

IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA

CORAM: Shri V.P. Singh  
Hon'ble Member(J)  
&  
Shri Jinan K.R.  
Hon'ble Member(J)

**C.P.(I.B.) No.182/KB/2017**

**In the matter of:**

An application under section 10(1) of the Insolvency and  
Bankruptcy Code, 2016;

-And-

**In the matter of:**

M/s. Gujarat NRE Coke Limited,  
A Listed Public Non-Government Company, limited by  
shares, registered under the provision of the Companies  
Act, 1956 being CIN: L51909WB1986PLC040098 and  
having its registered office at 22, Camac Street,  
Block-C, 5<sup>th</sup> floor, Kolkata- 700 016, West Bengal;

**...Applicant/Corporate Debtor**

**Counsels appeared:**

For the Financial Creditor: 1. Mr. Jishnu Saha, Sr.Advocate  
2. Mr. Nikung Barlia, Advocate

For the Corporate Debtor: 1. Mr. Sumit Binani (R.P.)

For the Workers : 1. Mr. Ratnanko Banerjee, Sr.Advocate  
2. Mr. M.S. Tiwari, Advocate  
3. Mr. S. K. Tiwari, Advocate

Order pronounced on 11<sup>th</sup> January, 2018

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**Per Shri V.P. Singh, Member(J):**

Shri Sumit Binani, Resolution Professional has filed the progress report in Insolvency Case No.C.P. 182/2017. In this case, by our order dated 7<sup>th</sup> April 2017, a petition filed by the Corporate Debtor, Gujrat NRE Coke Limited was admitted under section 10 of the I.B. Code, 2016 and an order for initiating Corporate Insolvency Resolution Process was passed.

Resolution Professional, Shri Sumit Binani has filed final progress report dated 1<sup>st</sup> January 2018. It is stated in the report that CIRP period of the company commenced on 7<sup>th</sup> April 2017. The initial period of 180 days was due to expire on 3<sup>rd</sup> October 2017, and the same was subsequently extended by another period of 90 days vide an order dated 19<sup>th</sup> September 2017. Extended period for submission of CIRP was scheduled to end on 1<sup>st</sup> January 2018.

It is further stated in the report that on 22.12.2017, he received an expression of interest for submission of Resolution Plan from RARE Asset Reconstruction Company and the same was shared by him instantly over email to the Members of the CoC. After that in the 11<sup>th</sup> meeting of the CoC held on 26.12.2017, the proposed draft Resolution Plan, put forward by Resolution Applicant was placed before the CoC and discussed. It was then decided to convene another meeting of CoC on 28<sup>th</sup> December 2017 wherein the Resolution Applicant was invited by the R.P. for negotiation with the CoC members on the Resolution Plan, being proposed to be submitted by them.

On 28<sup>th</sup> December 2017, in its 12<sup>th</sup> meeting, the Resolution Applicant discussed and negotiated on the terms of the proposed

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Resolution Plan, and it was decided that RARE ARC will forward the revised Resolution Plan to the Resolution Professional, which will be circulated to all the Members for their review and voting through Electronic mode.

The Resolution Plan was duly circulated and accordingly put to the vote. However, the same was not approved. Eight members of the CoC having a total voting share of 14.31% voted in favour of the Resolution Plan. Fifteen members having a total voting share of 84.03% voted against the Resolution Plan and one member having 1.67% voting shares abstained from voting.,

On 30<sup>th</sup> December 2017, he received an e-mail from Shri Pawan Kumar Agarwal, the Chief Commercial Officer of the company purported to be representing all the employees and workers of the company enclosing a Resolution Plan on their behalf. In the said e-mail he mentioned that the employees and the workmen are concerned about the continuation of their employment and livelihood as the Resolution Plan submitted by RARE ARC has been declined by the CoC and the company might face liquidation. He mentioned that employees and workers are working on the day to day basis. Today the industry is doing well, and the company has also started doing well and making profits. As such, they have developed a Resolution Plan which takes care of the payment to the secured lenders as well as addresses the issue of all other stakeholders. By e-mail, it was requested to the RP to place the Plan before CoC for their acceptance and not to put the company into liquidation.

In response to the e-mail mentioned above, he clarified that given the prescribed timelines under IBC, it is unlikely that the Resolution Plan put forward could be put up for approval before the

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CoC and if approved, be subsequently placed before the Adjudicating Authority for final approval on or before 1<sup>st</sup> January 2018. Regarding applicable provisions of the IBC, the outcome of the Insolvency Resolution Process of the company will automatically trigger its liquidation.

The Ld. Resolution Professional has attached the minutes of the 12<sup>th</sup> CoC meeting dated 28.12.2017 wherein it is stated that voting through electronic mode began on 29<sup>th</sup> December 2017 from 5 p.m. and ended on 30<sup>th</sup> December 2017 at 5 pm. Therefore, as per provision of section 31 of the Insolvency and Bankruptcy Code, 2016, Resolution Plan does not confirm the requirements referred in sub-section (1) of section 31. From the report, it is clear that only eight members of the CoC having a voting share of 14.31% has approved the Resolution Plan and fifteen members having a voting share of 84.03% have voted against the Resolution Plan. Only one member having 1.67% voting share abstained from the voting. As per requirement of section 30, sub-clause (4), the Committee of Creditors may approve a Resolution Plan by a vote of not less than 75% of the voting share of the Financial Creditor. Thus it is thus clear that the Resolution Plan failed even during the extended period of the CIRP. Therefore, we reject the Resolution Plan under section 31 of I B Code, for the non-compliance of the requirements specified therein. Consequently, Corporate Debtor company will automatically go into liquidation as per provisions of section 33 of the Insolvency & Bankruptcy Code, 2016.

The Resolution Professional, Shri Sumit Binani appointed for the Corporate Insolvency Resolution Process under Chapter II shall act as the Liquidator for liquidation unless replaced by the Adjudicating Authority under sub-section (4) of section 34.

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Shri Sumit Binani, after his appointment under this section as Liquidator, will exercise all the powers of the Board of Directors, key managerial personnel and the partners of the Corporate Debtor, as the case may be, shall cease to affect and shall be vested in the Liquidator.

The personnel of the Corporate Debtor shall extend all assistance and cooperation to the Liquidator as may be required by him in managing the affairs of the Corporate Debtor.

The Liquidator appointed by us, Shri Sumit Binani shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of liquidation estate, assets, as may be specified by the Board.

For the conduct of the liquidation proceedings, the amount shall be paid to the Liquidator from the proceeds of the liquidation estate under section 53.

It is further directed that in case of difficulty in the liquidation process, the Liquidator appointed by us shall be guided by the decision of the Monitoring Committee, which shall consist of the erstwhile members of Committee of Creditors, subject to final approval of the Adjudicating Authority.

Ld. Counsel representing the employees and workers of the Gujrat NRE Coke Ltd. has filed an affidavit, wherein it is stated that the Corporate Debtor Company has on its rolls 1178 employees including workers. The said employees had on 30<sup>th</sup> December 2017 filed a proposal for Resolution of the Insolvency Process of the company. Given the fact that the extended period of 270 days for the completion of such process was expiring on 1<sup>st</sup> January 2018,

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the employee's proposal was not taken up for consideration by the Resolution Professional.

It is further stated in the affidavit of employees and workers that the company is functional and is operating manufacturing plants at Gujrat and Karnataka. The company has entirely tied up with all raw materials suppliers and has regular customers for its product. The company has been able to overcome its period of crisis and has made operational profits of RS.4.46 crores and Rs.2.12 crores in October and November 2017 respectively. Such rising trend in the operations of the company is apparent from the snapshot of the company's performance over the last six months, which is annexed and marked as Annexure-C with the Affidavit. The company has moreover, been able to make payments of all dues to all employees, contractual employees and workers engaged at its plant, as is apparent from the certificate issued by the Chartered Accountant on 26<sup>th</sup> December 2017, which is annexed as Annexure-D with the affidavit. The list of employees and workers is appended and marked as Annexure-E with the testimony.

It is further stated that by closing the company and by discharging 1,178 employees, their families, numerous small vendors, suppliers, contractors, job workers and transporters of the company totalling about 10,000 people will also be affected.

In the affidavit filed by the employees and workmen, emphasis has been laid down on section 33, sub-clause (7) read with regulation 32 of the Insolvency & Bankruptcy Board of India (Liquidation Process) Regulation, 2016 which provides **for a slump sale of the assets** of the company and clearly permits the sale of the business of the company including all its assets and properties **as a going concern**.

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The Ld. Counsel, representing the employees and workers has emphasised the sale of assets of the company as a going concern will save the livelihood of workers and it will also be beneficial to the creditors. It is further stated in their representation that slump sale is nothing but the transfer of the whole or part of a business concern as a going concern.

It is further stated in the affidavit that Hon'ble Supreme Court and High Court has often directed the sale of assets of the company as a going concern with the object of preserving the employment and protecting the livelihood of its employees and workmen, and has done so even in case when the company has been lying closed for a number of years. Ld. Counsel for the employees has relied on the law laid down by the Hon'ble Supreme Court in case of [2001] 1 SCC page 736. It has been further argued that the Insolvency & Bankruptcy Code, 2016 has been legislated as socially beneficial legislation.

We have heard the arguments of the Ld. Counsel appearing on behalf of employees and workers and Resolution Professional and perused the record.

It is important to point out that section 33(7) of the Insolvency & Bankruptcy Code, 2016 provides that the order of liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the Corporate Debtor, **except when the business of the Corporate Debtor is continued during the liquidation process by the Liquidator.**

On reading the provisions of the subsection (7) of section 33 of I.B.C., it is clear that order for liquidation under section 33 shall be deemed to be a notice of discharge to the officers, employees and workers of the corporate debtor. The only exception is provided that

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when the business of the Corporate Debtor is continued during the liquidation process by the Liquidator.

Here, employees and workers have filed the list of employees and workers who are at present on the rolls of the company which shows that 1178 workmen are in the employment of the company, list is annexed as Annexure-E with the affidavit of employees and workers. It is also clear from the certificate of the Chartered Accountant, which is annexure-D annexed with the affidavit of employees and workers of the corporate debtor that the Corporate Debtor earned an operational profit of Rs.4.46 crores for the month ending on 31.10.2017 and Rs.2.14 crores for the month ending on 30.11.2017. It is an undisputed fact that to date the company is a going concern. If the order is passed under section 33(7) that the order of liquidation will be deemed to be a notice of discharge to the officers, employees and workers of the Corporate Debtor, then indeed 1178 employees and workers of the Corporate Debtor will be out of employment in one go. It is important to state that section 32, Chapter-VI of the Insolvency & Bankruptcy Board of India, (Liquidation Process) Regulation, 2016 provides the manner of sale during the liquidation process, which is given below for ready reference.

### **Chapter-VI- Realisation of Assets .**

**32. Manner of sale-** 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.

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It is thus apparent that above Regulation also provides the sale of the assets in a Slump sale. It is also important to point out that under Income Tax Act, 1961, section 2, sub-clause (42C), slump sale has been defined, which is given as under:

“Slump sale means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.”

Explanation 1 for the purpose of above clause provides that “undertaking” shall have the same meaning as assigned to it in explanation to clause (19)(AA) . Clause 19(AA) of section 2 of the Income Tax Act 1961 provides that all the properties of the undertaking, being transferred by the demerged company, immediately before the demerger, become the property of the Resulting Company by virtue of demerger. It is further provided in sub-clause (6) of clause (19)(AA) that the transfer of the undertaking is on a going concern basis. -

In Allahabad Bank -versus- ARC Holding [2001] 1 SCC page 736, Hon’ble Supreme Court has held that:-

“in the absence of any credible material, the direction to sell the company as a going concern is not sustainable.----

The Official Liquidator for this purpose shall advertise the sale of the judgement debtor company in liquidation as a “going concern” as ordered by the Hon’ble High Court. Such publication shall indicate that the reserve price, shall be the amount equal to the total decree including interest which has occurred up to 31.12.1999 in favour of the appellant bank and shall also have to pay the balance interest which accrues, till full payment is made. The publication shall indicate that the Purchaser shall also to pay

the liabilities of other claimants in the proceedings for the liquidation of the company.

Since all the parties are represented before us, including the Official Liquidator, we grant total period of 10 weeks from today, for conducting the sale, with the condition above, including the period of advertisement, receiving offers, etc. In case it is not concluded within this period, the order of the High Court directing the sale of the company as a going concern shall stand set aside.”

It is thus apparent that Hon'ble Supreme Court has in the exceptional case allowed the sale of the company as a going concern in extraordinary circumstances. In the above case Hon'ble Supreme Court has provided ten weeks' period for completion of the sale on a going concern basis. A condition is also provided in the order that reserve price of the company will be an amount equal to the total decretal value including interest in favour of the Appellant bank.

In the case in hand, it is an undisputed fact that Corporate Debtor is a going concern and has about 1178 employees and workmen on its Roll. Learned RP has also admitted that corporate debtor is a going concern. Section 33(7) also provides that order of liquidation shall be deemed to be a notice of discharge to the officers, employees and workers of the Corporate Debtor, except when the business of the Corporate Debtor is continued during the liquidation process. Regulation 32 also provides provision for the manner of sale during liquidation process which shows that it can be by way of slump sale and slump sale means the transfer of an undertaking as a whole. In the light of the order of the Hon'ble Supreme Court in case of Allahabad Bank (supra), we pass following orders in addition to the orders made above.

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- i) The Liquidator shall try to dispose off the Corporate Debtor company as a going concern after publication of notice in newspaper with the reserve price which shall be equal to the total debt amount including interest and maximum period applicable for trying the sale of the Corporate Debtor as a going concern will be only three months from the date of the order, if the process of sale as a going concern is failed during this period, then process of the sale of the assets of the company will be according to the provisions of sale of asset of the Corporate Debtor prescribed under section 33, Chapter VI of the Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

In case it is not concluded within this period, the order of this Court directing the sale of the company as a going concern shall stand set aside and corporate debtor to be liquidated in the manner as laid down in Chapter III of the Liquidation Process provided in Insolvency & Bankruptcy Code.

- 2) The Liquidator is further directed to issue a public announcement stating that the Corporate Debtor is in liquidation.
- 3) It is also ordered that copy of the order be sent to the Registrar of Companies with which the Corporate Debtor is registered

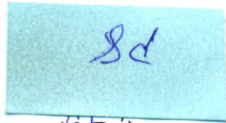
It is further declared that subject to provision of section 52, no suit or other legal proceeding shall be instituted by or against the Corporate Debtor;

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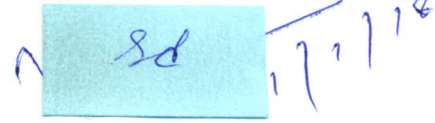
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Provided that a suit or other legal proceedings may be instituted by the Liquidator on behalf of the Corporate Debtor, with the prior approval of the Adjudicating Authority. Above provision shall not apply to legal proceedings about such transactions, as may be notified by the Central Government in consultation with any Financial Sector Regulators.

Copy of the order may immediately be communicated to the Registrar of Companies, Liquidator Shri Sumit Binani and Corporate Debtor and I.B.B.I. for information and necessary action.



(Jinan K.R.)  
Member (J)



(V.P. Singh)  
Member(J)

Dated, this the 11<sup>th</sup> day of January 2018