IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, KOLKATA

IA (IB) No.643/KB/2020
&
IA (IB) No.969/KB/2020
in
CP (IB) No.03/KB/2017

In the matter of

Applications under section 42 read with section 60(5)(a), (b) and (c) and other applicable provisions of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

And

In the matter of

Nicco Corporation Limited (in Liquidation), having its registered office at 2, Hare Street, Kolkata 700001, in the State of West Bengal

…Petitioner/Corporate Debtor

And

In the matter of

IA (IB) No.643/KB/2020

West Bengal Tourism Development Corporation Limited, having its registered office at Udayachal Tourist Lodge, DG Block (1st Floor), Sector – II, Salt Lake City, Kolkata 700091.

… Applicant

Versus

Vinod Kumar Kothari, Liquidator of the Corporate Debtor, having his office at 1006-1009, Krishna Building, 224 A.J.C. Bose Road, P.S. Karaya, Kolkata 700020

... Respondent

Nicco Parks & Resorts Limited, service through its Managing Director, having his office at Jheel Meel, Salt Lake Bypass, HM Block, Sector IV, Bidhannagar, Kolkata, West Bengal 700 106.

… Proforma Respondent

And

In the matter of

IA (IB) No.969/KB/2020

West Bengal Industrial Development Corporation Limited, Protiti Bhawan, 23, Abanindra Nath Thakur Sarani (Camac Street), Ground Floor, Kolkata 700017

… Applicant

Versus

Vinod Kumar Kothari, Liquidator of the Corporate Debtor, having his office at 1006-1009, Krishna Building, 224 A.J.C. Bose Road, P.S. Karaya, Kolkata 700020.

... Respondent

Nicco Parks & Resorts Limited, through its Managing Director, having his office at Jheel Meel, Salt Lake Bypass, HM Block, Sector IV, Bidhannagar, Kolkata, West Bengal 700 106. … **Proforma Respondent**

Order reserved on: 01.12.2020

Order pronounced on: 18.02.2021

Coram:

Shri Rajasekhar V.K.	:	Member (Judicial)
Shri Harish Chander Suri	:	Member (Technical)

Appearances (through video conferencing):

Mr. Kishore Dutta, Advocate General Ms. Sumita Shaw, Advocate Mr. Debendra Raut, PCS	For the Applicants in both IAs, WBIDC and WBTDC
Mr. Joy Saha, Sr. Advocate Ms. Barsha Dikshit, PCS	For the Respondent in both IAs
Mr. Ratnanko Banerji, Sr. Advocate Mr. Pratik Shanu, Advocate Mr. Nilanjan Bhattacharjee, Advocate	For the Proforma Respondent in both IAs

COMMON ORDER

{disposing of IA (IB) No.643/KB/2020 and IA (IB) No.969/KB/2020}

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

1. Preamble:

1.1. **IA (IB) No.643/KB/2020** is an application filed by West Bengal Tourism Development Corporation (WBTDC) seeking directions against the Respondent/Liquidator as follows: -

(a) "That directions for stay be served on the Respondent Liquidator against proceeding with the Invitation for EoI dated 29 June 2020 and accepting EoIs from prospective investors till further orders;

(b) That the said Invitation for Expression of Interest dated 29th June 2020 be declared null and void."

1.2. **IA (IB) No.969/KB/2020** is an application filed by West Bengal Industrial Development Corporation Limited (WBIDC), West Bengal seeking directions against the Respondent/Liquidator as follows: -

(a) "That directions for stay be served on the Respondent Liquidator against proceeding with the Invitation for EOI dated 29th June 2020 and the decision contained in the publication for submission of Expression of Interest dated 25th August, 2020 for depositing of earnest money as well as extending the time to response to the EOI and accepting EOIs from prospective investors till further orders;

(b) That the said Invitation for Expression of Interest dated 29th June, 2020 and the decision contained in the publication for submission of Expression of Interest dated 25th August, 2020 for depositing of earnest money as well as extending the time to response to the EoI be declared null and void;

(c) The direction upon the respondent liquidator to comply the provisions of Joint Sector Agreement and the Article of Association which are binding on him."

1.3. Both these applications have common prayers and therefore have been heard and taken up for disposal together.

2. Factual Matrix:

2.1. The Government of West Bengal proposed to set up a Recreation Centre/ Amusement Park with private partners, in which the Corporate Debtor/NCL became a party in view of its long standing commercial relationship with the Government of West Bengal, its reputation in the community and expertise in the field.

2.2. Nicco Parks and Resorts Limited (NPRL) was incorporated on 17.03.1989. A Joint Sector Agreement (JSA) dated 23.02.1990 was entered into between West Bengal Industrial Development Corporation Limited (WBIDC) and West Bengal Tourism Development Corporation Limited (WBTDC) with Nicco Corporation Limited (NCL), the Corporate Debtor.

2.3. WBIDC and WBTDC, the applicants in each of the IAs before us, together held 26% shares in NPRL. A further 25% of the share capital was held by the Corporate Debtor/NCL. The remaining shares were offered to the public for subscription. Therefore, the Government of West Bengal has some stake in NPRL.

2.4. In terms of clause 7 of the JSA, WBIDC and WBTDC together were entitled to nominate three directors on the Board including the Managing Director, while the Corporate Debtor/NCL, was entitled to nominate the other three directors. Clause 14 of the JSA stipulated that the JSA remained in force so long as the parties continued to hold shares in NRPL in proportion. Clause 13 of the JSA restricts assignment of benefits or obligations under the agreement without the written consent of the parties, *i.e.,* the Government Organisations or the Corporate Debtor.

2.5. Subsequently, the Government of West Bengal made available about forty acres in Jheel Meel at Salt Lake City, Kolkata to NPRL for a term of thirty three years, with a provision for renewal for two terms. A lease deed was executed in this regard on 05.07.1991. It is the stand of both the applicants that the project holds significant value not only for the Government but also for the public at large. At present, more than 37% of its shares are held by the public and it is traded on BSE Limited.

2.6. *Circa* 2010, the Corporate Debtor/NCL filed a reference under section 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) before the Board of Industrial and Financial Reconstruction (BIFR). BIFR *vide* order dated 23.08.2011, declared the Corporate Debtor as a “Sick Company”.

Thereafter, upon promulgation of the Insolvency and Bankruptcy Code, 2016 (the Code), the Corporate Debtor made a reference under section 10 thereof before this Adjudicating Authority on 20.12.2016. That Company Petition was registered as CP (IB) No.03/KB/2017 and admitted *vide* order dated 18.01.2017. At the sixth meeting of the Committee of Creditors (CoC) held on 06.10.2017, the Resolution Plan submitted for revival of the Corporate Debtor failed to pass muster from the CoC. Therefore, *vide* order dated 17.10.2017, this Adjudicating Authority directed the Corporate Debtor to be liquidated. Mr. Vinod Kumar Kothari was appointed as the Liquidator.

2.7. The Liquidator has attempting to sell 25% shares held by the Corporate Debtor/ NCL in NPRL. He has floated several Expression of Interests (EoIs) with changes in the reserve price. The last such EoI was floated on 29.06.2020, wherein the reserve price of 1,17,00,000 (one crore and seventeen lakh) equity shares of the Corporate Debtor/NCL held in NPRL was fixed at ₹35.06 crore.

2.8. It is the stand of the applicants that while the Liquidator has addressed a letter dated 03.01.2018 for permitting him to dispose of the said shares, this letter was not really an "offer," but was merely an intimation of intent of the Liquidator to dispose of the shares in favour of other parties. WBIDC and WBTDC are both aggrieved by the fact that the Liquidator has not gone by clause 10 of the JSA in getting the shares valued. Therefore, identical prayers have been made in the two applications seeking a stay of the process by which invitations for EoI were issued.

Chequered history

2.9. Before the present application came to be filed, there was a previous round of litigation involving the parties. It is important to notice the result of that litigation, which went right up to the Hon'ble Supreme Court. The applicants – WBIDC and WBTDC, and the proforma respondent/NPRL – have both drawn inspiration and sustenance from the denouement in that round of litigation, in the present round of litigation. The facts of that litigation are detailed below:

(a) In June, 2019, the Liquidator filed an application being IA (IB) No.669/KB/2019 against NPRL and two of its Directors, Mr. Rajive Kaul and Ms. Pallavi Priyadarshini Kaul, praying for various reliefs, including an order for vacation of offices of the said directors.

(b) By an order dated 18.12.2019, this Adjudicating Authority allowed the Liquidator's prayers, as a result of which the said directors vacated their office. The said order further directed NPRL to take on board the nominees of the respondent Liquidator.

(c) The said order dated 18.12.2019 came to be challenged by way of three separate appeals before the Hon'ble National Company Law Appellate Tribunal (NCLAT) which dismissed the same *vide* order dated 20.03.2020. Against this an appeal was preferred before the Hon'ble Supreme Court,[1] which upheld the order of the Hon'ble NCLAT.[2]

3. Arguments of Mr. Kishore Dutta, Ld. Advocate General appearing for WBIDC & WBTDC, the applicants in both the IAs: -

3.1. Mr. Kishore Dutta, Ld. Advocate General, referred us to para (q) at page 14 of the application.[3] This para reproduces clause 10 of the JSA dated 23.02.1990. This clause stipulates that if either WBIDC and WBTDC or NCL at any time wish to dispose of their shares in NPRL then the party wishing to sell the shares will first offer its shares to the other party on the basis of –

(a) the fair valuation which shall be fixed by the Auditors of the Company; or

(b) the average price of the shares trading on recognised Stock Exchange on which such shares may be quoted, for the preceding six months of such offer being made;

whichever is higher. This clause further enjoins upon the party to whom such offer is made, to exercise its right to purchase the shares within the period of six

[1] Civil Appeal No.2738/2020 with Civil Appeal No.2749/2020 and Civil Appeal No.2764/2020 decided on 21.07.2020.

[2] CA (AT) (Ins) No.44/2020, decided on 20.03.2020.

[3] IA (IB) No.969/KB/2020.

months from the date of the offer, failing which the offeror shall be free to dispose of the shares through a public issue or to public financial institutions at a price not lower than the price offered. In case the offeror wishes to dispose of the shares at a price lower than that offered, then the offeror is obligated to make the offer once again to the other party, and clause 10 will apply as if it was a fresh offer.

3.2. Mr. Kishore Dutta stressed that this clause in the JSA surely created a right of pre-emption between the parties. Only if the other party refused to buy such shares, can the offeror offer such shares to the public on the same price as offered to the other party. Mr. Kishore Dutta also drew our attention to Article 48 of the Articles of Association (AoA) of NPRL which incorporates, in substantive terms, clause 10 of the JSA. Therefore, Mr. Kishore Dutta submits, the same is binding. Clause 10 and Article 48 do not militate against the free transferability of shares. He drew support for this view from the following judgments: -

(a) ***Messer Holdings Ltd. v. Shyam Madanmohan Ruia & Ors.,***[4] (para 44);

(b) ***Bajaj Auto Limited v. Western Maharashtra Development Corporation Ltd.,***[5] (paras 39 & 40);

(c) ***Darius Rutton Kavasmaneck v. Gharda Chemicals Limited & Ors.,***[6] (paras 65 & 68); and

(d) ***Riverdale Infrastructures Private Limited v. Kirloskar Ebara Pumps Limited & Ors.,***[7] (Para 8.5).

3.3. Mr. Kishore Dutta also referred us to page 65 of the application,[8] whereby the Liquidator wrote a letter dated 03.01.2018 to WBIDC and WBTDC. In this

[4] (2010) SCC Online Bom 1284, decided on 01.09.2010.

[5] 2015 SCC OnLine Bom 2111, decided on 08.05.2015.

[6] 2015) 14 SCC 277, decided on 28.10.2014.

[7] Company Appeal No.221/58(4)/MB/2017, decided on 26.05.2020 [NCLT, Mumbai Bench].

[8] IA (IB) No.643/KB/2020.

letter, the Liquidator notices clause 10 of the JSA and requests the Corporations to allow the Corporate Debtor to dispose of its investment in NPRL through a "transparent mechanism". The letter ends by asking the Corporations whether they would be willing to permit the Corporate Debtor to dispose of its shareholding in NPRL in the manner provided in the Code and the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Liquidation Regulations).

3.4. Mr. Kishore Dutta submitted that the Liquidator, having noticed the provisions of clause 10 of the JSA, could not have ignored the valuation methodology specified therein. The Liquidator has not stated in his letter that he has adhered to clause 10 of the JSA in the valuation of the shares. The figure of ₹40.00 crore in the said letter has been arrived at without recourse to the methodology of valuation prescribed in clause 10.

3.5. Further, Mr Kishore Dutta drew our attention to Annexure 'A' of page 76 of the reply of the liquidator.[9] He submits that in terms of this document, valuation has been carried out on four occasions – December, 2017, February/March 2019, November, 2019 and June, 2020. Mr. Dutta further submits that even if it is assumed that the letter dated 03.01.2018 constituted an offer, even that offer was only once, whereas, in terms of clause 10 of the JSA embodied in Article 48 of the AoA of NPRL, WBIDC and WBTDC ought to have been offered the shares at the time of the second, third and fourth valuations also. Once the Liquidator had come to the conclusion that the shares held by the Corporate Debtor in NPRL should be disposed of, he had no option but to stick to clause 10 of the JSA.

3.6. Mr Kishore Dutta summed up his arguments thus –

(a) There was a common offer in the first phase in terms of the letter dated 03.01.2018;

(b) Even if it is considered to be an offer, the WBIDC and WBTDC ought to

[9] IA(IB) 643/KB/2020.

have been offered the shares on the three other occasions when the valuation of shares was made;

(c) The valuation method adopted by the Liquidator was in violation of clause 10 of the JSA.

4. Arguments of Mr. Joy Saha, Ld. Sr. Counsel appearing for the Liquidator:

4.1. Mr. Joy Saha, Ld. Sr. Counsel appearing for the Liquidator submitted at the outset that the entire liquidation process is completed, except for sale of this block of shares. What is otherwise pending are some claims of workers and a decision on certain preferential transactions.

4.2. The 1,17,00,000 shares held by the Corporate Debtor/NCL in NPRL were valued by the Liquidator at ₹40.00 crore. There were no buyers. Thereafter, shares were revalued at ₹35.06 crore. Mr. Joy Saha submitted that the present objection does not seem to be with reference to the proposed sale itself, but only to the manner in which the sale is to be conducted. The delay in selling the shares was defeating the rights of the Corporate Debtor, and it goes against the grain of maximising the value of assets of the Corporate Debtor.

4.3. Mr. Joy Saha drew our attention to the reply of WBTDC to the letter dated 03.01.2018 of the liquidator, at pages 72 & 73.[10] It has been stated therein that the subject matter (sale of shares of the Corporate Debtor held in NPRL) is under active consideration by the department and that the conclusion would be arrived at very soon, say within a period of 3 months. At page 70,[11] it has been stated that *"park is one of the Tourism Hub of Kolkata where public interest is involved and various Departments of the Government are involved and therefore WBTDC is in the process of getting the necessary feedback and thereafter intimate the decision."*

4.4. Mr. Joy Saha submits that even at that stage there was no objection communicated by WBTDC in regard to the valuation methodology or the sale

[10] Reply of Liquidator in IA(IB) No.643/KB/2020.

[11] IA(IB) No. 643/KB/2020.

of shares itself. At this point of time, the Liquidator has received EoI, Earnest Money and a serious buyer for the shares.

4.5. Mr. Joy Saha further submitted that on expiry of the period of six months starting from 03.01.2018 and the extended period of a further three months as sought for by the applicants, the Liquidator wrote a letter dated 04.09.2018 which is placed at page 68,[12] stating that since no response has been received from the Corporations till 03.09.2018, the Liquidator was proceeding with the process of sale of shares under the Code.

4.6. Mr. Joy Saha referred to the averments in clause (ll) at page 16,[13] whereby they have stated that the shares may be sold by the Liquidator on the stock exchange itself. The Liquidator did not try to sell the shares on the stock exchange because finding a single buyer for 1,17,00,000 shares was going to be really difficult. He described as unfortunate the allegation in clause (mm) at page 16 of the application,[14] whereby the motives of the Liquidator have been questioned.

4.7. Mr. Joy Saha further submitted that at this stage the rights of WBIDC and WBTDC under the JSA dated 23.02.1990 should be treated as having been waived by conduct and by the intention conveyed in the letter referred to above, *i.e.*, 19.07.2018. The JSA envisages the situation where the parties contemplated a voluntary sale and not an involuntary sale under mandate of law. If the Code prescribes a particular method, then it cannot be ignored in favour of the method prescribed by an instrument such as the JSA. It is pertinent to note that the letters from WBIDC and WBTDC are dated 19.07.2018 and thereafter there has not been a single communication in this regard with the Liquidator. Even now, there is not a single averment in the two applications that there is intent to buy the shares in question either at ₹40.00 crore or at the reduced price of ₹35.06 crore, which is what would have been expected of WBIDC and WBTDC if the public interest was the overriding consideration. Therefore, Mr. Joy Saha urged

[12] IA(IB) 643/KB/2020.

[13] *Ibid*.

[14] *Ibid.*

the Bench to allow the Liquidator to sell the shares by public auction in accordance with regulations 33 and 35 of the Liquidation Regulations.

5. Arguments of Mr. Ratnanko Banerji, Ld. Sr. Counsel appearing for NPRL, the Proforma Respondent:

5.1. Mr. Ratnanko Banerji, Ld. Sr. Counsel appearing for NPRL, the proforma respondent, submitted that there are only two issues that merit consideration: -

(a) The applicability of clause 10 of the JSA which is embodied in Article 48 of the AoA of NPRL; and

(b) Whether sale under the Code should ignore the contractual arrangement between the parties.

5.2. Mr. Ratnanko Banerji started his submissions by drawing reference to the previous ground of litigation whereby the Liquidator, in exercise of his powers under the JSA, nominated three directors on the Board of NPRL and this came to be challenged before the Adjudicating Authority, the Hon'ble NCLAT and the Hon'ble Supreme Court. NPRL lost the litigation at every stage and the Liquidator's power to nominate directors under the JSA was upheld right through. Having done that, the Liquidator cannot now take a contradictory stand to say that he is not bound by the JSA. Either the Liquidator is bound entirely by the JSA with all its rights and obligations, or not at all. It is not for the Liquidator to pick and choose the clauses that are beneficial to him alone while ignoring the obligations envisaged under the JSA.

5.3. Mr. Banerji urged that clause 10 of the JSA provides a particular procedure to be followed. In terms thereof NPRL has not been approached by the Liquidator to appoint the Auditor of the Company to value the shares. This right of pre-emption offered to the parties to the JSA is a very invaluable right. In so far as the shareholding of NPRL taken as a whole is concerned, the Government is a key player. The Government determines the shareholding composition, and it is upto the Government to determine whether the so-called "offer" made by the Liquidator *vide* his letter dated 03.01.2018 should be taken up or not. Mr.

Banerji reiterated that having taken advantage of the JSA in the previous rounds of litigation in getting his nominees on the Board of NPRL, the Liquidator cannot now attempt to sell the shares *dehors* clause 10.

5.4. Mr. Ratnanko Banerji submitted that Invitation for EoI for the 25% shares in NPRL was first issued by the Liquidator on 29.06.2020. Clause 4.3 sets out a brief description of the assets being sold, *viz.*, 1,17,00,000 equity shares held in NPRL. At page 56 of the application,[15] the description of assets is given in a table in column 3 thereof – *"the sale of NPRL shares is subject to the provisions of the JSA dated 23.02.1990 including rights of the Government or of WBTDC and WBIDC."*[16] After IA No.643/KB/2020 was filed before this Adjudicating Authority, a fresh Invitation for EoI was issued on 27.07.2020. In this fresh invitation, in the table in clause 4.3 thereof which has been placed at page 87 of the PDF version of the reply filed by the Liquidator in IA No.643/KB/2020, the notes have undergone a significant change, which now read as follows: -

> *"Note 1: The buyer of NPRL shares is advised to examine the provisions of the Joint Sector Agreement dated 23.02.1990 ("JSA"), which contains the mutual rights of NCL – now in Liquidation, and the rights of the Government, or of WBTDS/WBIDC therein.*
>
> *Note 2: There are references to several other documents/information in JSA, which may or may not be in possession of the Liquidator."*

5.5. Mr. Ratnanko Banerji urged us to refer to section 36(3)(d) of the Code, wherein it has been laid down that Liquidator shall form the Liquidation Estate which consists, *inter alia,* of intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights. In this context he submitted that the liquidation estate is not really devoid of contractual rights, and that it has to be strictly followed even by the Liquidator.

[15] IA (IB) No. 969/KB/2020.

[16] Ibid at 56.

5.6. Mr. Ratnanko Banerji also highlighted the provisions of regulation 33 of the Liquidation Regulations, which laid down that the Liquidator shall "ordinarily" sell the assets through an auction. He stressed on the word "ordinarily." Read together, the sale in terms of the Liquidation Regulations recognise that there can be a contractual obligation. The Liquidator also initially recognised this when the first Invitation for EoI was issued on 29.06.2020. Therefore, the sale shall have to be conducted in a manner consistent with clause 10 of the JSA.

5.7. Mr. Ratnanko Banerji further stressed that there has not been any valuation conducted by the auditors of NPRL,[17] nor has the Liquidator prepared an index in terms of which the price has to be determined.[18] He supported the submissions made by the Ld. Advocate General on behalf of WBIDC and WBTDC in this regard. He also submitted that the letter dated 03.01.2018 cannot be construed as an offer in terms of clause 10 of the JSA.

5.8. Mr. Banerji also quoted ***Riverdale Infrastructures Private Limited v. Kirloskar Ebara Pumps Limited and Ors.,***[19] the judgment of NCLT, Mumbai Bench (to which one of us was a party) and submitted that proviso to section 58(2) recognises that even in the public limited company there can be a contractual restriction. He also quoted the judgment of the Hon'ble Supreme Court in ***Claude-Lila Parulekar* v. *Sakal Papers (P) Ltd***.[20] Mr. Banerji repeatedly urged that the Liquidator, having stepped into the shoes of the shareholder/NCL, will have to be bound by the contractual obligation of the JSA. The Liquidator's rights cannot be superior to the Company in Liquidation.

5.9. Mr. Ratnanko Banerji urged a further point: The Liquidator has been trying to sell these shares for quite some time. In terms of Stock Exchange valuation, the price is higher than what the Liquidator has offered. The existence of this project

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17 In terms of sub-clause (a) of clause 10 of the JSA.

18 In terms of sub-clause (b) of clause 10 of the JSA.

19 *Supra* note 7.

20 (2005) 11 SCC 73, decided on 18.03.2005.

– an Amusement Park, is one of its kind. The land is a largesse from the State Government. Therefore, if properly pursued it was possible to get into an arrangement where, with the consent of the State Government shares of the Corporate Debtor could have been bought back.

6. Arguments of Mr. Joy Saha, replying to the arguments of the Ld. Advocate General Mr. Kishore Dutta and Mr. Ratnanko Banerji

6.1. Mr. Joy Saha, Ld. Sr. Counsel appearing for the Liquidator submitted that the principal argument of the Ld. Advocate General is two-fold: -

(a) The letter of 03.01.2018 of the Liquidator is not an offer letter and therefore he has not discharged his duties in terms of clause 10 of the JSA.

(b) Every time the price was reduced, the Liquidator ought to have informed the WBIDC and WBTDC and because this was not done, the right of first refusal in terms of clause 10 of JSA was breached.

6.2. Answering the second point first, Mr. Joy Saha submitted that if the offer was to be repeated every time that there was a fresh valuation of shares, then the liquidation process would have been delayed indefinitely. Further, the preamble to the Code would have to be relegated to the dustbin. This is particularly so because the Liquidator has been writing to them from time to time. Altogether, the Liquidator has written six letters, out of which WBIDC has replied on two occasions, even after WBIDC offer refers to the looming presence of clause 10 of the JSA. Instead, the Corporation has only sought time to respond. After about three years, the Corporations have now moved this Adjudicating Authority primarily on the ground that there was no offer.

6.3. Answering the first point, Mr. Joy Saha further submitted that the very fact that the Liquidator has written six letters to the WBIDC is sufficient to prove that he intended to stick to clause 10 of the JSA. It is the Liquidator's case that there is no right of pre-emption. In at least three letters, the Liquidator has explicitly stated that in case the Corporations did not exercise their right of pre-emption, then the Liquidator would proceed under the provisions of the Code. Not once did the Corporations respond to this in explicit terms nor did they say that the IBC shall not apply. Mr. Joy Saha further pointed out that the Corporations have no objection if the sale is through the Stock Exchange.[21]

6.4. Mr. Joy Saha also questioned the locus of NPRL to be heard in the present proceedings. He submitted that the JSA is an agreement *inter se* between WBIDC and WBTDC and NCL/Corporate Debtor. NPRL is not a party to this arrangement and, therefore, it has no locus. In spite of that, although volumes have been spoken about it, the buyback offer from the Government is not on the table today.

6.5. Mr. Joy Saha further submitted that if there is a right under clause 10 of the JSA then it should be held that there is an equal obligation to respond to the letter of the Liquidator. NPRL has three representatives of the State run Corporations (WBIDC and WBTDC) on its Board. Mr. Joy Saha questioned the probability of the Corporations not knowing of the other attempts of the Liquidator to sell the shares.

6.6. As far as the valuation of the shares to be done by the Company is concerned, Mr. Joy Saha referred to section 247 of the Companies Act, 2013 in terms of which valuation can only be done by a Registered Valuer.

6.7. Mr. Joy Saha further urged led us to section 238 of the IBC which provides overriding effect to the provisions of the IBC over other laws inconsistent from that of any instrument having effect by virtue of any such law. He submitted that if NCL was a functioning company, then it would be bound by the JSA. But the Liquidator is not so bound. The question really is whether clause 10 will prevail or section 238 of the Code will prevail. He further submitted that every litigant who comes to the Court should come with clean hands. The Corporations waited over two years before coming to Court and submitting that clause 10 has been violated. However, they did not say that the valuation already carried out by the Liquidator is wrong. They also do not point out what prejudice

[21] Refer para (ll) & (mm) at page 16 of IA (IB) 643/KB/2020.

has been caused to them. Mr. Joy Saha submitted that there is nothing that prevents the Corporations from participating in the auction and making the highest offer in the shares in question, which would be accepted by the Liquidator with open arms.

6.8. Mr. Joy Saha also submitted that clause 10, which has been heavily relied on by the Ld. Advocate General and by Mr. Ratnanko Banerjee, contains a caveat that a response has to be sent within six months. Would the right available under clause 10 survive in perpetuity if there was no response, Mr. Joy Saha wondered. Hence, the question really is whether the non-valuation of the shares by the Statutory Auditors of NPRL would be fatal. In this regard, it is to be noted that there is really no opposition from any quarter to the valuation arrived at, though there is opposition to the manner of sale that is now proposed, *i.e.*, auction under the provisions of the Code.

7. Arguments in rejoinder of Mr. Kishore Dutta, Ld. Advocate General appearing for the applicants.

7.1. Rounding up the submissions made by Mr. Joy Saha, Mr. Kishore Dutta, Ld. Advocate General submits that the question whether section 247 of the Companies Act, 2013 was even applicable is a matter that is brought for consideration before this Adjudicating Authority for the first time today. Supplementing the submissions, Mr. Ratnanko Banerji stated that the contractual rights under the JSA have been upheld by the Hon'ble NCLAT in para 60 of its order,[22] it supported the arguments that recognises the contractual right in terms of the JSA which has ultimately been upheld by the Hon'ble Supreme Court.

7.2. On Mr. Joy Saha's contention regarding sale under the aegis of the Code, Mr. Kishore Dutta submitted that the concept of voluntary and involuntary sale distinction is an artificial one. Irrespective of whether it is a voluntary disposition of shares by the Corporate Debtor or whether an involuntary one by

[22] CA (AT) (Ins) No.44/2020, decided on 20.03.2020.

the liquidator of the Corporate Debtor, the fact remains that the liquidator has stepped into the shoes of the Corporate Debtor with all the rights and obligations envisaged under the JSA, including clause 10.

8. Issues for determination:

8.1. The issues for determination are only two-fold –

(a) Whether clause 10 of the JSA was applicable even to the process of sale under the IBC, thereby binding the Liquidator to the provisions; and

(b) If so, does the letter of 03.01.2018 really constitute an offer in terms of clause 10 of the JSA?

9. Analysis

9.1. We have heard Mr. Kishore Dutta, Ld. Advocate General appearing for the applicants in each of the IAs, Mr. Joy Saha, Ld. Sr. Counsel appearing on behalf of the Liquidator and Mr. Ratnanko Banerji, Ld. Sr. Counsel appearing on behalf of the Proforma Respondent/NPRL.

9.2. The question whether the provisions of the JSA dated 23.02.1990 really apply to the Liquidator was considered, albeit in a different context, in the previous round of litigation wherein the right of the Liquidator to nominate three Directors on the Board of NPRL was challenged first before this Adjudicating Authority and thereafter in an appeal before the Hon'ble NCLAT and then before the Hon'ble Supreme Court.

9.3. That was a matter where in terms of clause 7(b) of the JSA,[23] the Corporate Debtor was entitled to nominate three directors on the Board of NPRL. It is apposite to mention that this Adjudicating Authority, the Hon'ble NCLAT and the Hon'ble Supreme Court all upheld the right of the Liquidator to nominate the directors in question in terms of the JSA. The details thereof have already been noticed in para 2.9 *supra*.

[23] Page 32 of IA(IB) No.969/KB/2020.

9.4. At the outset, there is considerable merit in the contention of Mr. Ratnanko Banerji, Ld. Sr. Counsel appearing for NPRL, the Proforma Respondent, that the Liquidator should not be allowed to pick and choose clauses in the JSA that he is comfortable with, while ignoring the obligations on the part of the Corporate Debtor whom he represents. The reasons are not far to seek. The JSA cannot be treated to be in severable parts, some of which will be applicable to the Liquidator while the others will stand overridden by the Code at the option of the Liquidator. Either we must hold that the JSA applies in its entirety to the Liquidator or not at all.

9.5. As regards Mr. Joy Saha's contention regarding the overriding effect of section 238 of the Code is concerned, we must confess that the argument is quite attractive at first blush. We may even have been persuaded to do so, had it not been for one stellar fact: The Liquidator had taken recourse to the very same JSA to his advantage when he exercised the right of nomination of three directors on NPRL's board which was upheld right upto the Hon'ble Supreme Court in the teeth of vehement opposition. Therefore, to contend now that the Liquidator would not be bound by the obligation of the JSA would be neither appropriate nor equitable. This would amount to supporting the cherry-picking approach of the Liquidator.

9.6. Therefore, since in the earlier round of litigation, the Liquidator's right under certain clauses of the JSA have been recognised right up to the Hon'ble Supreme Court, we have no hesitation in holding that the JSA applies in its entirety to the Liquidator also, and he cannot shirk away from the responsibilities that certain clauses of the JSA obligate him to do. Clause 10 of the JSA is integrated into Article 48 of the AoA, which clearly specifies the methodology to be adopted by either party to the JSA in case it wishes to divest itself of its shareholding in the NPRL.

9.7. Therefore, the first issue as to whether clause 10 of the JSA binds the Liquidator, is answered in the affirmative.

9.8. We now cast a glance at the letter dated 03.01.2018,[24] written by the Liquidator to the Corporation. This letter is deemed to be an "offer" by the Liquidator whereas this contention is hotly contested by the applicant.

9.9. In the first page the Liquidator has reproduced the contents of clause 10 of the JSA. At page 66,[25] the Liquidator indicated that if clause (a) of the JSA was to be available to the Corporations, the Corporations may have to consider the following: -

(a) *The Corporation have to invest a substantial amount of money for buying the equity shares of NPRL. Even on a most conservative basis, the investment required in buying NCL stake itself will be at least ₹40 crores.*

(b) *NPRL being a listed company, the Corporations holding, together, more than 25% equity in the Company already, will trigger the provisions of regulation 3(2) of SEBI (SAST) Regulations, 2011. The said regulation, provides that where an acquirer together with PACs holds more than 25% of the voting rights in any target company, and acquires more than 5% of voting rights in a financial year, the said acquirer will have to make a public offer to acquire additional 26% of the voting capital of Target Company. The requirements of the public offer are quite intricate and among other things require creation of an escrow into which at least 25% of the amount involved in the transaction will have to be put upfront.*

(c) *Inclusive of the above, there will be nearly-immediate requirement of funds to the tune of about ₹80 crores immediately.*

(d) *Also, if the acquisition from NCL and the public offer succeeds to the fullest extent, NPRL will become owned, to the extent of 75%, by the Corporations. The Corporations may enquire such a substantial majority in a commercial concern is in accordance with public policy."*

9.10. After indicating this, the Liquidator proceeds to request the Corporations to allow NCL to dispose of the investments in NPRL through "a transparent mechanism" under the supervision of the NCLT. He also draws attention to the

[24] Page 65 of IA (IB) No.643/KB/2020.
[25] IA (IB) No.643/KB/2020.

Code and the Regulations made thereunder and contends that this is of binding nature. He thereafter proceeds to ask whether the Corporations will be willing to permit NCL to dispose of its shareholding in NPRL in the manner provided in the Code and the Liquidation Regulations.

9.11. Having considered the entirety of the letter dated 03.01.2018 written by the Liquidator, we do not see how this can even remotely be construed as an offer that would satisfy the definition of "proposal" in terms of section 2(a) of the Indian Contract Act, 1872. Rather, this is merely in the nature of a letter trying to get the Corporations to agree to sell the stakes of the Corporate Debtor in NPRL through public auction. It can be safely surmised that the Liquidator was actually trying to push for a sale under the aegis of the Code.

9.12. It is further noticed that the Liquidator has not indicated therein whether he has conducted a valuation at all, and if so, what the valuation was. He has merely indicated that even on a most conservative basis, the investment required in buying NCL stake itself will be at least ₹40.00 crore.

9.13. The tenor of the letter seems to indicate that the Liquidator was trying to dissuade the Corporations from acquiring the stakes of the Corporate Debtor in NPRL by first pointing out that the minimum required investment would be ₹40.00 crore and thereafter by stating that NPRL is a listed Company and the acquisition by the Corporations of more than 25% of the voting right in any listed public company would trigger the provisions of regulation 3(2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011, compliance whereof would require expenses of about ₹80.00 crore immediately.

9.14. At least at the time of receipt of the letter dated 03.01.2018, there is nothing on record to indicate that the Corporations were given a copy of the valuation report on the basis of which it was mentioned by the Liquidator that the investment may be "at least ₹40.00 crore." Nor was it any party's case during arguments that a copy of the valuation report was made available by the liquidator to WBIDC and WBTDC. To this extent, there is merit in the contention of the Ld.

Advocate General that there was no basis for the said figure of ₹40.00 crore. Considering that the State Government was an interested party, it could not have been expected that a decision would have been conveyed on the basis of some seemingly arbitrary figure. The Liquidator would have been well advised first to enclose a copy of the valuation report and then enquire, in no uncertain terms, whether the Corporations would be keen on acquiring the shares at the costs indicated in the valuation report.

9.15. Therefore, the second issue as to whether the Liquidator's letter dated 03.01.2018 constituted an offer, is answered in the negative.

9.16. We have already seen how the Liquidator had taken advantage of certain provisions of JSA in the previous round of litigation. Now, when it comes to the question of offer of NPRL shares, he conveniently ignores the provisions of clause 10. We also noticed that the Liquidator was first appointed on 17.10.2017. He was already aware of the provisions of the JSA. All he needed to do was to write a letter to the Corporations seeking a valuation in terms of clause 10 and enquiring whether the Corporations would like to acquire the shares on the basis of such valuation by the statutory auditors of the company.

9.17. If such a course had been adopted, it is quite possible that this litigation could have been nipped in the bud. The exercise may have been concluded in six to eight months. Instead, we are today faced with the situation where, three years down the line, we are still considering whether the letter dated 03.01.2018 constituted an offer or not. Both sides must, therefore, be apportioned their fair share of the blame for this delay, which was wholly unnecessary.

10. Findings: -

10.1. In these circumstances, we hereby hold as follows: -

(a) The letter dated 03.01.2018 does not constitute an offer within the meaning of section 2(a) of the Indian Contract Act, 1872.

(b) There was no way for the Corporations to know the basis on which the figure of ₹40.00 crore was quoted in the letter dated 03.01.2018 by the Liquidator.

(c) The provisions of the Code and the Liquidation Regulations are not to be applied selectively when it suits the Liquidator and discarded at other times.

(d) Section 247 of the Companies Act, 2013, dealing with valuation has since been notified by the Central Government with effect from 18.10.2017. Section 6 of the Companies Act, 2013, stipulates that the Act shall have effect notwithstanding anything to the contrary contained in the Memorandum and Articles of the Company or in any agreement executed by it. Therefore, it should be held that the provisions of clause 10(a) of the JSA which is mirrored in Article 48 of the AoA of NPRL, shall stand modified to the extent that valuation of shares shall now be carried out by a Registered Valuer and not by the statutory auditor of the company.

11. Orders: -

11.1. We are acutely conscious of the fact that considerable time has been lost in the liquidation process and that only this chunk of 1.17 crore shares held by the Corporate Debtor in NPRL remains to be sold. At the same time, the sanctity of due process cannot be sacrificed at the altar of expediency. Therefore, considering the sum total of the circumstances, we believe that the ends of justice would be met if we order as follows:

(a) The Liquidator shall approach NPRL for valuation of the shares by a Registered Valuer in terms of section 247 of the Companies Act, 2013 within a period of two weeks from today.

(b) The Valuer so appointed shall arrive on the fair valuation of the shares within a period of four weeks after taking into account the average price of the shares ruling on the recognised Stock Exchange of which such shares are quoted for the preceding six months.

(c) The Liquidator shall thereafter formally offer the shares to the two Corporations, *viz.*, WBIDC and WBTDC, by way of letter enclosing therewith a copy of the Valuation Report received from the registered valuer.

(d) Upon receipt of the formal offer from the Liquidator, the applicants shall have four weeks within which to take a decision on accepting or refusing the offer. The timeframe envisaged under the JSA for this purpose is required to be cut short keeping in view the three years lost in unnecessary bickering.

(e) In case of refusal on the part of the applicants to accept the shares at the price offered or in case the applicants fail to exercise their right to purchase the shares offered within the said period of four weeks, the Liquidator shall be at liberty to proceed with the sale of shares by way of public auction in accordance with regulation 33 of the Liquidation Regulations.

(f) There shall be a stay of further proceedings in terms of Expressions of Interest invited by the Liquidator on 27.07.2020.

12. We order accordingly.

13. With these directions, **IA (IB) No.643/KB/2020** and **IA (IB) No.969/KB/2020** in **CP (IB) No.03/KB/2017** shall stand **disposed of.**

14. 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.

15. Certified copy of this order be issued, if applied for, upon compliance of all requisite formalities.

16. Before parting with the matter, we wish to place on record our appreciation to the Ld. Advocate General, Ld. Senior Counsel appearing for the respondent and the proforma respondent, and the Counsel appearing with them, for the able assistance rendered by them in this matter.

Harish Chander Suri
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

18.02.2021

VC (Steno)/GGRB (LRA)/SR (LRA)