

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

IA No. 2674 of 2021

IN

CP(IB) No. 1055 of 2017

Under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016

IA No. 2674 of 2021

In the Application of

Jammu and Kashmir Bank Limited

...Applicant

Versus

Jitender Kumar Jain

...Respondent/

Liquidator

In the matter of

Roofit Industries Limited

...Corporate Debtor

Order Delivered on : 21.03.2024

Coram:

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

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

Appearances:

For the Applicant : Mr. Dharmesh S Jan, Advocate

For the Respondent : Mr. Prakhar Tandon, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Application bearing **IA No. 2674/2021** is filed by Jammu and Kashmir Bank Limited (“**Applicant**”) in the Liquidation process of Roofit Industries Limited (“**Corporate Debtor**”) under the provisions of the Insolvency and Bankruptcy Code, 2016 (“**Code**”) seeking the following reliefs :

- a) Direct the Respondent to distribute the proceeds of sale of all the assets of the Corporate Debtor between the secured creditors, relinquishing security pursuant to Section 52 of the Code, equally in accordance with Section 53 of the Code without regard to holding of previous charge on a particular asset that was the subject matter of sale, or any ranking created or conferred in favour of such secured creditors.
- b) Direct the Respondent to call upon the secured creditors to bring back the amounts already received by them under Section 53(1)(b)(ii) of the Code on the basis of unequal distribution made by the Respondent having regard to their charge, ranking, contrary to the mandate of Section 53 of the Code and re-distribute such amount under Section 53(1)(b)(ii) of the Code equally amongst the secured creditors without having any regard to their respective rankings or charge on particular assets.

Brief Facts

2. The Applicant is a Financial Creditor of the Corporate Debtor and a member of the Stakeholders Consultation Committee (“**SCC**”) of the Corporate Debtor holding 1.15% share as per the amount admitted by the Liquidator. The Applicant held first ranking *pari*

passu charge on the stocks of raw material, semi-finished and finished goods, other consumables and book debts of the Corporate Debtor as well as second *pari passu* charge on certain fixed assets of the Corporate Debtor.

3. The Corporate Debtor was ordered to be liquidated by this Tribunal on 22.01.2018 and the Respondent herein was appointed as the Liquidator.
4. The Applicant filed its claim of Rs. 41,32,01,951.63 in Form D dated 14.02.2018 due as on 22.01.2018.
5. The Respondent proceeded to sell and liquidate various assets of the Corporate Debtor.
6. The Applicant relinquished its security interest to the liquidation estate to receive proceeds from sale of assets by the Respondent in the manner prescribed in Section 53 of the Code.

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

7. The Applicant has relied on the decision of the Hon'ble National Company Law Appellate Tribunal ("NCLAT") in the case of *Technology Development Board vs. Mr. Anil Goel and Ors.* to submit that except recognizing the status as secured creditors for the purposes of Section 53 of the Code, all other inter se priority rights, contractual or otherwise, amongst such secured creditors are required to be ignored. However, the above-mentioned Order of the NCLAT has been stayed by the Hon'ble Supreme Court.
8. The Respondent informed the Applicant that 8 out of the 9 immovable properties of the Corporate Debtor had been sold and provided the details of distribution vide e-mail dated 26.08.2021. The Applicant

was distributed an amount of Rs. 77,339 as its share in the Silvassa property.

9. It is the Applicant's case that according to the details of distribution provided, the Respondent distributed the proceeds selectively only to the secured creditors holding charge on specific assets and further sought to create a class within the class under Section 53 of the Code proposing that the first charge holders relinquishing security interest should be paid in priority and precedence over the second charge holders, and not in equal proportion as provided by Section 53 of the Code.

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

10. The Respondent submits that at the relevant time, the Regulations had not prescribed any specific method for a secured creditor to relinquish their security interest to the liquidation estate and there was also ambiguity relating to the manner in which the inter-se priorities amongst the secured financial creditors were to be dealt with.
11. The Respondent filed a Miscellaneous Application bearing M.A. No. 117/2018 seeking an interpretation of Section 52 and 53 of the Code, specifically the manner in which the inter-se priorities amongst the secured financial creditors were to be treated. The Tribunal, vide Order dated 15.03.2018 dismissed the Application as misconceived.
12. The Respondent filed an Appeal against the above-mentioned Order vide Company Appeal (AT)(Ins) No. 214 of 2018 before the Hon'ble NCLAT, New Delhi, which was partly allowed vide Order dated 26.07.2018. The Applicant did not participate in this Appeal.
13. Accordingly, the Respondent relied on the interpretation that the inter-se priorities between secured financial creditors are not affected by the relinquishment of security interest to the liquidation estate. The

Respondent, vide letter dated 27.07.2018, informed the secured financial creditors of the arrangement contemplated and asked them to consider if they want relinquishment of their security interest.

14. In response, the Applicant vide email dated 20.08.2018, agreed to relinquish their security interest to the liquidation estate and accepted that the position of law was that priorities inter-se secured financial creditors would be protected and would not be affected by relinquishment of security interest to the liquidation estate.
15. It is the Respondent's contention that the Applicant had not objected to this interpretation of law and is now estopped from seeking relief under the present Application.

Findings

16. Heard learned Counsel and perused the material available on record.
17. The issue before us is this - **How are inter se priorities between secured financial creditors to be treated upon relinquishment of their security interest while distributing sale proceeds in liquidation under Section 53 of the Code?**
18. In order to answer this question, we note that the 2018 Insolvency Law Committee Report had addressed this issue and reported the following-

“...the Committee was of the opinion that it is sufficiently clear from a plain reading of section 53(1)(b) that it intended to rank workmen's dues equally with debts owed to secured creditors who have relinquished their security. Section 53(1)(b) does not talk about priority inter-se secured creditors. Thus, valid inter-creditor/subordination agreements would continue to govern their relationship. Further sub-section (2) of section 53 must also be

interpreted accordingly. For instance, applying section 53(2) in the context of section 53(1)(b), any agreements between workmen and secured creditors which disrupts their pari passu rights will be disregarded by the liquidator. However, agreements inter-se secured creditors do not disturb the equal ranking sought to be provided by section 53(1)(b) and therefore do not fall within the ambit of section 53(2). The Committee felt that there was no requirement for an amendment to the Code required since a plain reading of section 53 was sufficient to establish that valid inter-creditor and subordination provisions are required to be respected in the liquidation waterfall under section 53 of the Code.”

19. This interpretation of Section 53 of the Code regarding treatment of inter se priorities in the liquidation waterfall mechanism was also supported by the 2020 Insolvency Law Committee Report wherein it was suggested that an Explanation be inserted under Section 53(2) to clarify the correct interpretation of the Section, as explained in the First ILC Report.
20. However, the suggestions made in the above-mentioned Reports have not yet taken the shape of law. There has been no amendment in the existing IBC framework that protects the inter-se priorities of secured financial creditors in the liquidation waterfall mechanism. Nonetheless, we note that the Law Committee had deliberated this aspect at length and had only advised insertion of the explanation to clarify the position. It is trite law that explanation merely seeks to explain the law as it stands and does not enlarge the scope of the main provision. Accordingly, it can be said that the Insolvency Law Committee was in favour of respecting inter se priorities after taking note of **A Ramaiya, Guide to the Companies Act (17th edn, LexisNexis 2010) 5297** stating that subordination agreements inter-se creditors were respected in winding up proceedings.

21. We note that the Hon'ble National Company Law Appellate Tribunal ("NCLAT") has held in *Technology Development Board v. Anil Goel & Ors. [Company Appeal (AT) (Insolvency) No.731 of 2020]* that secured creditors who release their security interest during liquidation under Section 53 of the Insolvency & Bankruptcy Code, 2016, do not receive inter-se priority. The relevant paragraph from the judgement is reproduced below-

"10. In "ICICI Bank vs. Sidco Leathers Ltd. & Ors. (2006) 10 SCC 452", the Hon'ble Apex Court, while taking note of Section 48 of Transfer of Property Act, observed that the claim of first charge holder shall prevail over the claim of the second charge holder and where debts due to both the first charge holder and the second charge holder are to be realised from the property belonging to the mortgager, the first charge holder will have to be repaid first. The Hon'ble Apex Court observed that while enacting the Companies Act parliament cannot be held to have intended to deprive the first charge holder of the said right. Such a valuable right must be held to have been kept preserved. It referred to an earlier judgment titled 'Workmen of Firestone Tyre and Rubber Company of India vs. Management & Ors.' observing that if such valuable right of first charge holder was intended to be taken away, Parliament, while amending the Companies Act would have stated so explicitly. The view taken by the Adjudicating Authority on the basis of judgment of Hon'ble Apex Court in "ICICI Bank vs. Sidco Leathers Ltd. (supra)" (which is pre-IBC), ignoring the mandate of Section 53 of I&B Code which has an overriding effect and came to be enacted subsequent to the aforesaid judgment rendered by Hon'ble Apex Court explicitly excluding operation of all Central and State legislations having provisions contrary to Section 53 of I&B Code, is erroneous and cannot be supported.

11. *For the foregoing reasons the impugned order holding that the inter-se priorities amongst the Secured Creditors will remain valid and prevail in distribution of assets in liquidation cannot be sustained.”*

22. The NCLAT has also held in *Oriental Bank of Commerce vs. Anil Anchalia [Comp. App. (AT) (Ins.) No. 547 of 2022]* that this issue is no more *res integra* in view of the judgement of the Hon’ble Supreme Court in *India Resurgence ARC Private Limited vs. Amit Metaliks Limited and Anr. [2021 SC OnLine SC 409]* and held that upon relinquishment of their security interest, the secured creditors of a corporate debtor cannot exclusively claim any amount realized from the secured assets and will be governed by the waterfall mechanism as provided under Section 53 of the Code. However, we find that the decision in the case of *India Resurgence ARC* (supra) was in the context of CIRP process. Accordingly, the decision is not applicable to the present facts of the case.

23. We are cognisant of the fact that appeals have been filed against the above-mentioned judgements of the NCLAT viz. *Technology Development Board v. Anil Goel & Ors.* and *Oriental Bank of Commerce vs. Anil Anchalia* before the Hon’ble Supreme Court. However, these appeals are still pending adjudication and there is a stay on operation of *Technology Development Board* (supra) and the decision in the case of *Oriental Bank of Commerce* (supra) is tagged along.

24. It is also to be noted that the NCLT, Hyderabad Bench has recently, in the case of *PTC India Financial Services Ltd. v. Vikas Prakash Gupta & Ors. and Indo Unique Flame Limited v. Vikas Prakash Gupta & Anr. [IA. No. 1341 of 2022 and I.A. No.254/2023 in CP (IB) No. 377/7/HDB/2018]* held the same position, i.e., Section 53(1) of the Code does not recognize any inter-se ranking of charges among the financial creditors of a corporate debtor, as existing before the

initiation of its CIRP, for the distribution of sale proceeds during liquidation.

25. On careful examination of the present case along with the case laws, we are of the considered view that the Insolvency Law Committee Report has opined after considering the following principles emerging from the decision of the Hon'ble Supreme Court in the case of ***ICICI Bank Limited v. SIDCO Leathers Limited & Ors [(2006) 10 SCC 452]***.

- a) *Right to property was a constitutional right and right to recover money lent by enforcing a mortgage was also a right to enforce an interest in the property. Had the Parliament intended to take away such a valuable right of the first-charge holder, there was no reason for it to not state so explicitly.*
- b) *Section 48 of the Transfer of Property Act, 1882 ("TOPA") clearly provides that claim of a first charge holder shall prevail over the claim of a second charge holder.*
- c) *Merely because the relevant section did not specifically provide for the rights of priorities over mortgaged assets, it would not mean that the provisions of section 48 of TOPA shall stand obliterated in relation to a company that has undergone liquidation.*
- d) *Deprivation of a legal right existing in favour of a person cannot be presumed in construing a statute and it is in fact the other way round and thus, a contrary presumption shall have to be raised.*
- e) *Companies Act may be a special statute but if the special statute does not contain any provisions dealing with contractual and other statutory rights between different secured creditors, the specific provisions contained in the general statute shall prevail.*
- f) *Section 529(1)(c) used the phrase "the respective rights of secured and unsecured creditors." This was to be interpreted as rights of secured creditors vis-à-vis unsecured creditors. It does not envisage respective rights amongst secured creditors.*

26. Accordingly, the Committee opined that the principles stated above that emerge from the ICICI case are also applicable to the issue at hand under section 53 of the Code.

27. We are of the considered opinion that the reasoning of the Insolvency Law Committee on this issue is in accordance with the position as available under the Companies Act also and is in accordance with the expectation of the financial creditor emerging out of the contractual arrangement between the creditor and the borrower in relation to their security interest. Accordingly, we have no hesitation to hold that the inter se priority of the secured creditor in relation to charge over the security must be respected and the distribution out of liquidation proceeds in that class should be in accordance with such inter se priority.

28. In light of the above, we hold that the Liquidator has distributed the sale proceeds in accordance with the Section 53 of the Code.

29. Accordingly, IA No. 2674/2021 is dismissed.

Sd/-

Prabhat Kumar
Member (Technical)

/SP/

Sd/-

Justice V.G. Bisht
Member (Judicial)