

Clean Slate Principal for acquisition of Company/Corporate Debtor under Liquidation as “going concern”

[CS Nutan Rajendra Thakkar](#)

Director at Rajendra M Thakkar (Ravasia) and Sons Pvt. Ltd.

[Insolvency and Bankruptcy Board of India \(Liquidation Process\) Regulations, 2016](#) (as amended from time to time) permit the Liquidator to sell the Corporate Debtor as “going concern”, however, there is no definition as such for ‘going concern’ provided either in the IBC Code or in the Regulations. The Liquidation Regulations still do not clarify as to what is a going concern sale what are the determinants of a going concern sale and how will the liabilities be tacked in a going concern sale. Notably, there is nothing equivalent to [Section 31](#) and [Section 32A](#) of the [IBC Code](#) in case of a liquidation proceeding.

Therefore, it is beneficial to refer the report of the **Insolvency Law Committee dated 26/03/2018 (Para 8.1 of the Report)**, wherein the committee examined the term “going concern” as below:

“The phrase ‘as a going concern’ imply that the Corporate Debtor would be functional as it would have been prior to the initiation of CIRP, other than the restrictions put by the Code.”

It is also beneficial to refer **Para Nos. 7 & 8 of the Round Table of Insolvency and Bankruptcy Board of India held with the stakeholders on 21/05/2018**, referring to the case of Gujarat NRE (NCLT KOLKATA BENCH: C.P. (IB) No. 182/KB/2017)([2021 ibclaw.in 186 NCLT](#)), wherein a note was published by IBBI defining “going concern” as below:

“7. ‘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.”

In view of this, the following options are submitted for consideration:

a. The corporate debtor may be sold as a going concern, as provided in the extant regulations. As the Company survives, there will be no need for dissolution of the Company in terms of [section 54](#) of the Code. The assets along with all attendant claims, limitations, licenses, permits or business authorizations remain in the Company. The Company survives as it was; the ownership of the Company is transferred by the Liquidator to the acquirer. The Liquidator shall make an application to the AA for approval of the sale of the corporate debtor as a going concern and the AA may pass an order with respect to:

(a) Sale of the corporate debtor to the intended buyer as a going concern

(b) Transfer of shares of the corporate debtor to the intended buyer

(c) Transfer of the going concern of the corporate debtor to the buyers

(d) Continuation of the authority, powers and obligations of the Liquidator to complete the liquidation process as provided under the Code and the regulations including the control, operations and continuation of the liquidation bank account of the corporate debtor,

(e) Payment to stakeholders in accordance with [section 53](#) from the liquidation bank account, and

(f) Protection of the intended buyer from all claims and liabilities pertaining to the period prior to the sale of the corporate debtor as a going concern.

In such a case, the final report of Liquidator, as required under clause (3) of regulation 45, shall form part of the application for the closure of the liquidation process of the corporate debtor and not for the dissolution of the corporate debtor to the AA to be made under [section 54](#).

b. The regulations may provide another option of sale, that is, sale of business of the corporate debtor as a going concern. It will be only sale of business, not the corporate debtor which will be liquidated in accordance with the regulations. In this case, the assets and liabilities relevant for the business are transferred to a new entity, and stakeholders are paid from proceeds of sale in accordance with [section 53](#) and the corporate debtor will be dissolved.”

8. Both the options require consent of the secured creditors to relinquish security interest. If security interest is not relinquished, other modes of sale will be used.”

In view of above **Hon’ble National Company Law Tribunal (NCLT), Mumbai vide its order dated 09.03.2021 in the case of Gaurav Jain Vs. Sanjay Gupta, Liquidator of Topworth Pipes & Tubes Pvt. Ltd. citation - (2021) ibclaw.in 824 NCLT** observed following;

.....Para no. 24. One advantage of the sale of the Corporate Debtor as a ‘going concern’ is that the Corporate Debtor is retained, it will not be dissolved and the Corporate Debtor will be transferred along with the assets. So, the Corporate Debtor as a legal entity remains as such.

25. The crux of the ‘going concern sale’ is that the equity shareholding of the Corporate Debtor is extinguished and the acquirer takes over the undertaking with the assets, licenses, entitlements etc. The undertaking includes the business of the Corporate Debtor, assets, properties and rights etc. excluding the liabilities. However, in this case the assets that are included in the E-Auction Memorandum only have to be taken over by the Applicant.

26. The Corporate Debtor survives, only the ownership is transferred by the Liquidator to the purchaser. All the rights, titles and interest in the Corporate Debtor including the legal entity is transferred to the purchaser. After the sale as a ‘going concern’, the purchaser will be carrying on the business of the Corporate Debtor.

27. As far as the Liquidator is concerned, when the sale consideration is received from the bidder / purchaser, the same will be distributed to the Creditors in accordance with [Section 53](#) of the Code. Since the amount is paid to the Creditors in terms of the Code, the liabilities of the Corporate Debtor towards the Creditors are treated as settled and the purchaser takes the assets free of any encumbrances or whatsoever.

28. In the normal parlance “going concern” sale is transfer of assets along with the liabilities. However, as far as the ‘going concern’ sale in liquidation is concerned, there is a clear difference that only assets are transferred and the liabilities of the Corporate Debtor has to be settled in accordance with [Section 53](#) of the Code and hence the purchaser of this assets takes over the assets without any encumbrance or charge and free from the action of the Creditors.

29. This Bench feels that following are the advantages of selling the Corporate Debtor “as a going concern”:

- a. The entity i.e., the Corporate Debtor itself gets transferred;
- b. The equity shareholding gets transferred or extinguished and new shares are issued;
- c. The purchaser is expected to carry on the business of the Corporate Debtor after the sale of assets is confirmed;
- d. The existing employees will have a chance to continue in their employment.

30. The decision to sell the Corporate Debtor as a going concern is taken by the Liquidator himself or in consultation with the Creditors / stakeholders and the proceeds from the sale of assets are going to be utilised for distribution to the Creditors in the manner specified under [Section 53](#) of the Code. Hence all the Creditors of the Corporate Debtor get discharged and the assets are transferred free of any encumbrances. The legal entity of the Corporate Debtor however survives.

In view of above observation Hon’ble NCLT, Mumbai has allowed the application filed by successful bidder and passed following order;

.....(c) The Applicant shall not be responsible for any other claims / liabilities / obligations etc. payable by the Corporate Debtor as on this date to the Creditors or any other stakeholders including Government dues. All the liabilities of the Corporate Debtor as on date stand extinguished, as far as the Applicant is concerned.

(d) 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, enquiries, investigations, assessments, claims, disputes, litigations etc. will not have any bearing against the assets sold in this process. The said assets are free from any financial implications arising out of any pending proceedings before relevant authorities, if any.

(e) The existing shares / share capital of the Corporate Debtor shall stand cancelled without there being any payment to the Shareholders. The Liquidator in consultation with the Registrar of Companies (RoC) concerned shall take action to change the status of the Corporate Debtor in the records of the RoC from the status of “liquidation” to the status of “active”. The concerned RoC shall do the needful.

(f) The Board of the Corporate Debtor can be reconstituted as indicated in prayer (i) and necessary filings may be made to the RoC concerned.

.....(i) The Applicant shall not be held responsible / liable for any of the past liabilities of the Corporate Debtor in inquiries, investigations, assessments, notices, causes of action, suits, claims, disputes, litigations, arbitration or other judicial, regulatory or administrative proceedings against or in relation to, or in connection with the Corporate Debtor prior to this date. They shall not have any effect on the Applicant.

...(k) Creditors of the Corporate Debtor which include Creditors in any form or category including Government Departments shall stand extinguished qua the Applicant.

.....(l) *The non-compliance of provisions of any laws, rules, regulations, directions, notifications, circulars, guidelines, policies, licenses, approvals, consents or permissions prior to the date of acquisition shall stand extinguished qua the Applicant.*

....(q) *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.*

Therefore, Hon'ble NCLT Mumbai in the aforementioned case has laid down principal of clean slate for successful bidder for acquisition of the Company / Corporate Debtor under Liquidation as "going concern".

Similarly, **Hon'ble National Company Law Appellate Tribunal (NCLAT), New Delhi in the matter of M/s Shiv Shakti Inter Globe Exports Pvt. Ltd. v/s M/s KTC Foods Private Limited Through Liquidator, Mr. Anup Kumar Singh and others - Company Appeal (AT) (Insolvency) No. 650 of 2020 (2022) [ibclaw.in](https://www.ibclaw.in) 192 NCLAT** vide its order dated 25.02.2022 has observed following;

Para no. 21..... The scope and objective of the Code is to extinguish all claims specifically the ones which were not even made during the CIRP or in the Liquidation stage, to aid the purchaser of the Company as a 'going concern' to start on a 'clean slate'. The Hon'ble Supreme Court in 'Ghanshyam Mishra & Sons Pvt. Ltd.' Vs. 'Edelweiss Asset Reconstruction Company Ltd. & Ors.', Civil Appeal No. 8129 of 2019 and in 'CoC of Essar Steel India Ltd.' Vs. 'Satish Gupta & Ors.' (2020) 8 SCC 531 has laid down the proposition that the purchaser of the Company even in the Liquidation stage cannot be burdened with past liabilities when it is not mentioned in the 'Sale Notice'.

Para no. 22.... It is no longer Res Integra that while approving a 'Corporate Debtor' sale as a 'going concern' in Liquidation Proceedings without its dissolution in terms of Regulation 32(e) of the Liquidation Process Regulations, 2016, it is essential to see that the 'Corporate Debtor' is not burdened by any past or remaining unpaid outstanding liabilities prior to the sale of the Company as a 'going concern' and after payment of the sale proceeds distributed in accordance with [Section 53](#) of the Code, is allowed

Therefore, Hon'ble NCLAT also in the aforementioned case has laid down principal of clean slate for successful bidder for acquisition of the Company / Corporate Debtor under Liquidation as "going concern".

Conclusion

Hon'ble NCLT and Hon'ble NCLAT provided a very useful clarity and laid down principal of clean slate for successful bidder for acquisition of the Company / Corporate Debtor under Liquidation as "going concern" similar to reliefs which is available for Resolution Applicant for taking over the Corporate Debtor from Corporate Insolvency Resolution Process (CIRP) pursuant to [Section 32A](#) of IBC Code.

Pursuant to principal of clean slate laid down by Hon'ble NCLT and Hon'ble NCLAT, successful bidder shall be entitled for following major reliefs for acquisition of the Company / Corporate Debtor under Liquidation as "going concern";

- a. All the claims / liabilities / obligations etc. of the Corporate Debtor including government dues stand extinguished
- b. All claims which were not even made during the CIRP or in the Liquidation stage stand extinguished
- c. The non-compliance of provisions of any laws, rules, regulations, directions, notifications, circulars, guidelines, policies, licenses, approvals, consents or permissions prior to the date of acquisition shall stand extinguished
- d. The successful bidder shall not be held responsible / liable for any of the past liabilities of the Corporate Debtor in inquiries, investigations, assessments, notices, causes of action, suits, claims, disputes, litigations, arbitration or other judicial, regulatory or administrative proceedings against or in relation to, or in connection with the Corporate Debtor prior to this date. They shall not have any effect on the successful bidder
- e. Creditors of the Corporate Debtor which include Creditors in any form or category including Government Departments shall stand extinguished
- f. The existing shares / share capital of the Corporate Debtor shall stand cancelled without there being any payment to the existing Shareholders
- g. All the assets of the Corporate Debtor are transferred to successful bidder free of any encumbrances / charge / pledge etc.
- h. 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, enquiries, investigations, assessments, claims, disputes, litigations etc. will not have any bearing against the assets sold to successful bidder. The said assets are free from any financial implications arising out of any pending proceedings before relevant authorities, if any.
- i. 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.
- j. The benefits of brought forward input tax credits, if any, if so, entitled under the relevant provisions of the GST Act.

Disclaimer: While every effort is made to avoid any mistake or omission, this document including case-summary/brief about the decision/ add. info/headnote/ judgment/order/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this document. The authenticity of this text must be verified from the original source. Read more [here](#).