

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

MA No. 1342 of 2018

IN

CP(IB) No. 247 of 2017

Under Section 43 and Section 44 of the Insolvency and Bankruptcy Code, 2016 r/w Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

MA No. 1342 of 2018

In the Application of

Mr. Sanjeev Maheshwari

...Applicant/

Resolution Professional

Versus

Varun Gas Logistics Private Limited & Ors.

...Respondents

In the matter of

Indian Bank Limited

...Financial Creditor

Versus

Varun Resources Limited

...Corporate Debtor

Order Delivered on : 16.04.2024

Coram:

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

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

Appearances:

For the Applicant : Ms. Fatima Barodawalla, Advocate

For Respondent No. 1 : Mr. Shyam Kapadia, Mr. Akash Agarwal,
Advocates

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Application bearing **IA No. 1342/2018** is filed by Mr. Sanjeev Maheshwari, the Resolution Professional of Varun Resources Limited (“**Applicant**”) in the Corporate Insolvency Resolution Process (“**CIRP**”) of Varun Resources Limited (“**Corporate Debtor**”) under Section 43 and 44 of the Insolvency and Bankruptcy Code, 2016 (“**Code**”) r/w Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 (“**CIRP Regulations**”) seeking the following reliefs:
 - a) To direct Varun Gas Logistics Limited to release a sum of Rs. 20 crores given by Varun Resources Ltd. towards the inter corporate deposits along with interest at the rate of 18% p.a. from 16 August 2016 until the date of realization;
 - b) To direct Varun Corporation Limited to release a sum of Rs. 1.63 crores given by Varun Resources Ltd. towards the inter corporate deposits along with interest at the rate of 18% p.a. from 23 June 2016 until the date of realization;
 - c) That pending the final hearing and disposal of this application, this Tribunal may direct Varun Gas Logistics Limited and Varun Corporation Limited to disclose on oath the assets including movable and/or immovable, bank accounts held/owned by the companies and create charge on the properties so disclosed in order to secure the monies payable to

Varun Resources Limited.

Brief Facts

2. This Tribunal initiated the CIRP of the Corporate Debtor vide Order dated 14.06.2017 and the Applicant herein was appointed as the Interim Resolution Professional. At the 1st CoC meeting held on 20.07.2017, the Applicant was confirmed as the Resolution Professional.
3. On 27.11.2017, the Resolution Professional appointed T.R. Chadha & Co. LLP (“**TRC**”), Chartered Accountants to carry out the special investigation review of the Corporate Debtor to identify and report preferential, undervalued, extortionate credit transactions and transactions to defraud creditors as defined under the Code.
4. The investigation was conducted for the period between 14.06.2015 to 13.06.2017 for related parties and for the period between 14.06.2016 to 13.06.2017 for other parties. The financials of the Corporate Debtor were analysed for the period ending up to 30.06.2017. The transactions as detailed below were impugned as preferential transactions in the investigation report.

Submissions made by the Ld. Counsel on behalf of the Applicant

5. On 23.06.2016, a deposit worth Rs. 4.89 crores was given to Varun Corporation Limited (“**VCL/Respondent No. 2**”), out of which Rs. 3.26 crores was refunded to the Corporate Debtor by Varun Corporation Limited on 22.06.2017. Hence, an amount of Rs. 1.63 crores is recoverable from them.
6. It is submitted that another inter corporate deposit of Rs. 20 crores was given to Varun Gas Logistics Private Limited (“**VGLPL/Respondent No.1**”) on 16.08.2016. However, these transfer of monies were not backed by any agreement entered between these companies and no justification was given by the parties regarding the purpose of giving these

amounts, repayment terms, etc. There are also no confirmations available on record by the parties as regards the amounts as due from their end to the Corporate Debtor.

7. It has also been submitted that the Corporate Debtor is undergoing CIRP on one hand, but has still made inter-corporate deposit to related parties without the approval of the lenders.
8. The Corporate Debtor has responded by stating that "*Axis Bank overdraft was facility active at the time of restructuring i.e.1-4-2015 with an overdrawn amount of Rs. 25.54 crores. This facility was repaid as agreed in JLM minutes dt. 7-4-2016 by IL & FS acquiring the loan of Axis Bank on account of Maharshi Bhavatreyya. This payment was made on 13-5-2016. The Axis Bank overdraft facility was renewed on 30.06.2016, which was then used to pay Varun Gas Logistics Pvt Ltd (VGLPL), in the form of a loan.*

This loan was given from VRL to VGLPL was not from the operating cash flows of VRL but from a specifically sanctioned overdraft facility and as this facility is not secured against any of the vessel of VRL, it does not impact the liquidation value to any bank in CoC."

9. The Applicant submits that the transactions were made during 2016, i.e. 2 years preceding the insolvency commencement date to related parties, i.e. Varun Gas Logistic Private Limited and Varun Corporation Limited, which fall under the definition laid down in Section 5(24)(i) and (j), respectively, of the Code. It is also submitted that these transactions have had the effect of minimizing instead of maximizing the value of the assets of VRL.
10. The Applicant has also mentioned the following two transactions that are sub-judice before the Hon'ble Bombay High Court and are still pending adjudication -

10.1 The Corporate Debtor has provided an unsecured loan of Rs. 115.93 crores along with advances worth Rs. 65.41 crores to Varun Asia Pte. Ltd. (“**VAPL/Respondent No.3**”), an associate company of the Corporate Debtor. The unsecured loan was disbursed in two tranches, Rs. 50.23 crores were disbursed in the FY 2015-16 and Rs. 65.70 crores were disbursed in the FY 2016-17. VAPL has refunded Rs. 38.27 crores in the FY 2015-16, therefore, Rs. 77.66 crores still remain outstanding from VAPL.

10.2 The Corporate Debtor has also invested Rs. 48.96 crores in preference shares of VAPL.

11. However, no relief has been prayed with respect to these transactions against Respondent No. 3, and these transactions have been placed on record only to inform the Tribunal.

Submissions made by the Ld. Counsel on behalf of the Respondents

Submissions advanced by Respondent No. 1

12. Respondent No.1 states that Respondent No. 2 was admitted into CIRP on 30.06.2017 and thereafter, the Tribunal directed that Respondent No. 2 be liquidated. Mr. Prakash K. Pandya is the Liquidator and the records, data, financial statements, etc. along with the affairs of the management of Respondent No. 2 are in his possession and hence, Respondent No. 1 has no submissions regarding deposit given to Respondent No.2.

13. As regards the inter-corporate deposit made to Respondent No. 1, it is submitted that Respondent No. 1 was in the process of acquiring a gas carrier vessel which was to be financed by Axis Bank Limited. In order to part finance the vessel, Respondent No. 1 borrowed Rs. 20 crores as inter-corporate deposit from the Corporate Debtor as an unsecured debt. On 28.09.2016, at the request of the Corporate Debtor, Respondent No. 1 addressed a Letter of Comfort (“**LOC**”) to Axis Bank Limited with

respect to a renewed overdraft facility of Rs. 25 crores afforded to the Corporate Debtor by Axis Bank Limited vide Sanction Letter dated 30.06.2016. Respondent No. 1 had stated in the said LOC that in fulfilment of the conditions of the aforesaid Sanction Letter, it is issuing the LOC and undertook to standby the obligation of the Borrower Company, i.e. the Corporate Debtor for the said overdraft facility of Rs. 25 crores. In the event the Corporate Debtor could not repay the said amount, Respondent No. 1 undertook to repay the outstanding amount to Axis Bank Limited as per the manner stipulated therein.

14. It is also submitted that Respondent No. 1 has repaid Rs. 5 crores to Axis Bank Limited under the LOC towards the overdraft facility afforded by Axis Bank Limited to the Corporate Debtor and therefore the liability of the Corporate Debtor towards Axis Bank Limited has been reduced to that extent as the Corporate Debtor could not repay the loan.

15. Respondent No.1 submits that as per the terms of the ICD from the Corporate Debtor, any payment made by VGLPL to Axis Bank Limited under the LOC is to be treated as repayment towards the ICD from the Corporate Debtor. Since the Corporate Debtor is now under liquidation and therefore unable to repay Axis Bank Limited under this facility, Respondent No. 1 will continue to pay off this facility under the LOC and thereby reduce its liability to the Corporate Debtor over the course of time. This arrangement between the companies squarely refutes the contentions raised by the Applicant.

Submissions advanced by Respondent No. 2

16. Respondent No. 2 submits that the Applicant has not sought permission from the Adjudicating Authority to initiate any legal proceedings against Respondent No. 2 as laid down in Section 33(5) of the Code. Respondent No. 2 has undergone liquidation vide Order of the Tribunal dated 18.05.2018, whereas the Applicant has filed the present Application in

the month of November, 2018, i.e. after initiation of liquidation of Respondent No. 2.

17. It is Respondent No. 2's contention that the transaction impugned by the Applicant was in the ordinary course of business of Respondent No. 2, being the holding company of the Corporate Debtor. Respondent No. 2 holds 52.28% of paid-up share capital of the Corporate Debtor and had no business activities other than borrowing money from and lending the same to its subsidiaries and group companies. Respondent No. 2 has relied on its financial statements of FY 2015-16 and 2016-17 along with the ledger account of the Applicant in the books of Respondent No. 2 for the period between 01.04.2015 till date which shows several transactions including the impugned inter-corporate deposits.

18. Respondent No. 2 has emphasised that since the impugned transactions have been undertaken in the ordinary course of business, they lie outside the scope of Section 43 as provided for in the exception laid down in Section 43(3)(a) of the Code.

Submissions advanced by the Applicant by way of Rejoinder

Submissions relating to Reply of Respondent No. 1

18.1 The Applicant submits that the Sanction Letter dated 30.06.2016 is issued in the name of the Corporate Debtor (erstwhile Varun Gas Infrastructure Limited, hereafter referred to as VGIL) which has no connection whatsoever with Respondent No. 1 as Respondent No. 1 is a different entity from VGIL.

18.2 The transaction between Axis Bank Limited and the Corporate Debtor is an independent transaction, wherein the Corporate Debtor has borrowed Rs. 25 crores from Axis Bank Limited for business purpose like dry-docking expenses/pressing creditors and working capital.

- 18.3 There is no direct or indirect correlation of the borrowings from Axis Bank Limited with the inter-corporate deposits advanced by the Applicant to Respondent No. 1.
- 18.4 Respondent No. 1's claim of the LOC is not mentioned in the claim filed by Axis Bank Limited or the Sanction Letters. Respondent No. 1 has also not placed on record any request for such LOC from the Corporate Debtor.
- 18.5 Respondent No. 1 has also not placed on record any terms of inter-corporate deposit wherein they have claimed that payment made by Respondent No. 1 to Axis Bank Limited shall be treated as repayment towards the inter-corporate deposit received from the Corporate Debtor.
- 18.6 Also, stating that Respondent No. 1 has undertaken to pay Axis Bank Limited cannot itself be enough to place Axis Bank Limited higher on priority of payment above the secured lenders.
- 18.7 There is no link or correlation in the transaction between Axis Bank Limited and the Corporate Debtor and the Corporate Debtor and Respondent No. 1.

Submissions relating to Reply of Respondent No. 2

- 19.1 The Applicant submits that the Section 33(5) of the Code refers to "suits" and "other legal proceedings" to be filed in other forums and does not refer to applications to be filed before this Tribunal. Section 33(5) does not lay any prohibitions/restriction on a liquidator to file an application under Section 43, 45, 47, 49 and 50 of the Code. Moreover, it is the duty of the Liquidator under Section 35 of the Code to preserve the property of the Corporate Debtor to distribute the same in accordance with Section 53 of the Code. Therefore, it is the Applicant's

contention that obtaining leave of this Tribunal for filing the present application is not required.

19.2 As regards the contention that these transactions were undertaken in the ordinary course of business, the Applicant submits that the Corporate Debtor is in the business of shipping and not in the business of lending money. The Applicant also submits if these transactions did arise out of ordinary transactions, they should have been backed by agreements between the companies stating the purpose of lending the amounts, interest component payable and repayment terms, etc. which have not been produced in the present case.

Findings

19. Heard learned Counsel and perused the material available on record.
20. It is submitted that there are 4 impugned transactions, out of which 2 transactions involving Respondent No. 3, i.e. VAPL are sub judice before the Hon'ble Bombay High Court. The Applicant has not sought any reliefs against Respondent No. 3. Hence, we shall restrict ourselves to the examination of the remaining 2 transactions involving Respondent No. 1 and Respondent No. 2.
21. We shall first examine the transaction between the Corporate Debtor and Respondent No. 1. It is Respondent No. 1's contention that the purpose of the inter-corporate deposit received from the Corporate Debtor was to partly finance the acquisition of a gas carrier vessel, which was also being partly financed by Axis Bank Limited. The Corporate Debtor has submitted that the overdrawn amount of Rs. 25.52 crores had already been repaid on 13.05.2016, prior to renewal of the overdraft facility, by IL&FS acquiring the loan of Axis Bank Limited on account of Maharshi Bhavatreya and the impugned inter-corporate deposit was made to Respondent No. 1 using the funds from the overdraft facility renewed by

the Axis Bank Limited vide Sanction Letter dated 30.06.2016, not from the cash flow of the Corporate Debtor.

22. Respondent No. 1 has also placed on record a Letter addressed to Axis Bank Limited dated 27.09.2016 conveying their readiness to provide LOC for securing the renewal of overdraft facility of Rs. 25 crore availed by the Corporate Debtor. Respondent No. 1 has further relied on this LOC to describe an arrangement wherein any payment made by Respondent No. 1 to Axis Bank Limited under the LOC towards the overdraft facility shall be treated as repayment towards the inter-corporate deposit received from the Corporate Debtor, thereby reducing its liability towards the Corporate Debtor. Respondent No. 1 has submitted that payment of Rs. 5 crores has already been made to Axis Bank Limited under the LOC towards the overdraft facility, and that Respondent No. 1 shall continue to repay Axis Bank Limited pursuant to such arrangement.

23. One of the ingredients for holding a transaction as Preferential transaction is existence of “antecedent debt”. In this case, the debt itself came into existence on payment of Rs. 20.00 crores by the Corporate Debtor to Respondent No. 1 and there was no pre-existing debt also qua Axis Bank also at the time of payment of Rs. 20.00 crores to Respondent No. 1. The Corporate Debtor had advanced monies to Respondent No. 1. In order to provide the requisite funding to Respondent No. 1, the Corporate Debtor has merely acted as a conduit in the impugned transaction. Further, we note that the submissions of Respondent No. 1 find support in the Axis Bank Account Statement of the Corporate debtor placed on record, wherein it can be seen that the Corporate Debtor has transferred Rs. 20 crores to Respondent No. 1, which resulted in a debit balance of Rs. 24.91 crores. The said transfer has been made to Respondent No. 1 on 18.08.2016, and the LOC has been issued soon after, i.e. 28.09.2016 under which Respondent No. 1 has undertaken to shoulder the liability in case the Corporate Debtor is unable to repay the

same. Since the ultimate beneficiary of the Overdraft Facility is Respondent No. 1 and Respondent No. 1 is obligated to make repayments directly to Axis Bank Limited in terms of LOC issued in favor of Axis Bank, we are of the opinion that the liability of Respondent No. 1 qua the Corporate Debtor is being discharged under the LOC. Respondent No. 1 has already repaid the amount partly under the LOC and has undertaken to repay the entire amount to Axis Bank Limited, which shall discharge it of its liability in toto and shall not cause any prejudice to the Corporate Debtor. Further, when the amount was transferred to Respondent No. 1, it was neither a surety nor guarantor. Accordingly, the ingredient of existence of “antecedent debt’ is missing. In light of these facts and submissions, we find that the impugned transaction cannot be a preferential transaction as there was no antecedent debt which is a necessary ingredient of a preferential transaction. Hence, this transaction does not fall within the ambit of a preferential transaction as laid down in Section 43 of the Code.

24. Consequently, the claim filed by Axis Bank Limited in the Liquidation Process of the Corporate Debtor shall be reduced by the amount that Respondent No. 1 is obligated to repay under the LOC.

25. We shall now deal with the transaction between the Corporate Debtor and Respondent No. 2. Respondent No. 2 has submitted that the inter-corporate deposit has been received under the ordinary course of business from the Corporate Debtor and hence, does not fall within the scope of Section 43 of the Code. We find that, akin to the transaction with Respondent No. 1, the impugned transaction with Respondent No. 2 also does not tantamount to a preferential transaction as there is no antecedent debt owed to Respondent No. 2. It is important to note that Respondent No. 2 has also partly repaid the amount. Nonetheless, this does not negate the fact that Respondent No. 2 continues to owe Rs. 1.63 crores to the Corporate Debtor, as it is a receivable in the books of the Corporate Debtor. However, at this juncture, it becomes imperative to

note that the Code does not stipulate a recovery mechanism, which is what the Applicant is seeking. However, the Applicant is at liberty to recover proceedings.

26. Respondent No. 2 has also relied on Section 33(5) of the Code to state that the requisite approval has not been obtained from the Adjudicating Authority to file the present Application. However, this argument holds no ground as Section 33(5) of the Code bars institution of any suit or legal proceedings and application for determination of transactions in nature of avoidance transaction does not fall within that purview.
27. The Applicant has also prayed that pending the final hearing and disposal of this Application, this Tribunal may direct Respondent No.1 and Respondent No. 2 to disclose on oath the assets including movable and/or immovable, bank accounts held/owned by the companies and create charge on the properties so disclosed in order to secure the monies payable to Varun Resources Limited. However, we are of the view that such a direction may be issued only during the course of execution proceedings and such directions may be prayed at that juncture, if the need arises.
28. Accordingly, MA No. 1342/2018 is dismissed and disposed off accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

/SP/

Sd/-

Justice V.G. Bisht
Member (Judicial)