

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, KOLKATA

IA No.865/KB/2020

in

CP (IB) No.182/KB/2017

In the matter of

An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016
r/w rule 4 of the Insolvency and Bankruptcy Board of India (Liquidation Process)
Regulations, 2016

and

In the matter of

Gujarat NRE Coke Limited
(in liquidation)

Basavaraj Koujalagi & 82 others : Applicants

Versus

Sumit Binani, liquidator of
Gujarat NRE Coke Limited : Respondent

Coram:

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

Appearances (physically):

For the Applicants : Mr Swatarup Banerjee, Adv
Mr Arindam Paul, Adv
Mr Shariful Haque, Adv
Md Zohaib Rauf, Ad

For the Liquidator : Mr Krishnaraj Thaker, Adv
Mr Arjun Asthana, Adv
Ms Sreenita Ghosh-Dastidar, Adv
Ms Ujjaini Chatterjee, Adv
Mr Sumit Binani, Liquidator

Order reserved on: 17.02.2021

Order pronounced on: 03.05.2021

ORDER

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

1. Preamble

1.1. This is an application filed by the workers of the Dharwad Unit of Gujarat NRE Coke Limited (*"the Company"* or *"the Corporate Debtor"*), seeking *inter alia* the following reliefs: -

- (a) The respondent/Liquidator be directed to disburse payment of dues of workers and employees of the Company working at the Dharwad Plant of the company in Karnataka in a regular and timely manner;
- (b) The respondent/Liquidator be restrained by an order of injunction from taking any coercive steps for closing the operations of the company's plant at Dharwad, Karnataka;
- (c) The respondent/Liquidator be restrained by an order of injunction from terminating, or taking any decision to terminate, the agreement between the company and Jeju Metals Private Limited as recorded in the letter dated 27.09.2019; and
- (d) A competent and independent agency be appointed to investigate the manner in which the respondent/Liquidator has been conducting his affairs as such Liquidator, and a report be called for from such agency;

2. The case of the applicants

2.1. The conspectus in which the application is required to be decided is set out as follows.

2.2. The applicants are the employees and workers of Gujarat NRE Coke Limited (*"the Company"* or *"Gujarat NRE"*), in employment for the last twelve years and working at the plant of the Company at Belur Industrial Area, Dharwad, Karnataka.

2.3. The Company is in the business of manufacture of Low Ash Metallurgical Coke (*'met coke'*) and is one of the largest independent coke producers in India.

- 2.4. The coal and coke industry suffered a major setback since 2012 due to various external factors, which impacted the performance of the Company. In spite of its best efforts and due to continuous downturn in the industrial scenario, the Company could not manage to revive its operations. This led to the loan accounts of the Company turning into Non-Performing Assets (NPA).
- 2.5. The Company filed an application under section 10 of the Insolvency and Bankruptcy Code, 2016 (*“the Code”* or *“IBC”*), which was admitted. In due course, the Company was sent into liquidation *vide* order dated 11.01.2018,¹ and Mr Sumit Binani, the respondent herein, was appointed as the Liquidator. The Liquidator was directed to dispose of the Company as a going concern and in the event the process of sale as a going concern failed during the three-month period specified in the said order, the process of sale of assets of the Company was to be initiated in accordance with section 33 of the Code.
- 2.6. The applicants claim that while they tried their best to run the plant at Dharwad, they were unsuccessful due to the continuous intervention and obstacles created by the Liquidator. The production at the plant gradually declined and finally stopped for no fault of the applicants.
- 2.7. Jeju Metals Private Limited (*“Jeju”* or *“JMPL”*), a company dealing in coal and coke and one of the customers of the Company, expressed a desire to get its coal processed at the Coke plant of the Gujarat NRE at Dharwad. It was mutually agreed between the Company and JMPL that JMPL’s coal would be processed into metallurgical coke at the Dharwad plant of the Company with effect from 01.10.2019. Such arrangement was agreed on terms specified in the letter dated 27.09.2019.²

¹ pp.30-41 of the Application.

² page 42 of the Application

- 2.8. In terms of the aforesaid agreement, JMPL was to pay consideration for the use of the production facilities at the Dharwad plant of the Company at the rate of ₹200/- per metric ton of met coke produced for the purpose, subject to a minimum of ₹40.00 lakh per month (*“processing charges”*) plus all manufacturing expenses, such as, electricity power and fuel, repair and maintenance, travelling and conveyance, except salary, wages and contribution to security personnel expenses. The processing charges was agreed to be paid as a consideration for the Company providing JMPL with an exclusive right to use the plant at Dharwad, the land and all related facilities.
- 2.9. In order to ensure that there is no impediment faced by JMPL in the process of conversion of coal into met coke, the Company also agreed to provide it employees and workers presently in its employment for such operation at the Dharwad plant. The agreement was agreed to be terminated by either party by giving a prior notice of four months to the other party. On behalf of the Company, the respondent had issued the letter dated 27.09.2019, which was accepted by JMPL only with effect from 01.11.2019.³
- 2.10. As per the agreement dated 27.09.2019 the Company, through its present employees and workers, provides services for conversion of the coal into met coke using the manufacturing facilities at the Dharwad plant. For the period November, 2019 to July, 2020, the Company raised monthly invoices on JMPL in terms of the said agreement for a sum of ₹47.20 lakh each.⁴
- 2.11. In terms of the bills/invoices raised by the Company, JMPL has been making payments to the Company covering the period November, 2019 to July, 2020. All the employees and workers of the Company at its Dharwad plant continue to work for JMPL in terms of the agreement dated

³ page 43 of the Application.

⁴ pages 44 to 52 of the Application.

27.09.2019 and to cover such costs, JMPL had been making payments in the manner aforesaid. It is also evident that the business of the Company through its plant at Dharwad is operational, even during the liquidation process.

- 2.12. The respondent has not paid any sum of money to the applicants from the account of the Company. All salaries and wages of the employees/workers at the Dharwad plant of the Company and the security agencies appointed by the respondent were being paid by the respondent from the money received from JMPL. As per the agreement, the applicants are required to work at the Dharwad plant of the Company to ensure that the terms of such agreement are honoured and there is no difficulty faced by JMPL in the process of conversion of coal into met coke.
- 2.13. Although the applicants were attending their duties at the Dharwad plant of the Company regularly, the respondent delayed the payment of their salaries and wages almost every month and in particular has refused to make any payment since the month of June, 2020 for quite some time. The applicants, upon expressing concern with regard to such non-payment, were informed by the respondent that the respondent was following the principle of “*no work no pay.*”
- 2.14. The respondent failed to appreciate that when the entire nation is suffering by the disastrous financial effect caused by the outbreak of the pandemic, the applicants have been regularly attending the Dharwad plant of the Company to render their services to JMPL. Non-payment of the salaries and wages by the respondent is against the principles of equity, fairness and humanity. The liquidator has, however, been receiving continuous payment from JMPL under the agreement.
- 2.15. Prior to the nationwide lockdown declared by the Government of India, by reason of the outbreak of the Covid-19 pandemic, the Hon’ble Supreme

Court, by an order dated 24.02.2020,⁵ passed in an appeal preferred by Mr Arun Kumar Jagatramka, directed that the liquidation proceeding of the Company may go on, but sales, if any, was not to be confirmed.⁶ It is pleaded that in terms of the orders passed by this Adjudicating Authority and the Hon'ble Supreme Court, the respondent cannot remove any of the employees or workers or retrench them from employment.

- 2.16. However, since payments were not being made by the respondent in spite of funds available in the Company, some of the employees at the higher management level have been compelled to tender their resignations. The respondent, by his act and conduct, and, by withholding the payments, which the workers and employees are entitled to receive, was trying to create a compelling situation for the workers to leave the Company.⁷
- 2.17. By email dated 03.08.2020,⁸ the respondent/liquidator had informed the Deputy Commissioner of Police, Dharwad Region, Karnataka, about a possible unrest at the Dharwad plant. The email was only intended to portray that the respondent took all possible steps to revive the Company and had been paying the salaries of employees and wages of workers even during the pandemic till May 2020. The respondent also created an impression that the financial condition of the Company had deteriorated further and that it was becoming impossible to pay the salaries and wages to idle employees and workmen.
- 2.18. For their part, the applicants lodged complaints dated 04.08.2020 with the Deputy Labour Commissioner, Belgaum, and with the Deputy Commissioner of Police, Dharwad Region, Karnataka, on 06.08.2020, setting out the facts from their perspective, and informing the said

⁵ p.53 of the Application.

⁶ page 53 of the Application.

⁷ para 19 at page 22 of the Application.

⁸ page 54 of the Application.

authorities that the salaries and wages for the month of July 2020 have not been paid, and the respondent is also not interested in paying any further amount on frivolous grounds.⁹

- 2.19. It is also submitted that the liquidator has presented all the ongoing litigations before the stakeholders' committee but has deliberately failed to disclose the pendency of Civil Appeal bearing No.9664/2019 titled as *Arun Kumar Jagatramka vs Jindal Steel and Power Limited & another* before the Hon'ble Supreme Court and also failed to disclose the order dated 24.02.2020¹⁰ of the Hon'ble Supreme Court which barred him from confirming the sale of assets of the Company.
- 2.20. According to the respondent, the operations at the Dharwad plant of the Company stopped and the workers were idle. However, even in the month of July, 2020, the respondent had issued a bill/invoice upon JMPL for a sum of ₹47,20,000/- per month and received money therefor. The contention of the respondent that the workers are not entitled to pay as there was no work after May 2020, therefore, is not only dishonest, but a fraudulent representation on the part of the respondent.
- 2.21. The applicants have also come to learn from some senior employees still working for the Company that some of the shareholders of the Company had proposed a Scheme under section 230 of the Companies Act, 2013 for revival of the Company. Since the respondent did not render any assistance and co-operation in explaining the prospect of the Revival Scheme of the Company to the lenders/bankers in right earnest, and on the contrary, portrayed that the Scheme was without merit, the Monitoring Committee did not consider such Revival Scheme and rejected the same. Consequently,

⁹ pp.56-57 of the Application

¹⁰ p.53 of the Application.

this Adjudicating Authority also did not interfere with the decision of the Monitoring Committee.

2.22. The work at the Dharwad plant of the Company in terms of the agreement is still operational. There are dispatches of met coke that have been made from the Dharwad plant even in Aug 2020. The employees and workers are regularly attending their duties as per the requirements of the management of the Company.

2.23. The applicants have been harassed unnecessarily by the respondent by refusing to pay legitimate dues on account of the services rendered even after receipt of payment and having available fund. The respondent is only interested in closing down the Dharwad plant, which is otherwise operational and cut short the source of generating revenue. Immediate intervention of this Adjudicating Authority is, therefore, both expedient and necessary to prevent further illegalities being committed upon the applicants at the instance of the respondent, who is only interested in the closure of the Company and not its revival. The manner in which the respondent is discharging the functions as the Liquidator of the Company also requires to be investigated by an independent and competent agency so as to prevent any unjust decision being taken at the behest of the Respondent.

3. *Arguments of Mr Swatarup Banerjee, learned counsel for the applicants*

3.1. Mr Swatarup Banerjee, learned counsel appearing for the applicants, started his arguments by referring us to the Hon'ble Supreme Court order dated 24.02.2020,¹¹ wherein it was directed that while the liquidation proceedings could go on, sales, if any, will not be confirmed. This was apropos the hon'ble NCLAT's order that liquidation should be the last resort, and that resolution should be the first. The workers should not be inconvenienced.

¹¹ p.53 of the Application.

- 3.2. Mr Banerjee then led us through the letter dated 27.09.2019,¹² written by the Company to JMPL, in terms of which the offer for processing of coal at the Company's Dharwad plant was given. This offer was accepted by JMPL with effect from 01.11.2019.¹³ He submitted that payments to workers have been stopped in the midst of the Covid-19 pandemic from July 2020 onwards, without reasons. Mr Banerjee then referred to the two complaints made by the workers – dated 04.08.2020 to the Labour Commissioner, Belgaum¹⁴ and dated 06.08.2020 to the Deputy Commissioner of Police, Dharwad, against the liquidator, wherein *inter alia* it was mentioned that the liquidator is not making any payments in spite of receiving payments from JMPL.
- 3.3. Mr Banerjee submitted that the liquidator's action in serving four months' notice to terminate the agreement accepted by Jeju on 01.11.2019, was obnoxious. No reasons are stated in the letter. Mr Banerjee submitted that this was a company earning forty lakh rupees a month through Jeju. Even as late as on 13.07.2020, the liquidator had received forty lakh rupees from Jeju in terms of the contract. However, in spite of this, notice of termination of contract was issued. He took us through the invoices from 02.12.2019 to 31.07.2020,¹⁵ pointing out that around ₹47.20 lakh is the invoice amount raised by the liquidator for each month during this period.
- 3.4. Mr Banerjee also referred us to para 14(i)¹⁶ of the reply filed by the respondent/liquidator to the present application, stating that it is the liquidator's case that the Dharwad unit was not functioning and therefore he entered into a processing agreement with JMPL. This is in stark contrast

¹² p.42 of the Application

¹³ p.43 of the Application.

¹⁴ p.56 of the Application.

¹⁵ pp.44-52 of the Application.

¹⁶ p.7 of the Reply.

to the specific case of the applicants made out in the two complaints¹⁷ to the authorities, wherein the workers have stated that the Company earned ₹416 crore from Jan 2018 to Oct 2019. Mr Banerjee lamented that the liquidator had not put in any document on record to show that the workers were sitting idle. Even if the liquidator's version is taken at face value, not a single letter was issued to JMPL asking for funds in terms of the contract. Mr Banerjee submitted that the liquidator's intent was clear – to completely shut down the unit, which would harm the interests of the workers at large.

- 3.5. Mr Banerjee also pointed out from the liquidator's reply, "*It is also on record that JMPL has not been processing its coal as per the agreement for the reasons best known to them. Further, there was recall notice recently issued on 03.09.2020 by the lenders of JMPL, ¹⁸indicating defaults of debts by JMPL to their lenders.*" Mr Banerjee submitted that this was a recall notice issued by Lakshmi Vilas Bank Ltd dated 03.09.2020,¹⁹ which had nothing to do with the period between Feb 2020 to July 2020, when the liquidator finally issued notice of termination to JMPL. The recall notice issued by Lakshmi Vilas Bank Ltd is after the date of termination (15.07.2020) of JMPL's contract by the liquidator. Mr Banerjee wondered what the effect of the Bank's letter was when it was issued more than one and a half months after the notice of termination by the liquidator.
- 3.6. Mr Banerjee submitted that the main issue was whether the Company was running on a foothold which could have revived the Company. In this regard, Mr Banerjee drew our attention to the statement titled, *Financial Health of the Corporate Debtor*,²⁰ given by the applicants in their Rejoinder. The revenue from Dharwad unit was ₹18.50 crore. Therefore, the picture given in the reply affidavit that there was no business, is not correct. Why

¹⁷ pp.56 and 61 of the Application

¹⁸ p.9 of the reply, first para.

¹⁹ p.22 of the reply.

²⁰ p.117 of the Rejoinder.

was the liquidator in a tearing hurry to finish off the contract two months prior to JMPL's loan being recalled, Mr Banerjee wondered.

- 3.7. Mr Banerjee then took us through the statement titled, '*Ongoing Litigation*'.²¹ Mr Banerjee queried why the liquidator suppressed the factum of the proceedings before the Hon'ble Supreme Court, and the order dated 24.02.2020²² passed by the Hon'ble Supreme Court.
- 3.8. On the question of fee for the liquidator, Mr Banerjee invited us to the chart titled, '*Liquidation Expenses*',²³ which mentions that the liquidator's fee was ₹0.48 crore out of the total liquidation expenses for the period from 11.01.2018 to 31.05.2020. The fee claimed is not commensurate with the effort put in by the liquidator and is excessive, Mr Banerjee submits.
- 3.9. Mr Banerjee submitted that all of a sudden, the liquidator terminated the agreement dated 27.09.2019 with JMPL on 15.07.2020 even though he was well aware of the fact that due to COVID 19 pandemic and in absence of payment plans, it was impossible for JMPL to start any operations at the Dharwad plant.²⁴ The production in the plant could not start due to failure of the liquidator to act in accordance with the other coal sales contracts of the Company with JMPL.²⁵ Mr Banerjee submitted that in terms of the said contracts a net sum of ₹4.82 crore was due to be paid to JMPL by the Company after adjusting the receivables of the Company from JMPL till June 2020, which included the dues of minimum processing charges. Since the liquidator did not provide any payment plan nor paid its net dues, JMPL could not start the coke production under the processing agreement dated 27.10.2019.²⁶

²¹ p.121 of the Rejoinder.

²² p.53 of the Application.

²³ p.123 of the Rejoinder.

²⁴ p.9 of the rejoinder to the two supplementary affidavits.

²⁵ p.14 of the rejoinder to the two supplementary affidavits.

²⁶ p.42 of the rejoinder to the two supplementary affidavits.

- 3.10. Mr Banerjee alleged that the liquidator deliberately never provided JMPL with detailed plans for payments to be made by him to the importer of the coal lying at the port, while holding back the payments due to JMPL. As a result, JMPL could not lift the required coal from the port and start production, which gave a chance to the respondent to terminate the agreement dated 27.09.2019 with JMPL. The respondent imposed a suspension notice with effect from 24.09.2020 which was well before the four-month notice period of termination which ended on 14.11.2020.²⁷
- 3.11. Mr Banerjee pointed out that there were two back-to-back contracts entered into between the Company and JMPL. The first was a coal contract, and the second was the processing contract. If these two were to be read together, and the adjustments made thereunder, it would appear that JMPL owes nothing to the Company, and that it is the Company that owed payments to JMPL. Therefore, Mr Banerjee submitted that termination of contract was wrong and uncalled for on the part of the liquidator. He also stated that the liquidator should have been more flexible keeping the interests of the workers central to the issue. The liquidator should have strained every sinew to ensure that the Dharwad plant was functional for the benefit of its workers and employees in these hard times.
- 3.12. Mr Banerjee urged the Court to grant reliefs mentioned at (a) and (c) of the Application,²⁸ stating that these are paramount in the spirit of the orders passed by the Hon'ble NCLAT on 24.10.2019 and Hon'ble Supreme Court on 24.02.2020.²⁹ The survival of the employees and their families is important.

4. *Arguments of Mr Krishnaraj Thaker, learned counsel for the Liquidator*

²⁷ pp.17-18 of the rejoinder to the two supplementary affidavits.

²⁸ p.26 of the Application.

²⁹ p.53 of the Application.

- 4.1. Mr Krishnaraj Thaker, learned counsel appearing for the respondent/liquidator, submitted that the application has been made by employees/workers of the Company working in its Dharwad plant at Karnataka. It is filed by around 83 workers/employees. Not all of the applicants are workers as was being continuously submitted by the counsel for the applicants.
- 4.2. Mr Thaker submitted that the case of the liquidator is broadly thus: after the order of liquidation in Jan 2018, the liquidator was directed to run the Company as a going concern for three months. The liquidator has, for various and good reasons, run the Company way beyond this point – till Sep 2020, when it became commercially unviable and the liquidator had to give Notice of Suspension of Work dated 23.09.2020.³⁰
- 4.3. Mr Thaker submitted that the instant application has been affirmed by one Mr. Vimal Kumar Taparia, who is an employee of a company namely GNRE Infra Private Limited which is under the management and control of Mr. Arun Kumar Jagatramka, erstwhile director of the Company, and his family members and as such it is evident that this application has been instituted at the instance of the said Mr. Arun Kumar Jagatramka. Therefore, *ex facie* it is filed with *mala fide* intent and is liable to be dismissed with cost. Mr Thaker submitted that the applicants in their rejoinder have not denied the employment of the said Mr. Vimal Kumar Taparia and the reason given for being unable to travel to Kolkata for such authorisation is not altogether convincing. Further, it is on record that after the respondent has brought this fact in his reply to the application, the rejoinder filed by the applicants has been affirmed by an employee of the Company, being Mr. Raghavendra Kundangar at Dharwad instead of the said Mr Vimal Kumar Taparia.

³⁰ p.133 of the Rejoinder.

- 4.4. Mr Thaker went on to state that on failure of the CIRP of Corporate Debtor, the order for liquidation was made on 11.01.2018.³¹
- 4.5. On 15.05.2018, this Adjudicating Authority gave directions for convening a meeting of stakeholders to considering a scheme propounded by the erstwhile promoter. From this an appeal was preferred. On 01.02.2019, the NCLAT directed the promoter and the liquidator to propose a scheme. 24.10.2019, the appeal was allowed, and the promoter was held ineligible to propound a Scheme u/s 230 by the NCLAT, which further directed the Liquidator to follow the directions passed in *Y. Shivram Prasad v S. Dhanapal & Ors.*³² Following this, on 30.11.2019, around 370 employees/workmen propounded a scheme for revival. On 21.02.2020, the secured creditors and the equity shareholders rejected the scheme, while the operational creditors and the bondholders approved the same. On 29.05.2020, an application for reconsideration of the Scheme by the financial creditors was filed. In this application, the applicants therein also specifically prayed for restraining the liquidator to discharge any employees and maintain their employment. Since the secured creditors refused to reconsider, this Adjudicating Authority *vide* its order dated 09.06.2020 dismissed the application as not worth considering and did not grant any relief on prayers made by the applicants therein relating to discharge of employees by the Liquidator. The application filed by the liquidator for directions was rejected by this Adjudicating Authority *vide* order dated 24.06.2020. In between was the order dated 24.02.2020³³ by the Hon'ble Supreme Court, directing the liquidation process to go on, but the sale of assets is not to be confirmed.

³¹ pp.30-41 of the Application.

³² 2018 SCC OnLine NCLAT 692 decided on 27.02.2019 [Company Appeal (AT) (Insolvency) No. 224/2018 a/w Company Appeal (AT) (Insolvency) No.286/2018]

³³ p.53 of the Application.

- 4.6. The scheme propounded by 109 employee/shareholders was rejected and as such was unsuccessfully challenged right up to the Hon'ble Supreme Court in Civil Appeal No.4062-4063/2020, which dismissed the Appeals on 28.01.2021 holding that it was not inclined to interfere with the order of the National Company Law Appellate Tribunal dated 19.11.2020 in Company Appeal (AT) (Insolvency) Nos 985-986 of 2020.
- 4.7. Mr Thaker submits that the Company has three Coke Oven Plants at Dharwad in Karnataka, Khambalia and Bachhau in Gujarat, apart from a Steel Unit at Bachhau and 62 windmill assets in Gujarat. The monthly fixed cost of the Corporate Debtor is ₹381 lakh as on August 2020.³⁴ As on the date of this application all the coke units were non-operational and there were severe challenges in the continuing operations of its steel plant owing to paucity of funds and discontinuance of windmill operations.³⁵
- 4.8. Mr Thaker also submits that the Company's financial health had severely deteriorated much prior to the commencement of its liquidation process. At the time of commencement of its liquidation process, a significant majority of the business of the Company were shut and its operations have been further declining since then regularly. This was due to continuous erosion of working capital due to continuing losses, non-availability of resources including interim finance from banks and also because of intermittent long periods of non-favourable business scenario. Mr Thaker elaborated that in spite of these and many other constraints, the liquidator has tried to revive the Company by taking all possible steps as required under law. Salary and wages of all people employed in the Company have been paid even without work since long. None of the workers and employees were retrenched at any point of time since the liquidation commencement date. Mr Thaker submitted that although section 33 of the Code provides that the order of liquidation under this section shall be deemed to be a notice of discharge to

³⁴ p.114 of the Rejoinder to the Application

³⁵ pp.80, 93 and 100 of the Rejoinder to the Application

the officers, employees and workmen of the Company, except when the business of the Company is continued during the liquidation process by the liquidator, no such steps were taken even for non-functional units of the Company since revival of the Company was the objective under law.³⁶

- 4.9. Since the Company did not have requisite funds to purchase met-coke for operating the Coke plants, as a result of which Coke Plants were non-functional. The agreement with JMPL was conceived in order to ensure that the monthly wages/salary and other expenses arising out of the Dharwad plant are met. The Liquidator, after due consultation with the Key Managerial Personnel (KMPs) of the Company, entered into a Processing Agreement with JMPL dated 27.11.2019 which was accepted by JMPL only with effect from 01.11.2019.³⁷ Under this Agreement, the Company was to receive a minimum of ₹40 lakh plus applicable taxes.
- 4.10. Coming to the present application, the primary contention raised by the applicants was that there was a viable agreement with JMPL, which was self-sufficient to pay off their wages. It is the contention of the applicants that payments from Jeju were coming on time and that the liquidator, for no good reason, gave notice of termination of work.
- 4.11. JMPL carried out conversion of coking coal into met coke at the Dharwad unit in November 2019 and there was no production thereafter, as per email dated 17.08.2020³⁸ of Mr Dilip Singh, head of the Dharwad Plant, addressed to the other KMPs and the liquidator. The relevant invoices have also been placed on record.³⁹ JMPL did not make payments in April 2020. In May 2020 JMPL paid only Rs. 14.40 lakhs on account of its dues for March 2020. JMPL did not make any payment for the month of June 2020 but paid only

³⁶ pp.54-55 of the Application.

³⁷ pp.19-20 of the Reply to the Application.

³⁸ p.12 of the 1st Supplementary Affidavit filed by the liquidator.

³⁹ pp.44-52 of the Application.

Rs. 20 lakhs in July 2020 towards part discharge of dues for April 2020 and thereafter no payments were made. The details of payments received from JMPL and the payment made to workers for the period from 01.11.2019 to 31.08.2020 are placed on record.⁴⁰ The relevant pleadings are at para 7 at page 5 of the 1st Supplementary Affidavit.

- 4.12. Annexure X2⁴¹ is a combined chart of receipts and payments, limited to the Dharwad unit. JMPL was supposed to make payment within T+21 days. But the remarks column at p.13 of the 1st supplementary affidavit would reveal that on 26.12.2019, the liquidator received ₹44 lakh in two tranches. The liquidator used this money to pay of ₹37,83,129/- in salaries, wages, labour payments to authorities, security charges and electricity expenses. Further, the invoice for March 2020⁴² was to be paid in April 2020. But there was no payment. In May 2020, JMPL made part payment of ₹14,40,000/-. This was the first instance of default. JMPL was not prompt in its payments. In June 2020, JMPL paid ₹30 lakh, squaring off the payment for March 2020. In other words, what should have come in April 2020 came only in June 2020. There was no payment from JMPL in May 2020 and June 2020 towards invoice of April 2020. But the liquidator made full payment of salaries and wages for the months of March, April and May 2020 without waiting for payments from JMPL. Mr Thaker submitted that the correctness of the chart showing receipts and payments from 01.11.2019 to 31.08.2020,⁴³ has not been disputed. This chart would reveal that the outgo was far in excess of receipts.
- 4.13. Alluding to Mr Swatarup Banerjee's contention that there was enough money to pay the workers on the basis of the chart attached to the Rejoinder

⁴⁰ p.13 of the 1st Supplementary Affidavit.

⁴¹ pp.13-14 of the 1st Supplementary Affidavit.

⁴² p.48 of the Application.

⁴³ pp.14-15 of the 1st Supplementary Affidavit.

to the Supplementary Affidavits,⁴⁴ Mr Thaker stated that this looks attractive at first blush. But it hides far more than what it reveals. The chart is not limited to Dharwad unit, but to the Company's various units as a whole. Without going into the factual correctness of the figures stated therein, it does not include electricity, cost of procurement of raw material for other units of the Company, and other charges like maintenance, administration, freight, consumables and other statutory dues. The chart showing receipts and payments from 01.11.2019 to 31.08.2020⁴⁵ remains completely uncontroverted, and the last part received from JMPL is in the month of July 2020, which is the last part payment for April 2020. After this, the liquidator issued notice of termination of contract with JMPL.

- 4.14. It is in this background that the notice dated 03.09.2020⁴⁶ issued by Lakshmi Vilas Bank Ltd has to be seen. Apropos this, the applicants had stated that this notice cannot be a ground for termination of the contract. A large portion of the arguments of Mr Swatarup Banerjee, learned counsel for the applicants, was devoted to espouse the cause of JMPL. What was the fascination of the employees with JMPL, a recalcitrant, Mr Thaker mused. The applicants are employees of the Company whose dues have been fully cleared till the Notice of Suspension of Work.⁴⁷ Mr Thaker submitted that JMPL is not before the court, and there is also no grievance espoused before any court by JMPL that the termination was wrong. Therefore, it is not for the applicants to pursue remedies against the termination on behalf of JMPL, which should have been the aggrieved party. In any case, the decision to terminate the agreement with JMPL in July 2020 was a good one considering the financial stress that JMPL seemed to be in, Mr Thaker submitted. The notice dated 03.09.2020 states that the accounts of JMPL

⁴⁴ p.55 of the Rejoinder to the Supplementary Affidavits.

⁴⁵ pp.13 of the 1st Supplementary Affidavit filed by the liquidator.

⁴⁶ p.22 of the Reply to the main Application.

⁴⁷ p.133 of the Rejoinder to the main Application.

were declared non-performing assets (NPA) with effect from 25.03.2020. Therefore, the liquidator's decision to terminate the agreement has been founded on cogent grounds. JMPL's defaults compelled the liquidator to issue notice of termination.⁴⁸ Mr Thaker drew attention to the last para of that notice, where the liquidator called upon JMPL "*clear all our past dues as we have been communicating to you in the past and also the future dues on time.*" Mr Thaker submitted that after this, no payments were made by JMPL, and therefore, it does not lie in the mouth of the workers to espouse the cause of JMPL.

4.15. Answering the allegation that the payments from JMPL would have been more than enough to keep the plant going, Mr Thaker submitted that the monthly fixed cost even in shutdown condition of the Dharwad plant was approximately ₹41 lakh.⁴⁹ Dharwad plant's revenue up to December 2019 was ₹18.5 crore, including whatever payments were made by JMPL. From the same chart,⁵⁰ the dramatic reduction in revenue from the previous financial year (2018-19) is clear – ₹230.90 contrasted with ₹18.5 in the period from April to Dec 2019. This makes it clear to what extent operations were on at the Dharwad plant. Even ignoring the other plants of the Company for the time being, the expenditure in respect of Dharwad exceeds the revenue generated by about ₹14 crore. This cannot go on for ever, Mr Thaker submitted.

4.16. In response to the liquidator's fee of ₹0.48 crore out of the total liquidation expense of ₹0.95 crore, Mr Thaker submitted that the Company went into liquidation from 11.01.2018.⁵¹ the amount of ₹48 lakh withdrawn by the Liquidator was in terms of the order dated 18.10.2019 passed by this Adjudicating Authority in CA No.867/KB/2019. The liquidator has drawn

⁴⁸ p.21 of the Reply to the main Application.

⁴⁹ p.114 of the Rejoinder to the main Application.

⁵⁰ p.117 of the Rejoinder in the main Application.

⁵¹ pp.30-41 of the Application.

remuneration for a period of sixteen months from 11.01.2018 and that too in a staggered manner, with the last of such drawings in March 2020, which was for the period ended July 2019.

- 4.17. On the allegation regarding proceedings in the Supreme Court not finding place in the chart of ongoing litigation,⁵² Mr Thaker submitted that he was a bit surprised as to how the workmen sitting in Dharwad could get hold of this document, which was part of a presentation made to the Monitoring Committee. This was a confidential document. In any case, no prejudice was caused to the workers by the purported non-disclosure of the Supreme Court order dated 24.02.2020⁵³ to the Monitoring Committee. Further, the 24.02.2020 order has been clearly referred to in the order dated 09.06.2020 and 24.06.2020, whereby the Schemes propounded by the employees and shareholders were rejected by this Adjudicating Authority.
- 4.18. Mr Thaker further submitted that the date of presentation before the Monitoring Committee was 16.09.2020. On this date, the minutes of the meeting were also drawn up, which are again confidential documents. However, these confidential documents have also found their way into IA No.1053/2020. In that application, there were four applicants who are also applicants in the present application, as follows: -
- (a) Applicant No.1 is Applicant No.15 in IA 1053/2020
 - (b) Applicant No.8 is Applicant No.4 in IA 1053/2020
 - (c) Applicant No.17 is Applicant No.8 in IA 1053/2020
 - (d) Applicant No.62 is Applicant No.14 in IA 1053/2020
- 4.19. Mr Thaker submitted that these applicants now say that the order passed by SC on 24.02.2020 is a very material fact that has been suppressed from the Monitoring Committee. They do not tell this court that the minutes are

⁵² p.121 of the Rejoinder in the main Application.

⁵³ p.53 of the Application

prepared after the presentation. But they annex the minutes to the application in IA 1053/2020. The minutes contain two paragraphs devoted to the order dated 24.02.2020, starting at p.229 of that application. pp.233-234 of the application in IA 1053/2020 may be referred to. *“Status of appeal by promoter in the appeal.”* The workers have access to everything – minutes, presentation documents, emails. Mr Thaker urged us to see p.28 of that application, which is the affidavit affirmed by a duly constituted attorney – Mr Vimal Kumar Taparia – who is an employee of GNRE Infra Pvt Ltd, a group company of the corporate debtor. This has been stated in page 4, para 2 of the reply. The applicants have dealt with this at para 5 at p.2 of their Rejoinder. Mr Vimal Taparia is a company secretary of Bharat NRE Coke Ltd (*a group company now under liquidation*).

- 4.20. On the allegation that the plant was very much operational and that the liquidator was trying to shut down a thriving, viable entity,⁵⁴ Mr Thaker submitted that till JMPL came into the picture, the plant was admittedly not functional. In this context, Mr Thaker urged us to read this in juxtaposition with the email dated 17.08.2020⁵⁵ sent by the head of the Dharwad plant to the liquidator, which clearly recorded that there was no production in Dharwad after November 2019. All that was happening was only despatch.
- 4.21. On the question of back-to-back contracts between the Company and JMPL, Mr Thaker firstly submitted that this was way beyond the scope of the present application. With these preliminary objection, Mr Thaker led us through the correspondence⁵⁶ attached to the Rejoinder to the Supplementary Affidavit, between JMPL and officials of the Corporate Debtor. He submitted that monies which JMPL claims under the coal contract are not payable by the Company as on date, since the liabilities have not yet been discharged. It is submitted that claim on account of the

⁵⁴ paras 23 at p.24 and para 26 at p.25 of the Application.

⁵⁵ p.12 of the 1st Supplementary Affidavit.

⁵⁶ pp.26-53 of the Rejoinder to the Supplementary Affidavits.

coal sale contract would admittedly accrue only after JMPL has taken delivery of the coal from the Importers and submitted the Importer's Invoice to the Company. In any case, Mr Thaker submitted that these are not to be relied on, especially in an application filed by the workers, where the arguments have travelled well beyond the cause espoused by the applicants in their application.

- 4.22. Mr Thaker stated that the liquidator had explored all avenues before terminating the contract with JMPL. The processing agreement was already fixed at the most optimal consideration, only considering that the salaries and wages of the employees and workmen of the Company and other allied costs of the Dharwad plant could be met. Any further reduction in the consideration was not possible for the Company.
- 4.23. After Notice of *no work no pay* issued on 23.09.2020,⁵⁷ it was categorically informed to JMPL over email of the same date (23.09.2020)⁵⁸ that if they intend to carry their production at Dharwad plant, the terms of the processing agreement should be honoured. JMPL was specifically asked to inform the same to the Liquidator so that the necessary arrangements could be made. But JMPL did not commence any production work nor paid any money in terms of the agreed contract after July, 2020. It is submitted that under the above circumstances, the liquidator therefore did not deprive the workers of Dharwad plant of any work opportunity even after issuance of suspension notice as alleged.
- 4.24. Despite no processing operations being carried out by JMPL since the execution of the processing agreement after November, 2019, wages of all the workmen have been paid in full till 23.09.2020. As the workmen and employees at the Dharwad Plant refused to cooperate with the Liquidator and his team, the said wages have been paid in absence of wages sheet for

⁵⁷ p.29 of the 2nd Supplementary Affidavit.

⁵⁸ p.30 of the 2nd Supplementary Affidavit.

September, 2020 and the wages have been paid by the Liquidator on the basis of net wages payable as per August, 2020 wages sheet. The salaries to all employees of the Dharwad and other units of the Company have been paid in full till August, 2020. However, owing to limited cash flow, the Liquidator has remitted a sum of ₹15,000/- on account of salary of employees drawing up to ₹30,000/- for the month of September, 2020, while every employee drawing salary up to ₹15,000/- have been paid in full for the month of September, 2020.⁵⁹

5. *Arguments in reply of Mr Swatarup Banerjee, learned counsel for the applicants*

5.1. Mr Swatarup Banerjee, learned counsel for the applicants, made two points in reply to the arguments of Mr Krishnaraj Thaker, learned counsel for the respondent/liquidator.

5.2. Referring to the pleadings in para 5 of the 1st supplementary affidavit,⁶⁰ Mr Banerjee stated that this was to prove that the last payment from JMPL was received on 13.07.2020, while the liquidator terminates the services with JMPL two days later on 15.07.2020. Mr Banerjee referred to the email dated 08.05.2020⁶¹ from the liquidator to JMPL, and the reply dated 12.05.2020 from JMPL to the liquidator.⁶² He alluded to this correspondence to prove his point that JMPL was begging the liquidator to understand the situation after the Covid-19 pandemic struck the country, and that the employees would be reasonably taken care of JMPL in the difficult period. However, it was the liquidator who was quite adamant in sticking to the contract in spite of the Covid-19 pandemic which made it difficult for JMPL to honour its commitments.

⁵⁹ paras 16 & 17 at pp.9-10 of the 1st Supplementary Affidavit.

⁶⁰ p.5 of the 1st Supplementary Affidavit.

⁶¹ p.17 of the 2nd Supplementary Affidavit.

⁶² p.19 of the 2nd Supplementary Affidavit.

- 5.3. Mr Banerjee closed his arguments by submitting that the liquidator is an extended arm of the court. His function is to work within the statute, not beyond it. In extraordinary circumstances, one would have expected the Liquidator to safeguard the assets, not to close working units. Skilled workers are being rested.
- 5.4. Leading us through the prayers, Mr Banerjee submitted that prayer (a) seems to be an admitted fact in terms of the documents attached to the 1st supplementary affidavit.⁶³ Prayer (b) is for restraining the Liquidator from taking any coercive decisions or steps for closing down the plant. Mr Banerjee submitted that prayer (c) is in the nature of an indulgence, he conceded that it is for the court to examine. He, however, urged that granting this prayer would save livelihoods.

6. *Analysis of the arguments, findings and orders thereon*

- 6.1. We have heard the learned counsel appearing for both sides and perused the records.
- 6.2. During the course of arguments, we observed that the matter has travelled far beyond the pleadings raised in the original application, which was directed primarily at the liquidator seeking a direction to pay the dues of the workers and employees in a regular and timely manner, and to restrain the liquidator from taking any coercive action for closing down the operations of the Company's plant at Dharwad, Karnataka.
- 6.3. One of the reasons why the arguments became all-encompassing was because of the insistence to restrain the liquidator from terminating the agreement between the Company and JMPL, which was captured in the letter dated 27.09.2019 and which was accepted by JMPL with effect from 27.09.2019. We wish to deal with this issue right at the outset, so that we

⁶³ pp.16-17 of the 1st Supplementary Affidavit.

can look at the other issues without being clouded by this one. This concerns prayer (c) of the application.

Prayer (c):

- 6.4. When the correctness of this prayer was questioned by the Bench especially when seen in the context of the fact that JMPL had itself not challenged the decision of 15.07.2020 to terminate the contract, Mr Swatarup Banerjee, learned counsel submitted that he only had the interests of the workers at heart in making this request. He, however, left it to the court to decide on the matter.
- 6.5. A contractual agreement between two corporate entities such as the Corporate Debtor and JMPL cannot be considered to be skewed in favour of any one party. It has necessarily to be treated as a contract between equals, and therefore, unless the contrary is proved, entered into without any undue influence, coercion, fraud or any other such element which would have vitiated the agreement. The parties to the contract, in such circumstances, should normally be held to their bargain.
- 6.6. No doubt, the Covid-19 pandemic intervened, but then it is not for the Adjudicating Authority to step into the shoes of the liquidator and examine the commercial viability of the contract. The liquidator is responsible for the affairs of the company in liquidation and if the decision is taken by him in the best interests of the company, then the matter should be left at that. The workers cannot be used as the thin edge of the wedge to revisit the termination of the contract, for that would amount to JMPL riding piggyback on the workers to further its own cause.
- 6.7. If JMPL thought that the termination of the contract was wrong, it has all the resources and the legal framework to challenge the same. The fact remains that this has not been done so far. An inference should, therefore, be drawn that JMPL was not aggrieved in any manner by the termination

of the contract. **In these circumstances, we hold that prayer (c) of the Application cannot be granted.**

6.8. That leaves us with prayer (a) and prayer (b) to deal with.

Prayer (a):

6.9. Prayer (a) is a direction sought upon the liquidator to pay the dues of the workers and employees working at the Dharwad plant of the Company in a regular and timely manner. We are satisfied with the statement in para 4.24 (*supra*) that the liquidator has made payments wages of all workmen have been paid in full till 23.09.2020 on the basis of wages sheet for Aug 2020, and that the salaries of all employees at Dharwad and other units of the Company have been paid in full till August 2020. We also note that owing to limited cash flow, the liquidator has paid ₹15,000/- on account of salary of employees drawing up to ₹30,000/- for the month of September, 2020, while every employee drawing salary up to ₹15,000/- have been paid in full for the month of September, 2020. The liquidator cannot be expected to foot the bill from his own pocket in the absence of adequate cash flows to the corporate debtor.

6.10. We note the arguments of Mr Swatarup Banerjee that had the agreement with JMPL not been terminated, the workers would have had some money in their pockets. This is neither here nor there. The liquidator has taken the decision to terminate the contract on 15.07.2020 from a commercial perspective, where the payments for April 2020 came to be paid in tranches till July 2020. The liquidator was not sure whether the payments for May, June and July 2020 would at all come, and therefore came to the conclusion to terminate the contract so that he could explore other options. We have seen from the correspondence exchanged between the liquidator and JMPL, mentioned in para 4.23 (*supra*) that the admitted position was that JMPL was not in a position to commence its operations in the plant, firstly due to 'market conditions' and later due to the Covid-19 pandemic. In such circumstances, it is a matter of conjecture whether JMPL would have come

as the knight in shining armour to save the workers. Considering that no payments have come forth from JMPL after the termination of the contract, we are not too sure that this could have happened.

- 6.11. Therefore, in the absence of inflows into the coffers of the Company, prayer (a) cannot be granted at this stage, and we order accordingly.

Prayer (b):

- 6.12. In so far as prayer (b) is concerned, this is for a direction to restrain the liquidator from taking any coercive decision for closing down the operations of the Company's Dharwad plant.

- 6.13. We have, in the course of oral arguments from both sides, had occasion to go through the correspondences, charts, cash flow statements, and statements of expenditure brought on record. The liquidator has made payment of wages in full till 23.09.2020 to all workers, and salaries to all employees in full till August 2020. Even for September 2020, the liquidator has paid salary in full for those employees drawing salary up to ₹15,000/-, and ₹15,000/- for those employees drawing salary up to ₹30,000/-. This statement is uncontroverted. We find therefrom that the liquidator has taken every possible step to keep the Dharwad plant operational. We note that the outstanding expenses of the Company as on 31st August 2020 were ₹8.32 crore besides other liabilities,⁶⁴ and that the same would continue to increase due to monthly fixed costs of the Company. We also note that that April to Dec 2019, the revenue of the Dharwad unit was ₹18.50 crore, whereas the expenditure was ₹32.55 crore,⁶⁵ thereby making the unit unviable. The liquidator cannot be expected to keep it afloat when the balance sheet of the company is in the red. The documents placed on record

⁶⁴ pp.124-125 of the Rejoinder.

⁶⁵ pp.117 of the Rejoinder.

do not reveal any other source of revenue to meet the expenses of the Company.

- 6.14. At some point of time, hard decisions are called for in the life of a company, and these have to be taken. Unviable units will have to be closed down. The actions will have to be measured up against the objectives of the Code, one of which is to free up resources of unviable companies by permitting an easy exit. It cannot be misconstrued to keep unviable units afloat by some sleight of hand under the guise of keeping it as a “going concern,” thereby defeating a key objective of the Code.
- 6.15. The upshot of the discussion is that prayer (b) cannot be granted. It is for the Liquidator to take a call on whether to close down the operations of the Dharwad plant of the Company, as indeed for other units of the Corporate Debtor. In the order dated 11.01.2018,⁶⁶ this Adjudicating Authority had specifically ordered the liquidator to try and dispose of the corporate debtor as a going concern within a maximum period of three months. For various reasons, this has not been possible for the liquidator.
- 6.16. We, accordingly, now direct the liquidator to proceed with the sale of assets of the Company without further ado as per section 33 of the Code, now that the stay on confirmation of assets has been lifted in the light of the final decision of the Hon'ble Supreme Court in *Arun Kumar Jagatramka v Jindal Steel & Power Ltd.*⁶⁷

Prayer (d):

- 6.17. Before we part with the matter, we record that the prayer (d), which is for a competent and independent agency to be appointed to investigate the manner in which the liquidator has been conducting his affairs as such

⁶⁶ pp.30-41 of the Application.

⁶⁷ Civil Appeal No.9664/2019 a/w Writ Petition (C) No.269/2020 and Civil Appeal No.2179/2020, decided on 15.03.2021.

liquidator, was not seriously argued by the learned counsel for the applicants. It was also not given up.

- 6.18. In this regard, we hold that in the absence of any allegation of fraud or bias in the decisions of the liquidator, we cannot order a roving inquiry just on the basis of perceived loss of employment of the workers on account of a business decision taken by the liquidator to terminate the arrangement with JMPL. To hold otherwise will set a wrong precedent, and insolvency professionals shall not be able to take independent decisions, leading to a failure of the system. Such an approach should, therefore, be shunned. Actions taken in good faith by a public servant always enjoy protection under the law, and the IBC is no different, providing for the same under section 233 of the Code.⁶⁸
- 6.19. Resultantly, **IA No.865/KB/2020 shall be dismissed.**
- 6.20. The Registry is directed to list the main CP for reporting further progress on 17.07.2021.
- 6.21. The Registry is directed to communicate a copy of this order to the counsel on record for the parties immediately.
- 6.22. Urgent certified copies of this order be issued on completion of requisite formalities.

Harish Chander Suri
Member (Technical)

Rajasekhar V.K.
Member (Judicial)
03.05.2021

⁶⁸ **233. Protection of action taken in good faith.**— No suit, prosecution or other legal proceeding shall lie against the Government or any officer of the Government, or the Chairperson, Member, officer or other employee of the Board or an insolvency professional or liquidator for anything which is in done or intended to be done in good faith under this Code or the rules or regulations thereunder.