

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH-II, CHENNAI**

IA/515/2021 in IBA/307/2019 filed
under Section 60(5) of the
Insolvency and Bankruptcy Code,
2016 r/w Rule 11 of the NCLT Rules,
2016

In the matter of M/s. Bhatia Coke & Energy Limited

M/s. State Bank of India

having its registered office at
State Bank Bhavan,
Madame Cama Road, Nariman Point,
Mumbai – 400 021

---Applicant

Vs.

Mr. Subrata M Maity,

(Resolution Professional of
M/s. Bhatia Coke & Energy Limited)
Ref. No. IBBI/IPA-001/IP-P00884/2017-2018/11481
having his office at Shop No. 28 & 29,
Plot No.25, Greenspace Royale CHS Ltd.,
Sector-7, Kamothe,
Navi Mumbai – 410 209

---RP/Respondent

Coram:

R.SUCHARITHA, MEMBER (JUDICIAL)

B. ANIL KUMAR, MEMBER (TECHNICAL)

For the Applicant/SBI : *Shri. A.R. L. Sundaresan, Sr. Advocate*
Shri. Saurav Panda, Advocate,

For M/s. Shardul Amarchand Mangaldas & Co

For the RP/Respondent : *Shri. V. Venkata Sivakumar, PCA*

Authorized Representative for RP

ORDER

Per: R.SUCHARITHA, MEMBER (JUDICIAL)

Order Pronounced on: 10.06.2021

IA-515/2021 filed by State Bank of India, one of the CoC members against the RP of M/s. Bhatia Coke and Energy Limited under Section 60(5) of the Insolvency and Bankruptcy Code, 2016, with the following prayer:

- a) Direct the Respondent to call for a meeting of the members of CoC to discuss and deliberate on the resolution plan as submitted by the Consortium RA to the Respondent;*
- b) Stay the voting process proposed by the Respondent to the resolution plan of 13 May 2021 of the Consortium RA;*
- c) Declare all acts done relating to the voting process with a deadline of 02 June 2021 and results of voting declared if any on the resolution plan dated 13 May 2021 as null and void;*
- d) In the interim, direct the Respondent not to precipitate/continue with the voting process and declare the deadline given by the Respondent as 02 June 2021 as the last day to vote as void;*
- e) Exclude the time lost from 10 April 2021 up to date of order being passed in the instant application in the CIRP;*

2. This Applicant has filed this application raising serious procedural lapses on the part of the RP in conducting the CoC meetings for approval of a resolution plan.



3. The Applicant Counsel states that the RP/Respondent herein has violated the Regulations under 39(2), 39(3), 39B to 39D of the Code.

4. The Applicant Counsel states that the final revised application plan was not placed before the CoC for detailed deliberation, hence a “collective wisdom” could not be arrived before the plan was taken up for voting.

5. The Applicant also points out that proposal for settlement by the erstwhile Promoters under Section 12A of the IBC is also pending for approval, therefore the abovementioned prayer ought to be allowed for smooth completion of the CIRP.

6. In response to the allegations submitted by the Applicant, the Respondent has filed a detailed Counter. The Respondent in the Counter states that the CIRP commenced on 22.05.2019. Till date, more than 730 days have elapsed. Five Petitions were filed for extension of the CIRP period and the same were allowed by this Adjudicating Authority.



7. In the Counter, the Respondent also states that there is no procedural irregularity in submission of the Resolution Plan to the CoC. The revised plan was time and again submitted to the CoC members and also their Legal Counsels vetted the documents and approved the same. Thereafter, in the 21st CoC meeting held on 07.05.2021, the Applicant herein i.e., State Bank of India also participated. The Minutes of the Meeting was enclosed along with the application at Page No.61. It is evident that the details of the resolution plan were deliberated at the CoC meeting.

8. In the Counter, the Respondent further states that the proposals submitted by the erstwhile Promoters under Section 12A were put to vote and the same was rejected thrice by the CoC. Hence, enough opportunity was given to the erstwhile Promoters and the CoC members have categorically rejected the proposal thrice, hence there is no merit in the statement of the Applicant that 12A application is pending for approval.



9. After deliberation of the Resolution Plan in the 19th, 20th & 21st meeting of the CoC, the resolution plan was put to e-voting and the e-voting was opened on 17.05.2021 and closed on 02.06.2021.

10. On 02.06.2021, all the members of the CoC voted in favour of the resolution plan and the resolution plan was approved by 100% voting. The Applicant herein has also voted in favour of the resolution plan. The resolution plan is yet to be filed before this Adjudicating Authority for approval.

11. The Respondent further states that the voting share of the Applicant is only 32%, assuming that the Applicant has voted against the resolution plan, still the plan would have been approved by 68% of the vote, the minimum approval being 66%, as per the IBC.

12. The Respondent raises a point that the Applicant having voted in favour of the resolution plan is now barred from filing this application on the principle of Estoppel. Hence, this application itself is not maintainable before this Adjudicating Authority.



13. The Learned Counsel appearing on behalf of the Applicant states that the Applicant voted in favour of the resolution plan, to avoid a liquidation order by this Adjudicating Authority. However, the Learned Counsel for the Applicant states that the Applicant voted in favour of the Plan “under protest”.

14. It is pointed out by the Respondent that there is no such provision under IBC to vote “under protest”, either the Applicant and CoC members vote for or against the resolution plan.

15. Having heard both the learned counsels and perused the relevant provisions of the Code and the documents filed in support of the parties, it is found that this application is not maintainable on the ground that State Bank of India, the Applicant herein has voted in favour of the resolution plan on 02.06.2021.

16. The argument of the Applicant Counsel is that the voting was done “under protest” to avoid a liquidation order is not acceptable. Further, there is no provision under the IBC for the Applicant to vote “under protest”. Moreover, the IBC is time bound and there have to



be a “commercial wisdom” of the CoC members, before exercising on voting. The Court have time and again acknowledged and has upheld the “commercial wisdom” of CoC. That being the case, there must be an absolute clarity from the CoC members, whether to vote for or against the resolution plan and there should never be any ambiguity on the viability of the plan and if the Applicant had any doubts about the viability of the plan, the only option available to the Applicant herein is to vote against the plan, when a complete decision of approval of the plan has been given to the CoC, the CoC members have to exercise their commercial wisdom with an absolute clarity. Hence, the stand of the Applicant that they have voted in favour of the Applicant with a doubt in their mind about the viability of the plan is not acceptable. Further, the Applicant states that even though he has 100% voting on resolution plan, the Applicant has various allegations and lists out the procedural irregularities on the part of the RP, the manner in which the CoC meetings were conducted and serious allegations have been placed before us in this application.



17. The Applicant being a Nationalized Banker holding 32% of the voting share in the CoC has had all the options to vote against the Plan or file applications or even take up an application for change of the RP, if they wish so. But the Applicant has not done any of the above said things. If the Applicant is unable to arrive at a conclusion regarding the resolution plan, it appears that there is a lack of clarity in the commercial wisdom in the mind of the Applicant. We cannot allow the CoC members who have acted in favour of the resolution plan, and subsequently come up with another new “commercial wisdom” regarding the viability of the plan and the procedural lapses of the RP. Such application will only lead to absolute chaos and if such applications are entertained, then no resolution plan can be completed on time. Hence, we conclude that the Applicant having voted in favour of the resolution plan is estopped from filing this application seeking the abovementioned directions.

18. On the question of maintainability of this application, we conclude from the foregoing discussions that this application is not maintainable at this stage. When the resolution plan was placed



before this Adjudicating Authority for approval, it is the duty of the Adjudicating Authority to go into the facts of the case and also ensure that there are no procedural irregularities in the CIRP period and the resolution plan was in-conformity with the IBC and Regulations. Therefore the issues raised by the Applicant regarding the procedural irregularities in the conduct of the CoC meeting and about the RP are not addressed at this stage. The Adjudicating Authority is duty bound to address all these issues at the time of approval of the resolution plan, when the same be placed before this Adjudicating Authority.

19. Another point raised by the Counsel for the Applicant is that, since it is pandemic period, the joint meeting of all the CoC members was not called for to sit together to deliberate, hence the “collective wisdom” could not be arrived at. If that being the case, then no resolution plan since March 2020 could have taken up, considering that the Country and the World, at large, are in a pandemic period and continues so, till date.



20. Further, in this digital world, even though there may not be a possibility of a physical meeting, virtual meetings and deliberations are happening around the world, hence this lacunae raised by the Applicant is also negated.

21. In view of the above discussions, **IA/515/2021** stands **dismissed**. No cost.

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(ANIL KUMAR B)
MEMBER (TECHNICAL)

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(R. SUCHARITHA)
MEMBER (JUDICIAL)

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