

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No. 398 of 2021**

[Arising out of Order dated 02.12.2020 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad, Court-2, in IA 698 of 2020 in CP(IB) 53/NCLT/AHM/2017]

In the matter of:

**Mr. Sundaresh Bhat
Liquidator of ABG Shipyard Limited
Having office at:
BDO Restructuring Advisory LLP,
Level 9, The Ruby, North West Wing,
Senapati Bapat Road, Dadar West,
Mumbai- 400028, Maharashtra**

....Appellant

For Appellant: Mr. Krishnendu Datta, Sr. Advocate with Mr. Ayush J Rajani, Ms. Khusboo S. Rajani, Advocates.

Mr. Sumant Batra, Advocate (Amicus Curiae)

**J U D G M E N T
(20th September, 2021)**

A.I.S. Cheema, J.

1. This Appeal has been filed by the Appellant who is Liquidator of 'ABG Shipyard Limited' against impugned order passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad in IA 698 of 2020 in C.P No.(IB) 53 of 2017. By the impugned order, the Adjudicating Authority declined to give benefit of provision of 90 days to pay balance sale consideration as per amended clause 12 of Schedule I of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("Regulations" for short). Relying on Circular issued by the IBBI, the Adjudicating Authority held that as the

liquidation order in the proceeding was passed before the amendment dated 25.07.2019 benefit under amended clause 12, could not be granted. Hence, the Appeal.

2. A few facts may be referred. 'ICICI Bank Ltd.' had filed Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC" for short) against the Corporate Debtor which was admitted on 01.08.2017 in C.P. No. (IB) 53 of 2017. Since no Resolution Plan was approved by the Committee of Creditors ("CoC" for short), liquidation order was passed on 25.04.2019. The Appellant who was appointed Liquidator made four consecutive attempts for sale of assets of Corporate Debtor through public auction but did not succeed for one reason or the other. The Appellant claims that the Appellant made efforts to understand the local market and realised that the timeframe for payment of consideration of 15 days on conclusion of e-auction after declaration of the highest bidder was too short considering the quantum of sale considerations and the ongoing economic slow-down due to the COVID-19 pandemic. The amendment to the Schedule I Clause 12 of the Regulations was made on 25.07.2019 which substituted period of 15 days by introducing 90 days as a period to make the payment of balance consideration. As such, the Appellant moved Application before the Adjudicating Authority as IBBI had issued a Circular clarifying that the benefit of the amendment could only be taken in the matters in which the liquidation process commenced on or after 25.07.2019.

3. It would be appropriate to reproduce relevant provisions for reference to the context. Schedule I of Liquidation Regulations deals with 'Mode of sale' under Regulation 33. Regulation 33 reads as follows:-

“33. Mode of sale. (1) *The liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I.*

(2) *The liquidator may sell the assets of the corporate debtor by means of private sale in the manner specified in Schedule I when-*

- (a) the asset is perishable;*
- (b) the asset is likely to deteriorate in value significantly if not sold immediately;*
- (c) the asset is sold at a price higher than the reserve price of a failed auction; or*
- (d) the prior permission of the Adjudicating Authority has been obtained for such sale:*

Provided that the liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to-

- (a) a related party of the corporate debtor;*
- (b) his related party; or*
- (c) any professional appointed by him.*

(3) *The liquidator shall not proceed with the sale of an asset if he has reason to believe that there is any collusion between the buyers, or the corporate debtor’s related parties and buyers, or the creditors and the buyer, and shall submit a report to the Adjudicating Authority in this regard, seeking appropriate orders against the colluding parties.”*

Schedule I relates to Auction. Clause 12- earlier read as follows:

“(12) On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within fifteen days of the date when he is invited to provide the balance sale consideration. On payment of the full amount, the sale shall stand completed, the liquidator shall execute certificate of sale or sale deed to transfer such assets and the assets shall be delivered to him in the manner specified in the terms of sale.”

After substitution vide Notification No. IBBI/2019-20/GN/REG.047 dated 25.07.2019, Paras 12 and 13 now read as follows:-

“(12) On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within ninety days of the date of such demand:

PROVIDED that payments made after thirty days shall attract interest at the rate of 12%:

PROVIDED FURTHER that the sale shall be cancelled if the payment interest is not received within ninety days.

(13) On payment of the full amount, the sale shall stand completed, the liquidator shall execute certificate of sale or sale deed to transfer such assets and the assets shall be delivered to him in the manner specified in the terms of sale.”

4. The Appellant filed I.A No. 698 of 2020 before the Adjudicating Authority making following prayers as can be seen in the impugned order:-

“i. To allow the Liquidator to apply Clause 12 of Schedule-I of the Liquidation Regulation as amended on 25 July 2019, for the liquidation process of the Corporate Debtor in exercise of power under Rule 11 of NCLT Rules, 2016;

Alternatively,

To declare that the Clause 12 of Schedule-I of the Liquidation Regulation as amended on 25 July 2019, shall be applicable for the liquidation process.

ii. To allow the Liquidator to permit the highest bidder of an auction to provide balance sale consideration within 90 days from the date of such demand in accordance with the specific terms of Clause 12 of Schedule-I of the Liquidation Regulation as amended on 25 July 2019;

Alternatively,

To declare that time limit of 90 days may be permitted in accordance with Clause 12 of Schedule-I of the Liquidation Regulation as amended on 25 July 2019.

iii. Consider and allow the present IA in terms of Section 60(5) read with Regulation 33(2)(b) and Clause 12 of Schedule-I of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

iv. To permit the Liquidator to sell the assets of the Corporate Debtor by way of private sale in terms of Regulation 33(2)(d) Of the Liquidation Regulations in case e-auction fails;

v. And for such other/ further order(s) and/or direction(s) as the facts and circumstances of the case may warrant.”

5. The Adjudicating Authority considered the legal position of the Clauses 12 and 13 of Schedule I of the Regulations which relates to ‘Mode of Sale’ and considering IBBI’s Circular dated 26.08.2019 observed that as the liquidation order in the matter was passed prior to the amendment, the benefit could not be taken of 90 days in place of 15 days in view of the clarification dated 26.08.2019, issued by IBBI.

6. When the Appeal came up before us on 14.06.2021, we had passed the following order:-

“14.06.2021: *Heard. In this matter the Liquidator moved the Adjudicating Authority seeking certain directions with regard to the substitution made by IBBI in Schedule-I of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. Schedule-I relates to ‘Mode of Sale’ whereunder Clause 12 earlier read as under:-*

“(12) On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within fifteen days of the date when he is invited to provide the balance sale consideration. On payment of the full amount, the sale shall stand completed, the liquidator shall execute certificate of sale or sale deed to transfer such assets and the assets shall be delivered to him in the manner specified in the terms of sale.”

The above Clause was substituted by IBBI vide Notification No. IBBI/2019-20/GN/REG047 dated 25th July, 2019 w.e.f. 25th July, 2019. After substitution the Clause 12 reads as under:-

“(12) On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within ninety days of the date of such demand:

PROVIDED that payments made after thirty days shall attract interest at the rate of 12%.

PROVIDED FURTHER that the sale shall be cancelled if the payment is not received within ninety days.”

Thereafter it appears that IBBI issued some Circular No. IBBI/LIQ/024/2019 dated 20th *[Sic- Read “26th”] August, 2019, relevant of which has been extracted by the Adjudicating Authority in impugned order in Para 4 which is as under:-

“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.”

The Liquidator who moved the Adjudicating Authority seeking directions was granted one of the relief sought still the Liquidator is before us. We would have not gone into the appeal further but it appears to us that the issue is material and before we take a decision we should have assistance of an Amicus Curiae with regard to the manner in which the IBBI has issued Circular with regard to whether the amendment in the Regulations is prospective or retrospective. It is necessary that there should be no confusion.

As such we request Advocate Mr. Sumant Batra to be Amicus Curiae in the present appeal for the issue

involved. The Appellant to supply copy of the appeal and its Annexures to Advocate Mr. Sumant Batra.

*List the Appeal 'For Admission Hearing' on **25th June, 2021.***

7. The above order of ours gives bird's eye view of the issue. The Circular of IBBI referred is not of 20.08.2019 but of 26.08.2019 which error is reflected in our order dated 14.06.2021, due to the typing error in impugned order at Para 4. By our order we appointed Advocate Mr. Sumant Batra as an Amicus Curiae and the Learned Amicus Curiae has painstakingly brought on record before us material with regard to the issue. The Learned Amicus Curiae submitted that the provisions in Clause 12 of Schedule I, before 25.07.2019 stipulated that on the close of the auction, the highest bidder shall be invited to provide balance sale consideration within fifteen days of the date when he is invited to provide the balance sale consideration. This limitation of 15 days, according to the Learned Amicus Curiae, was onerous and presented a practical difficulty to the Liquidator, as for the auction purchaser, who has to buy large assets, it was not possible to deposit entire sale consideration within 15 days. The Learned Amicus Curiae referred to the 'Discussion Paper' of IBBI relating to Corporate Liquidation Process along with Draft Regulations dated 27th April, 2019 (Pages 103-131; Diary No.28303). The Discussion Paper is at Page 103 of compilation and the Learned Amicus Curiae referred to Para 5.2.2 (at Page 115) which reads as under:-

“5.2.2 The schedule I to Regulations requires the successful bidder to make payment of consideration within fifteen days. Many Liquidators find this too short. Some have suggested to increase this period to 90 days in sync with the time period of three months provided under

SARFAESI Act. However, payment made after 30 days may attract interest at the rate of 12%.”

8. According to the Learned Amicus Curiae, such ‘Discussion Paper’ was released on 27.04.2019 and, later on 25.07.2019 after getting feedback, the Liquidation Regulations were amended so as to permit the Liquidator to receive payments from the auction purchaser up till 90 days after the sale. The amendment to the Regulations was gazetted as per the Gazette of India-Extraordinary [Part III- Sec.4] vide IBBI/2019-20/GN/REG047. The earlier para 12 came to be substituted with the present para 12 on 25.07.2019. The substitution by way of Gazette Notification can be seen at Page 151 of the paper book.

9. Learned Amicus Curiae pointed out that the Hon’ble Supreme Court in the matter of **“Swiss Ribbons Private Limited & Anr. vs. Union of India & Ors.” – [(2019) 4 SCC 17]** observed that 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. Reliance is also placed on judgment in the matter of **“Y. Shivram Prasad v. S. Dhanapal & Ors.” [2019 SCC OnLine NCLAT 172]** passed by this Appellate Tribunal which requires the Liquidator to attempt to revive the Corporate Debtor by exploring the route of compromise or arrangement under Section 230 of the Companies Act, 2013. According to the Learned Amicus Curiae, there were implementation gaps and feedback received from the stakeholders, including on the inadequacy of timeline of 15 days was considered by the IBBI and the concerned amendment in Regulation was brought in. Reference has been made to other amendments also which were made when

Gazette dated 25.07.2019 was published. Then there is Circular dated 26.08.2019 which may in the present matter be referred as impugned Circular. Copy of the impugned Circular has been filed by the Learned Amicus Curiae (Diary No. 28303 at Page 155) which reads as follows:-

*“Insolvency and Bankruptcy Board of India
7th Floor, Mayur Bhawan, Connaught Place, New Delhi-110001*

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,

(I. Sreekara Rao)

Chief General Manager

Email: sreekararao@ibbi.gov.in”

10. Learned Amicus Curiae has submitted that once the IBBI amended Schedule I in the Regulations, whether the amendment would apply retrospectively or prospectively, could not be decided by issuing a Circular. It is not a case of IBBI amending Regulations as per powers available under Section 196 of the IBC. It is argued that under Section 196 of the IBC which deals with powers and functions of the IBBI, the Board shall, subject to the general direction of the Central Government, perform all or any of the functions specified under Section 196(1). The Board can by notification make Regulations which are consistent with the Code and the Rules to carry out the provisions of the Code. The Learned Amicus Curiae pointed out that under Section 241 of the IBC, the Rules and Regulations are required to be laid before Parliament. It is argued that there is no parallel provision for placing Circular before Parliament. Thus, the binding force of Regulations cannot be equated with the impugned Circular which is not having the legal force. The Learned Amicus Curiae pointed out that although the Circular claims that it is being issued in exercise of powers under Section 196 of the IBC, but this is unacceptable. It is stated Circular is not a substitute of Regulations nor does it have the effect of Regulations framed under Section 196 read with Section 240 and 241 of the IBC. It is argued that whether an amendment applies prospectively or retrospectively is for the Courts to interpret and a Circular issued by IBBI cannot take away benefit granted by the amendment. The Learned Amicus Curiae submitted that the amendment being procedural will apply retrospectively which would be more in time with intent and aims and objects of the IBC and the reason for which the amendment was made. By making the amendment prospective by issuing a Circular the very purpose of the amendment would get defeated. By issuing such Circular a separate class of proceedings are

being created. If the Circular is acted upon, there would be one class of liquidation proceedings which would be governed under the old provisions giving benefit only of 15 days for balance consideration and another class of liquidation proceeding would be those in which the liquidation process was commenced on or after 25.07.2019 giving 90 days' time. This would be discriminatory according to the Learned Amicus Curiae.

11. Learned Counsel for the Appellant has also argued that the Circular could not be enforced to the disadvantage of proceedings which had been initiated before 25.07.2019.

12. Having heard Counsel for Appellant and Amicus Curiae and considering the material placed by them, it does appear to us that the laudable object with which Clause 12 was substituted is defeated by issuing such Circular dated 26.08.2019. When in an auction somebody has given a higher bid, if instead of 15 days, the person gets a breathing time of 90 days to make a payment, no other person gets affected. We have seen the Discussion Paper referred to by the Learned Amicus Curiae which was alongwith the Draft Regulations dated 27.04.2019. The Discussion Paper discussed various issues that had been brought up by stakeholders relating to liquidation process under IBC. Reference was made to judgments where direction was given with regard to time during which process should be completed. Para 3.2 of the Discussion Paper referred to Regulation 32 and the option to explore sale of Corporate Debtor as a going concern along with the other available sale options and the need to provide complete framework to enable the Liquidator to exercise the option. The Discussion Paper tries to balance need to be within timeframe for maximisation of the value and the need to have

sufficient time for steps to be taken. In such backdrop, Para 5.2.2 (referred supra) was included in the Discussion Paper with regard to difficulties found by Liquidators when time is of mere 15 days.

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.

14. The Adjudicating Authority in the impugned order had partly allowed the Application permitting prayer (iv) i.e. to sell by Private Sale.

15. For the reasons mentioned above, we modify the order passed by the Adjudicating Authority and hold that the Appellant- 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.

16. We record our appreciation for the pains taken by Advocate Sumant Batra- the Amicus Curiae to assist us in this non-adversarial Appeal. The Learned Amicus Curiae has taken lot of pains to bring on record necessary material and ably argued the cause of justice.

17. With these observations, the Appeal stands disposed of.

No costs.

**[Justice A.I.S. Cheema]
The Officiating Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

New Delhi
Anjali