

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH,
NEW DELHI**

Company Appeal (AT) (Ins) No. 334 of 2021

IN THE MATTER OF:

1. SUN PHARMACEUTICAL INDUSTRIES LIMITED,

a company within the provision of the Companies Act, 2013,
having its registered office at SPARC,
Tandalja, Vadodara, Gujarat- 390020,
outside the jurisdiction aforesaid.

....Appellant No. 1

2. UNIMED TECHNOLOGIES LIMITED,

a company within the provisions of the Companies Act, 2018,
having its registered office at Baska, Ujeti Road,
Halol, Gujarat-389 350,
outside the jurisdiction aforesaid.

....Appellant No. 2

Vs.

1. SUMIT BINANI

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

....Respondent No. 1

2. MONITORING COMMITTEE/STAKEHOLDERS

Consist of erstwhile member of CoC
being represented by State Bank of India,
Having its office at State Bank of India,
Conference Room, 1st Floor, State Bank of India,

SAMB II, Jeevandeep Building, 1,
Middleton Street, Kolkata – 700 013.

...Respondent No. 2.

Present:-

For Appellant:-

Mr. Ravindra Shrivastava Sr. Advocate, Mr. Shyam Kumar, Miss Nayan Gupta, Advocates

For Respondent:-

Mr. Sidharth Sharma, Mr. Arjun Asthana, Mr. Jishnu Chowdhury and Vjjaini Chatterjee, Advocates for R1.

Mr. Krishna Venugopal, Sr. Advocate with Mr. VM Kannan, Mr. Sanjay Kapur, Mr. Lalit Rajput, Mr. Arjun Bhatia, Mrs. Shubhra Kapur, Advocates for R-2. Mr. Jitendra Lohia, IRP

J U D G M E N T

Jarat Kumar Jain: J.

The Ld. Adjudicating Authority (National Company Law Tribunal, Kolkata Bench) vide order dated 18.03.2021 partly allowed the Application I.A. (IB) No. 1001/KB/2020 in CP (IB) No. 182/KB/2017 filed by the Liquidator “Mr. Sumit Binani” against that order the Appeal is filed.

2. The Application filed by the Liquidator of Gujarat NRE Coke Ltd (Corporate Debtor) seeking following directions:-

(i) Allowed the Liquidator to keep windmill assets of the Corporate Debtor outside the sale purview of Liquidation Estate.

(ii) Allowed the liquidator to distribute the sale proceeds from the sale of windmill, where Rs. 180 Crore is laying 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.

(iii) Allowed the Liquidator to get himself impleaded as a party in the Civil Suit No. 39 of 2019 titled as Sun Pharmaceutical Industries & Anr. Vs. State Bank of India & Ors., pending before the Hon’ble High Court.

3 Ld. Adjudicating Authority by the impugned order dated 18.03.2021 partly allowed the Application which is as under:-

“The following orders are, therefore, passed:-

(a) 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 of 2019 before the Hon’ble Calcutta High Court, outside the sale purview of the Liquidation estate.

(b) 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 of 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) The Application is allowed, and the Liquidator is directed to file appropriate Application to intervene in the Civil Suit No. 39 of 2019 before the Hon’ble High Court and get himself impleaded as representative of the Corporate Debtor.

4. After passing of the impugned order, Ld. Adjudicating Authority vide order dated 23.03.2021 deleted the word from clause (b) of the aforesaid order. “and therefore, at this stage, it is not proper to order distribution of the sale proceeds”. The Appellants have challenged the impugned order and the corrigendum dated 23.03.2021.

5. Brief and relevant facts of this Appeal are that the account of Gujarat NRE Coke Ltd. (Corporate Debtor) was classified as a Non-Performing Asset (NPA) by the State Bank of India (SBI) on 27.10.2013. Due to 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.

6. SBI Caps services facilitated the sale transaction of the said windmill asset by inviting bids. The Sun Pharmaceutical Industries (Appellant No. 1 herein) and Unimad Technologies Ltd. (Appellant No. 2 herein) were declared as Successful Bidder for the 52 windmill assets and 10 windmill assets for an amount of Rs. 154 Crores and 26 Crores respectively. As per terms of the bid document 25% of the total bid amount alongwith bank guarantee for the balance amount was to be deposited. Accordingly, the Appellant No. 1 remitted a sum of Rs. 38.5 Crores and the Appellant No. 2 remitted a sum of Rs. 6.50 Crores on 21.10.2016 for the credit of the “No Lien Account” of the bank. The Appellant No. 1 and 2 also submitted the balance amount of Rs. 115.50 Crores and 19.50 Crores respectively by way of bank guarantee in favour of the SBI on the said date.

7. As per the letter of intent (LOI) dated 7.10.2016 issued to the Appellant No. 1 and 2, the aforementioned bank guarantee were to be invoked by the SBI in the event the buyer failed to comply with the agreement. The said LOI had been acknowledged by both the Appellants and pursuant thereto the agreement for sale was entered into between the Corporate Debtor and the Appellants on 01.04.2017.

8. The Corporate Debtor was admitted into Corporate Insolvency Resolution Process (CIRP) by the Adjudicating Authority vide order dated 07.04.2017 in CP (IB) No. 182/KB/2017 by allowing the Application under Section 10 of IBC filed by the Corporate Debtor.

9. An Application bearing CA (IB) No. 326/KB/2017 was made before the Adjudicating Authority by the SBI on behalf of CoC of the Corporate Debtor.

Ld. Adjudicating Authority vide order dated 22.08.2017 approved the sale of the windmill assets of the Corporate Debtor to the Appellants. However, Ld. 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.

10. According to the liquidator, on being informed of the approval of sale of the windmill assets by the Adjudicating Authority, the Appellants backed out of the sale transaction. SBI, Representing Monitoring Committee (Respondent No. 2) herein advised the Appellants to perform the sale agreement failing which it would invoke the bank guarantee.

11. The Appellants instituted a Civil Suit 39 of 2019 before the Hon'ble High Court of Calcutta inter alia seeking decree for declaration that the Appellants are entitled to and have duly avoided the transaction with the Respondent No. 2 recorded in the LOI dated 07.10.2016 and the same is not binding on the Appellants and seeking refund of the upfront consideration amount and to release of the bank guarantees.

12. In the suit the Appellants have filed an Application for interim relief granting stay on invocation of the bank guarantees. Single Bench of Hon'ble High Court of Calcutta allowed the Application. However, on Appeal the Division Bench of the Hon'ble High Court of Calcutta vide order dated 04.09.2019 set aside the order of the Single Bench and allowed the Respondent No. 2 SBI to invoke the bank guarantees. The said bank guarantees have been encashed by the Respondent No. 2 on 06.09.2019 and the said amount is lying in the "No Lien Account" of the Respondent No. 2

SBI. Thereafter, the Civil Suit No. 39 of 2019 before High Court of Calcutta was amended inter alia by modifying the prayer for release of bank guarantees to refund of the amount of bank guarantees, illegally invoked by SBI (Respondent No. 2).

13. In a previous round of litigation involving Jindal Steel and Power Ltd., Arun Kumar Jagatramka (erstwhile promoter and member of Gujarat NRE Coke Limited) and Gujarat NRE Coke Ltd., the Corporate Debtor i.e. Jindal Steel and Power Ltd. Vs. Arun Kumar Jagatramka and Ors. [CA (AT) No. 221 of 2018] this Appellate Tribunal had directed the Liquidator to proceed as per the direction given in the matter of Y. Shivram Prasad Vs. S. Dhanpal and Ors. [CA (AT) No. 224 of 2017] 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 sale 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.

14. In an Appeal against the said order of this Appellate Tribunal, 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.

15. The Liquidator has taken steps according to the direction of Y. Shivram Prasad (Supra). The steps taken for revival by way of a scheme of arrangement have failed. The Liquidator therefore, has to sale the entire

business as a going concern in its totality with the employees under the directions of orders in 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.

16. 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 Liquidator decides to sell the Corporate Debtor as a going concern, he may do so without considering the windmill assets.

17. The Liquidator has therefore, approached the Ld. Adjudicating Authority and filed the Application with the prayer as aforementioned. Ld. Adjudicating Authority after hearing Ld. Counsels for the parties passed the impugned order dated 18.03.2021 and subsequently, a corrigendum order dated 23.03.2021.

18. Ld. Sr. Counsel for the Appellants submitted that the Adjudicating Authority has no jurisdiction to pass an order permitting to the Liquidator to keep windmill asset outside the sale purview of the liquidation estate while doing so the Ld. Adjudicating Authority has not considered the effect of the order of liquidation dated 11.01.2018. This order of liquidation and the directions contend therein supersedes all previous orders of the Adjudicating Authority and transactions, if any, between the parties. The

impugned order excluding the windmill asset of the Corporate Debtor from the purview of the liquidation process is prima facie contrary to the order of liquidation dated 11.01.2018.

19. It is also submitted that windmill asset is an asset of the Corporate Debtor and therefore, become part and partial of the liquidation estate under Section 36 of the IBC. This section is complete Code in itself and only exclusion provided is in sub-Section (4) thereof, which is exhaustive. There can be no exclusion of an asset other than what is expressly provided in sub-Section (4). Ld. Adjudicating Authority had no jurisdiction to exclude windmill asset by passing an order which is clearly contrary to the mandatory terms of Section 36 of the IBC. This aspect of the matter has not been considered at all by the Ld. Adjudicating Authority but being question of jurisdiction goes to the root of the power and authority of the Adjudicating Authority or lack thereof to allow the Application of the Liquidator and direct keeping away windmill asset from the purview of liquidation proceedings. Such order is, therefore, void.

20. Ld. Sr. Counsel for the Appellants also pointed out that once the asset become part of the liquidation estate, the Adjudicating Authority has no power or jurisdiction to modify the liquidation estate or review any asset outside the liquidation purview. For this purpose, he placed reliance on the Judgment of the Hon'ble Supreme Court in the case of Ebix Singapor Pvt. Ltd. Vs. Committee of Creditors of Educomp Solutions Pvt. Ltd.& Anr. decided on 13.09.2021 in Civil Appeal No. 3224 of 2020 in this case Hon'ble Supreme Court upheld the order of this Appellate Tribunal holding that

withdrawal of the resolution plan by the Resolution Applicant after its approval by the CoC cannot be permitted, inter alia, because there is no specific provisions in the IBC for allowing withdrawal.

21. Ld. Sr. Counsel for the Appellants further submitted that it is an undisputed fact on record that by an email dated 18.08.2017 the Appellant withdrew the proposal to purchase the windmill asset from the Corporate Debtor and demanded refund of the advance deposit with interest the factum of withdrawal of the proposal as aforesaid has not been considered in the impugned order or earlier orders as a matter of fact, such a vital fact has been suppressed by the SBI and also the Liquidator. The impugned order as well as submissions of the Liquidator and the beneficiary (SBI) proceeds on fallacious assumption that there is concluded sale in regard to windmill asset of the Corporate Debtor, this assumption is absolutely baseless and is indeed gross misrepresentation of the facts.

22. It is also submitted that the order of the Adjudicating Authority dated 22.08.2017 is illegal and not binding on the Appellant. This order was passed in complete suppression of the facts as well as misrepresentation. A fraud was played by SBI by not bringing into notice of the Tribunal that the proposal has already been withdrawn prior to the order being passed. An order obtained by a fraud is nullity it does not bind anyone much less the Appellant. Therefore, it cannot become the basis of passing the impugned order dated 18.03.2017.

23. Ld. Sr. Counsel for the Appellants also submitted that the Adjudicating Authority has wrongly concluded that Civil Suit is for

determining rights of parties over the windmill asset. The transaction was terminated on 18.08.2017 and neither SBI nor RP (now Liquidator) took any steps to go ahead with the transaction till liquidation order on 11.01.2019. The Civil Suit was filed by the Appellant subsequent to liquidation order on 20.02.2019 against SBI and the banks issuing bank guarantees and the prayer in the said suit is limited to refund of upfront consideration and permanent injunction on invocation of bank guarantees. Since bank guarantees were invoked upon vacation of stay order, the said suit was amended with the prayer for refund of the amount of bank guarantees. Even if the Appellants lose the Civil Suit there could be no decree for sale of windmill asset and there cannot lie any execution proceedings to compel the transfer of windmill assets to the Appellant. Hence, keeping the windmill assets outside the liquidation serves no purpose.

24. It is also pointed out that while deciding the Appeal the observations made by the Ld. Division Bench of the Hon'ble High Court of Calcutta are only confined to the consideration of interim injunction. Those observations are not final and do not decide the rights of the parties. Therefore, such observations cannot be used against the Appellant. The Civil Court is in seisin of the Civil Suit pending before it. Who should be proper or necessary party in a Civil Suit is the sole discretion of the Civil Court. Therefore, no direction can be issued by the Adjudicating Authority for impleadment or even granting liberty to apply for impleadment in the Civil Suit. Hence, such direction is solely without jurisdiction.

25. Ld. Sr. Counsel for the Appellants further submitted that the corrigendum dated 23.03.2021 is on the face of it without jurisdiction, Ld. Adjudicating Authority is a Tribunal of limited jurisdiction and derives its power under the IBC. It does not have any plenary and inherent power to pass orders. No power of review has been conferred upon the Adjudicating Authority. The impugned corrigendum order has been passed behind the back of the Appellant and there was no occasion to pass the said corrigendum order. A perusal of the direction would show that the said direction follows a judicial determination. No Application for review was filed by any party and it is surprising that the Ld. Adjudicating Authority deleted the direction by which it had not allowed distribution of the sale proceeds. The said corrigendum order was passed modifying the earlier order dated 18.03.2021 in complete violation of principle of natural justice and fair play. The corrigendum order was passed without notice to the Appellant. The argument of the Respondent No. 1 that it was passed upon oral mentioning by him and the name of the matter was published in the cause list which amounts to due notice is preposterous. Even the cause list which is being relied upon by the Respondent does not have the name of the Appellants. Rule 11 and Rule 154 of NCLT Rules does not confer power of review but only allow rectification of clerical or arithmetical mistakes. For this purpose, he placed reliance on the Judgment of this Appellate Tribunal in the case of Shri Lalit Aggarwal Vs. Shri Bihari Forgings Pvt. Ltd. & Ors. Review Application No. 04 of 2020 in CA (AT) No. 380 of 2018 and Peoples International & Services Pvt. Ltd. Vs. Alliance Industries Ltd. CA (AT) No. 107 of 2018. Therefore, the impugned order deserves to be set aside.

Submissions of the Respondent No. 1.

26. Per contra, Ld. Counsel appearing on behalf of the Respondent No. 1 (Liquidator) supports the impugned order and submitted that the Appellants have misconstrued statements of Respondent No. 1 in fact the agreement for sale of windmill asset was executed on 01.04.2017 prior to initiation of CIRP. On the Application of the Respondent No. 2 being CA (IB) No 326/KB/2017, the Ld. Adjudicating Authority vide its order dated 22.08.2017 directed to keep the sale transaction outside the CIRP. The entire sale consideration has been received by the Respondent No. 2. The Civil Suit No. 39 of 2019 has been instituted against the Respondent No. 2 bank and not the Corporate Debtor. The windmill assets having been sold by the Appellants prior to the initiation of CIRP and entire consideration having been obtained by the Respondent No. 2 does not form part of liquidation estate and as such does not contravene interim order of the Hon'ble Supreme Court which now stands vacated.

27. It is also submitted that the initiation of CIRP was duly informed to the Appellants by the Respondent No. 2 vide email dated 14.06.2017 and it was decided between the Appellants and the Respondent No. 2 that appropriate direction shall be sought from the Adjudicating Authority for allowing sale of windmill assets to the Appellants outside the CIRP. The Appellants agreed to extend the time for Respondent No. 2 to seek appropriate direction from the Ld. Adjudicating Authority for execution of sale of windmill assets outside the CIRP. For this purpose, he drew our attention towards the email of the Appellants dated 14.06.2017 (which is at

Pg. 140 of the Appeal Paper Book). The sale transaction with respect to windmill assets was finalised prior to initiation of CIRP and accordingly, by order dated 22.08.2017 the said transaction was kept outside the purview of CIRP. However, the Appellants refused to take over control and possession of the windmill assets and also refused to take steps for execution of conveyance deed despite the entire consideration having been obtained by Respondent No. 2.

28. Ld. Counsel for the Respondent No. 1 further submitted that the Division Bench of Hon'ble High Court of Calcutta vide its order dated 04.09.2019 observed that time was not the essence of the contract as the Appellants were put to notice on 14.06.2017 and informed about the initiation of CIRP, the Appellants without any compulsion extended the period for performance and completion of sale of windmill assets. In so far as the enforceability of the sale transaction of the windmill assets are concerned, the same is pending adjudication before the Hon'ble High Court of Calcutta in Civil Suit No. 39 of 2019. The Appellants cannot seek adjudication of the contractual dispute, inter se Appellants and Respondent No. 2 which is prior to initiation of CIRP of the Corporate Debtor.

29. Ld. Counsel for the Respondent No. 1 lastly submitted that the order dated 23.03.2021, only proceeds to delete the embargo created in respect of distribution of sale proceeds in respect of sale, which is outside the purview of IBC and the same is not a matter of interest for the liquidation process of the Corporate Debtor. In light of the aforesaid submissions, the Appeal deserves to be dismissed with costs.

Submissions of Respondent No. 2

30. Ld. Sr. Counsel representing the Respondent No. 2 (SBI) submitted that the Ld. Adjudicating Authority has permitted the liquidator to keep the windmill assets outside the liquidation estate as the same sold to the Appellant against consideration as prior to the initiation of CIRP. The Appellants, therefore, is not at all concerned with the process of liquidation of the Corporate Debtor. The Appellants in its Appeal confirmed this position in para 3 of the Synopsis (Pg. 3 of Appeal Paper Book) “Though the Appellants have no role or relation with the liquidation proceedings of Gujarat NRE Coke Ltd. (Corporate Debtor), however, they have mischievously been dragged into such proceedings by SBI who had an independent contract with the Appellants which was terminated by the Appellants on 18.08.2017 on account of non-performance of obligations by SBI.”

31. It is submitted that the dispute between the Appellants and SBI is contractual dispute relating to pre-CIRP period. The contractual dispute overs around windmill assets which were non-core asset of the Corporate Debtor. The pre-CIRP contractual dispute is already before the Hon’ble High Court of Calcutta in Civil Suit and it is not open either to Ld. Adjudicating Authority or this Appellate Tribunal to consider the said assets as part of liquidation process. In Tata Consultancy Services Ltd. Vs. Vishal Ghisulal Jain CA No. 3045 of 2020,(2020) SCC Online SC 1113 Hon’ble Supreme Court has held that NCLT does not have any jurisdiction under Section 60(5) (c) to entertain the contractual dispute, which has arisen dehorse the

Insolvency of the Corporate Debtor. In view of the above, the Appellant cannot be aggrieved by the impugned order keeping the windmill assets outside the liquidation estate.

32. Ld. Sr. Counsel for the Respondent No. 2 further submitted that the Appellants supported the prayer made before and granted by the Adjudicating Authority as in the counter affidavit filed by the Appellant, it was stated that “thus, it is made clear that the Respondent No. 1 and 2 are not interested in the windmill assets of the Corporate Debtor as the sale of windmill assets was never concluded and this Hon’ble Tribunal may pass such orders on the liquidator’s Application as it deem fit but should not permit the liquidator to distribute the amount of Rs. 180 Crores”. Accordingly, the Ld. Adjudicating Authority while allowing the prayer order to keep the windmill assets outside the liquidation estate, the second prayer for distribution thereof was rejected as prayed by the Appellants and the Respondent No. 2 (SBI). Thus, the Appellants cannot be aggrieved person and maintain the Appeal under Section 61(1) of IBC.

33. Ld. Sr. Counsel for the Respondent No. 2 submitted that the provisions in relation to formation /creation of liquidation estate are dealt with in Section 36 of IBC. Sub-clauses (a) and (e) of Section 36 (4) of IBC are attracted in the present case which provides that the assets owned by a third party which are in possession of the Corporate Debtor shall not be used for recovery in liquidation and also clause (e) provides that any other assets as may be specified by the board, including assets which could be subject to set-off on account of mutual dealings between the Corporate

Debtor and any creditor shall not be used for recovery in liquidation. The windmill assets do not belong to the Corporate Debtor since there was a binding and irrevocable sale in favour of the Appellants against full sale consideration paid and the windmill asset were subject to set off in view of Master Restructuring Agreement and the attempts thereafter made by the consortium of banks led by SBI. Pursuant to which the Appellants have taken commercial decision to purchase the same unconditionally and irrevocably.

34. It is also submitted that admittedly the sale has concluded in favour of the Appellant, was an irrevocable and binding sale, based on an unequivocal acceptance thereof by the Appellants. Ld. Adjudicating Authority has already granted the permission during the CIRP stage approving the sale in favour of the Appellants. Thus, in view of the binding LOI and agreement dated 01.04.2017, the sale stood concluded.

35. It is further submitted that the Appellant had filed the Civil Suit before the Hon'ble Calcutta High Court seeking to unwind the transaction for sale of the windmill assets as also, for injunction seeking restraint against the encashment of bank guarantees. The Division Bench of the Hon'ble High Court had permitted SBI to encash the bank guarantees. Resultantly, the Appellants amended their Civil Suit seeking relief for refund of balance sale consideration encashed under the bank guarantees. Therefore, the entire dispute raised by the Appellants with respect to concluded sale is pending before the Hon'ble Calcutta High Court.

36. Ld. Sr. Counsel for the Respondent No. 2 submitted that the corrigendum order dated 23.03.2021 is legal and within jurisdiction. It is settled law that a Court/Tribunal is inherently empowered to correct its own error in a Judgment, Decree or Order from any accidental slip or omission. The Courts also have duty to see that record are true and present the correct state of affair. Such power of Court is well recognized for this purpose, he placed reliance on the Judgment of Hon'ble Supreme Court in the case of Niyamat Ali Molla Vs. Sonargon Housing Co-operative Society Ltd. & Ors. (2007) 13 SCC 421.

37. It is further submitted that Rule 154 of NCLT Rules permits the Tribunal to correct the errors including on its own motion. The contention of the Appellant that the corrigendum was passed behind its back is liable to be rejected inasmuch as the matter was listed in the cause list and the cause list is sufficient notice as held by the Hon'ble Supreme Court in the case of Bar Association and Ors. Vs. B. D. Kaushik (2011) 13 SCC 774. The corrigendum has to be appreciated on a complete reading of the impugned order dated 18.03.2021 passed by the Ld. Adjudicating Authority both the Appellants and SBI had supported the first prayer but the second prayer was opposed by the parties which was ultimately not granted by the Adjudicating Authority. The error due to accidental slip was manifest and no Court would ever permit it to remain cited the Judgment of this Appellate Tribunal in the case of Santosh Wasantrao Walokar Vs. Vijay Kumar V. Iyer and another 2020 SCC Online NCLAT 128.

38. It is further submitted that when the Adjudicating Authority has allowed the prayer of keeping the windmill assets outside the liquidation process it was obvious that the sale proceeds of such assets would also be outside the liquidation process and would be dealt with as per direction in Civil Suit No 39 of 2019 alone. When such is the position, the lines “and therefore, at this stage, it is not possible to order distribution of the sale proceeds” is not necessary, rather it was unwarranted.

39. Ld. Sr. Counsel for the Respondent No. 2 also submitted that the Adjudicating Authority has rightly allowed the liquidator to implead himself in the Civil Suit before the Hon’ble High Court. The Appellants have a specific case before the High Court that the RP has not transferred the assets despite the order dated 22.08.2017 passed by the Adjudicating Authority. This would obviously require the RP/Liquidator to explain his stand before the High Court. The Liquidator has also been repeatedly calling upon the Appellants to take possession of the assets. The interest of the Corporate Debtor in respect of which proceedings are pending before the High Court ought to be protected by the Liquidator before the Hon’ble High Court of Calcutta. It is, therefore, prayed that the Appeal being only an abuse of process of law and liable to be dismissed with exemplary costs.

40. After hearing Ld. Counsels for the parties, we have gone through the record.

41. Following issues arose for our consideration: -

(i) Whether the title of windmill asset has passed to Appellants is sub-judice before the Calcutta High Court?

(ii) Whether the order for keeping the windmill asset out of the liquidation estate is beyond the jurisdiction of Adjudicating Authority?

(iii) Whether the Adjudicating Authority has exceeded its jurisdiction in passing an order for allowing the liquidator to implead in Civil Suit No. 39 of 2019 pending before the Calcutta High Court?

(iv) Whether the order of corrigendum dated 23.03.2021 is without jurisdiction?

Issue No. (i)

Whether the title of windmill asset has passed to Appellants is sub-judice before the Calcutta High Court?

42. For deciding the issue, we have considered the subject matter of Civil Suit pending before the Hon'ble Calcutta High Court (in brief HC). In that Civil Suit the Appellants have prayed the relief that the SBI, Yes Bank and Indusland Bank may be restrained from invoking the bank guarantees with respect of 75% remaining consideration and decree for the up front amount Rs. 38.50 Crores and 6.5 Crores. The Single Bench of the HC has passed the interim order in favour of the Appellants, however, on Appeal, the Division Bench of the HC vide order dated 04.09.2019 set aside the order of the Single Bench and allowed the Respondent No. 2/SBI to invoke the bank guarantees. The bank guarantees have been encashed by the Respondent No. 2 on 06.09.2019. Thereafter, the Appellants have amended their plaint and sought the relief for return of total consideration Rs. 180 Crores i.e. the

amount of bank guarantees as well as up front amount (25% of the sale consideration).

43. Whether the Appellants are entitled for refund of the consideration Rs. 180 Crores. To answer this issue HC has to examine whether in terms of the LOI and the agreement dated 01.04.2017 the sale of the windmill assets has been concluded as alleged by the Respondent No. 2 SBI. On behalf of the Appellants, counter affidavit was filed before the Adjudicating Authority in reply to the Application I.A. (IB) No. 1001/KB/2020. This affidavit is sworn by Rakesh Chandra Sinha who is the Associate vice president of the Appellant No. 1 and authorised signatory of the Respondent No. 2, we would like to refer the Para 6 of the affidavit which as under:-

“6. With reference to
I say that the rights of the respective parties over the windmill asset can only be determined upon adjudicating of Civil Suit No. 39 of 2019 by the Hon’ble High Court of Calcutta initiated by the said Respondents (Appellants herein). Accordingly, it is submitted that since the Hon’ble High Court of Calcutta is in seisin of the issues of sale of windmill assets and as such making the Respondent Nos. 1 and 2 as parties to the instant proceedings is uncalled for unjustified and their name should be accordingly be deleted from the array of the parties”.

44. With the aforesaid admission of the Appellants in reply to the Application, it is clear that they are of the firm view that the issues of sale of windmill assets can only be determined upon adjudication of the Civil Suit which is pending before the HC.

45. The Division Bench of the HC while deciding the Appeal arises from an order passed by Trial Judge restrained the SBI from invoking bank guarantees, observed that:-

“15.....

I categorically reject the contention made out in the notes of the arguments filed on behalf of the plaintiffs (though not made in the submissions during the course of hearing) that the bank guarantees were dependent on the performance of obligations under the letter of intent or linked to performance of any such obligations, this aspect of the matter was most relevant and required careful analysis by the Trial Court”

46. In the same judgment in Para 17, the Division Bench of the High Court has observed that:

“17.

I am of the view that even on the merits of the disputes the underlying contract, it is highly debateable (a) whether the time was essence of the contract (b) the underlying contract stood frustrated (c) whether the extension of the bank guarantee was obtained by coercion_(d) whether there was a duty on the part of the Appellant bank to inform the plaintiffs of the initiation of proceedings before the NCLT and so on these all are issues which would decree which may be granted in favour of the plaintiffs.

“18.....

I am of the view that the whole case of the plaintiffs centers around the allegations with regard to alleged breaches of underlying contract by the Appellants. All the points urged by the plaintiffs (a) whether time was essence of the contract (b) and that no objection certificate had been received (c) or that the sale could not be completed with the extended period (d) or that the contract stood frustrated in view of the proceedings before the NCLT (e) or that windmills could or could not be transferred have to be ultimately decided in the suit”

47. At this stage, we would like to refer the arguments of Ld. Counsels of Appellants advanced before the Adjudicating Authority.

“5.1. Mr. Malay Kumar Ghosh, Ld. Sr. counsel appearing for Respondents No. 1 and 2 submitted that the sale of the windmill asset was never concluded and that the Respondent No. 3 SBI illegally invoked the bank guarantee. The rights of the respective parties over the windmill asset can only be determined upon adjudication of the Civil Suit No. 39 of 2019 by the Hon’ble Calcutta High court, since that court is in seisin of the same.

48. With the aforesaid it is apparent that whether the title of windmill assets has been passed to the Appellants is to be decided in the Civil Suit which is pending before the HC. Thus, we are unable to convince with the

argument of Ld. Sr. Counsel that the Adjudicating Authority has wrongly concluded that the Civil Suit is for determining rights of the parties over the windmill assets.

Issue No.(ii)

Whether the order for keeping the windmill asset out of the liquidation estate is beyond the jurisdiction of Adjudicating Authority?

49. It is an admitted fact that before initiation of CIRP the Master Restructuring Agreement (MRA) dated 02.03.2015 was entered into between the Corporate Debtor and the consortium of lenders/Joint Lenders Forum (JLF) led by SBI whereby SBI granted the right to auction non-core assets i.e. windmill assets by private treaty. The Appellants participated in the bid by submitting their respective offers of Rs. 154 Crores for 52 windmill assets and 26 Crores for 10 windmill assets.

50. Thereafter, as per terms of the bid document 25% of the total bid amount alongwith bank guarantee for the balance amount was to be deposited. Accordingly, the Appellant No. 1 remitted a sum of Rs. 38.5 Crores and the Appellant No. 2 remitted a sum of Rs. 6.50 Crores on 21.10.2016 for the credit of the No Lien Account of the bank. The Appellant No. 1 and 2 submitted the balance amount of Rs. 115.50 Crores and 19.50 Crores respectively by way of bank guarantee in favour of the SBI on the said date. Subsequently, as we have already discussed above that as per the order of Division Bench of Hon'ble High Court of Calcutta the bank guarantees were invoked and the amount was deposited in the "No Line Account" of SBI.

51. Now we have considered the factual aspect of the matter. On 01.04.2017 an agreement entered into between the Appellants and SBI for sale of the windmill assets i.e purchase agreement. Thereafter, on 07.04.2017 admitting the Application under Section 10 of IBC for initiation of CIRP, moratorium on sale/disposal of assets of the Corporate Debtor was declared. Subsequently, SBI filed an Application CA (IB) No. 326/KB/2017 under Section 60 (5) of IBC before the Adjudicating Authority for approval of the proposed sale transaction of windmill assets belonging to the Corporate Debtor. The Adjudicating Authority vide order dated 22.08.2017 allowed the Application, operative portion of the order as under:-

“Upon the above said circumstances, even if the moratorium was declared by the Tribunal it appears to me that approval of sale process initiated by the RP if granted it would benefit the Corporate Debtor as well as Corporate Creditors. Denial of approval may cause economic loss and in connection to the Creditors, Corporate Debtor as well as to the prospective buyers. Therefore, I am inclined to permit RP to complete the proposed sale transaction initiated by him. The Applicant prays for distribution of the proceeds of the sale amongst JLF, considering total claims admitted by the RP. Considering that Corporate Insolvency Resolution Process is in progress and not yet finalised it is not fair and just to allow the said prayer of the Applicant at this stage. It is to be decided upon finalization of the process by the RP. If it is allowed at present, it would cause great injustice to the Corporate Debtor as well as to the unsecured creditors. In view of the above said discussion, the prayer for appropriation and distribution of proceeds of sale is hereby rejected.

In the result, the Application is allowed in part permitting the RP to complete the proposed sale transactions by executing the conveyance under the law in favour of the buyers.”

52. According to the Appellants before passing of the aforesaid order they have informed SBI vide email dated 18.08.2017 that the contract already stood terminated prior to passing of the aforesaid order. Thus, the aforesaid

order was obtained by concealing the facts that the contract has been terminated.

53. It is disputed fact that whether the contract is legally terminated on 18.08.2017. The effect of this email dated 18.08.2017 is yet to be considered in Civil Suit. But now the order dated 22.08.2017 is in existence. It is also to be noted that this order has not been challenged by the Appellants. By this order, the Adjudicating Authority has directed to keep the windmill assets outside the CIRP. Subsequently, the Corporate Debtor vide order dated 11.01.2018 gone into liquidation and Mr. Sumit Binani was appointed as Liquidator. The Liquidator of the Corporate Debtor filed the present Application I.A. No. 1001/KB/2020 before the Adjudicating Authority and vide order dated 18.03.2021 the Adjudicating Authority has partly allowed the Application and liquidator is permitted to keep the windmill assets outside the sale purview of the liquidation estate.

54. We can say that impugned order dated 18.03.2021 is passed by the Adjudicating Authority in the light of the earlier order dated 22.08.2017.

55. We have seen that the Appellants have not raised any objection in their counter affidavit in regard to the relief claim in the Application that the Liquidator may be permitted to keep the windmill asset outside the sale purview of the liquidation estate. For this purpose, it is useful to refer the counter affidavit sworn by Rakesh Chandra Sinha on behalf of the Appellants. The Appellants in the affidavit have admitted that they have no objection in allowing and granting the relief to the liquidator, the relevant assertion is as under:-

“Thus, it is made clear that the Respondents No. 1 and 2 (Appellants herein) are not interested in the windmill assets of the Corporate Debtor as the sale of the windmill assets was never concluded and this Hon’ble Tribunal may pass such orders on the Liquidator’s Application as it deems fit but should not permit the Liquidator to distribute the amount of Rs. 180 Crores which was procured by illegally invoking the bank guarantees and illegally appropriating the advances given. The amount of Rs. 180 Crores laying in the lien account of SBI consists of the advance payment made by the Respondents No. 1 and 2 and the bank guarantees illegally invoked by the SBI. The Respondent Nos. 1 and 2 are entitled to refund the entire sum of Rs. 180 Crores alongwith interest thereon”

56. With the aforesaid assertion it is clear that in regard to the Application the Appellants have only objection that the amount of Rs. 180 Crores laying in the lien account of SBI may not be disbursed. Therefore, the Adjudicating Authority has not allowed the prayer for distribution of sale proceeds of the windmill assets and refused to grant the prayer (b) of the Application.

57. Now, we have considered the legal aspect of the matter. As per the Ld. Sr. Counsel for the Appellants in view of Section 36(4) of IBC. The Adjudicating Authority cannot direct exclusion of windmill assets from the liquidation estate. Section 36(4) provides that:-

“The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:-

(a) assets owned by a third party which are in possession of the corporate debtor.

58. In this matter, the question is yet to be decided by the Hon’ble High Court of Calcutta whether the title of windmill asset has been passed to the Appellants. At this juncture, it is not clear that windmill assets is owned by the Appellants or the Corporate Debtor. Ld. Sr. Counsel for the Respondent No. 2 drew our attention towards the clause (e) of sub-Section (4) of Section 36 which provides that:-

“any other assets as may be specified by the board, including assets which could be subject to set-off on account of mutual dealings between the Corporate Debtor and any creditor shall not be included in the liquidation estate.”

59. As we have seen that before initiation of CIRP the creditors of the Corporate Debtor and the Corporate Debtor have decided to sale the windmill assets belonging to the Corporate Debtor as contemplated under the MRA dated 18.09.2014 and the supplemental MRA dated 02.03.2015. The same were executed by the Corporate Debtor and the creditors forming part of JLF of the Corporate Debtor constituted in October, 2013. As agreed between the Corporate Debtor and the JLF lenders an asset sale committee was formed and pursuant to a bid process on a private treaty basis commencing in August, 2016 and considering this fact, the Adjudicating Authority vide order dated 22.08.2017 directed that the windmill assets to keep outside the CIRP. Thus, the case comes within the exclusion clause (a) and (e) of sub-Section (4) of Section 36 of IBC.

60. We are of the view that the Adjudicating Authority while allowing the prayer No. (i) of the Application has not committed any illegality.

Issue No. (iii)

Whether the Adjudicating Authority has exceeded its jurisdiction in passing an order for allowing the liquidator to implead in Civil Suit No. 39 of 2019 pending before the Calcutta High Court?

61. The Adjudicating Authority vide order dated 11.01.2018 directed 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 (See Pg. 264). In the light of this order, the liquidator has sought the permission. The Adjudicating Authority has assigned the reasons for permitting the liquidator to get impleaded as representative of the Corporate Debtor. Para 7.3 of the impugned order is as under: -

“The Applicant/Liquidator is not a party to that suit. If the Respondent Nos. 1 and 2 (Appellants herein) had indeed considered that the transaction in question in respect of the windmill asset 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.”

62. It means the Adjudicating Authority has only permitted the Liquidator to file an Application before the Hon’ble Calcutta High court to get impleaded as party. It cannot hold that the Adjudicating Authority has exceeded its jurisdiction and encroached in the jurisdiction of the Hon’ble Calcutta High Court. The Adjudicating Authority has only permitted the Liquidator to file the Appropriate Application.

Issue No. (iv)

Whether the order of corrigendum dated 23.03.2021 is without jurisdiction?

63. The controversy arises when the Ld. Adjudicating Authority passed the order on 18.03.2021 and partly allowed the Application filed by the Liquidator. After passing of the order, Ld. Adjudicating Authority on 23.03.2021 deleted the words from the clause (b) of the aforesaid order “and therefore, at this stage it is not proper to order distribution of the sale proceeds” (Pease See Para 3 of the Judgment).

64. According to the Appellants this is a review of its own order by the Adjudicating Authority which is not permissible in IBC and the Adjudicating Authority while modifying the order has exceeded its jurisdiction.

65. On the other hand, Ld. Sr. Counsel for the Respondent No. 2 submitted that every Court/Tribunal inherently empowered to correct its own error in a Judgment, Decree or Order from any accidental slip or omission. Rule 154 of NCLT Rules, 2016 provides the Tribunal may correct error arising from any accidental slip or omission at any time on its own motion or on Application of any party. It is also pointed out that by the corrigendum Ld. Adjudicating Authority deleted the aforesaid sentence as the Appellants and Respondent No. 2 opposed second prayer which is ultimately not granted by the Adjudicating Authority. The error due to accidental slip was manifest and therefore, the Adjudicating Authority has corrected it. The Adjudicating Authority has not reviewed its order. In support of the argument, Ld. Sr. counsel for the Respondent No. 2 has placed reliance on the Judgment of Hon'ble Supreme court in the case of Niyamat Ali Molla Vs. Sonargon Housing Co-operative Society Ltd. &Ors (2007) 13 SCC 421. Hon'ble Supreme Court held that

“Where it is the Court's own accidental slip or omission, or that of its ministerial officers. But it gives power to rectify any accidental slip or omission in a judgment, decree or order, and might include an accidental slip or omission traceable to the conduct of the parties themselves”.

66. We have first considered what is the effect of this modification of the order dated 18.03.2021. With this modification, the Adjudicating Authority has directed that at this stage it is not proper to order distribution of sale proceeds subsequently, these words are deleted from the order dated

18.03.2021. In this regard, it is useful to refer the earlier order passed by the Adjudicating Authority on 22.08.2017, by this order, the Adjudicating Authority, even during the moratorium considering the facts permitted the RP to proceed further. The operative part of the order is that:-

“therefore, I am inclined to permit the RP to complete the proposed sale transaction initiated by him, the Applicant prays for distribution of the proceeds of sale amongst JLF, considering total claims admitted by the RP. Considered that the Corporate Debtor Insolvency Resolution Process is in progress and not yet finalised. It is not fair and just to allow the said prayer of the Applicant at this stage”

67. It is an admitted fact that the Appellants in the counter affidavit which is filed in reply of the Application stated that they have no objection in case the Adjudicating Authority allow the Application but should not permit the Liquidator to distribute the amount of Rs. 180 Crores. The same prayer was made by the Respondent No. 2. It seems that considering these prayers, the Ld. Adjudicating Authority vide order dated 23.03.2021 deleted the aforesaid words.

68. We are of the view that such deletion is not amount to review its order by the Adjudicating Authority. It seems that it is an accidental slip or omission by the Adjudicating Authority and the Adjudicating Authority can rectify such mistakes under Rule 154 of NCLT Rules 2016. Thus, we find no substance in the argument of Ld. Sr. Counsels for the Appellants that the Adjudicating Authority vide order dated 23.03.2021 reviewed its own order and exceeded its jurisdiction.

69. With the aforesaid discussions, no interference is called for by this Appellate Tribunal in the impugned order. The impugned order dated 18.03.2021 and 23.03.2021 are upheld.

70. It is to be noted that during the course of the argument both the parties have made submissions about the terms and conditions of LOI and the agreement dated 01.04.2017 in regard to windmill assets but it is not required to examine the terms and conditions by this Appellate Tribunal as these issues will be decided in Civil Suit No. 39 of 2019.

Thus, the Appeal is dismissed. However, no order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

New Delhi
18th January, 2022
SC