

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA  
(Special Bench)**

**IA (IB) 1001/KB/2020  
in  
CP (IB) 182/KB/2017**

***In the matter of:***

An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016 and Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

***And***

***In the matter of:***

**Gujarat NRE Coke Limited**  
*(in Liquidation)*

...

**Corporate Debtor**

***And***

***In the matter of:***

**Sumit Binani, as**

Liquidator of Gujarat NRE Coke Limited, Registration No. IBBI/IPA-001/IP-N00005/2016-17/10025, having his office at 4<sup>th</sup> Floor, Room No. 06, Commerce House, 2A, Ganesh Kolkata-700013

**...Applicant**

***Versus***

1. **Sun Pharmaceutical Industries Limited**, having its registered office at SPARC, Tandalja, Vadodara, Gujarat-390012.
2. **Unimed Technologies Limited**, having its registered office at Baska, Ujeti Road, Ujeti, Halol, District-Panchmahal, Halol, Gujarat.
3. **Monitoring Committee/Stakeholders** consisting of erstwhile member of CoC being represented by State Bank of India, having its office at State Bank of India, Conference Room, 1<sup>st</sup> Floor, State Bank of India, SAMB II, Jeevandeep Building, 1 Middleton Street, Kolkata 700071.

**...Respondents**

**Date of hearing: 04.01.2021**

**Date of pronouncement of Order: 18.03.2021**

***Coram:***

Shri Rajasekhar V.K.

: Member (Judicial)

**Appearances (through video conference):**

- For Applicant/Liquidator : 1. Mr. Jishnu Chowdhury, Advocate  
2. Mr. Sumit Binani, Liquidator in person
- For Respondent Nos.1 &2 : 1. Mr. Malay Kr. Ghosh, Sr. Advocate  
2. Mr. K.T. Thakker, Advocate  
3. Ms. Nilanjana Adhya, Advocate  
4. Mr. Arindam Chandra, Advocate  
5. Mr. Atish Ghosh, Advocate
- For Respondent No.3 : 1. Mr. Ratnanko Banerjee, Sr. Advocate  
2. Mr. Ajay Gaggar, Advocate  
3. Mr. Ramanuj Ray Chaudhuri, Advocate
- For SFIO : 1. Mr. Debu Chowdhury, Advocate

**ORDER**

*Per: Rajasekhar V.K., Member (Judicial)*

**1. Preamble:**

- 1.1. **IA (IB) 1001/KB/2020** is an application filed by Mr. Sumit Binani, the Liquidator of Gujarat NRE Coke Limited(*the Corporate Debtor*), seeking following directions:
- (a) Allow the Liquidator to keep the windmill assets outside the sale purview of Liquidation Estate;
- (b) Allow the Liquidator to distribute the sale proceeds from the sale of windmills, where ₹180 crore is lying in a Lien Account of SBI in view of the fact that the sale was approved by this Tribunal by order dated 22.08.2017;
- (c) Allow the Liquidator to get himself impleaded as a party in the Civil Suit No.39/2019 titled as *Sun Pharmaceuticals Industries Ltd. and Anr. v. State Bank of India and Ors.*, pending before the Hon'ble High Court.

**2. Factual Matrix:**

- 2.1. The Corporate Debtor's account was classified as a Non-Performing Asset (NPA) by the State Bank of India on 27.10.2013. Due to a huge overdue of the Corporate Debtor, a proposal was made for sale of non-core assets of the Corporate Debtor charged to the lender Banks. The windmill assets of 87.5 MW belonging to the Corporate Debtor located at Jamnagar and Kutch in the State of Gujarat were finalised for the said purpose in August, 2016.
- 2.2. SBI CAPS services facilitated the sale transaction of the said windmill assets by inviting bids. The Respondent No. 1 emerged as and was declared the successful bidder of fifty-two windmill assets at an amount of ₹154 crore and the Respondent No. 2 emerged as and was declared the successful bidder of ten windmill assets at an amount of ₹26 crore.
- 2.3. As per the terms of the bid document, 25% of the total bid amount along with bank guarantee for the balance amount was to be deposited. Accordingly, Respondent No. 1 remitted a sum of ₹38.5 crore and Respondent No. 2 remitted a sum of ₹6.50 crore on 21.10.2016 for the credit of the "No Lien Account" of the Bank. Respondent Nos. 1 and 2 also submitted the balance amount of ₹115.50 crore and ₹19.50 crore respectively by way of bank guarantee in favour of State Bank of India on the said date.
- 2.4. As per the letter of intent dated 07.10.2016 issued to the Respondent Nos. 1&2, the aforementioned bank guarantees were to be invoked by the State Bank of India in the event the buyer failed to comply with the agreement. The said letter of intent had been acknowledged by both the Respondents and, pursuant thereto, the agreement for sale was entered into between the Corporate Debtor the two Respondents on 01.04.2017.
- 2.5. The Corporate Debtor was admitted into Corporate Insolvency Resolution Process (CIRP) by this Adjudicating Authority *vide* order dated 07.04.2017 in CP (IB) No. 182/KB/2017. An application bearing CA (IB) No.326/KB/2017 was made before the Adjudicating Authority, wherein *vide* order dated

22.08.2017, the Adjudicating Authority approved the sale of the windmill assets of the Corporate Debtor to the Respondent Nos.1 & 2 herein. However, the Adjudicating Authority did not accord its approval to distribute the sale proceeds at the relevant point of time since the Corporate Debtor was undergoing CIRP.

- 2.6. On being informed of the approval of sale of the windmill assets by the Adjudicating Authority, Respondent Nos.1 & 2 backed out of the sale transaction. The State Bank of India (SBI), Respondent No.3 herein, advised the Respondents Nos.1 & 2 to perform the sale agreement failing which it would invoke the bank guarantee.
- 2.7. Respondent Nos.1 & 2 preferred a Civil Suit No.39/2019 before the Hon'ble High Court of Calcutta on grounds that the sale transaction could not be completed due to the failure of Respondent No.3/SBI to get the No Objection Certificate (NOC) within a reasonable period and due to suppression of the information by Respondent No.3/SBI about the initiation of CIRP of the Corporate Debtor. Respondent Nos.1 & 2 prayed for direction on Respondent No.3/SBI to refund the initial amount remitted and to restrain it from invoking the bank guarantees submitted by the Respondent Nos.1 & 2.
- 2.8. The Hon'ble High Court of Calcutta, *vide* order dated 17.05.2019, restrained Respondent No.3/SBI from invoking the Bank Guarantees. However, in appeal before the Division Bench of the Hon'ble High Court of Calcutta, the Hon'ble High Court allowed the Respondent No.3/SBI to invoke the said bank guarantees *vide* order dated 04.09.2019. Pursuant to this, Respondent No.3/SBI invoked the bank guarantees amounting to ₹135 crore on 16.09.2019 and the said amount is lying in the "No Lien Account" of Respondent No.3/SBI.
- 2.9. In a previous round of litigation involving Jindal Steel and Power Limited, Arun Kumar Jagatramka (*erstwhile promoter and member of Gujarat NRE Coke Limited*) and Gujarat NRE Coke Limited, the Corporate

Debtor, *i.e.*, *Jindal Steel and Power Limited v. Arun Kumar Jagatramka and Ors.*,<sup>1</sup> the Hon'ble National Company Law Appellate Tribunal (NCLAT) had directed the Liquidator to proceed as per the direction given in the matter of *Y. Shivram Prasad v. S. Dhanapal and Ors.*,<sup>2</sup> that provided for a scheme of compromise or arrangement with the creditors or class of creditors or members or class of members in terms of section 230 of the Companies Act, 2013 to be arrived at. Upon failure of this, the Liquidator was to take steps to sell the business of the Corporate Debtor as a going concern in "its totality with the employees". The last stage was to be death of the corporate debtor by liquidation, which would be avoided.

- 2.10. In an appeal against the said order of Hon'ble NCLAT, the Hon'ble Supreme Court *vide* order dated 24.02.2020 directed that the liquidation proceedings may proceed and sales, if any, shall not be confirmed.
- 2.11. The Liquidator has taken steps according to the directions of *Y. Shivram Prasad (supra)*. The steps taken for revival by way of a scheme of arrangement have failed. The Liquidator, therefore, has to sell the entire business as a going concern in "its totality with the employees" under the directions of orders under *Y. Shivram Prasad (supra)*. However, the Liquidator is faced with several impediments, *inter alia*, the fact that all the business units of the corporate debtor are not functioning due to several reasons, the Liquidator is facing non-cooperation from the members of suspended board of directors, etc.
- 2.12. The Liquidator has intimated the difficulties faced by him to the stakeholders in the meeting held on 03.08.2020. The stakeholders were of the opinion that the liquidator should consider selling the running business of the Corporate Debtor as a going concern since the corporate debtor, as a whole, is not operating as a going concern. They were also of the opinion that in case the

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<sup>1</sup>Company Appeal (AT) No. 221 of 2018.

<sup>2</sup>Company Appeal (AT) No. 224 of 2018

Liquidator decides to sell the corporate debtor as a going concern, he may do so without considering the windmill assets.

2.13. The Liquidator has, therefore, approached this Adjudicating Authority with prayers as aforementioned.

**3. *Arguments of Mr. Jishnu Chowdhury, learned counsel appearing for the liquidator.***

3.1. Briefly alluding to the pleadings, Mr. Jishnu Chowdhury, learned counsel appearing for the liquidator submitted that Respondent No. 1 and Respondent No. 2 were the successful auction purchasers of certain non-core assets (windmill assets) in Gujarat. On 01.04.2017, the parties entered into a business transfer agreement under which Respondent No. 1 and Respondent No. 2 were to get these non-core assets.

3.2. Mr. Chowdhury submitted that CIRP with respect to the corporate debtor commenced on 07.04.2017, and an order for completion of sale of the said non-core assets was passed by this Adjudicating Authority on 22.08.2017.

3.3. Mr. Chowdhury further submitted that by this time, certain disputes had arisen between the banks on one side and Respondent No. 1 and Respondent No. 2 on the other. These disputes related principally to the issue whether Respondent No.3/SBI would get certain documents executed by the other lenders. The Liquidator was asked to complete the sale and execute the sale deed. There is an order by the Adjudicating Authority in this regard. But Respondent Nos.1 & 2 did not come forward. The entire consideration is with the Respondent No.3/SBI.

3.4. In this situation, Respondent Nos.1 & 2 went before the Hon'ble High Court of Calcutta in respect of the sale, which is pending adjudication before the said Court, Mr. Chowdhury submitted.

3.5. Mr. Chowdhury stated that the lenders tried to bring about a Scheme, which travelled upto the Hon'ble Supreme Court. The Hon'ble Supreme Court

allowed the liquidation process *vide* order dated 24.02.2020, albeit with the caveat that the sale should not be confirmed.

- 3.6. Mr. Chowdhury further stated that on 25.09.2020, the Adjudicating Authority passed an order in the liquidation proceedings for continuing and making disbursements. The order dated 24.02.2020 was not brought to the Adjudicating Authority's notice on that day. After the matter went up in appeal before the Hon'ble NCLAT, this Adjudicating Authority, *vide* its order dated 18.11.2020, modified the order permitting the proceedings, but specifying that the sale is subject to confirmation of Hon'ble Supreme Court.
- 3.7. Mr. Chowdhury reiterated that ₹180 crore is lying with the State Bank of India and the Purchasers (Respondent Nos.1 &2) have not come forward and have instead gone to the Hon'ble High Court of Calcutta.
- 3.8. Mr. Chowdhury stated that the Liquidator needs to know as to what should be done with the wind mill assets – whether these are to be included in the liquidation estate or not. There is an order by the Adjudicating Authority which states that the Liquidator would be guided by the Monitoring Committee. The Monitoring Committee directed the liquidator to obtain legal opinion.
- 3.9. Mr. Chowdhury submitted that there are three issues that need consideration:
- (a) Whether the windmill assets should be kept out of the liquidation estate?
  - (b) Whether the sale should be concluded or not?
  - (c) Whether the 180 crore with State Bank of India should be disbursed or not?
- 3.10. Mr. Chowdhury iterated that on 11.01.2018 this Adjudicating Authority had directed that in case of difficulty in the Liquidation process, the Liquidator shall be guided by the decision of the Monitoring Committee subject to final approval of the Adjudicating Authority. The Monitoring Committee itself consists of the erstwhile members of the CoC.

- 3.11. Mr. Chowdhury took us through the minutes of meeting dated 03.08.2020 of the Monitoring Committee annexed at page 112 of the present application, wherein it was decided that the liquidator may consider taking a legal opinion and proceed further in the liquidation process.
- 3.12. Mr. Chowdhury took us through the order dated 22.08.2017 annexed with the application at page 117. He pointed out that in the meeting held on 05.05.2017, the Committee of Creditors (CoC) had decided to sell 87.5 MW assets of the corporate debtor. The transaction of sale was contemplated under the MRA dated 18.9.2014 and the supplemental MRA dated 02.03.2015. He again referred to the order whereby the Adjudicating Authority had allowed the RP to complete the proposed sale transaction initiated by him. Instead of coming forward, the buyers went to the High Court. Today, the situation is that unless the Liquidator sells the windmill assets, the Liquidator cannot proceed, Mr. Chowdhury submitted.
- 3.13. Mr. Chowdhury further reiterated that the Hon'ble Supreme Court's order dated 24.02.2020 hits confirmation of sale.
4. ***Arguments of Mr. Ratnanko Banerji, learned Senior Counsel appearing for State Bank of India along with Mr. Ajay Gaggar for the Monitoring Committee:***
- 4.1. Mr. Ratnanko Banerji, learned Senior Counsel appearing for Respondent No.3/SBI submitted that the order at page 117 of the application was passed on an application made by SBI. The sale of the windmill assets belonging to the Corporate Debtor was contemplated under MRA dated 18.09.2014 and Supplemental MRA dated 02.03.2015, executed between the corporate debtor and the creditors. This was a sale by private treaty.
- 4.2. Mr. Banerji submitted that he supports prayer (a) made in the application but not prayer (b). If prayer (a) is allowed, prayer (b) would essentially be between Respondent No.3/SBI and the proposed purchasers, Respondent No. 1 and Respondent No. 2.



- 4.3. Mr. Banerji took us through pages 122 and 123 of the application and contended that perhaps the Adjudicating Authority has excluded from its purview the contemplated sale of the windmill assets. He submitted that the Corporate Debtor should have no role in the matter anymore. It is essentially a matter between the lenders and the purchasers.
- 4.4. Mr. Banerji then took us through the order of the Hon'ble High Court of Calcutta dated 04.09.2019 and 17.05.2019. The learned senior Counsel referred to page 170 of the application wherein the judgment dated 18.04.2019 under appeal therein, was set aside and injunction was vacated.
- 4.5. Mr. Banerji then contended that we would have to look at the rest of the orders. But nothing would really stand in the way with respect to granting prayer (a) of this application, which essentially means that windmill assets should be kept out of the liquidation process. It is really the Respondent Nos.1 &2's option to take it or leave it from then on.
5. ***Arguments of Mr Malay Kumar Ghosh, learned Senior Counsel along with Ms. Nilanjana Adhya, learned Counsel for Respondent Nos.1 & 2:***
- 5.1. Mr Malay Kumar Ghosh, learned Sr. Counsel appearing for Respondent Nos.1 & 2 submitted that the sale of the windmill assets was never concluded and that the Respondent No.3/SBI illegally invoked the bank guarantee. The rights of the respective parties over the windmill assets can only be determined upon adjudication of the civil suit No.39/2019 by the Hon'ble Calcutta High Court, since that Court is in *seisin* of the same. It is the stand of Respondent Nos.1 & 2 that the sale was never concluded within the stipulated time and the contract was terminated by the said respondents due to defaults committed by Respondent No.3/SBI.
- 5.2. Mr Malay Ghosh, ld Sr. Counsel, further stated that the plaint has since been amended to include the relief of refund of the entire sum of ₹180 crore along with interest thereon. The contract was terminated, and the sale was never

concluded. Respondent Nos.1 & 2 have been unnecessarily dragged into the proceedings; Mr Ghosh submitted.

**6. Rejoinder arguments of Mr. Ratnanko Banerji, learned Senior Counsel appearing for State Bank of India**

6.1. Mr. Banerji submitted that sale was by way of private treaty. The assets were sold in 2016 for a price of Rs.180 crore, pursuant to a bid. 25% of the sale consideration amounting to Rs.45 crore was paid upfront, while the balance was given by way of bank guarantees.

6.2. The said business transaction was entered into on 01.04.2017. The CIRP was initiated in pursuance of an application under section 10, admitted on 10.04.2017. On 22.08.2017, sale was approved on an application made by the liquidator.

6.3. In the civil suit, neither Gujarat NRE is a party nor is the Liquidator a party. Therefore, Respondent Nos. 1 and 2 admit that the question of confirmation of sale etc. is not the subject matter of the insolvency proceedings, but is a part of the civil suit. Page 10 of the civil suit is the plaint. The defendants therein are State Bank of India, Yes Bank and IndusInd Bank. Reliefs claimed in the suit are at page 35. A relief for return of consideration was added to the plaint by way of amendment. The Division Bench did not accept their submission that the bank guarantee could not be invoked.

**7. Findings**

7.1. We have heard Mr Jishnu Chowdhury, learned counsel for the Liquidator, Mr Malay Kumar Ghosh, learned Sr Counsel for the Respondent Nos.1 & 2, and Mr Ratnanko Banerji, learned Sr Counsel for the Respondent No.3, and perused the pleadings.

7.2. I have no doubt in my mind that the windmill asset should be kept out of the liquidation estate. For this, I have a primary reason: the question whether the title of the windmill asset has actually passed from the Corporate Debtor to the Respondent Nos.1 & 2 is now *sub judice* before the Hon'ble Calcutta High

Court in Civil Suit No.39/2019. The Respondent Nos.1 & 2 have voluntarily chosen to pursue their remedies under civil law before the Hon'ble Calcutta High Court which has also passed some orders in the suit. Therefore, any inquiry in this behalf by this Adjudicating Authority will not be proper.

7.3. The Applicant/Liquidator is not a party to that suit. If the Respondent Nos.1 & 2 had indeed considered that the transaction in question in respect of the windmill assets was indeed not really concluded and therefore belonged to the Corporate Debtor, as Mr Malay Kumar Ghosh, Ld. Sr Counsel appearing for them, had vehemently argued, then the claim would primarily have arisen against the Corporate Debtor, now represented by the Liquidator. Therefore, the Corporate Debtor ought to have been made a party to the civil suit. Such is not the case here. This is a dead giveaway that the Respondent Nos.1 & 2 themselves considered the transaction to be complete. That is the reason why the suit was filed primarily only for unwinding of the transaction pertaining to the bank guarantees and refund thereto, which probably dictated the decision that only the holders of the bank guarantees be made parties.

7.4. With the amendment for refund of the bank guarantees on the stand taken by the Respondent Nos.1 & 2 that the sale was never concluded, the issue would no longer be confined just to the banks and the Respondent Nos.1 & 2, since the bank guarantees were invoked on the basis of a contract which involved the Corporate Debtor's interests. Therefore, I deem it fit to grant the Liquidator permission to file appropriate applications before the Hon'ble Calcutta High Court in civil suit No.39/2019 for leave to implead the Corporate Debtor in the civil suit.

**8. Directions**

8.1. The following orders are, therefore, passed: -

(a) Prayer (A)(i) at page 26 of the Application is allowed, and the Liquidator is permitted to keep the windmill assets that are the subject matter of the

civil suit No.39/2019 before the Hon'ble Calcutta High Court, outside the sale purview of the Liquidation Estate;

(b) Prayer (A)(ii) at p.27 of the Application is not granted, since the question whether the invocation of bank guarantees by the Respondent No.3/SBI, is correct or not is directly under challenge in Civil Suit No.39/2019 before the Hon'ble Calcutta High Court, and therefore, at this stage, it is not proper to order distribution of the sale proceeds.

(c) Prayer (A)(iii) at p.27 of the Application is allowed, and the Liquidator is directed to file appropriate applications to intervene in the civil suit No.39/2019 before the Hon'ble High Court and get himself impleaded as representative of the Corporate Debtor.

- 8.2. IA No.1001/KB/2020 shall stand disposed of in accordance with the above directions.
- 8.3. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
- 8.4. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities

Rajasekhar V.K.  
Member (Judicial)

18.03.2021