

**In The National Company Law Tribunal
Kolkata Bench
Kolkata**

Coram: Shri Vijai Pratap Singh, Hon'ble Member (Judicial)

&

Shri Jinan K.R. Hon'ble Member (Judicial)

C.P. No. 502/KB/2017

In the matter of :

SECTIONS 241 & 242 OF THE COMPANIES ACT, 2013.
AND

In the matter of :

**Aryan Mining & Trading Corporation Pvt. Ltd.
P-1, Hide Lane, 8th Floor,
Johar Building
Kolkata 700 029
PETITIONER**

...

AND

In the matter of :

**Brahmani River Pellets Limited
5th & 6th Floor, Ipicol Annex Building,
IPICOL House, Janpath,
Bhubaneswar 751 022
RESPONDENT**

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Counsels on Record :

Dr Abhishek Manu Singhvi, Sr. Advocate }
Shri Ashok Parija, Sr. Advocate }
Shri Joy Saha, Sr. Advocate }

For the Petitioner

Contd....P/2

Shri Samrat Sen, Sr. Advocate }
 Shri Anuj Singh, Advocate }
 Shri Anand Verma, Advocate }
 Shri Dhananjoy Mishra, Advocate }
 Shri Naresh Thacker, Advocate }
 Shri Avishkar Sungvi, Sr. Advocate }
 Shri Siddhartha Kalita, Sr. Advocate }
 Shri Ashok Kumar Singh, Sr. Advocate }
 Ms. Urmila Chakraborty, Sr. Advocate }
 Ms. Paromita Dutta, Advocate }
 Shri Ritoban Sarkar, Advocate }

For the Petitioner

Shri S.K. Kapoor, Sr. Advocate }
 Shri Sakate Khaitan, Advocate }
 Shri Gaurav Khaitan, Advocate }
 Sri Nirmalya Dasgupta, Advocate }
 Shri Pranit Bag, Advocate }
 Shri Shaunak Mitra, Advocate }
 Shri Jyoti Krishnan, Advocate }
 Shri Pritha Basu, Advocate }
 Shri Smriti Tiwari, Advocate }

For the Respondents 14 & 15

Shri Adhesh Agarwal, Advocate }
 Shri S. Ganguly, Advocate }
 Ms. Pooja Chakraborti, Advocate }

**For Respondent Nos.9,10,11
& 13**

Shri Mainak Bose, Advocate }
 Shri Anunoy Basu, Advocate }
 Shri Schin Shukla, Advocate }
 Ms Shreya Singh, Advocate }

For Respondent Nos.1,3 and 4.

Shri Soumava Ghosh }
 Shri Sachidananda Pandey, Advocate }

For Respondent No.12.

Date of pronouncement of the Order: 11.10.2017

Contd...P/3

ORDER

1. Ld. Sr. Counsel for the petitioner Dr Abhishek Manu Singhvi and Ld. Sr. Counsels for the Respondent Nos.14 and 15, namely, Shri S.K. Kapoor, Sr. Advocate and Shri Sakate Khaitan, Sr. Advocate, among others, are present. Heard the arguments of the learned counsel for the parties regarding the admissibility of the petition. Petitioner has filed this application under Section 241 and 242 of the Companies Act, 2013 alleging oppression and mismanagement against the respondent. Heard, admit.

2. Petitioner has stated that it holds 99.99% of the total paid-up share capital of the Respondent No.1 Company. Petitioner as such is a holding company of Respondent No.1. Seventy-Three Percent (73%) of the equity share capital of the petitioner is owned by Respondent No.16 through its subsidiary Companies. of which Respondent No.15 registered in India holding 27% and Respondent No.14 registered in Cyprus holding 46% of the petitioners' share capital

respectively. Balance 27% equity share capital of the petitioners' share capital is held by Saraf Group/FF Group. Respondent No.1 Company availed of a loan of Rs.975 crores to set up of its plant at Odisha. As a security of the said loan by the Consortium of Lenders 51% of the issued share capital of the Brahmani River Pellets Limited (BRPL) held by Stemcor Iron Ore Holdings Limited (SIOHL) was pledged in favour of the lenders and a guarantee for the said loans were issued by Respondent No.16. To secure the loans advanced by the Consortium of Lenders, the petitioner Company pledged the balance of the 49% equity of BRPL with the lenders and also issued corporate guarantees and shortfall guarantees. The Respondent No.1 Brahmani River Pellets Limited (BRPL) first defaulted on repayment of the loan amounts to the consortium of lenders on 01.12.2015. The Shareholders Agreement dated 11th December 2015 between the Petitioner, Saraf Group, Respondent No.14, Respondent No.15, BRPL and Respondent No.16 (erstwhile Stemcor Group) though Administrators (AMTC SHA), whereby it was agreed and

recorded that Respondent No.14 and 15 shall not be involved in any manner with the operation or management of AMTC and its mining operations, and the Respondent Nos.14 and 15 shall have the right to determine the manner in which BRPL's operations shall be conducted until the sale of BRPL (BRPL Sale).

3. BRPL Governance Agreement dated 11th December 2015 between Aryan Mining & Trading Corporation Pvt. Ltd. (AMTC) Respondent No.14, Respondent No.15, BRPL and Respondent No.16 through Administrators, whereby it was agreed that all parties are desirous that all the shares held by AMTC in BRPL and/or all or substantially all the BRPL's business be hived off to any third party (BRPL Sale) so as to minimize losses pertaining to the operations of BRPL.

4. Thus, the Respondent Nos.14 and 15 decided to sell BRPL and accordingly a Share Purchase Agreement was entered into between AMTC, Tata Steel Limited as the Purchaser and BRPL.

5. Though the pledge was invoked by the Lenders, Respondent Nos.14 and 15, and/or the Moorgate Group being in control and management of day to day affairs of the Respondent No.1 took no action to safeguard the interests of Respondent No.1 and permitted the shares of Respondent No.1 held by the Petitioner to be transferred to Vistra ITCL (India) Ltd. (Vistra). An offer was made by the Saraf Group to the Respondent No.14 and 15 for the purchase of their entire shareholding in the Petitioner Company. However, for the reasons best known to them, the Respondent Nos. 14 and 15 have not responded to the offer. The Respondent Nos. 14 and 15 are creating hurdles thereby acting against the very essence of the Shareholders Agreement dated December 11, 2015, and Governance Agreement which were for sale of the Respondent No.1 Company. The Respondents have adopted the Circular Resolution dated 15th September, 2017 enabling the execution of the purported tolling agreement in a manner contrary to Sections 118, 179, 180 and 205 of the Companies, Act, 2013 and various other relevant provisions of the Companies Act, 2013 and the Secretarial Standards adopted by the ICSI (SS-1) and SS-7).

6. The Circular Resolution dated 15th September 2017 is a collusive exercise wherein the assets are being frittered away in the guise of a purported tolling arrangement to favour and provide entry to a completely stranger third party at a consideration which is a fraction of the actual value of the assets. Not only have the Stemcor nominee directors acted in collusion and connivance with such third-party interests, but also the lenders nominee directors on the board of the Respondent No.1 have acted in collusion and breach of their fiduciary duties by adopting an enabling resolution, even though the repayment of the loan amount was sub-judice before the Hon'ble High Court at Calcutta.

7. The adoption of the Circular Resolution enabling the entering of a tolling arrangement appears, from a bare reading of the resolution, to have been driven by the lender nominee directors acting collusively, even though such lender nominee directors were rendered *functions officio* upon the filing of the application by the Petitioner on 11th September 2017 offering to repay the entire amount. Entering into the purported Tolling

Agreement/Arrangement with Amba River Coke Ltd. which is contrary to law and against the procedure prescribed by law. The intention of the Saraf Group and the Moorgate Group was always to co-operate and assist in the sale of the Respondent No.1. Therefore, when because of the genuine efforts of Saraf Group, Respondent No.1 has been freed of the lenders who had initiated action, the Respondent Nos. 14 and 15 seek to derail the entire process and push Respondent No.1 towards liquidation. The Respondent Nos.14 and 15 have not disclosed any alleged transaction or negotiations it has had with Amba River Coke Ltd. The Petitioner has a substantial shareholding in Respondent No.1, and as such it has a right to be informed of any matter which is likely to affect or impact the Petitioner's shareholding and consequent rights.

8. The Board of Directors has surreptitiously attempted to create rights in favour of a third party in undue haste. Pertinently having allowed Vistra to invoke the pledge and transfer shares to itself, the Respondent No.14 and 15 have waived all their rights, if any, under the Shareholders Agreement dated December 11, 2015. After Saraf Group having paid the sum of Rs.560 crores, the

Respondent No.2 to 16 are once again trying to compromise the rights of the Petitioner in the Respondent No.1. Therefore, petitioner has filed this petition under Section 241 – 242 and has prayed for interim reliefs as under:

- (1) Restore status quo ante prior to the purported passed of the Circular Resolution dated 15th September 2017 on the ground that the said Circular Resolution is *prima facie* illegal and contrary to the provisions of the Companies Act, 2013 and Secretarial Standards issued by the Institute of Company Secretaries of India;
- (2) Restrain the Respondent Nos. 2 to 13 from holding any Board and General Meeting in respect of BRPL without notice to the Petitioners, including any Board and General Meeting to ratify the Circular Resolution dated 15th September 2017;
- (3) Direct the Respondents to disclose on oath the purported agreement/arrangement arrived at between them and any third-party entity including Amba River Coke Ltd., or any of its affiliates, holding company or subsidiary concerning the plant of BRPL and the shareholding of Respondents Nos. 14

and 15 in AMTC and consequently indirect holding in BRPL and the debts of Respondent Nos. 14 and 15 in BRPL;

(4) Restrain Respondent Nos. 1 to 13 by order of interim injunction including mandatory interim injunction from acting upon or in any manner doing anything in furtherance of the Circular Resolution dated 15th September 2017, including by way of the purported Tolling Agreement/Arrangement.

9. Heard the argument of the Sr. Counsels of the petitioner Dr Abhishek Manu Singhvi and Ld. Sr. Counsels for the respondent Nos. 14 and 15, namely, Shri S.K. Kapoor, Sr. Advocate, Shri Sakate Khaitan, Sr. Advocate and others Ld. Counsels' application for interim relief. Ld. Sr. Counsels for the petitioner has made an elaborate argument for issuing interim order on the basis that the alleged Circular Resolution dated 15th September 2017 is in violation of Section 118, 179, 180 and 205 of the Companies Act, 2013. Petitioner has stated that Under Section **180(1)(a)** of the Companies Act, 2013 lays restriction on the power of Board of Directors to **sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or**

where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings *only with the consent of the company by a special resolution.*

10. Ld. Sr. Counsel for the petitioner has also laid down the emphasis on the powers of the Board of Directors which is given under Section 179 of the Companies Act which does not include the power to sell/lease or otherwise dispose of the Company's property. Therefore, on this basis, it has been stated by the Ld. Sr. Counsel that without the consent of the Company by a Special Resolution, there was a restriction on the Board to pass any resolution regarding sale/lease or otherwise disposing of the Company's property.

11. Petitioner has stated that since the Company filed the Circular Resolution, Company has transferred or leased out the entire property of the R.1 Company, so the tolling agreement cannot be given effect, which is in contravention of the provisions of Section 180(a) of the Companies Act, 2013.

12. Petitioner has further stated that the alleged Circular Resolution dated 15.09.2017 for enabling execution of purported tolling agreement is in contravention of Section 118, 179, 180 and 205 of the Companies Act, 2013 and against the secretarial standard adopted by ICSI, SSI and SS3. So, the said agreement cannot be given effect, and on this basis, he made a request that required Interim Order be issued for giving effect to the said Resolution. Ld. Sr. Counsel for the respondent requested granting time for filing the reply, and he further stated that petitioner has filed this petition after suppressing important facts. Ld. Sr. Counsel for the respondent No.15 and 16 had further emphasized the order passed by Hon'ble High Court at Calcutta dated 3rd October 2017 which shows that the Ld. Counsel for the respondent has filed the copy of the order which shows that T.No.21 of 2017 – Stemcor Iron Ore Holdings Ltd. & Anr. Vs. Aryan Mining & Trading Corpn. Pvt. Ltd. & Ors. Hon'ble Calcutta High Court has passed an Interim Order which is given below:

“Under such circumstances, there shall be an interim order directing the parties to maintain status quo about the management and control of BRPL. The BRPL shall not create any third-party interest or encumber any of its assets and properties. However, the BRPL will be entitled to sell its products in its usual course of business. There shall be no further alienation

and/or encumbrance of the pledged shares until the disposal of this application.

The petitioners shall disclose the Tolling Agreement within a week from date. The Respondent No.1 shall also disclose the fullest details of the pledge agreement with a week from date.

Affidavit in opposition shall be filed by 24th October 2017; reply to it, if any, on 7th November 2017. The matter shall appear on 15th November 2017."

13. On perusal of the order, it also appears that the said order which was passed was also regarding the same R.1 Company and between the same parties.

14. It is also mentioned in the order of the Hon'ble High Court at Calcutta that the petition before the Hon'ble High Court was filed by the respondents of this case wherein they have alleged that the petitioner has suppressed facts.

15. All the objections which have been raised by the petitioner regarding the Circular Resolution dated 15th September 2017 which is said to be in contravention of the statutory provisions of Sections 118, 179, 180 and 205 of the Companies Act, 2013, can only be adjudged after giving opportunity of hearing to the other parties and after considering the replies and rejoinders of both the

parties. Therefore, two weeks' time is granted for filing reply with a copy in advance to the petitioner. After that, rejoinder, if any, may be filed within two weeks. Since stay order has already been passed by the Hon'ble High Court at Calcutta which is relating to the R.1 Company wherein Hon'ble High Court has granted order of maintaining status quo regarding the management and control of BRPL, R.1 Company, there is no need of passing any other interim order. Interim Order passed by the Hon'ble High Court at Calcutta is effective for the protection of the R.1 Company's interest by imposition of restriction on further alienation regarding pledging of shares of R.1 Company and it has also imposed restriction on creating third party interest in the assets and properties and both the parties have been directed to maintain status quo regarding management and control of the R.1 Company. The said order itself is self-contained, and there is no need of passing any other stay order regarding the R.1 Company.

16. Under such circumstances, there shall be an interim order directing the parties to maintain status quo about the management and control of BRPL. BRPL shall not create any third-party interest or encumbrance on any of its assets and properties.

BRPL will be entitled to sell its products in its usual course of business. There shall be no further alienation and/or encumbrance of the pledged shares until the disposal of this application.

17. The petitioner shall disclose the Tolling Agreement within a week from the date of this order. The Respondent No.1 shall also disclose the full details of the Pledge Agreement within a week from the date of the order. Affidavit in Opposition shall be filed by 24th October 2017 and reply to it, if any, may be filed on 7th November 2017.

This order is passed without prejudice to the rights and contentions of the parties.

The matter shall appear on **15th November 2017.**

(Jinan K.R.)
Member (J)

(Vijai Pratap Singh)
Member (J)

Signed this Eleventh day of October 2017.