

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH : HYDERABAD**

1. C.P.No.22 of 2016
(CP (TCAA) No.16/HDB/2017)
 2. CP No. 23 of 2016
(CP (TCAA) No.17/HDB/2017)
- U/S 391 & 394 of the Companies Act, 1956

In the matter of :

- 1.M/s. VBC Ferro Alloys Limited
Regd. Office at 6-2-913/914,
3rd Floor, Progressive Towers,
Khairatabad, Hyderabad – 500 004
Telangana

.....Petitioner / Transferor Company

2. M/s. VBC Power Company Limited
Regd. Office at 6-2-913/914,
3rd Floor, Progressive Towers,
Khairatabad, Hyderabad – 500 004
Telangana.

.....Petitioner / Transferee Company

Versus

1. The Bank of India
Hyderabad Main Branch
Post Box No.134, 5-8-659,
Nampally Station Road,
Hyderabad – 500 001.
2. The Securities and Exchange Board of India (SEBI)
Office at : 8-2-622/5/A/1,
1st Floor, Indira Chamber,
Road No.10, Avenue- 4, Banjara Hill,
Hyderabad – 500 034.



3. The Regional Director
South East Region
Ministry of Corporate Affairs
2nd Floor, Corporate Bhawan,
GSI Post, Tattilannaram,
Nagole, Bandlaguda,
Hyderabad- 500 068, TelanganaRespondents

Date of Order :10th August, 2017

CORAM:

Hon'ble Shri Rajeswara Rao Vittalana, Member (Judicial)
Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

Counsels Present:

For the Petitioners : Shri V.B.Raju & V.S.Raju
For State Bank of India : Mrs. V.Dyumaini
For SEBI : Shri P.Vikram &
Shri Nitish Bandari
For Regional Director : Shri B.Appa Rao.

Per: Rajeswara Rao Vittalana, Member (Judicial)

ORDER

1. The Company Petitions bearing No. C.P.Nos.22 & 23 of 2016 are filed by M/s.VBC Ferro Alloys Limited & M/s VBC Power Company Limited, U/s 391 and 394 of Companies Act, 1956 before the High Court of Judicature at Hyderabad for the State of Andhra Pradesh and Telangana by inter alia seeking to sanction the Scheme of Arrangement between M/s. VBC Ferro Alloys Limited (Transferor Company) and M/s. VBC Power Company



Limited (Transferee Company) and their Respective Shareholders with effect from 01.04.2014 as approved by the Shareholders and Secured Creditors of both the Companies etc.

2. The cases are initially instituted before the Hon'ble High Court, and the same were transferred to this Bench. Accordingly, the cases were listed before this Bench for hearing on various dates viz 31.01.2017, 15.02.2017, 08.03.2017, 20.03.2017, 03.04.2017, 25.04.2017, 05.06.2017, 19.06.2017, 12.07.2017, 31.07.2017 and 10.08.2017. And the counsels appearing for the parties have taken adjournments on one ground or the other.
3. Brief facts, as mentioned in the Company petitions, which are relevant to the issue in question, are as follows:

1) Details of Transferor Company:

- i) M/s. VBC Ferro Alloys Limited (hereinafter referred to as "VBC FERRO" / Transferor Company) was originally incorporated as Public Limited Company under Companies Act 1956 on 03.10.1981 under certificate of incorporation No. 01-3223 of 1981-82. Its Registered Office is situated at 6-2-913/914, 3rd Floor, Progressive Towers, Khairatabad, Hyderabad – 500 004, Telangana.
- ii) The Authorised Share Capital of Transferor Company as on 31.03.2015 is Rs.20,00,00,000/- divided into 2,00,00,000 equity shares of Rs.10/- each. The Issued Share Capital of Transferor Company as on 31.03.2015 is Rs.4,39,64,500/- divided into 43,96,450 equity shares of Rs.10/- each and Subscribed and fully



paid up capital is Rs.4,39,43,500/- divided into 43,94,350 equity shares of Rs.10/- each.

iii) The main objects of Transferor Company are as follows:

- a) To take over the Registration No. IND/GR IV/54/36/80-81/2017, dated 25.07.1981 of the Govt. of India for the establishment of Ferro Silicon Factory and doing all such other things as are incidental to the attainment of the above subject;
- b) To carry on the business of manufacture of Ferrous and Non Ferrous metals, Alloy Steels etc
- c) To establish, provide, main and conduct factories for the manufacture of electro-chemical and electro metallurgical products etc
- d) To generate, harness, develop, accumulate, distribute and supply electricity by setting up power plants by use of liquid, gaseous or solid fuels for the purpose of light, heat, motive power etc.



2) Details of Transferee Company:

- i) M/s. VBC Power Company Limited (hereinafter referred to as "VBC POWER" / Transferee Company) was incorporated as Public Limited Company on 29.11.2012 in the State of Andhra Pradesh under Corporate Identity No. U40108AP2012PLC084470 of 2012-13. Its Registered Office is situated at

6-2-913/914,3rd Floor, Progressive Towers,
Khairatabad, Hyderabad-500004, Telangana.

ii) The Authorised Share Capital of Transferor Company as on 31.03.2015 is Rs.5,00,000/- divided into 50,000 equity shares of Rs.10/- each. The Issued, Subscribed, and Paid up Share Capital of Transferee Company is Rs.5,00,000/- divided into 50,000 equity shares of Rs.10/- each fully paid up.

iii) The main objects of Transferee Company are as follows:

- a) To generate, harness, develop, accumulate, distribute and supply electricity by setting up power plants by use of liquid, gaseous or solid fuels for the purpose of light, heat, motive power etc.
- b) To acquire concessions or licenses granted by or to enter into contracts with the Government of India, or any State Government, Municipal or local authority, Company or person in India or with any other countries for the construction and maintenance of any electric installation for the production, transmission etc

4) It is stated that Transferor Company is inter alia engaged in the business of manufacture of Ferrous and Non-Ferrous metals, and other alloy steels, ferro alloys, manganese alloys and other metal alloys etc. and the Transferee Company is engaged in business of power



generation for captive consumption for the business of the Transferor Company. The Transferor Company now desires to focus on the power division and proposes to demerge power division to the Transferee Company to develop long term corporate strategies and financial policies specifically within the power business. Thus, enabling the better management and accelerate growth of power business and provide better visibility to the shareholders of the Transferor and Transferee Companies thereby enhancing the shareholders value.



- 5) In view of several advantages involved in the proposed scheme of Arrangement, the Board of Directors of Transferor Company and Transferee Company at their respective Board Meetings held on 29.05.2014 approved the Scheme of Arrangement between the Transferor Company and Transferee Company w.e.f. 1.04.2014.
- 6) The VBC Ferro Alloys Limited/Transferor Company has filed C.A.No.1609 of 2015 before the Hon'ble High Court by seeking to convene meeting of shareholders and unsecured Creditors. Accordingly, the Hon'ble High Court vide its order dated 14th October, 2015 directed to hold meetings by appointing chairpersons. The meetings were conducted by them and submitted their reports. It is stated that requisite majority of the shareholders and un-Secured creditors have approved resolution giving approval for the Scheme of Arrangement. Similarly, M/s VBC Power Company Limited / Transferee Company has also filed C.A.No.1610 of 2015 by seeking to dispense with

Convening of meeting of Equity Shareholders of the Company. Accordingly, the Hon'ble High Court allowed the CA by an order dated 14th October, 2015

- 7) It is stated that the Petitioner Company has availed Secured and Unsecured loans, and it has only one Secured creditor, who was approached for giving No Objection to the Scheme of Arrangement. It is stated that no investigations or proceedings are pending u/s 235, 237 or any other provisions of the Companies Act against the Transferor Company or Transferee Company.
- 8) The Transferor Company is listed Company in Bombay Stock Exchange, and they have given No Objection for the Scheme in question. It is stated that sanction of the Scheme of Arrangement would be beneficial to the Transferor & Transferee Companies, shareholders and employees.
- 9) It is stated that a notice was advertised in Business Standard, English Daily, Hyderabad dated 12.03.2016 and Andhra Bhoomi, Telugu Daily, Hyderabad dated 12.03.2016 as per the directions of the Hon'ble High Court.
- 10) When the case was pending before the Hon'ble High Court, the Bank of India, Hyderabad Main Branch has filed C.A.No.619 of 2016 in C.P.No.22 of 2016 by inter alia seeking to stall the Scheme of Arrangement from proceeding further in the interest of recovery of huge public money and thus opposed the scheme. They have stated that M/s. VBC Ferro Alloys Limited has availed Cash Limit of Rs.24.50 Crores, which includes Cash Limit of Rs.7.50 Crores and Bank



Guarantee limits and offered the securities by movable and immovable properties.

- a) The Petitioner Company also fails to repay the liability in accordance with the agreed terms and conditions leading to classify the account as non-performing asset. As per the norms fixed by the Reserve Bank of India, a Demand Notice dated 9.07.2014 was issued u/s 13(2) of the SARFAESI Act demanding for payment of Rs.9,62,45,018/- plus interest. The Company was also restrained from transferring any of the mortgaged properties as per provisions 13(13) of SARFAESI Act.
- b) The Bank also issued notice of sale dated 26.08.2015 under Rule 8 and 9 of the Security Interest (Enforcement) Rules, 2002 fixing the date of sale as 29.09.2015 in respect of Rudraram properties. Challenging the said notice, VBC Ferro Alloys Ltd. has filed S.A.No.428/2015 before the Debts Recovery Tribunal, Hyderabad and the same is pending.
- c) It is also stated that statutory dues including wage settlement to a tune of Rs.53.61 Crores is pending against the Company. In addition to that Rs.43.00 Crores is also pending against the Company on account of supply of raw materials and loans from corporate bodies and Central Excise and VAT Department have already issued distraint order against the Company properties. Further Central Excise Department filed a Writ Petition No.31502/2015 before



Hon'ble High Court of Judicature at Hyderabad against the sale of Rudraram property on 29.09.2015, in which the Hon'ble High Court its order dated 28.9.2015 permitted the bank to proceed with the sale, but bank shall keep an amount of Rs.1.00 Crores out of the sale proceeds in a separate interest bearing No Lien Account, pending further orders.

d) The Bank is the only Secured creditor and properties covered under Scheme of Arrangement are Secured by the petitioner. Both the Companies, which are under the same management, with a malafide intention to create hurdles in enforcement of the security and rights of Bank, the Companies, have devised the present Scheme of Arrangement. If the present scheme is accepted, public interest would suffer adversely.



- 11) Heard Shri V.B.Raju Learned Counsel for Petitioner Mrs.V.Dyumani for Bank of India, and Shri Nitish Bandari for SEBI, Shri B.Appa Rao for R.D and also perused pleadings of both the parties
- 12) Shri V.B. Raju, Learned Counsel for Petitioner, while reiterating various submissions made in the Company petitions, have further submitted that the petitioner Companies have fulfilled all requisite conditions prescribed u/s 391 & 394 of Companies Act, 1956 for the sanction of Scheme of Arrangement in question. In pursuance to the directions of Hon'ble High court, meetings as directed have been conducted, and parties have also consented the scheme. The Regional

Director, Ministry of Corporate Affairs and SEBI have also not opposed the scheme in question. Therefore, he submits that the Company petitions may be allowed as prayed for.

- 13) The Regional Director, South East Region, Hyderabad, has filed an Affidavit dated 05.08.2016 and also Additional Affidavit dated 07.10.2016. It is stated there in, that comments of Income Tax Department were sought on 30.03.2016 within 15 days from the date of receipt of notice. However, they did not send any objections to the scheme. SEBI also did not oppose the proposed Scheme in question, subject to complying usual conditions.
- 14) In the light of above contentions of petitioners and other parties to the issue, the main issue arise for consideration is whether the petitioners have disclosed all material facts relating to their Companies such as latest financial position of the Companies, latest auditors' report on the accounts of Company, pendency of any investigation etc as prescribed under various provisions of Sections 391 & 394 of Companies Act, 1956 so as to entitle them for the grant of relief as prayed for.
- 15) In order to examine the issue in question, it is relevant to extract provisions of sections 391 & 394 of Companies, 1956 for ready reference, since the cases are filed under these provisions by seeking sanction of Scheme in question. :



"Section 391. (1) Where a compromise or arrangement is proposed

(a) between the company and its creditors or any class of them; or

(b) between the company and its members or any class of them;

The court may, on the application of the company or of any creditor or member of the company or, in the case of company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be to be called, held and conducted in such manner as the court directs

(2) **If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members as the case may be, present and voting either in person or, where proxies are allowed** ¹ (under the rules made under section 643), by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributories of the company;

² (provided that no order sanctioning any compromise or arrangement shall be made by the court unless the court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 351, and the like).



(3) an order made by the court under subsection (2) shall have no effect until a certified copy of the order has been filed with the Registrar.

(4) A copy of every such order shall be annexed to every copy of the memorandum of the company issued after the certified copy of the order has been filed as aforesaid or in the case of a company not having a memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company.

(5) if default is made in complying with subsection (4) the company, and every officer of the company who is in default, shall be punishable with fine which may extend to ³ (one hundred rupees) for each copy in respect of which default is made.

(6) the court may, at any time after an application has been made to it under this section stay the commencement or continuation of any suit or proceeding against the company on such terms as the court thinks fit, until the application is finally disposed of.

(7) as appeal shall lie from any other made by a court exercising original jurisdiction under this section to the court empowered to hear appeals from the decisions of that court, or if more than one court is so empowered, to the court of inferior jurisdiction.

The provisions of sub-sections (3) to (6) shall apply in relation to the appellate order and the appeal as they apply in relation to the original order and the application.

“Section 394. (1) Where an application is made to the Court under section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court-



(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies; and

(b) that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a "transferor company") is to be transferred to another company (in this section referred to as "the transferee company"); the Court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters:-

(i) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

(ii) the allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(iv) the dissolution, without winding up, of any transferor company;

(v) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement; and

(vi) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or



amalgamation shall be fully and effectively carried out:

¹Provided that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme for the amalgamation of a company, which is being wound up, with any other company or companies, shall be sanctioned by the Court unless the Court has received a report from the Company Law Board, or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest: Provided further that no order for the dissolution of any transferor company under clause (iv). shall be made by the Court unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.]

(2) Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee company; and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.

(3) Within ² thirty] days after the making of an order under this section every company in relation to which the order is made shall



16) When the cases were taken up for final hearing on the above dates, the learned Counsel for the petitioners has taken time to get necessary consent from the parties especially Bank of India, who is admittedly sole secured Creditor of the Company as stated supra. However, he has not come with any such proposal of the Bank except producing some letters from the Bank, which did not show that they are accepting the proposed Scheme in question. He has also failed to convince the Bench about their liabilities such as dues to various Statutory Authorities apart from wages to workers etc. He has simply relied upon the orders of Hon'ble High court for dispensation and conducting of meetings of concerned parties as detailed supra. As per provisions sections 391 & 394 of the Companies, 1956 R/w // 230 & 232 of the Companies Act, 2013, a party approaching the Tribunal seeking to sanction any scheme as contemplated under the Act, should come with clean hands by disclosing all material facts, and all concerned parties to the affairs of Company, should also be taken into confidence. **It is also relevant to point out here that the petitioner (VBC Ferro Alloys Ltd) has filed an amendment petition dated 19th June, 2017 by interalia stating under para 17 as "the Company has only one secured creditor and the petitioner Company has approached the said Creditor and there will be no objection to the proposed scheme of Arrangement"** The petitioners have not only suppressed material facts as detailed by



the Bank of India, as briefly supra, but they have also miserably failed to convince the Bench to sanction the Scheme in question. The petitioners were extended ample opportunities, to prove their case in accordance with law, as dates of adjournments as mentioned supra would indicate. And the Petitioners have also not come with clean hands to seek any relief from the Tribunal. Therefore, the petitions are only liable to be rejected.



- 17) As stated supra, the petitioners have not come to the Tribunal with clean hands by disclosing the material facts and it is stated that they will come with No Objection Certificate from Secured Creditor i.e. Bank of India. Even at the time of final hearing, they have failed to substantiate the contentions with regard to the above averments. Therefore, the petitioners are liable to imposed with fine apart from dismissing the case.
- 18) The Petitioner Companies are directed to issue newspaper publication with respect to approval of scheme of arrangement, in the same newspapers in which previous publications were issued in order to ensure transparency / dissemination of complete information to all concerned parties about the status of scheme of arrangement submitted to the Tribunal.
- 19) The Petitioner Company is also directed to submit a copy of this order to RoC, within a month from the date of receipt of copy of this Order.
- 20) The Bench levied a cost of Rs.1.00 Lakh each on the Petitioners Company payable by way of DD to be



drawn in favour of "Pay & Accounts Officer, Ministry of Corporate Affairs, Chennai" within 3 weeks from the date of receipt of copy of this Order.

21) In view of the facts & circumstances of the case, both the C.P.No.22 of 2016 (CP(TCAA).No. 16/ HDB/2017) and C.P.No.23 of 2016 (CP(TCAA).No. 17/HDB/ 2017) are hereby rejected.

Sd/-
RAVIKUMAR DURAISAMY
MEMBER (TECHNICAL)

Sd/-
RAJESWARA RAO VITTANALA
MEMBER (JUDICIAL)

[Signature]
Dy. Regr./Asst. Regr./Court Officer/
National Company Law Tribunal, Hyderabad Bench

प्रमाणित प्रति
CERTIFIED TRUE COPY
केस संख्या
CASE NUMBER *CP.No.22 of 2016 (CP(TCAA) No. 16/HDB/2017)*
निर्णय का तारीख
DATE OF JUDGEMENT *10.8.2017*
प्रति तैयार किया गया तारीख
COPY MADE READY ON *13.12.2017*