



## NUJS MOOT COURT PROBLEM<sup>1</sup>

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### Committee of Dinergy Creditors & Others

### Versus

### Dinergy Sughoskar Power Pvt. Ltd., Bretley Bank & Others]

#### Introduction

1. Dinergy Power and Infrastructure Inc. ("**Dinergy**"), is a company listed on the New York and Luxembourg Stock Exchanges, and is a power and infrastructure company with its own financing arm. Dinergy is incorporated in the state of Delaware, United States of America ("**US**").
2. Dinergy has 235 subsidiaries across the globe with footprints in every habitated continent, the most important of them are:
  - i. Dinergy Chemicals (Nigeria),
  - ii. Dinergy Power and Infrastructure (Canada) and
  - iii. Dinergy Services (Cayman Islands).
3. In **May 2006** Dinergy entered into a project specific joint venture in India with Sughoskar Holdings Limited ("**Sughoskar**"). Accordingly, they set up a company in India called Dinergy Sughoskar Power Pvt. Limited (the "**JV Company**"). The JV Company is registered with the Registrar of Companies at Kolkata.
4. From the very outset the JV Company was marred by turf fights between the two partners in spite of the apparent advantages of having Sughoskar as the joint venture partner. The board of the JV Company is dominated by nominee directors of Dinergy. In fact, Dinergy along with its wholly owned subsidiaries listed above, owns about 88% of the JV Company's equity.
5. In **January 2007** the JV Company won a bid to develop a hydel power project in Chandigram (the "**Project**"), in West Bengal. This bid was won largely by the efforts of Sughoskar which has had good political ties with the ruling party in West Bengal. The Project is supposed to generate 3,00,000 MW of power a year, from the year 2014 and hit its peak capacity by the year 2020 solving eastern India's terrible power crises.
6. This Project has been the claim to fame of the incumbent government of the state of West Bengal and it has time and again hailed the Project as the symbol of development in the state.

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## **Leveraging of the JV Company**

7. The paid up equity share capital of the JV Company is Rs. 200 Crores of which Dinergy and its wholly owned subsidiaries (listed above) have contributed 88% while Sughoskar has contributed 12%.
8. In addition, the JV Company already has had an investment of Rs. 9,800 Crores in debt financing.
9. Dinergy had invested Rs. 4,500 Crores as unsecured shareholder loans under the extant Reserve Bank of India Guidelines on External Commercial Borrowings. While arranging for this loan Dinergy had caused the JV Company to stand as its guarantor to certain foreign banks that provided the funds to Dinergy.
10. The remaining Rs. 5,300 Crores had been lent as a secured loan with first pari passu charge on the assets of the JV Company by a consortium of Indian banks. The prime lender and lead arranger for this loan was Bretley Bank, one of India's fast emerging private banks with a very aggressive business and investment strategy. The agreement under which this loan was made clearly stated that any change in control of the JV Company would require the prior consent of Bretley Bank and other members of the Syndicate (defined below). Apart from Bretley Bank, the other lenders in the consortium are Sukoi Bank, National Kharchapani Bank and Bank of Chandigram (the "**Syndicate**").

## **Investigations into Dinergy**

11. In Delaware, US in **June 2008**, Dinergy defaulted in the payment of its insurance premium of USD 300 Million for its workers. The Employees' Union, known as Union of Power Workers of Dinergy ("**UPWD**") (which has been historically a great launch pad for local politicians) with active lobbying convinced the local government in the state of Delaware to start an investigation into the financial affairs of Dinergy.
12. On **24 September 2008** the State of Delaware published its report of the investigation into Dinergy ("**Delaware Government Report**"). Immediately thereafter on **29 September 2008**, the Securities and Exchange Commission initiated an investigation into Dinergy.
13. The Delaware Government Report revealed clear proof of a lot of unaccounted payouts in the Indian JV Company which could constitute potential fraud. Dinergy explained these to the authorities as facilitation payments. This was immediately considered a violation of US laws and was also referred to the Indian authorities for greater investigations into the matter of facilitation.
14. As a result in **October 2008** the Central Bureau of Investigation ("**CBI**") in India started investigations on the directors of the JV Company who were alleged to have made these payouts. On around **5 August 2009** the CBI completed its investigation and it was found that a large proportion of the debt finance had been spent by the JV Company in unaccounted payouts.

15. The investigations also revealed that a former minister in the previous government of the state of West Bengal along with several bureaucrats had received large payouts from the JV Company and allegations were flying thick and fast that the approval of the bid for the Project and the necessary approvals had been fixed. Moreover, these payouts appeared to be equivalent of the money that was found unaccounted for by the investigations in Delaware.
16. Amidst the confusion of these investigations, work on the Chandigram Project came to a standstill with severe losses. 2,000 out of the 9,000 workers were laid off and Sughoskar was rumoured to be looking for an exit.
17. The possibility of a breakdown in the state's power related infrastructure and the already heated up atmosphere regarding job loss and private enterprises, meant that the government of West Bengal was under immense pressure to resolve the situation and keep the Project running. On **30 August 2009** the Minister of Power in the State Government addressed the media and stated the following:

*"We are aware of the brewing crisis in the Chandigram project. We will like to state that the Government remains fully committed to development of the State of West Bengal and protection of its people's interests. The Government believes that since the Chandigram Project is crucial to the future of development in the state and therefore as a stakeholder in this matter we shall take every step possible to resolve the problems."*

### **Financial Difficulties of Dinergy**

18. In the US, the SEC's investigation report (the "**SEC Report**") which was published on **4 December 2008** came to the same conclusions as the Delaware Government Report. It also found that Dinergy with all its other group entities had a glut of common directors and that all of its independent directors were also industrialists in whose companies, Robin Schmidt, Chairman of Dinergy was actively involved.
19. As a result of these revelations, Moody's downgraded Dinergy's credit rating to CCC and it became impossible for Dinergy to raise capital in the debt market to fight through this situation.
20. On **22 December 2008** Dinergy decided to file for bankruptcy in Delaware. Robin Schmidt and the other members of the Schmidt family (who together own a majority 20% stake in Dinergy and had controlled it for generations) resigned on **24 December 2008** from the boards of several entities of the group including the parent company, Dinergy.
21. Several creditors of Dinergy made their claims before the Court at Delaware regarding priority of their claims and pleaded for an order of consolidation of assets across the 235 subsidiaries of Dinergy. The Court ensured that every subsidiary of Dinergy, including the JV Company was represented and was a party to this matter.

From its own examination of the matters at hand and on the basis of the Delaware Government Report and SEC Report (of which it took suo motu cognizance) the Court concluded that there was great scope of possible corporate fraud. As a result it applied the principles of asset consolidation and corporate disregard doctrines and ordered pay-outs for the secured creditors from the consolidated assets of the subsidiaries of Dinergy. This order ("**Foreign Decree**") was dated **18 September 2009** and included the assets of the JV Company. The Court set up a committee of major secured creditors of the Dinergy and named it Committee of Dinergy Creditors ("**CoC**") and gave them the responsibility and powers to execute this order in every jurisdiction across the globe. This change happened only on **1 October 2009**.

### **Action by Indian Banks**

22. In the meantime, on **23 August 2009** Bretley Bank notified the JV Company about its two successive defaults on repayment. The management's apathy towards addressing the issue meant that the Syndicate was apprehensive of a credit risk disaster on the Project.
23. Then on **27 August 2009** Bretley Bank and the Syndicate gave a further notice to the JV Company stating clearly that it was clearly unable to meet its immediate liabilities and amidst such a situation there's a grave possibility of winding up of the JV Company.
24. Under intervention from powerful members of the ruling party, the management and the creditors agreed to meet on **2 September 2009**, to work out an arrangement under Section 391 of the Companies Act, 1956 (the "**Indian Scheme**").
25. On **22 September 2009** the Indian Scheme was agreed between the parties and it was decided that the Indian creditors (Bretley Bank and the Syndicate) would have higher pari pasu charge than the foreign lenders. Even the Dinergy representatives voted in favour of this scheme. On **29 September 2009** the Indian Scheme was duly submitted before the CLB for approval after all required compliances.

### **Proceedings in Kolkata**

26. After the Foreign Decree on consolidation and liquidation of the assets of the Dinergy's subsidiaries across international jurisdictions was passed, Dinergy and its subsidiaries were taken over by the CoC for better and faster liquidation. Dinergy's representative directors changed and the CoC appointed its own directors on **5 October 2009** on the board of the JV Company. This was ostensibly done to facilitate execution of the Foreign Decree and to block any attempt at restructuring the JV Company. On **14 October 2009** the creditors from the US approached the Civil Court in Kolkata for enforcement of the Foreign Decree dated **18 September 2009**. This was immediately opposed by the Syndicate as they wanted the Indian Scheme, which was subjudice, to be given primacy in the interest of the public. The Syndicate also urged that it had priority over the assets of the JV Company. The State of West Bengal intervened in the matter and pleaded that this matter was of grave public importance and should be seen in light of the public interest and the

Indian Scheme that had already been worked out and submitted before the CLB should be implemented. The Board of the JV which was now controlled by the CoC stated that the Indian Scheme was not acceptable and had been passed after the Foreign Decree had been passed and before it had taken control of the JV Company.

27. The Civil Court decided to stay the enforcement, till the CLB decision. The foreign creditors led by CoC appealed to the High Court at Calcutta in Kolkata. The Court granted the request of the Government and the Syndicate and decided to transfer the matter of the restructuring scheme from the CLB and hear the two matters together as they were so intricately significant to the outcome of either.