Pension Fund Trust / NPS Interests and penalties component.

The amount deducted from the salary of the workmen and employees for on onward remittance to EPFO for credit to the PF account of the respective workmen or employee is fundamentally not the assets of the Corporate Debtor; there are the assets of the workers/employee in possession of Corporate Debtor under the capacity of trustee or guardian. The amount due to EPFO authorities from the employer shall forms part of provident fund with the CD, and these are to be paid by the Liquidator, under the provisions of section 36(4)(a)(iii), prior to any distribution of funds under the provisions of section 53.

c. Damages, Penal damages and penalties component.

These are the charges levied by the PF department on account of delay in making the payment of employer dues and these are not paid to any workmen or employee and they are paid only as per their entitlement only.

8. The Liquidator placed reliance on the following judgements wherein it was held that the amounts due and payable to any workmen or employee from the provident fund, pension fund and gratuity fund are the assets of the workmen/employees and hence shall not be included in the liquidation estate to be distributed pursuant to the order of priority as set out in Section 53 of the IBC.

a. Precision Fasteners Limited v Employees' Provident Fund Organisation (M.A.No.576 & 752/2018) in C.P.(IB)1339 (MB/2017)

Wherein the co-ordinate Bench Mumbai, in its order dated 12 September 2018, observed that dues of provident fund, pension fund and gratuity fund have to be deemed as an asset of the workmen or employees irrespective of whether they have been maintained in a separate account or not by the company under liquidation.

b. Alchemist Asset Reconstruction Company Ltd. v Moser Baer India, (IB-378 (PB) / 2017), order dated 19-3-2019 by Principal Bench, New Delhi

   In this case it is held that the overriding effect of section 238 of the IBC over any other law for the time being in force will not have any bearing over the amounts due and payable to the workmen/ employee by way of provident fund, pension fund and gratuity fund (deemed assets of the employees) because those amounts are specifically excluded from liquidation estate under section 36(4)(a), by reason of which, Section 53 of the IBC shall not be applicable to those amounts.

c. State Bank of India v Moser Baer Karamchari Union and Ors (AT) (Insolvency) No.396 of 2019 decided on 19-08-2019 by the National Company Law Appellate Tribunal, New Delhi.

   The point for consideration in this appeal was whether or not Provident Fund, Pension Fund and Gratuity Fund come within the meaning of assets of the Corporate Debtor for distribution under Section 53 of IBC.

   The appellate authority upheld the decision of the Delhi bench and ruled that the question of distribution of the provident fund or the pension fund or the gratuity fund in order of priority and within such period as prescribed under Section 53(1) does not arise as all sums due to any workman or employees from the provident fund, the pension fund and the gratuity fund, do not form part of the liquidation estate/liquidation assets of the 'Corporate Debtor' as provided in Section 36 of IBC.

9. The Liquidator however, further submits that a contradictory view has been taken in the case of Company Appeal (AT) (Insolvency) No. 1229 of 2019 the Hon'ble NCLAT in the matter of Lanco Infratech Limited in para 24 observed that:

Thus, it is the settled position of law, that the provident fund, the pension fund and the gratuity fund, do not come within the purview of 'liquidation estate 'for the purpose of distribution of assets under Section 53 of the Code. Based on this, the only inference which can be drawn is that Pension Fund, Gratuity Fund and Provident Fund can 't be utilized, attached or distributed by the liquidator, to satisfy the claim of other creditors. Sec 36(2) of the I B Code 2016 provides that the Liquidator shall hold the Liquidation Estate in fiduciary for the benefit of all the Creditors. The Liquidator has no domain to deal with any other property of the corporate debtor, which is not the part of the Liquidation Estate.

In a case, where no fund is created by a company, in violation of the Statutory provision of the Sec 4 of the Payment of Gratuity Act, 1972, then in that situation also, the Liquidator cannot be directed to make the payment of gratuity to the employees because the Liquidator has no domain to deal with the properties of the Corporate Debtor, which are not part of the liquidation estate.

Therefore, this Appellate Tribunal is of the considered opinion that the Adjudicating Authority erred in directing the Liquidator to make provision for payment of Gratuity to workers, as per their entitlement. Thus, Appeal is allowed and the impugned direction to 'Liquidator 'to make provision for payment of Gratuity, without their being a separate fund in this regard, is set aside.

The Regional Provident Fund Commissioner – I vs. Karpagam Spinners Private Limited.

In this case, it was pleaded by the Regional Provident Fund Commissioner that the categorisation by the Resolution Professional of the dues under the EPF Act under Section 53 (1) (f) as "other remaining debts and dues is incorrect and that the EPF Dues shall be a first charge on the assets of the establishment and shall have priority against all other dues including the waterfall of liquidation payments as set out in Section 53 of the IBC. However, it was held that, pursuant to 238 of the IBC, the IBC will over ride anything inconsistent with the IBC including the EPF Act and that the workmen dues as payable under the EPF Act will not be considered in priority to priority of payment under Section 53 of the IBC. It is however to be noted that in this case, no reference was made to Section 36 of the IBC.

10. It is further observed that dues payable to the workmen includes both the employee and employer contribution to the funds and hence the entire arrears towards the provident fund should be liquidated before paying off the other creditors of the company under liquidation. Thus, the employer contribution to provident fund, pension fund and gratuity fund shall be considered as allocated for payment to the respective funds irrespective of whether such amounts have been released or not.

11. It is the further contention of the Liquidator that the amount levied as damages, penal damages and penalties by the Respondent Organization will not be paid to any single workman or employee of the Company. These penalties and damages will be paid to the department only. Therefore, these damages, penalties will fall under the category of Government dues under u/s 53 (1) (e) (i) of IBC, 2016. Hence the dues of Provident Fund, Pension Fund and

Gratuity Fund are to be excluded from the waterfall of priority of payment as set out in Section 53 of the IBC.

12. The Liquidator has further elaborated Section 7A & 7Q of EPF & MP Act, 1956 which deals with determination of amounts due from employers and interest payable by the employers, which reads as follows:

7A. Determination of moneys due from employers. —

(1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commiss
ioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order, —

(a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

(b) determine the amount due from any employer under any provision of this Act, the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be, and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary;

7Q. Interest payable by the employer. —

The employer shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment: Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank.

Section 14B of the EPF & MP Act, 1956 deals with power to recover damages which read as follows:

14B. Power to recover damages. —

Where an employer makes default in the payment of any contribution to the Fund 3 [, the 2 [Pension] Fund or the Insurance Fund] or in the transfer of accumulations, accumulations required to be transferred by him under sub-section (2) of section 15 4 [or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of 5 [any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, 6 [the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf] may recover 7 [from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:

Provided that before levying and recovering such damages, the employer shall be given a reasonable e opportunity of being heard

Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, subject to such terms and conditions as may be specified in the Scheme.

The Respondent Organization claim is inclusive of determined amount under 7A, and interest u/s 7Q and damages under Section 14B of EPF & MP Act, 1956 and short remittance made up to Feb/2020.

13. It is further stated that as per new applicable laws, the board has power to reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company like the present Corporate Debtor after repeal of SICA in 2016 and allowed companies having pending proceedings under the SICA to approach the National Company Law Tribunal (NCLT) under the provisions of the Insolvency Code.

14. The Liquidator vide his letter dated 26.08.2021 apprised the facts to the Respondent Organization and with regard to the payment of current demand under Section 7A and interest under Section 7Q of EPF & MP Act, 1956 as priority dues and to submit the revised claim form, but the Respondent organization vide reply letter dated 06-09-2021 did not adhere to his request and directed to release it in priority. Thus submitting, the Ld. Liquidator prayed the Tribunal to declare the sum due to any workmen or employee from the provident fund under Section 7A & 7Q of the EPF & MP Act, 1956 shall not form part of the Liquidation Estate under Section 36 (4) (iii) of IBC, 2016, and to be considered in priority over other dues and the damages, penal damages claimed by the Respondent PF Organization under Section 14B of EPF & MP Act, 1956 are dues to the Central Government and to be treated u/s 53 (1) (e) (i) of IBC, 2016, and further directions to the Respondent Organization to waive the damages levied under Section 14B of EPF & MP Act, 1956 as the Corporate Debtor is a sick industrial unit and undergoing insolvency proceedings.

15. The record reveals that this Tribunal on 06.12.2021 having found from the proof of service filed by the Petitioner that service of notice in IA 638/2021 has been duly effected and none appeared for the Respondent herein, set the Respondent ex-parte and posted the matter to 10.01.2022 for hearing. The matter accordingly was heard on 10.01.2022 and adjourned the matter to 12.01.2022 and thereafter the matter has been posted to 04.02.2022 for orders. However order was not ready on 04.02.2022. The matter was posted to 07.02.2022 for orders.

16. Despite service of notice, the Respondent choose to remain ex-parte. No counter has been filed by EPFO.

17. In this backdrop the point that emerges for consideration of the Bench is

"Whether the Applicant is entitled for the reliefs as prayed in this Application?

18. We have heard the Counsel for Liquidator, perused the record and case laws.

POINT

Whether the Applicant is entitled for the reliefs as prayed in this Application?

19. This Tribunal dated 22.02.2019 allowing the application filed under Section 9 of IBC, declaring CIRP against Servomax India Private Limited, this AA, appointed the Liquidator vide order passed in IA No.535/2018 on 4th February 2019 to initiate the Liquidation process as envisaged in the Insolvency and Bankruptcy Code, 2016 by following the liquidation process given in Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

20. The Respondent Organization submitted their claim in Form F under regulation 19 of Voluntary Liquidation Process, Regulations, 2017 instead of Form G of Liquidation Process Regulations. According to the Liquidator, PF, Pension & Gratuity are terminal benefits that are basically employees' dues under statutory provisions which are provided through contributions to the dedicated funds, out of expenditure head – "workmen/employees cost" by a company. For PF, the contributions are placed with the EPFO or with the exempted PF Trust.

21. Here, it is useful to refer to Section 36 of the Insolvency and Bankruptcy Code, 2016. The said Section 36 reads as under:

Section 36 Liquidation Estate:

"(1) For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor.

(2) The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

(3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following: -

(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;

(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;

(c) tangible assets, whether movable or immovable;

(d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;

(e) assets subject to the determination of ownership by the court or authority;

(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;

(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;

(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and

(i) all proceeds of liquidation as and when they are realized.

(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation: -

(a) assets owned by a third party which are in possession of the corporate debtor, including -

(i) assets held in trust for any third party;
(ii) bailment contracts;

(iii) all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and
(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

Thus, a plain reading of the above provisions makes it clear that only the dues to workmen and employee from Provident fund, Pension fund and Gratuity fund do not form part of Liquidation Estate.

22. It is to further state that apart from this Bench various other NCLT Benches have consistently held that the amount due and payable to any workmen and employee from the Pension fund, Provident Fund and Gratuity Fund are assets of workmen/employees, hence shall not be included in the liquidation estate to be distributed pursuant to the order of priority as set out under Section 53 of the Code.

23. Here, it may be relevant to refer to the report of the Joint Parliamentary Committee, in its report had stated, "provident fund, pension fund and the gratuity fund provide the social safety net to the workmen and employees and hence need to be secured in the event of liquidation of a company or bankruptcy of partnership firm." The Committee recommended that all sums due to any workman or employee from the provident fund, the pension fund

and the gratuity fund should not be included in the liquidation estate assets and estate of the bankrupt.

24. We therefore, have no hesitation in holding that, only the dues of Pension Fund, PF and Gratuity Fund shall be excluded from the waterfall of priority of payment as set out in Section 53 of the IBC.

25. In so far as the damages is concerned, we refer to Section 14B of the EPF & MP Act, 1956 deals with power to recover damages which read as follows:

14B. Power to recover damages. —

Where an employer makes default in the payment of any contribution to the Fund 3 [, the 2 [Pension] Fund or the Insurance Fund] or in the transfer of accumulations, accumulations required to be transferred by him under sub-section (2) of section 15 4 [or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of 5 [any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, 6 [the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf] may recover 7 [from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:

Provided that before levying and recovering such damages, the employer shall be given a reasonable e opportunity of being heard.

Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, subject to such terms and conditions as may be specified in the Scheme.

26. The Applicant/Liquidator through letter dated 26-08-2021 intimated the above mentioned facts and payment of current demand under Section 7A and interest under Section 7Q of EPF & MP Act, 1956 as priority dues and requested the Respondent Organization to submit the revised claim form, but the Respondent organization through letter dated 06-09-2021 requested the Liquidator to accept the provident fund contributions and its allied amounts and to release it in priority as observed in Section 36 of IBC.

27. The total admitted secured claims of the Corporate Debtor are around Rs.769,15,71,337/- and the total realized amount from the sale of the Corporate Debtor is around Rs. 53 Crores therefore there is a huge haircut of Rs.716,15,71,337/- (93.11%) in the amount payable to the Secured Creditors who are the back bones of the Corporate Debtor.

28. Therefore considering the amounts claimed by the Respondent PF Organization as damages, penal damages etc., are paid only to the PF Organization and not to any single workmen or employee and when the Secured Creditors are losing 93% of secured amount, is of the firm view that it is not justified to pay the damages, penal damages and penalties to the Respondent PF Organization in priority over the amounts payable to the Secured Creditors of the Corporate Debtor, and if they are paid ultimately the Secured Creditors will suffer huge irreparable loss.

29. The factual position of Law being that only amount due to any workmen or employee from the provident fund under Section 7A & 7Q of the EPF & MP Act, 1956 will not form part of the Liquidation Estate under Section 36 (4) (iii) of IBC, 2016, and to be paid in priority over other dues and not the damages and penal damages levied by the Respondent organization under Section 14B of the EPF & MP Act, 1956, we hold that the Respondent/ EPFO is not entitled for damages or penal damages.

30. Therefore, in the light of our discussion, the IA deserves to be allowed.

31. According, IA No. 638/2021 is allowed. No order as to costs.

SD/-

SD/-

(Veera Brahma Rao Arekapudi)
Member (Technical)

(Dr. N.V. Ramakrishna Badarinath)
Member (Judicial)

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NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH-1

IA No. 714/2021
IN
CP (IB) NO.265/9/HDB/2017

U/s 35 (1)(n) and SECTION 60(5)(c) OF Insolvency & Bankruptcy Code 2016, R/W Rule 11 OF National Company Law Tribunal Rules, 2016

IN THE MATTER OF M/S SERVOMAX INDIA PRIVATE LIMITED
(IN LIQUIDATION)

BETWEEN:

G. Madhusudan Rao
Liquidator of M/s Servomax India Private Limited,
(IBBI/IPA-001/IP-P00181/2017-18/10360)
7-1-285, Flat No 103, Sri Sai Swapna Sampada Apts
Balkampet, Hyderabad 500038

.... Applicant

Date of order: 07.02.2022

Coram:

Dr N.Venkata Ramakrishna Badarinath, Hon'ble Member (Judicial)
Shri Veera Brahma Rao Arekapudi, Hon'ble Member (Technical)

Appearance:

For Applicant: Shri S. Ravi, Senior Advocate

PER: BENCH

ORDER

1. The Liquidator appointed for M/s Servomax India Private Limited filed an application under Section 35 (1)(n) and SECTION 60(5)(c) OF Insolvency & Bankruptcy Code 2016, R/W Rule 11 OF National Company Law Tribunal Rules, 2016, inter-alia, seeking certain reliefs to the successful bidder to kick start the business of the Corporate Debtor.
2. To put concisely, this Tribunal passed an order of liquidation in respect of Corporate Debtor on 4th February 2019 and appointed the Applicant herein as the Liquidator of the Company, pursuant to which he made public announcement 16 times regarding sale of the Corporate Debtor as a "going concern" and / or also sale of the individual assets and ultimately, the Liquidator was successful in receiving interest from two bidders to buy Corporate Debtor as going concern basis but however failed to receive bidders to buy individual asset of the CD in response to E-Auction Sale Notice published on 01-07-2021 with a Reserve Price of Rs.24.59 Crores.
3. It is further stated that due to tough competition, the Liquidator increased the reserve price to Rs. 31.59 crores as against Rs. 24.59 crores originally notified and one Mr. Akash Agarwal and Blue Berry Techno Services represented by Mrs. Raji Dinesh have emerged as Highest bidder in the Online E-Auction Bidding Process.

4. The Liquidator issued Letter of Intent (LOI) on 15-07-2021 to the Purchasers asking them to pay 25% of the Bid amount including EMD i.e. Rs.7,89,75,000/- within 7 days i.e., on or before 21-07-2021 and further to pay the balance sale consideration of Rs. 23,69,25,000/- within 30 days without interest or within 90 Days with an interest at the rate of 12% per annum and the Purchasers have accepted and acknowledged the Letter of Intent. 25% of the Highest bid amount i.e., Rs.7,89,75,000/- has been paid on 20-07-2021 as per the Letter of intent (LOI) and also further the balance sale consideration of Rs.23,69,25,000/- along with interest (12% PA) of Rs.43,07,954/- has been paid by 08-10-2021. It is submitted that after confirming the receipt of the balance sale consideration along with the applicable interest as mentioned above, the Liquidator issued Sale Certificate to the Purchasers on 09-10-2021.

5. The Purchasers on 17-11-2021 addressed a letter to the Liquidator to seek appropriate Orders from this Tribunal to kick start the business of the Corporate Debtor and to ensure smooth running of the business of the said Company and in order to ensure smooth running of the business of the Corporate Debtor, they are seeking certain reliefs viz. immunities or protection from past liabilities and civil and criminal actions from various creditors including various statutory and non-statutory authorities/parties, direction to ROC for change of the Board of Directors and reduction of the share capital and allotment of new share capital, other reliefs in the sale as a going concern.,

6. The Liquidator has relied on the following rulings:-

(1) This Bench order passed in CP (IB) No. 329/7/HDB/2018 in IA (IBC) No.157 OF 2021 in the matter of Viswa Infrastructures and Finances Private.

(2) This Bench Order in CP (IB) No. 675/7/HDB/2018 in IA No. 112/2021 dated 28-04-2021 in the Matter of M/s IFCI Ltd vs M/s KSK Energy Ventures Ltd.

(3) NCLT, Mumbai Bench passed Orders in similar matter in C.P. (IB) No. 1319/MB/2017 in I.A. No. 741 of 2021 in the matter of M/s Enviro Bulk Handling Systems Pvt Ltd.

(4) NCLT, Mumbai Bench passed Orders in similar matter in C.P. (IB) No. 1239/MB/2018 in in IA No. 2264 of 2020 in the matter of M/s Topworth Pipes and Tubes Private.

(5) This Tribunal order in the matter of CP (IB) No. 343/7/HDB/2018 in IA No. 1038/2019 dated 26-11-2019 in the Matter of M/s Southern Online Bio Technologies Limited.

7. The Liquidator submits that this Adjudicating Authority is empowered to grant necessary immunities or protection from past liabilities and civil and criminal actions from various creditors including various statutory and non-statutory authorities/parties, direction to ROC for change of the Board of Directors and

reduction of the share capital and allotment of new share capital, other reliefs in the sale as a going concern in order to enable the successful bidder/purchaser to kick start the business of the Corporate Debtor.

8. In this backdrop, the point that emerges for consideration of the Tribunal is that,

Whether the successful bidder is entitled for the reliefs prayed for in this Application?

9. We have heard the Counsel for the Liquidator, perused the records and case laws.

10. The Corporate Debtor has been sold as an ongoing concern, in pursuance of the decision taken by the Liquidator in consultation with the creditors / stakeholders and the proceeds from the sale of assets are being distributed to the creditors in the manner specified under Section 53 of the Code. One of the members of Stakeholders Consultation Committee Shri Ekambareswara Rao Manne had filed IA No. 387/2021 before this Tribunal challenging the sale of the CD as a going concern by the Liquidator on 15.07.2021. The Tribunal having examined the respective contentions of both sides, dismissed the said IA vide order dated 07.02.2022.

11. We have perused the facts pleaded and the reliefs prayed in the petition. In the light of the facts of the case and case laws, we are of the view that the following reliefs can be allowed. Accordingly, we pass the following orders:-

(a) Permission is accorded for reconstitution of Board of Directors of the Corporate Debtor by the Successful Bidder of the Corporate Debtor as under and we further direct the RoC (Hyderabad) to do all such acts deeds and things that are necessary to appoint the individuals recommended by the Successful Bidder/Purchaser, in order to enable the Company to file relevant returns required by applicable law.

1. Nirmal Agarwal
2. Akash Agarwal
3. Raji Dinesh

(b) The existing shares (held by erstwhile promoter group as well as other shareholders) of the Corporate Debtor shall be extinguished without any consideration and the rights and liabilities arising out of the same shall also be extinguished and the Corporate Debtor shall allot new shares at a face value of Rs. 10/- each to the shareholders as per the request of the successful bidder and the details of new share capital would be as under:-

S. No.	Name of Proposed Shareholder	No. of shares to be allotted (of INR 10 each)
1.	Akash Agarwal	60,00,000/-
2.	Raji Dinesh	20,00,000/-

c) We direct RoC (H) to change the status of the Corporate Debtor in the ROC records as 'active' from the status of "liquidation".

d) The Successful Bidder shall not be responsible for any other claims, liabilities or obligations, under any guarantees, etc. payable by the Corporate Debtor as on this date to the creditors or any stakeholders including the Government dues. All the liabilities of the Corporate Debtor as on date stands extinguished, qua the Successful Bidder.

e) Any proceedings pending against the Corporate Debtor (other than against the erstwhile promoters or former members of the management of the Corporate Debtor) as on date with respect to its liabilities / inquiries / investigations / assessment / claims / disputes/ litigations etc shall not have any bearing against the assets sold in the process. The said assets are free from any financial implications arising out of any pending proceedings before relevant authorities, if any. Further non-compliance of provisions of any laws, rules, regulations, directions, notifications, circulars etc on the Corporate Debtor under various Acts and Regulations stands extinguished, qua the successful bidder.

f. The Successful Bidder/ Corporate Debtor shall have the right to review and terminate any contract that was entered into prior to the date of this order.

g The Successful Bidder shall get all the rights, title and interest over whole and every part of the Corporate Debtor, including but not limited to contracts free from security interest, encumbrance, claim, counter claim or any demur.

h The assets specified in the e-auction memorandum, on payment of the consideration shall vest with the Successful Bidder. The erstwhile promoters or any member, associate of the Existing and Erstwhile promoter groups is hereby restrained from doing any business directly or indirectly in connection with the products and services presently offered by the Corporate Debtor and transferring any such IPR to any other person whether related to them or not.

i The Successful Bidder shall not be held responsible/liable for any of the past liabilities of the Corporate Debtor. The Liquidator and Successful Bidder shall take all the steps required to make accounting entries for the smooth transmission and clearing the balance sheet.

j The Liquidator is directed to ensure completion of pending filings with the Registrar of Companies, Income Tax Authorities and any other Government/ Statutory Authorities.

k. The Corporate Debtor is entitled to get the benefits of brought forward losses, if any, subject to permission of the appropriate authority, if so entitled under the relevant provisions of the Income Tax Act, 1961. As far as the prayer for considering the bid submitted by the successful bidder as Resolution Plan under Section 79 of Income Tax Act, 1961 is concerned, the bidder may approach the authority concerned who would consider such request under the Income Tax Act.

l. Relief sought with regard to issuance/renewal of all kinds of licenses / permissions/ approvals required is allowed subject to payment of renewal fees, if any, from this date to the Licensing Authorities.

m. The Liquidator is directed to provide all support and assistance to the successful bidder for the smooth functioning of the Corporate Debtor to complete the acquisition.

n. With regard to relief sought directing various statutory authorities to exempt income/gain/profits if any, arising pursuant to acquisition of Corporate Debtor and further with regard to exemption from stamp duty and tax liability, it is open to the Successful Bidder to approach the authorities concerned and it is for the authorities to consider the request of the bidder for exemption since the successful bidder purchased the Corporate Debtor Unit as ongoing concern during liquidation.

o. All the Brands (including Brand Name "SERVOMAX"), IPRs (Intellectual property Rights) belonging to the Corporate Debtor shall remain vested with the Corporate Debtor. The Existing Promoters/Existing Guarantors, erstwhile Promoters/erstwhile Guarantors or any member/previous employees, associates of the Existing and Erstwhile Promoter groups shall be restrained to do any business directly or indirectly in connection with the products and services offered by Corporate Debtor ("Corporate Debtor Business") by using, directly or indirectly, any of the IPR owned by the Corporate Debtor including but not limited to Trade Mark, brand name, drawings, designs, engineering, schemes, diagrams, tools etc. developed or procured in the past by Corporate Debtor directly or indirectly. In addition, the Existing Promoter Group or Erstwhile Promoters, Existing Guarantors or any member/previous employees, associates of Existing Promoter Group or Erstwhile Promoters and Promoter groups shall also be restrained from transferring all the Brands (including Brand Name "SERVOMAX"), IPRs (Intellectual property Rights) belonging to the Corporate Debtor to any other person whether related to them or third parties and the transfer if any done prior to the date of acquisition / Sale Certificate Date shall be declared as null and void.

12. With the above directions, the IA stands disposed of.

SD/-

(Veera Brahma Rao Arekapudi)
Member (Technical)

SD/-

(Dr. N.V. Ramakrishna Badarinath)
Member (Judicial)

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