

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.78 of 2019

IN THE MATTER OF:

Mr. Sunil Goel

...Appellant

Versus

Guild Builders Private Limited & Ors.

...Respondents

For Appellant:

**Shri S.N. Jha, Senior Advocate
Dr. U.K. Chaudhary, Senior Advocate
Shri Neeraj Malhotra, Senior Advocate with
Shri Arpit Dwivedi, Shri Shubham Paliwal
Shri Prashant Jain and Shri Dhruv Gupta, Advocates**

For Respondents:

**Shri Ramji Srinivasan, Senior Advocate with
Shri Sagar Chakravarty, Ms. Sylona Mohapatra,
Shri Nikhil Ramdev and Shri Rakesh Kumar,
Advocates (Respondent No.1)**

J U D G E M E N T

A.I.S. Cheema, J. :

1. The Appellant, who is one of the original Petitioners, has filed this Appeal challenging the Order dated 15th March, 2019 passed by the National Company Law Tribunal, Chandigarh Bench, Chandigarh (NCLT - in short) in CA 435 of 2018 and CA 25 of 2019 filed with regard to the main Company Petition No.183/Chd/Hry/2018 which has been filed alleging oppression and mismanagement in Respondent No.1 Company (Guild Builders Private Limited) by other Respondents. The Appellant is aggrieved by the fact that NCLT passed protection Order in favour of the original Petitioners directing Respondents not to encumber shares of

Omaxe (Respondent No.14) held by Respondent No.1 Company only limited to 1,48,59,726 and not 4,11,81,726 shares which should have been treated as unencumbered as on 19th December, 2018.

The grievance relates to following parts of the Impugned Order:-

“35. Taking into consideration the above arguments and contentions and also taking into consideration that the shareholding of the petitioners in Guild is 24.64%, we direct that Guild will not make any type of encumbrance whether by way of pledge/lien/non Disposal Undertaking or otherwise of 1,48,59,726 shares of Omaxe held by Guild except on account of top-up required and/or margin calls. We further direct that in case further pledge of the shares is required in order to top-up and/or margin calls, Guild would file the statement to that effect before this Tribunal within one week of doing so with copy advance to the counsel opposite.

36. The directions given by order dated 19.09.2018 that Guild shall not issue fresh equity shares are continued.

37. The remaining prayers for interim relief are declined.

38. The prayer for interim relief in CP No.183/Chd/Hry/2018 is disposed of as above. CA Nos.435/2018 and 25/2019 are also disposed of as above and the interim order passed earlier is modified to the extent of direction relating to pledging of 1,48,59,726 shares only.”

2. This Appeal arises out of an Interim Order. We have heard Counsel for both sides with regard to what should be the Interim Order. We proceed to dispose this Appeal itself on admission stage.

3. Learned Counsel for the Appellant stated that the Company Petition has been filed by the Appellant and other Petitioners on 16.09.2018 against the Respondents raising various grounds of oppression and mismanagement. It is stated that in the matter, Notice was issued on 19th September, 2018 and Respondents were restrained from issuing any fresh equity. It is stated that thereafter the original Petitioners filed CA 435 of 2018 on 9th October, 2018 (Annexure – A-10) claiming that the Respondent Company – Guild Builders Pvt. Ltd. had on 12th September, 2018 further pledged 38,15,000 equity shares of Omaxe which were owned by Guild. It was also claimed that the Company – Guild in addition to giving loans and advances to Omaxe and its subsidiary and associated Companies, had been pledging its assets including the shareholding in Omaxe as collateral for financial assistance which were being availed by Omaxe group. It is stated that Respondents filed Reply (Annexure – A-11) and inter alia stated in para – 5 (Page – 670 of Appeal) as under:-

“Further, the shares of Omaxe Limited (Respondent no.14 Company) have been pledged by the Respondent no.1 Company on 14.08.2018 with respect to and in compliance of the terms and conditions of the said facility dated 30.03.2018 availed by Omaxe Chandigarh Extension Developers Limited and not the Respondent no.14 Company. Further, the Respondent no.1 company is ready and willing to commit that the shares of Omaxe Limited (Respondent no.14 Company) held by the Respondent no.1 Company which are not pledged / un-encumbered as on 16.12.2018 being 1,48,59,726 shares (One Crore Forty Eight Lakhs Fifty Nine Thousand Seven Hundred Twenty Six Only) shall not be pledged/encumbered by the Respondent no.1

Company except on account of top-up required and/or margin calls.”

It is stated that thereafter, NCLT passed Orders on 21st December, 2018 (Annexure – A-12) to the following effect:-

“Learned Senior Counsel for respondent No.1 submits that he will be filing the reply to the interim application today in the registry. Let the needful be done during the course of the day. Copy of the reply be supplied to the counsel for the petitioner. The petitioner may file the affidavit by way of counter at least 10 days before the date fixed with copy advance to the counsel opposite.

List the application on 20.02.2018. in the meanwhile, it is directed that in case further pledge of the shares is required, as per the statement made in the reply, in order to top-up and/or margin calls, the respondent No.1 company would file the statement to that effect before this Tribunal within one week of doing so with copy advance to the counsel opposite. It is stated on instruction by learned Senior Counsel for respondent No.1 company that other than the above respondent No.1 company would not create further pledge for the time being. This undertaking is taken on record.”

4. According to the learned Counsel for the Appellant, the Petitioners had then filed CA 25 of 2019 (Annexure – A-13) claiming that the statement made in the Reply dated 18th December, 2018 with regard to CA 435 of 2018 that the shares of Omaxe Limited to the extent of 1,48,59,726 only were “not pledged/unencumbered” was not correct. The Appellant submits that they brought it to the Notice of the learned NCLT that the Respondent No.1 Company – Guild had itself in disclosure letter dated 19th December, 2018 (Page – 696) given information to Bombay Stock Exchange by way of

disclosure under Regulation 31(1) and 31(2) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Regulations – in short) and informed that from 11,44,47,697 shares of Omaxe Limited held by Guild Builders Private Limited as on 19th December, 2018, the pledged shares were 7,32,65,971. The learned Counsel pointed out to the format (Page – 697 and 698) annexed with the letter to show that this itself shows that 4,11,81,726 shares of Omaxe held by the Guild were unencumbered. The Counsel pointed out that the 8th column in this Format has the heading “Type of Encumbrance (pledge/lien/non-disposal undertaking/others)”. According to the Counsel, if there was any type of encumbrance with regard to the concerned shares, the 8th column of the format required disclosure and as nothing was pointed out in this column, the defence taken by the Respondents before the NCLT that there were certain shares which were committed to the banks and so they had been excluded while giving the figure of 1,48,59,726 shares was unacceptable. It is argued similar is the situation with statement filed with National Stock Exchange. The Appellant claims that it was wrong on the part of the NCLT to have bound the Respondent so as not to encumber by way of pledge, lien, non-disposal including or otherwise limited only to the extent of 1,48,59,726 shares of Omaxe held by Guild. According to the Counsel, 4,11,81,726 shares should have been treated as unencumbered on 19th December, 2018.

5. Against this, the Learned Counsel for the Respondent Company referred to the Convenience Compilation filed by him and the Reply which was filed by the Company to CA 25/2019. With regard to the difference of numbers appearing in the Reply filed to CA 435 of 2018 and the letter which was sent to Bombay Stock Exchange, the submission of the Respondent Company is that for the purpose of running the affairs of the Company, it is required to commit certain shares which cannot be treated as shares which are pledged as such. It is argued that apart from pledged shares, there are other shares which are not free or/are committed and taking into consideration such mode of functioning, the Respondent Company had mentioned 1,48,59,726 as the shares of Omaxe which were free on 16.12.2018.

6. The Reply of the Company to CA 25/2019 (Annexure – A-15) in para – 8 and 9 may be reproduced to see the line of argument which the Respondent Company is making:-

“8. In this regard it may be noted that often, not only is there a commitment/lien on a certain number of value of shares in terms of the loan agreement, such shares are placed at the disposal of the lender and the lender takes shares into its own depository account without formally creating a pledge.

9. Illustratively, in the case of Indiabulls / IVL finance limited (“**IVL**”), the shares of Respondent no. 1 Company lying in its CDSL account are 1,55,50,000 shares (One Crore Fifty Five Lakhs Fifty Thousand only), out of which only 68,00,000 shares have been formally pledged i.e. still leaving 87,50,000 shares (Eighty Seven Lakhs Fifty Thousand only) in its account. However, in so far as the Respondent no.1

Company is concerned, all 1,55,50,000 shares (One Crore Fifty Five Lakhs Fifty Thousand only) stand duly encumbered. It may be pointed out that IVL can at any point of time create a pledge on the remaining free 87,50,000 shares (Eighty Seven Lakhs Fifty Thousand only) as well.”

7. The Learned Senior Counsel for the Respondent Company in order to make his point referred us to Annexure – R-4 in Reply to CA 25/2019 (copy of which has been filed by him at Page – 40 of the convenience compilation). The learned Counsel stated that this is Transaction Statement of Indiabulls Ventures Limited with regard to Respondent Company – Guild Builders. Referring to Statement of Account from 01.07.2017 to 25.01.2019 in relation to equity shares of Omaxe Limited, it is stated that this Transaction Statement along with Statement of Holdings (Page – 41 of the convenience compilation) needs to be perused. The statement of holdings (page – 41) may be reproduced which is as under:-

STATEMENT OF HOLDINGS AS ON 26-01-2019						
Sec Type	ISIN Company Under Liquidation Settlement ID	ISIN NAME	Current Bal. Free Bal	Safekeep bal. Locked in Bal. Pledge Setup Bal.	Pledged Bal. Earmarked Bal. Pledge Bal.	Value (Rs.)
EQ	INE800H01010	OMAXE LIMITED – EQUITY SHARES	15550000.000 8750000.000	0.000 0.000 0.000	6800000.000 0.000 0.000	3310595000.00

From the above statement, the learned Counsel argued that the “current balance” of the shares in the depository of Indiabulls was 1,55,50,000. For the purpose of transaction, Indiabulls treated 68,00,000 shares as “pledged”. It is argued that the statement indicates that 87,50,000 shares were “free balance”. For Indiabulls even if this was free balance, for the Respondent Company, however, it was committed shares and due to this, the Respondent Company treats such shares as not free from encumbrance and shares remained committed. Thus the difference in what was stated in Reply as was filed and Forms submitted to Bombay Stock Exchange and National Stock Exchange it is claimed.

8. Having gone through the material available and the submissions as mentioned above, we find that the learned NCLT while dealing with the defence of the Respondent Company, did not consider that the Company under the Regulations was filing information with the Bombay Stock Exchange and also National Stock Exchange which did not match with the defence which was being taken. If there were any committed shares, nothing stopped the Company from disclosing the same on the given date in the format which has been prescribed as annexed to letter dated 19th December, 2018 (Page – 696 to 698 of the paper book). What was being informed to the Authorities could not be simply ignored. The Regulations have been made in exercise of powers conferred under Section 30 read with Section 11(2)(h) of Securities and Exchange Board of India Act, 1992 with

the object of regulating acquisition of shares. Incomplete information submitted would be matter of concern.

9. For the above reasons, the figure “1,48,59,726” used by NCLT in the Impugned Order – paragraph – 35 and Paragraph – 38 is deleted and the Impugned Order dated 15th March, 2019 stands modified accordingly.

The appeal stands disposed accordingly. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

9th April, 2019

/rs/sk