

**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 Veeranjanya Residency  
Radhika, Hyderabad – 500062
3. Insolvency and Bankruptcy Board of India  
7<sup>th</sup> Floor, Mayur Bhawan, Shankar Market  
Connaught Circle, New Dehi – 110001

4. The Registrar of Companies  
Complaints and Grievance Cell  
2<sup>nd</sup> Floor, Corporate Bhavan  
Bandlaguda, Nagole  
Hyderabad – 500 068
5. The Indian Institute of Insolvency Professional of ICAI  
Complaints and Grievance Cell  
ICAI Bhawan, 8<sup>th</sup> 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 very 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 circuits 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 1<sup>st</sup> 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 circuits 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.*)” .

- 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 from 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 about 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 1<sup>st</sup> 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 16<sup>th</sup> sale notice published on 1/7/2021 notifying that the sale of the CD as going concern scheduled on 15<sup>th</sup> July 2021, 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 deposit 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 26<sup>th</sup> August, 2019 has issued circular clarifying that the Regulation 32A, is not applicable to the liquidation if commenced by 26<sup>th</sup> 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 from 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. 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”.

- (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 about 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 apart, 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 16<sup>th</sup> 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 16<sup>th</sup> 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.



(Veera Brahma Rao Arekapudi)  
Member (Technical)



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