NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD

T.P. No. 94-A/2016 in TP No. 94/397-398/NCLT/AHM/2016 (New)
C.A. No. 188/2015 in C.P. No. 34/397-398/CLB/MB/2015 (Old)

Coram: **Present: Hon'ble Mr. BIKKI RAVEENDRA BABU**
MEMBER JUDICIAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 3.1.2017

Name of the Company: Vortex Ice Cream Pvt. Ltd. & Ors.
V/s.
Vadilal Chemicals Ltd. & Ors.

Section of the Companies Act: Section 397-398 of the Companies Act, 1956

S.NO.	NAME (CAPITAL LETTERS)	DESIGNATION	REPRESENTATION	SIGNATURE
1.	Pranjal Buch	Advocate	Respondent	
2.				

ORDER

Learned Advocate Mr. Pranjal Buch present for Applicants/Original Respondents. None present for Respondents/Original Petitioners.

Order in TP 94-A/2016 pronounced in open court. Vide separate order attached.

List the TP 94/2016 on 24.1.2017.

3.1.17
(BIKKI RAVEENDRA BABU)
MEMBER JUDICIAL

Dated this the 3rd day of January, 2017.

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD

CORAM: SRI BIKKI RAVEENDRA BABU, MEMBER (JUDICIAL)

T.P. No. 94-A/2016

IN

T.P. No. 94/397-398/NCLT/AHM/2016 (New)

C.A. No. 188/2015 IN C.P. No. 34/397-398/CLB/MB/GUJ/2015 (Old)

1. Vadilal Chemicals Limited
2. Rajesh Gandhi
3. Devanshu Gandhi
4. Jignesh Shah
5. Rohit Patel
6. Rajesh Pandya
7. Udayan Patel
8. Ashish Modi.....Applicants/Original Respondents 1 to 8

v.

1. Vortex Ice-Cream Private Limited
2. Virendra Gandhi
3. Ila V. Gandhi
4. Dharani K. Khambatta
5. Khevna R. Ramanlal
6. Janmejay Gandhi.....Respondents/Original Petitioners

This Interim Application having come up for hearing before this Tribunal on 14.10.2016 in the presence of Mr. Rashesh Sanjanwala, Senior Advocate for Applicants and Mr. U.K. Chaudhary, Senior Advocate and Mr. Arjun Sheth, Advocate for Respondents and having stood over for consideration till this date, this Tribunal pronounced the following final order on 3.1.2017.

FINAL ORDER

1. The Original Respondents in T.P. 94/2016 filed this Application seeking to annul the appointment of Hon'ble Shri Justice Ramesh A. Mehta (Retd.) as Independent Observer and instead appoint another Independent Observer to supervise the sale of assets of the first Respondent company and for a direction to Original Petitioners not to obstruct the process of sale of assets of company in any manner whatsoever and abide by the directions of the Company Law Board in the order dated 11.5.2015.

2. The parties in this Order are referred to as they are arrayed in the T.P. 94/2016 as Original Petitioners and Original Respondents for the sake of convenience.

3. The following are the facts that led to the appointment of Hon'ble Shri Justice Ramesh A. Mehta (Retd.) as Independent Observer to closely monitor the process of sale of the assets of the first Respondent company and ensure that the same fetch the maximum price.

4. The original Petitioners who are having 13.86% of paid-up share capital of the first Respondent company alleged certain acts of oppression and mismanagement in the conduct of the affairs of the first respondent company by the Original Respondents. The Original Petitioners sought for an interim relief restraining the Respondents from in any manner alienating the assets of the company. The Hon'ble Member of the Company Law Board while considering the said interim relief after hearing both sides, passed an elaborate order on 11.5.2015. The relevant portion of the order dated 11.5.2015 passed by the Hon'ble Member of the CLB is as follows: -

"Having given my serious thoughts to both the aforesaid elements required for grant of interim relief, I am of the opinion that the proposition advanced by the Ld. Sr. Counsel appearing on behalf of the Respondents that the CLB should not interfere in the commercial decision taken by the Company, has substance.

Time and again it has been held that the CLB should refrain itself from stepping into the shoes of the management of the Company which is best in position to assess and evaluate the requirement of the Company's benefit and eventually for the benefit of its shareholders. The duty of the CLB is to keep a watch on the Company's decision/action and scrutinize it as to whether the impugned decision action is wrongful, harsh, burdensome, unfair and lacks in probity and thus oppressive to the aggrieved shareholders and to do justice between the parties by passing appropriate directions to bring an end to the acts of oppression and mismanagement complained of. I, therefore, would like to refrain myself from interfering in the decision of the Company as to the sale of its assets which obviously is likely to take enough time and during this period, I believe the CLB would be able to examine all other aspects. However, taking into consideration all the facts and circumstances and in keeping in mind the paramount interest of the company and to balance the equity, I hereby dispose of the interim reliefs with the following directions:

ORDER

a. *The Petitioners are directed to disclose, by way of an affidavit, together with necessary documents, the entire particulars of the investments made by the Petitioner o. 6 in SVL. The names of the directors and the shareholders of the SVL shall also be provided by the Petitioners on an affidavit.*

b. *The Company may proceed to take necessary steps for sale of its assets as decided by its Board of Directors preferably in phases and in a strategic manner, applying the principles governing the corporate governance under supervision of an Independent Observer, who will closely monitor the process of sale of the assets of the company and ensure that the same fetch the maximum price. For this purpose, the parties are granted time to*

suggest a name of an Independent Observer by consensus, failing which the Bench may nominate an Independent Observer for the said purpose on the next date fixed.

c. *The Company shall get the approval of sale of the assets from its shareholders as required in law.*

d. *In the event, the Company gets a prospective buyer(s), the Petitioners will be given an opportunity to match the offer of their prospective buyer(s) within thirty days thereof and the assets of the Company shall be sold to the person(s) offering best price."*

5. Thereafter with the consent of both the parties, Hon'ble Shri Justice Ramesh Mehta (Retd.) was appointed as Observer.

6. Lot has been said by both parties regarding the delay that was caused in choosing the Observer and that has no relevance for grant or otherwise of the relief(s) prayed in this Application.

7. The following are the facts that led to the filing of this Application-

i. The Hon'ble Observer scheduled the first meeting with parties, their advocates and representatives on 21.9.2015 at 5.30 pm which is evident from Annexure "J" at pages 68-69 of the Application.

ii. The meeting on 21.9.2015 was attended by the advocates/ representatives of the Original Petitioners wherein Original Petitioners sought to be involved in the sale process of the assets of the company for which the Original Respondents strongly objected. The Hon'ble Observer granted time to the parties to file their submissions in writing vis-à-vis their participation in the sale process of the assets of the company which is evident from Annexure "L" at page 72 of the Application, i.e., minutes of the first meeting on 21.9.2015 presided over by the Independent Observer and signed by Independent Observer.

iii. The Original Respondents through a letter dated 30.9.2015 addressed to the Hon'ble Observer, submitted that the adjudication by the Independent Observer upon the submissions made by the Original Petitioners were beyond the scope of the order dated 11.5.2015 passed by the CLB. In the meeting on 30.9.2015 also, Original Respondents and Original Petitioners made their submissions in respect of participation of Original Petitioners in the sale process.

iv. The Hon'ble Observer in the minutes of the second meeting held on 30.9.2015 stated that both sides submitted before him that the Independent Observer has no power to adjudicate. The Hon'ble Observer asked one or both parties to obtain appropriate order, direction or clarification from CLB. The Hon'ble Observer stated in the minutes that he had no opportunity to supervise or monitor the appointment of valuer and valuation reports obtained in respect of all properties to be disposed of. The Hon'ble Observer also stated in the above-said report that suitable direction/clarification from the CLB may be obtained on the above-said aspect also.

8. The following are the grounds on which the Original Respondents are seeking annulment of the order appointing Hon'ble Shri Justice Ramesh Mehta as Independent Observer: -

i. In the above said scenario it is the apprehension of the Original Respondents that the observations made by the Hon'ble Observer in the minutes dated 30.9.2015 is without any substance and prejudicial to the Original Respondents.

ii. The main grievance of the Original Respondents is that the Original Petitioner shall not be allowed in the process of sale of assets of the first Respondent company except giving an opportunity to them to match the offer of the prospective buyers within thirty days. But the Original Petitioners were allowed to participate in the process of sale.

iii. The second grievance of the Original Respondents is that valuation reports were obtained with a view to seek the approval of the sale of the assets of the shareholders and with a view to keep the sale process

transparent but the Hon'ble Observer without considering the said aspect and without raising any objection in the meetings about the valuation report obtained by them, mentioned the same in the minutes dated 30.9.2015.

iv. The third grievance of the Original Respondents is that the Hon'ble Observer by allowing the parties to file their pleadings/submissions and allowing the professionals representing the parties to appear before him goes to show that the Hon'ble Observer has taken up the task of adjudication and which power has not been delegated to the Hon'ble Observer and such power could not be delegated to the Hon'ble Observer.

9. The following are the contentions of the Original Petitioners: -

i. The main contention of the Original Petitioners is that if they are not permitted to participate in the process of sale of assets of first Respondent company, the very object of conducting a fair sale of assets of first Respondent company under the close monitoring of the Hon'ble Observer would become a futile exercise and they being the Original Petitioners they have got every right to participate in the process of sale of assets of first Respondent company.

ii. Another contention of the Original Petitioners is that as per the order dated 11.5.2015 passed by the CLB, the valuation reports which is the basis for the process of sale of assets of first Respondent company shall be monitored by the Observer but they were not subjected to the monitoring by the Hon'ble Observer and therefore the Hon'ble Observer is right in asking for a clarification in this regard.

iii. The further contention of the Original Petitioner is that there are no grounds to annul the order of appointment of Hon'ble Shri Justice Ramesh Mehta as an Independent Observer.

10. The points that emerge for consideration in this Application are as follows: -

i. Whether Hon'ble Independent Observer appointed by the CLB by its order dated 11.5.2015 has got the authority to adjudicate the

controversial issues that arose in the process of sale of assets of first Respondent company?

ii. Whether Original Petitioners are entitled to participate in the process of sale of assets of first Respondent company when it is subjected to the monitoring by the Hon'ble Observer?

iii. Whether valuation reports of the assets of the company obtained by the Original respondents can be taken into consideration by the Hon'ble Independent Observer?

iv. Whether there are any grounds to annul the order of appointment of Hon'ble Observer?

Point nos. (i) and (ii)

11. In order to decide this point, it is necessary to refer to certain observations of Hon'ble High Court of Bombay in the case of *Rakesh Malhotra v. Rajender Kumar Malhotra* reported in (2015) 192 Company Cases 516 Bombay-

> *"There is no doubt, especially following Bennet Coleman, that it was well within the CLB's power to appoint an observer and facilitator. However, I have the gravest misgivings whether, on the basis of its findings, that order is correct particularly in regard to what it is that it asks the observer-cum-facilitator to do. The parties were directed to cooperate with observer-cum-facilitator in smooth discharge of his functions "sorting out the allegations of the Petitioners and the grievances of the Respondents." This is not a substitution of non-corporate management for corporate management. This is a wholly impermissible delegation of a judicial function. It is one thing to charge an independent observer and facilitator with the management of the companies or supervision of their businesses. It is quite another to ask him to resolve or "sort out" the disputes between the two warring parties. What would be the nature of his attempted "sorting out"? Would it be an award under the Arbitration Act? A mediation report? What if it was disobeyed?*

Is this not a matter that is, and must remain, only within the province of the CLB? There is nothing in Chapter VI of the Companies Act, 1956 that permits the CLB to delegate this dispute-resolution judicial function in this manner."

12. There is no provision in the Companies Act 1956 or in Companies Act 2013 which enables the CLB or this Tribunal to delegate the powers of adjudication to Independent Observers. It is settled law that the CLB and this Tribunal have got power to appoint Observer for the management of companies or for supervision of its functions including process of sale.

13. In the case on hand, considering the minutes dated 16.9.2015 and 21.9.2015, the Original Respondents are under the apprehension that the Hon'ble Independent Observer is going to adjudicate the issue namely whether Petitioners have got right to participate in the process of sale of assets of first Respondent company on the ground that they moved the Company Petition before the Company Law Board or not? But if we consider the minutes dated 30.9.2015 as a whole, it is clear that the Hon'ble Independent Observer has not taken up the task of adjudication and he referred the parties to seek directions, order or clarification from the CLB. Therefore, there is no justification for the apprehension of the Original Respondents on this ground. It is made clear that the Hon'ble Independent Observer appointed by the CLB has no power to adjudicate the controversial issues, if any, that crop up in the process of sale of assets of first Respondent company.

14. Coming to the participation of the Original Petitioners in the process of sale on the ground that they are the persons that moved the Company Law Board and on the ground that the process of sale of assets of first Respondent company is subjected to the close monitoring by the Hon'ble Observer is also not approved by law. Even the CLB or this Tribunal cannot interfere with the management and affairs of a company in the ordinary course unless the actions constitute acts of oppression and mismanagement. Even then this

Tribunal can give only such directions and orders to do justice to all the stakeholders and to prevent oppression or to put the affairs of the company in right direction. In the case on hand, the Original Respondents are in management of the company. The CLB by its order dated 11.5.2015 permitted the Original Respondents to sell the assets of the company but subject it to the close monitoring by the Hon'ble Observer. There is no mention in the order dated 11.5.2015 passed by the CLB permitting the Original Petitioners to participate in the process of sale. Simply because Petitioners filed Company Petition, they cannot interfere in the process of sale especially when it is being closely monitored by an Independent Observer appointed with the consent of both parties. The right of the Petitioners, if any, in the affairs of the company are that of any other member of the company. Therefore, it is made clear that Petitioners have no say or participation in the process of sale of the assets of the first Respondent company or in the monitoring of the process of sale by the Hon'ble Observer, except right to have an opportunity to match the offer of the prospective buyers, which right is given by CLB in its order dated 11.05.2015. However, the Original Petitioners are having liberty to approach this Tribunal to give directions, orders or clarifications to the Original Respondents or the Hon'ble Observer from time to time in case if they are so advised and if the circumstances require.

15. The contention of the Original Respondents is that the Hon'ble Observer allowed the Original Petitioners to participate in the sale process. But a reading of the minutes dated 16.9.2015 and 21.9.2015 together would go to show that Original Petitioners themselves made an attempt to participate in the process of sale and therefore the Hon'ble Observer in his minutes dated 30.9.2015 referred the matter to CLB for clarification.

16. Point Nos. (iii) and (iv): -

It is the admitted case of the Original Respondents that they have obtained the valuation certificate in respect of the assets of first Respondent company before 26.6.2015 that means before the appointment of the Hon'ble

Observer and after the order dated 11.05.2015. Therefore, there is no opportunity to the Observer to monitor the process of valuation. A mere plain reading of the order of CLB expressly states in so many words that company may take necessary steps for sale of its assets as decided by its Board, applying the principles governing the corporate governance under supervision of an Independent Observer. It is needless to say that process of valuation of assets of first Respondent company is the basic and important step in the process of sale of assets of first Respondent company and that had happened even before the Observer was chosen by parties. It is not at all contemplated in the order of CLB that process of sale shall commence even before choosing of Independent Observer. In these circumstances, Hon'ble Observer rightly asked the parties to obtain clarification from CLB. It is canvased by the Original Respondents that Hon'ble Observer without raising any objection regarding valuation process and without informing them asked the parties to obtain clarification from CLB and that caused prejudice to them. But the said contention does not merit acceptance for the following reasons: -

i. It is the duty of the Original Respondents to bring the entire process of valuation to the notice of Hon'ble Observer and take his consent before acting upon it. Instead of doing such exercise, Original Respondents are commenting on action of the Observer in asking the parties to take clarification.

ii. The Original Respondents instead of asking for a clarification or direction had asked for annulment of order appointing Hon'ble Shri Justice R.A. Mehta raising the bogie of prejudice.

iii. This Tribunal in this order does not want to elaborate what exactly prejudice means and when it helps the parties to obtain relief from a court of law or on equities, since *per se* no element of prejudice is seen in Hon'ble Observer asking the parties to take clarification.

17. In this background and in view of the above said discussion it can only be said that although process of valuation took place even before the choosing of Hon'ble Observer, still he can take it into consideration as the valuation is

based on documents, reports of valuer etc. In case if the Hon'ble Observer did not satisfy with the valuation process or its outcome, it is within his authority to file his report before this Tribunal after giving copy to both parties and ask for further orders, in which case this Tribunal after hearing both parties shall pass order.

18. In view of the findings given in points (i) to (iv) there are no justifiable grounds to annul the order appointing Hon'ble Shri Justice R.A. Mehta as Independent Observer who is appointed with the consent of both parties.

19. This Application is disposed of as follows: -

i. The prayer to annul the order appointing Hon'ble Shri Justice R.A. Mehta as Independent Observer is negatived.

ii. Independent Observer has no power of adjudication or to undertake the processes of adjudication of controversial issues that may crop up in the process of sale of assets of first Respondent company except referring such issues to this Tribunal by way of a report.

iii. Original Petitioners have no say or participation in the process of sale of assets of first Respondent company except having an opportunity to match the offer of the prospective buyers.

iv. Although process of valuation of assets of first Respondent company took place even before the choosing of Hon'ble Observer, still Observer can take it into consideration as the valuation is based on documents, reports of valuer etc. In case if the Hon'ble Observer did not satisfy with the valuation process or its outcome it is within his authority to file his report before this Tribunal for further orders after giving copy of report to both parties in which case this Tribunal after hearing both parties shall pass order.

Both parties are directed to bear their own costs.

A copy of this order shall be communicated to Hon'ble Shri Justice R.A. Mehta, Independent Observer.

3.1.17

(BIKKI RAVEENDRA BABU)
MEMBER JUDICIAL

Typed by me and pronounced by me in open court on this the 3rd day of January, 2017.