

## Analysis of Selling Companies as “Going Concern”

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### Introduction

As per the amendment to the Liquidation Process Regulations, dated 28th March 2018, a change was made to Reg 33 of the Liquidation Process Regulations permitting the liquidator to sell the corporate debtor as going concern. With this viewpoint, the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, was amended to permit the sale of the corporate debtor as a going concern. Subsequently, a further amendment, IBBI (Liquidation Process) (First Amendment) Regulations, 2018, was made to introduce the concept of “sale of the business of the corporate debtor as a going concern”.

The underlying principle behind restructuring or reorganization proceeding is that a business may be worth a lot more preserved or even sold, as a going concern than if the parts are sold piecemeal. For instance, in the US Congress, it has been stated that:

*“The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business’s finances so that it may continue to operate, provide its employees with jobs, pay its creditors and provide a return for its stockholders.”*

The amendment vide 28th March 2018 notification adds clause (c) to Reg. 32 of the Liquidation Process Regulations. The Regulation, as amended, stands as under:

The liquidator may:

- a) sell an asset on a standalone basis; or
- b) sell
  - (i) the assets in a slump sale,
  - (ii) a set of assets collectively, or
  - (iii) the assets in parcels or”.
- c) sell the corporate debtor as a going concern

As a new clause (c) was added to allow selling the company as a going concern.

### Selling as a Going Concern

While the Code recognizes going concern sale as one of the methods of sale, however, it does not provide for the definition of going concern”. The meaning of the term has been provided interpreted in various rulings. ‘A *Going Concern Scheme*’ means selling on “*as is where is basis*” which enables the sale of business of the company including all its assets and properties. When the company goes into liquidation, the liquidator prior the amendment had limited options either to sell the assets as

piecemeal or slump sale but after Section 32(c) is in effect the liquidator has options to sell the company with all its assets i.e selling the business as a whole without bifurcating its properties and liabilities. Thus, one of the essential objectives of Insolvency and Bankruptcy Code, 2016 was to ensure speedy recovery of cases but in numerous cases it is seen that due to delay in liquidation process there was a loss to the company, its employees, workers and CoC could play no role in this process. Alternatively, now the company can be sold as a going concern provides better utilization of resources of the company. Also, if the company is transferred as a going concern, there is no question of disposal of the assets of the company, either by way of a piecemeal sale or a slump sale. Therefore, it may be argued that strictly speaking, sec 53 of the Code does not apply. The assets stay in the company, and so do the liabilities, along with all attendant claims, limitations, licenses, permits or business authorizations. The company survives as it was - the ownership of the company is moved by the liquidator to the acquirer.

### Advantages of Selling as Going Concern

One of the key features of the company is 'perpetual succession' which means, a continuation of a corporate entity despite the death, bankrupt, insanity or change in ownership. Selling as a going concern provides life to the company after going through liquidation. Though liquidation is the antithesis of going concern courts in various judgments have provided this route primarily motivated by an objective of keeping employment potential and economic activities intact. Thus, some of the reasons why a company should be liquidated as a going concern:

- Preservation of Intangible Assets:
- Smooth transition of undertaking.
- Collective value of assets.
- Retaining workers and employees
- Time-bound process.

### Role of Adjudicating Authority

- In the recent case of IVRCL, that owed more than 14000 cr to financial and other creditors was under liquidation as a going concern following the order of NCLT, Hyderabad.

*"This sale is subject to the decision of National Company Law Appellate Tribunal, Delhi in the matter of Company Appeal (AT) on the pending appeal against NCLT order dated 26 July 2019 read with Corrigendum order dated 31st July 2019 ordering liquidation of the company as a going concern and subject to the provisions of IBC, 2016 and liquidation regulation," IVRCL said in filing to the exchanges."*

- In another case before the Calcutta High Court, was the *National Tannery Co Case* where a company was ordered to be sold on going concern basis under liquidation. This is an interesting case study of how a committee of management was formed to run the company until its sale on going concern basis, and eventually, how the West Bengal govt. offered to acquire the company on a going concern basis, pay consideration, and also agree to pay the wages of the workmen.
- In a Supreme Court ruling in *Allahabad Bank vs ARC Holding and another* in the following words: *"But subsequent order directs sale of the entire assets of the company as a 'going concern'. This means to revive the company first to make it operational, re-employ its*

*employees, which would involve huge investment by the prospective buyer, a Herculean task, making execution practically infructuous.”*

- See 35(1)(f) of Code empowers liquidator to sell the property of the corporate debtor in liquidation by public Auction, Hence there was no need for adjudicating authority to direct the liquidator for considering the proposal of R-2 to R-4 *State Bank of India Vs. Maithan Alloys Limited* - NCLT the Adjudicating Authority after due date of finalization of Auction.
- An important decision would be another order of the Mumbai bench of NCLT in the case of *Gupta Global Resources Pvt Ltd*, where the bench, dealing with an application made by the liquidator of Gupta Global Resources Private Limited, had made the following observation: Ld. Counsel appearing on behalf of the Liquidator submitted that the meaning of “going concern” is not at all clear in the Liquidation Regulations. Different meanings have emerged in the context of accounting standards, GST law and from several rulings. “Going Concern” means all the assets, tangibles or intangibles and resources needed to continue to operate independently a business activity which may be whole or a part of the business of the Corporate Debtor without values being assigned to the individual asset or resource. It is pertinent to mention that when the business of the Corporate Debtor is being sold on going concern basis, then it has a presumption that sale will be with assets and liabilities.
- In the matter of *Edelweiss Asset Reconstruction Company Ltd. Vs. Bharati Defence and Infrastructure Ltd.*:

*“... we direct that the Liquidator shall endeavour to sell the Corporate Debtor company as a going concern..... The maximum period applicable for trying the sale on a going concern basis of the Corporate Debtor will be only six months from the date of the order. In case the efforts to sell the company as a going concern fails during the stipulated period of six months, then the process of the sale of the assets of the company will be undertaken by the liquidator as prescribed under Chapter- III of IBC, 2016 and the relevant regulations of IBBI.”*

### Limitation of Selling as a Going Concern

- When the company is sold “as is where is” basis, the buyer’s interest is not protected by representations and warranties. This provides limited recourse to the buyer against the seller if there is any variance in the terms of sell or agreement.
- Section 52 read with Section 33(5) allows a secured creditor the option to (i) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or (ii) realize its security interest in the manner specified in section 52 of the Code read with regulation 37. Thus, a secured creditor may opt to realize its security interest outside the liquidation foreclosing the option of sale of the corporate debtor as a going concern by the liquidator. In order to sell the corporate debtor as a going concern in the liquidation process, either the secured creditors opt in favour of relinquishing their security interest in favour of liquidation estate, or the secured creditors postpone the exercise of their option under section 52 to realize security interest outside liquidation process to allow the liquidator to explore the possibilities of sale as a going concern.<sup>[1]</sup>
- In a going concern sale in liquidation, there cannot be a question of the liabilities being a part of the undertaking, as that will be a case of business transfer and not a case of liquidation. Liabilities in the priority order listed in Section 53. Hence, the business of the company, as well as its assets, becomes part of the liquidation estate. The legal entity continues and gets transferred to the acquirer. The proceeds realized by transfer of both of these are used by the

liquidator to settle the claims, in the manner provided in Section 53.

- It is also evitable that the goodwill of a business, cultivated over time, will be lost with the change in management and control of the corporate entity.

## Conclusion

In reference to the above, Going Concern Scheme is one of the routes that can expedite the process of liquidation, one of the achievements which I can observe is the retaining of the employees as it provides them with a medium to still retain their jobs, a company if sold as a going concern gives the acquirer an opportunity to revive the company without it being non-existent. A recent survey by World Bank (Doing business in 2005 - India Regional Profile) has pointed out that it took 10 years on an average to wind up / liquidate a company in India as compared to 1 to 6 years in other countries. Such lengthy time-frames are detrimental to the interest of all stakeholders. The process should be time-bound, aimed at maximizing the chances of preserving value for the stakeholders as well as the economy as a whole.

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