

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI  
BENCH- I**

**IA No. 1419 of 2021**

**IN**

**CP(IB) No. 725 of 2017**

Under Section 45(1) of the Insolvency and  
Bankruptcy Code, 2016

**IA No. 1419 of 2021**

**In the Application of**

**Prakash K. Pandya**

**...Applicant/  
Liquidator**

**Versus**

**Varun Gas Logistics Private Limited & Ors.**

**...Respondents**

**In the matter of**

**The Mauritius Commercial Bank**

**...Financial Creditor**

**Versus**

**Varun Corporation Limited**

**...Corporate Debtor**

**Order Delivered on : 02.04.2024**

***Coram:***

Hon'ble Member (Judicial) : SH. Justice Virendrasingh G. Bisht (Retd.)

Hon'ble Member (Technical) : SH. Prabhat Kumar

***Appearances:***

For Respondent Nos. 1 & 3 : Mr. Shyam Agarwal, Advocate

For Respondent No. 2 : Mr. Rohit Gupta, Advocate

**ORDER**

*Per: Prabhat Kumar, Member (Technical)*

1. This Application bearing **IA No. 1419/2021** is filed by Mr. Prakash K. Pandya, the Liquidator of Varun Corporation Limited (“**Applicant**”) in the Liquidation Process of Varun Corporation Limited (“**Corporate Debtor**”) under Section 45(1) of the Insolvency and Bankruptcy Code, 2016 (“**Code**”) seeking the following reliefs:
  - a) That the Share Pledge Agreement (SPA) dated 26.10.2016 entered in between Corporate Debtor, Respondent No. 1 VGLPL and Respondent No. 2 Axis Trustee Services Ltd. be declared void ab initio;
  - b) That the Non Disposal Undertaking Agreement (NDU) dated 26.10.2016 entered in between the Corporate Debtor, Respondent No. 1 VGLPL, Respondent No. 2 Axis Trustee Services Ltd. and Respondent No. 3 Mr. Yudhishtir Khatau be declared void ab initio;
  - c) Physical Share Certificates of Respondent No. 1 VGLPL (i.e. 3,85,00,000 equity shares) be handed over to the Liquidator;
  - d) Respondent No. 2 Axis Trustee Services Ltd. be directed to release the Pledge under SPA and unfreeze all of the equity shares under NDU held by the Corporate Debtor in its Demat Account with Axis Bank Ltd. having Client ID 23875217 and DP ID : IN300484;
  - e) The Respondent No. 3 Mr. Yudhishtir Khatau be punished for willful non co-operation with the Applicant Liquidator in managing the affairs of the Corporate Debtor and acting illegally by handing over the Share Certificates to the Respondent No. 1 Axis Trustee Ltd. instead of the Applicant

- Liquidator without any legal authority;
- f) That the present Application be allowed with cost on the Respondents.

**Brief Facts**

2. The Tribunal had passed an Order dated 30.06.2017 in the captioned petition, initiating the Corporate Insolvency Resolution Process (“**CIRP**”) of the Corporate Debtor u/s 7 of the Code. Mr. Prakash K. Pandya was appointed as the Interim Resolution Professional (“**IRP**”). Further, vide Order dated 18.05.2018 in MA No. 335 of 2018, the Tribunal ordered the Liquidation of the Corporate Debtor and Mr. Prakash K. Pandya continued as the Liquidator.
3. In the year 2016, Varun Gas Logistics Private Limited (“**Respondent No.1/VGLPL**”) availed a Rupee Term Loan Facility of Rs. 1,51,20,00,000/- and ECB Facility of US \$ 36 million (INR 2,40,68,37,600/-) i.e. total Rs. 391,88,37,600/- from Axis Bank Limited wherein the terms and conditions of the loan required the Corporate Debtor, being the holding company of VGLPL, to pledge 30% of total equity shares of VGLPL and the remaining 70% equity shares of VGLPL to be frozen under a Non-Disposal Undertaking (“**NDU**”) in favour of Axis Trustee Services Limited (“**Respondent No. 2/Security Trustee**”) who is Security Trustee to the Pledge and the NDU agreement.
4. The Corporate Debtor holds 99.98% (21,35,51,000 equity shares) shares of VGLPL and Mr. Yudhishtir Khatau (“**Respondent No. 3**”) holds the remaining 0.02% (49,000 equity shares) shares. Mr. Yudhishtir Khatau is an ex-director of the Corporate Debtor and is also a director of Respondent No. 1. Out of the 21,35,51,000 equity shares held by the Corporate Debtor, 17,50,51,000 are held in dematerialized form, and the remaining 3,85,00,000 are held in physical form.
5. The shares of VGLPL were allotted to the Corporate Debtor in the following manner-

Sr. No.	Date of transfer of share	Share Application Money (Rupees)	Date of allotment	No. of shares allotted	Premium, if any (Rupees per share)	Total value of allotment
1.	01.04.2016	51,000	13.04.2016	51,000	Nil	51,000
2.	07.07.2016	35,00,00,000	28.09.2016	17,50,00,000	1	35,00,00,000
3.	12.07.2016 13.07.2016	7,00,00,00 70,00,000	14.07.2017	3,85,00,000	1	7,70,00,000
Total		42,70,51,000		21,35,51,000		42,70,51,000

6. On 26.10.2016, the Corporate Debtor, VGLPL and Axis Trustee Services Ltd. (“**Respondent No. 2/Security Trustee**”) entered into a Share Pledge Agreement (“**SPA**”) and a Non Disposal Undertaking Agreement (“**NDU**”) for providing security to Axis Bank Ltd. against the loan advanced to VGLPL.

7. The status of custody of shares of the Corporate Debtor pursuant to the SPA and the NDU is as follows-

Particulars	Total Shares	Under Pledge	Under NDU	Status
Dematerialised Form	17,50,51,000	5,25,30,000	12,25,21,000	Shares frozen by Respondent No. 2 Axis Trustee
Physical Form	3,85,00,000	1,15,50,000	2,69,50,000	In custody of Axis Bank Ltd.
Total	21,35,51,000	6,40,80,000	14,94,71,000	

8. The physical share certificates representing 3,85,00,000 equity shares have been handed over to Mr. Parag Thally of Axis Bank Ltd. by Mr. Yudhishtir Khatau on 15.05.2018 and they are not in the Liquidator's custody. This transfer was made 3 days before the Liquidation Order dated 18.05.2018.
  
9. The Liquidator had filed IA No. 1364/2020 against the present Respondents seeking possession of the physical share certificates. During the course of the hearing of IA No. 1364/2020, Respondent No. 1 and Respondent No. 3 confirmed vide their Affidavit in Reply that they have handed over the physical share certificates of VGLPL to Respondent No. 2 and later confirmed that they have handed over the physical share certificates to Axis Bank Ltd., which was not a party to the IA. However, Respondent No. 2 confirmed on affidavit that they did not receive the said physical share certificates. Owing to these facts, the Liquidator withdrew the IA with the liberty to file a fresh IA impleading appropriate parties. However, the Applicant has submitted before us that Axis Bank Ltd. is not a party to the SPA or the NDU, hence it is not required to be a necessary party in the present Application.

**Submissions advanced by the Ld. Counsel on behalf of the Applicant**

10. The Applicant submits that in accordance with Para 4(1) of the NDU, any additional shares acquired by the Undertaking Providers, i.e. the Corporate Debtor and Mr. Yudhishtir Khatau shall form part of the NDU shares such that at all times, the NDU shares shall not represent less than 70% of the paid-up equity share capital of Respondent No. 1 collectively held by the Undertaking Providers.
  
11. In the present case, the additional shares allotted to the Corporate Debtor on 14.07.2017 were handed over to Axis Bank Ltd. by Respondent No. 3 instead of being handed over to the Corporate Debtor or the Resolution Professional at the time.

12. The Applicant further submits that the timing of handing over of physical share certificates is relevant as they were handed over by Respondent No. 3 on 15.05.2018, when he was fully aware of the fact that the CoC had decided to liquidate the Corporate Debtor at their meeting dated 14.03.2018.
13. The Applicant submits that the SPA and the NDU are hit by Section 45 read with Section 46 of the Code, i.e. undervalued transactions. The Corporate Debtor has invested a total sum of Rs. 42,70,51,000/- during 01.04.2016 to 13.07.2016 for which it is holding 99.98%, i.e. 21,35,51,000 fully paid up equity shares of Respondent No. 1. Thereafter, 30% of the Corporate Debtor's shareholding has been pledged and the remaining 70% frozen, pursuant to the SPA and the NDU. However, the Corporate Debtor has not received any benefit from this transaction. On the contrary, one of the major assets of the Corporate Debtor has been encumbered, in order for Respondent No. 1 to avail a loan from Axis Bank Ltd and thus it is out of reach of the Liquidator.
14. It is the Applicant's case that Respondent No. 2 and Axis Bank Ltd. have not filed a claim with the Liquidator and no money is owed to Respondent No. 1 in accordance with Section 53 of the Code, yet Respondent No. 1 is in an advantageous position due to the SPA and the NDU as these transactions have allowed Respondent No. 1 to avail a huge loan from Axis Bank Ltd., by securing assets of the Corporate Debtor and at the same time Respondent No. 1's liability towards its creditors has reduced as the paid-up value of the shares in question is Rs. 42,70,51,000/-. Thus, the disposal of the said equity shares of Respondent No. 1 without any consideration by the Corporate Debtor for the benefit of the lender of Respondent No. 1 is an undervalued transaction.
15. This creation of interest over the assets of the Corporate Debtor has accorded an advantageous position to Respondent No. 1 as compared to the other creditors and stakeholders of the Corporate Debtor in the event

of distribution of assets under Section 53 of the Code because such heavily encumbered assets will not form part of the available estate of the Corporate Debtor.

16. The Applicant has relied on the judgement dated 03.02.2021 in the matter of *Phoenix ARC Pvt. Ltd. vs Ketulbhai Ramubhai Patel [Civil Appeal No. 5146 of 2019]* wherein the Hon'ble Supreme Court has held that a person having only security interest over the assets of the Corporate Debtor, even if falling within the description of "secured creditor" by virtue of collateral security extended by the Corporate Debtor, would not be covered by the definition of financial creditor as per definitions contained in Sub-Section (7) and (8) of Section 5 of the Code.
17. The Applicant has also relied on the judgement of the Hon'ble Supreme Court in the matter of *Anuj Jain, IRP for Jaypee Infratech Ltd. vs Axis Bank Ltd.* to support its contention that the SPA and the NDU are transactions that are not in the ordinary course of business as expounded in the judgement.
18. The Applicant also submits that the relevant period as per Section 46 of the Code for the said transaction is 2 years as Respondent No. 1 is a related party of the Corporate Debtor. The SPA and the NDU squarely fall within the relevant period as laid down in Section 46 of the Code as these Agreements were executed on 26.10.2016 and the Insolvency Commencement Date ("ICD") is 30.06.2017.
19. The Applicant further submits that according to Section 56(4) of the Companies Act, 2013, shares should be issued within 2 months of allotment. However, the shares of Respondent No. 1 were issued much later and even then, they were not handed over to the Corporate Debtor. It is the Applicant's case that in accordance with Section 25(2)(a) of the Code, once CIRP is initiated, it is the duty of the IRP to take immediate custody and control of all the assets of the Corporate Debtor, becoming the custodian of the shares held in Respondent No. 1, even if they were

pledged. It is submitted that the powers of Respondent No. 3 were suspended once CIRP was initiated and ceased after Liquidation was ordered. Therefore, Respondent No. 3 had no authority to hand over the share certificates directly to Axis Bank Ltd. without consulting the Resolution Professional/Liquidator, who was in charge of the Corporate Debtor at the relevant time.

**Submissions advanced by the Ld. Counsel on behalf of the Respondents**

**20. Submissions advanced by Respondent Nos. 1 & 3**

20.1. It is submitted that Respondent No. 3 handed over the physical share certificate numbers 6 & 7 on 15.05.2018 to Axis Bank Ltd. as the beneficiary of the shares pledged against the facility availed to give effect to the duly executed NDU dated 26.10.2016, before the Corporate Debtor being admitted into CIRP. The Applicant is neither the beneficiary nor the custodian of the shares held in Respondent No. 1 pledged by the Corporate Debtor.

20.2. It is further submitted that it is a standard business practice to pledge the equity shares of a Special Purpose Vehicle (“SPV”) which is incorporated for specific business ventures. The Corporate Debtor is the holding company for all the Varun Group Companies and fills the role of what is commonly known as a Promoter Investment Vehicle, the purpose of which is to purchase equity by way of investment in various other group companies that are subsidiaries and to provide guarantees/collaterals as additional security for the finance provided by institutional lenders to the subsidiary companies. It is submitted that as per the Memorandum of Association of the Corporate Debtor, the acquisition of shares in any company promoted by the Corporate Debtor constitutes an ordinary course of business for the Corporate Debtor. It is also submitted that the investment by the Corporate Debtor in Respondent No. 1 had been carried out for full value of the consideration at the time of investment by the Corporate Debtor and

therefore, the said investment cannot be hit by the provisions of Section 45(2) of the Code.

20.3. The Respondents further submit that the captioned Company Petition had been filed against the Corporate Debtor in the capacity of the Corporate Debtor being the Corporate Guarantor of Real Point Mauritius, a 100% subsidiary of the Corporate Debtor. Accordingly, the Resolution Professional was appointed. By accepting the Petitioner's claim, the Applicant accepted the position that the Corporate Debtor was a Corporate Guarantor. Therefore, a direct inference is drawn that the Corporate Debtor has been investing in its subsidiaries and investee companies and issuing guarantees on their behalf as part of its ordinary course of business.

20.4. The Respondents also submit that in addition to the investment in Respondent No. 1, the Corporate Debtor also held long-term strategic investments in the Group Companies engaged in the shipping business which includes an investment of Rs. 1,258 Mn (at cost) in Varun Resources Ltd. and the entire investment of the Corporate Debtor was pledged to the consortium lenders of Varun Resources Ltd. It is submitted that a pledge on Promoter Equity and Corporate Guarantee of the Promoter are basic stipulations for borrowing transactions of this nature used to raise finance in the shipping business which cannot attract provisions of Section 53 of the Code.

20.5. The Respondents state that it was the commercial wisdom of the Corporate Debtor at the relevant time to make investments in the subsidiary companies and based on those investments Respondent No. 1 purchased assets which made it a profit-making going concern. The investment made in Respondent No. 1 was used to purchase a shipping vessel, namely Mareena Gas which operates and generates income by way of charter hire. The Respondents submit that the investment was made in the year 2016 and there was no way they could

have predicted that the Corporate Debtor would go into CIRP in the year 2017.

20.6. The Respondents also submit that under Clause 4(p) of the NDU, the Corporate Debtor had to execute a Power of Attorney in favour of Respondent No. 2 to exercise certain powers in accordance with the NDU. Accordingly, the Corporate Debtor executed an Irrevocable Power of Attorney dated 26.10.2016 (“**POA**”) and appointed Respondent No. 2 as its attorney to do for and on behalf of the Corporate Debtor all such acts, deeds and things as may be required to discharge the obligations of the Corporate Debtor under the NDU.

**21. Submissions advanced by Respondent No. 2**

21.1. Respondent No. 2 submits that the present Application is not maintainable based on the following grounds-

- a) the Applicant is seeking that the Agreement between Respondent No. 2, the Corporate Debtor and the other Respondents be declared void ab initio, which is a relief that can only be prayed before the appropriate forum, i.e. the Civil Courts and not this Tribunal;
- b) the Applicant has not impleaded Axis Bank Ltd. even after IA No. 1364/2020 was withdrawn in view of the admission by the parties that the physical share certificates are lying with Axis Bank Ltd. and not the Respondents. It is settled law that if the necessary and proper parties are not impleaded for a matter, then the Application is not maintainable;
- c) the present Application proceeds on the basis of the opinion of the Applicant, who has not even engaged any expert to conduct a transaction-based audit to support his opinion, and lacks the most basic ingredients of undervalued transactions;
- d) the Applicant has not assigned any value which should have been an ideal value for the transaction in question;
- e) the present Application is barred by limitation as it has been filed at an extremely belated stage, i.e. 1350 days after the

commencement of CIRP of the Corporate Debtor, instead of 135 days as is required under Regulation 35A of the CIRP Regulations. The Applicant has not pleaded any ground for this delay or its condonation;

21.2. It is further submitted that the transactions cannot be treated as undervalued as they have been undertaken in the regular course of business and are hence excluded under Section 45 of the Code.

### **Findings**

22. Heard learned Counsel and perused the material available on record.

23. The Respondents have raised the issue of limitation contending that the present application has been filed 1350 days after the commencement of CIRP of the Corporate Debtor, instead of 135 days as is required under Regulation 35A of the CIRP Regulations. However, the direction to file application within 135 days has been held to be directory in nature, hence, there is no merit in this ground.

24. The Respondents have also contended that the issue in the present matter can also be decided by the Civil Courts and not this Tribunal. Section 60(5) of the Code is a non-obstante clause and it vests the jurisdiction in this Tribunal to entertain or dispose of any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code. The issue in hand arises from the assets of the Corporate Debtor, which is alleged to be transferred to Axis Bank Limited in terms of the Share Pledge Agreement and Non Disposal Undertaking. In terms of the provisions of the code, the Resolution Professional is duty bound to take control and custody of assets of the Corporate Debtor, and thereafter resolve the claims against the Corporate Debtor. Accordingly, the issue in the present application arises out of liquidation proceedings of the Corporate Debtor, hence this

Tribunal has jurisdiction in terms of Section 60(5)(c) of the Code to decide the issue in hand. Nonetheless, the Applicant has filed this application under Section 45 of the Code, which vests the exclusive jurisdiction in this Tribunal to decide whether the transaction in hand is an undervalued transaction and if so, set aside such undervalued transactions or pass appropriate order. Accordingly, this Tribunal does not find any substance in this contention also.

25. The issue before us is whether the pledge of shares held by the Corporate Debtor in Respondent No. 1 Company, the wholly owned subsidiary of the Corporate Debtor, in favor of Axis Bank Ltd. to secure the credit facilities availed by the Respondent No. 1 under the SPA and the NDU satisfies the rigours of Section 45 of the Code as an undervalued transaction.

26. Section 45 of the Code reads as under -

*45. Avoidance of undervalued transactions. -*

*(1) If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.*

*(2) A transaction shall be considered undervalued where the corporate debtor—*

*(a) makes a gift to a person; or*

*(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor,*

*and such transaction has not taken place in the ordinary course of business of the corporate debtor.*

27. In the present case, it cannot be said that any gift has been made by the Corporate Debtor in favour of Axis Bank Limited as there is a valuable consideration in the form of credit facilities availed by the wholly owned subsidiary of the Corporate Debtor, i.e. Respondent No. 1. In the corporate world it is normal practice to create an investment vehicle which holds various business ventures carried out in a separate legal entity. Such holding company assists and facilitates the funding of these legal entities. Further, the investments made by the holding company in the subsidiary company may necessitate provision of such guarantee to protect and preserve the value of such investments. Accordingly, it is imperative for such holding company to hold the hand of subsidiary company and guarantee its credit facilities. It must be appreciated that the value of the shares held by the Corporate Debtor is derived from the business of Respondent No. 1 company exclusively. In other words, the value of shares of the subsidiary company still remains available to the Corporate Debtor after satisfaction of lender's debt, if such subsidiary company is in a position to do so.

28. In the present case, it is not in dispute that Respondent No. 1 is the wholly owned subsidiary of the Corporate Debtor which was formed for the purpose of making investments and providing guarantee facility to such investee companies. The Respondents have placed on record the Memorandum of Understanding (“MOA”) of the Corporate Debtor, and the Object Clause of the MOA clearly states the following as the Objects of the Company-

*“(7) To guarantee the contracts obligations, debts, borrowing or accounts of this Company or any otherwise Company and for that purpose, to give or join in giving and to execute or endorse pronotes, drafts or other negotiable instruments, agreements and other documents.*

*(14) To take or otherwise acquire and hold shares in any Company promoted by this Company or in the promotion of which this Company may have joined or be interested or in any other Company having objects altogether or in part similar to those of this Company or carrying on any business capable of being conducted so as to directly or indirectly benefit this Company... ”*

29. A plain reading of the relevant objects clearly explains the objects for which the Corporate Debtor was incorporated, i.e. object of investing in other Companies and to assist them in raising finance. In the present case, the Corporate Debtor has pledged 30% of its holding in the Respondent No. 1 and has also provided a Non Disclosure Undertaking in relation to the remaining 70% shares to secure the credit facilities availed by Respondent No. 1. Hence, it can be said that the said act of pledging the shares in Respondent No. 1 company by the Corporate Debtor to secure finance for such company is in the ordinary course of business. Further, the wholly owned subsidiary is generally dependent on its parent company to facilitate raising of finances for its business in case it is required. Generally, it is the lenders who insist upon the promoters of the borrower to pledge their shareholding in the borrower company to secure the facility availed by such borrower company. Accordingly, the act of borrowing against the guarantee provided by the holding company in the form of borrowing company's shares is also in the ordinary course of business. Accordingly, we are of the considered view that this transaction is in the ordinary course of business qua the Corporate Debtor as well as the Respondent No. 1. Hence, the decision in the case of Anuj Jain is distinguishable and not applicable to the present case.

30. Accordingly, IA No. 1419/2021 is disposed of as dismissed.

Sd/-

**Prabhat Kumar**

Member (Technical)

/SP/

Sd/-

**Justice V.G. Bisht**

Member (Judicial)