

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.731 of 2020

[Arising out of Order dated 27th February, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmadabad Bench, Ahmadabad in I.A. No. 514 of 2019 in C.P. (IB) No. 04 of 2017]

IN THE MATTER OF:

Technology Development Board

Through – Assistant Law Officer
Vishwakarama Bhavan, Wing ‘A’,
Shaheed Jeet Sing Marg,
New Delhi – 110 016.

...Appellant

Versus

1. Mr. Anil Goel

Liquidator of Gujarat Oleo Chem Limited (GOCL),
AAA Insolvency Professional LLP,
E-104, Kailash Colony, Greater Kailash -1,
New Delhi – 110 048.

2. Stressed Asset Stabilisation Fund,

5th Floor, IDBI Tower, WTC Complex,
Cuff Parade, Mumbai – 400 005.

3. Gujarat State Finance Corporation,

Block No. 10, Udyog Bhavan,
Gandhinagar – 382017.

....Respondent

Present:

For Appellant: Mr. P. Vinay Kumar, Advocate & Ms. Nalini Negi, AR.

**For Respondents: Mr. Kanishk Khetan, Advocate with Mr. Anil Goel,
Liquidator for R-1.
Mr. Pranab Kumar Mullick, Ms. Soma Mullick and
Mr. Deepak Kochhar, Advocates for R-2.
Mr. Indravadan R. Patel, Advocates for R-3.**

J U D G M E N T

BANSI LAL BHAT, J.

The issue raised for consideration in this appeal is whether there can be no sub-classification inter-se the Secured Creditors in the distribution mechanism adopted in a Resolution Plan of the Corporate Debtor as according priority to the first charge holder would leave nothing to satisfy the claim of Appellant who too is a Secured Creditor.

2. For determining the issue a brief reference to the facts is inevitable. I.A. No. 514 of 2019 in CP (IB) 404/2017 was filed by the Appellant – ‘Technology Development Board’ being a Financial Creditor of ‘Gujarat Oleo Chem Ltd.’ – the Company under liquidation. It was asserted in the application before the Adjudicating Authority (National Company Law Tribunal) Ahmadabad Bench, Ahmadabad that the Appellant was part of the Committee of Creditors (CoC) having voting share of 14.54% in Corporate Insolvency Resolution Process (CIRP) of ‘Gujarat Oleo Chem Ltd.’ and had lodged its claim for Rs.24,78,68,595/- with the Liquidator, who while did not call for meeting of Creditors for one and a half years but upon inability of Appellant to attend meeting of Creditors scheduled for 9th May, 2019 informed the Appellant that the sale proceeds had been distributed amongst ‘Stressed Asset Stabilisation Fund’ (Respondent No. 2) and ‘Gujarat State Finance Corporation’ (Respondent No. 3) as security charge holders and distributed Rs.9,59,03,179 to Respondent No. 2 and Rs.1,59,99,480 to

Respondent No. 3. The Appellant was aggrieved that its claim as Secured Creditor was not considered. The Appellant contended before the Adjudicating Authority that the distribution by the Liquidator was not in consonance with the provisions of the Insolvency and Bankruptcy Code, 2016 (for short 'I&B Code') more particularly as the Appellant's claim was admitted and it was granted voting rights. The Appellant stressed that the distribution had to be as per the admitted claims of Secured Creditors as per their voting rights and the Appellant having 14.54% share was entitled to Rs.1,62,70,647 in the total proceeds which have been wrongly distributed by the Liquidator. Respondent No. 1 (Liquidator) contended before the Adjudicating Authority that due to failure of CIRP, process for liquidation of Corporate Debtor was set in motion on 17th January, 2018 and the decision on distribution of sale proceeds was made in accordance with Section 53 of I&B Code. It was submitted that the Liquidator made the distribution of the liquidation proceeds based on the interpretation of Section 53(2) as given in para 21 of the Report of Insolvency Law Committee dated 26th March, 2018. Upon consideration of rival submissions, the Adjudicating Authority was of the view that the inter-se priorities amongst the Secured Creditors would remain valid and prevail in distribution of assets in liquidation. Appellant's application (I.A. No. 514 of 2019) was held to be non-maintainable.

3. Learned counsel for Appellant would submit that when the Company went into liquidation, Appellant being one of the Secured Creditors filed its proof of claim which was acknowledged in first CoC meeting as also in fourth CoC Meeting. Voting share of 14.54% was assigned to Appellant.

Proof of claim in Form B was filed for a total claim of Rs.24.78 Crores, which was confirmed by the Liquidator vide email dated 1st March, 2018. However, subsequently Liquidator had called for a meeting of the stakeholders to be held in Mumbai on 9th May, 2019 which the Appellant could not attend as he was in Delhi, however, the Liquidator went ahead with the meeting. The security charge sheet provided amount of Rs.9,59,03,179/- to Respondent No. 2 and Rs.1,59,99,480/- to Respondent No. 3. No amount was paid to the Appellant. It is further submitted that the Appellant objected to the disbursement of the sale proceeds and claimed a sum of Rs.1,62,70,647/- on the basis of holding 14.54% voting share. The Liquidator, while stating that the claim of Rs.24.78 Crores was admitted on the basis of the security interest held by the Appellant, took the stand that distribution of sale proceeds to Respondent No. 2 and 3 being first charge holders was as per Para 21 of Insolvency Law Committee Report and since the Appellant only had second charge, no amount was payable from the sale proceeds. It is further submitted that the Secured Creditors relinquished their security interest to the liquidation estate and thus forfeited their right on the assets. The only right available to them was to receive proceeds from the sale of assets in the manner provided in Section 53. It is submitted that the priority of charge i.e. first charge or second charge loses its significance on relinquishment of the security interest and the sale proceeds are put in a common pool of money to be distributed in accordance with Section 53 of I&B Code which does not provide for further classification of Secured Creditors. When the asset itself is non-existent and rights attached with it

are relinquished, there is no question of claim in priority on the basis of being first charge holder. It is further submitted that the first charge holders would have got priority in the event they had not relinquished their rights but having relinquished their rights, Section 53 mandating equal ranking among Secured Creditors would come into play and the sale proceeds will have to be distributed equitably among the Secured Creditors irrespective of their priorities held before such relinquishment.

4. Per contra it is submitted on behalf of Respondent No. 1 (Liquidator) that the Appellant was not entitled to any amount disbursed to the Secured Creditors as the Appellant was admittedly a second charge holder. It is further submitted that the Appellant had not raised any objection to the charge sheet circulated by the Liquidator and the Liquidator disbursed the amount received from the sale of assets to Respondents 2 and 3 on the basis of understanding of para 21.6 of the Insolvency Law Committee Report dated 26th March, 2018 with regard to waterfall treatment of Section 53 of I&B Code. It is submitted that the distribution of sale proceeds is in accordance with the judgment of Hon'ble Apex Court in "*ICICI Bank Ltd. vs. Sidco Leathers Ltd. & Ors.*" - Appeal (Civil) 2332 of 2006, decided on 28th April, 2006. Reliance was also placed on Section 48 of the Transfer of Property Act. The Liquidator has also placed reliance on judgment of this Appellate Tribunal in "*J M Financial asset Reconstruction Co. Ltd. vs. Finquest Financial Solutions Pvt. Ltd. & Ors.*", which held that only the first charge holder i.e. the Secured Creditor being highest in the inter creditor

ranking is entitled to enforce his right for the realization of its debt out the secured asset.

5. Learned counsel for Respondent No. 2 would submit that the Appellant cannot be said to hold second charge over immovable properties of Corporate Debtor as it failed to produce requisite documents before the Liquidator. It is submitted that in absence of certificate issued by ROC no charge shall be taken in account by Liquidator or any other creditors. It is further submitted that voting share during CIRP does not entitle the Appellant to get the same share in liquidation. The two processes are entirely different as on liquidation CoC comes to an end and voting rights do not subsist any longer. The creditors would rank in liquidation in accordance with their class and security held. It is further submitted that Section 48 of Transfer of Property Act gives precedence to first charge holder over a second charge holder in respect of an immovable property. Section 53 of I&B Code does not take away that right on relinquishment.

6. Heard learned counsel for the parties and perused the record. Sections 52 and 53 of I&B Code relevant for our purposes are reproduced hereinbelow:-

“52. Secured creditor in liquidation proceedings. –

(1) A secured creditor in the liquidation proceedings may—

(a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or

(b) realise its security interest in the manner specified in this section.

(2) Where the secured creditor realises security interest under clause (b) of sub-section (1), he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.

(3) Before any security interest is realised by the secured creditor under this section, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either—

(a) by the records of such security interest maintained by an information utility; or

(b) by such other means as may be specified by the Board.

(4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.

(5) If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing off the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.

(6) The Adjudicating Authority, on the receipt of an application from a secured creditor under sub-section (5) may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force.

(7) Where the enforcement of the security interest under sub-section (4) yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall—

(a) account to the liquidator for such surplus; and

(b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.

(8) The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

(9) Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in clause (e) of sub-section (1) of section 53.

53. Distribution of assets. – *(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority*

and within such period and in such manner as may be specified, namely :—

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following :—

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:—

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.—For the purpose of this section—

(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) the term “workmen’s dues” shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013.”

7. Sections 52 & 53 form part of Chapter III dealing with Liquidation Process. Chapters I to VII are incorporated in Part II of I&B Code dealing with Insolvency Resolution and Liquidation for Corporate Persons. This arrangement under the legal framework would demonstrate that insolvency resolution and liquidation for Corporate Persons is interlinked but treated distinctly from insolvency resolution and bankruptcy for Individuals and Partnership Firms falling under Part III of I&B Code. Section 52, being a part of the liquidation process prescribes one of the two courses which, at its option, a Secured Creditor can adopt in liquidation proceedings:

- (i) The Secured Creditor may relinquish its security interest to the liquidation estate. If it does so, it shall be entitled to receive proceeds from sale of assets by Liquidator in accordance with the waterfall mechanism engrafted in Section 53; or
- (ii) The Secured Creditor may realise its security interest as provided in Section 52 of I&B Code.

Section 52(2) provides that in the event of the Secured Creditor choosing to realise the security interest, it shall inform the Liquidator of such security interest and also identify the asset subject to such security interest to be realised. It shall be the duty of the Liquidator to verify such security interest and permit the Secured Creditor to realise only such security interest the existence of which is proved in the prescribed manner. Section 52(4), further dealing with realisation of security interest provides the mode of realisation of security interest and application of proceeds to

recover the debts due to it. It is abundantly clear that the realisation of security interest is directly linked with the asset subject to such security interest to be realised. On the other hand, Section 53 deals with distribution of assets by providing that the proceeds from the sale of liquidation assets shall be distributed in the order of priority laid down in the Section. The provision engrafted in Section 53 has an overriding effect over all other laws in force. The vital distinction between the two provisions viz. Section 52 and Section 53 lies in regard to realisation of interest with Section 52 providing option to the Secured Creditor in liquidation proceedings to choose between relinquishment of its security interest and realisation of its security interest while Section 53 is confined to mode of distribution of the proceeds from the sale of the liquidation assets. While the realisation of security interest can be exercised only qua the asset which is subject to such realisable security interest, relinquishment of security interest to the liquidation estate would leave the Secured Creditor entitled to claim distribution in the proceeds from the sale of the liquidation assets. It is therefore clear that while the security interest bears direct and proximate nexus with the asset subject to such security interest, relinquishment of such security interest divests the Secured Creditor of enforcing its security interest qua the secured assets thereby rendering him subject to operation of Section 53 whereunder he would be entitled to distribution in order of priority enshrined therein out of the proceeds from the sale of liquidation assets. Section 53(1)(b)(ii) provides that the debts owed to a Secured Creditor, in the event of such Secured Creditor having relinquished security

in the manner set out in Section 52 shall rank equally between and among the two sub-categories classified under Clause (b) viz. workmen dues for period of 24 months preceding the liquidation commencement date and the debts owed to a secured Creditor who relinquished its security interest. In order of priority beneficiaries classified under clause (b) would rank next only to clause (a) viz. insolvency resolution process cost and liquidation costs paid in full.

8. While it is true that the relinquishment of security interest affects the order of distribution, it is equally true that the Secured Creditor does not lose its status of being a Secured Creditor though he has elected to forego his right of enforcing security interest. Whether the Secured Creditor holds first charge or second charge is material only if the Secured Creditor elects to realise its security interest. A conjoint reading of Sections 52 and 53 of I&B Code, leaves no room for doubt that the legislature in its wisdom thought it proper to provide an option to the Secured Creditor armed with a security interest to choose out of the two options viz. either enforce security interest against the asset out of liquidation estate which is the subject of security interest or relinquish the same and claim as Secured Creditor in the manner set out under Section 53(1)(b)(ii) ranking equal to other Secured Creditors. It is manifestly clear that in the event of a Secured Creditor electing to realise its security interest but failing to realise the whole amount due to it would be entitled to distribution of assets under Section 53(1)(e)(ii) for any amount that remains unpaid following the enforcement of security interest thereby ranking lower in priority as compared to a Secured Creditor

who has relinquished its security interest to the liquidation estate and is entitled to distribution of assets under Section 53(1)(b)(ii). Once a Secured Creditor elects to relinquish its security interest to the liquidation estate, it ranks higher in waterfall mechanism under Section 53 to a Secured Creditor who has enforced its security interest but failed to realise its claim in full and for the unpaid part of its claim ranks lower to the Secured Creditor who has relinquished its security interest. Viewed in this context the argument advanced that sub-classification amongst Secured Creditors is impermissible cannot be accepted. Section 52 incorporating the doctrine of election, read in juxtaposition with Section 53 providing for distribution of assets treats Secured Creditor relinquishing its Security interest to the liquidation estate differently from a Secured Creditor who opts to realise its security interest, in so far as any amount remains unpaid following enforcement of security interest to a Secured Creditor is concerned by relegating it to a position low in priority. The two sets of Secured Creditors, one relinquishing the security interest and the other realising its security interest are treated differently. A creative interpretation has to be given to the provisions to make them workable and stand in harmony. It is significant to note that Section 53 has been given overriding effect and the non-obstanate clause contained in the very opening words of the Section leaves no room for doubt that the distribution mechanism provided thereunder applies in disregard of any provision to the contrary contained in any Central or State law in force. Of course first charge holder will have priority in realising its security interest if it elects to realize its security

interest and does not relinquish the same. However, once a Secured Creditor opts to relinquish its security interest, the distribution of assets would be governed by the provision engrafted in Section 53(1)(b)(ii) whereunder all Secured Creditors having relinquished security interest rank equally and in the waterfall mechanism are second only to the insolvency resolution process costs and the liquidation costs.

9. The Appellant's claim that it was initially having first charge on the immovable and movable assets of the Company which was later changed to second charge is disputed by the Respondents by contending that in absence of Appellant substantiating its claim of holding second charge over immovable properties of Corporate Debtor and no certificate having been issued by ROC to such effect, no charge on the part of Appellant could be taken into account by the Liquidator. Voting share of 14.54% assigned to Appellant was material during CIRP proceedings but would not extend to allotting commensurate share to Appellant in liquidation proceedings. The creditors rank in liquidation as per their class and security interest. The Secured Creditors admittedly having relinquished their security interest to the liquidation estate, Section 53 would come into play and the Secured Creditors viz. Appellant and the Respondents 2 and 3 shall rank equally under Section 53(1)(b)(ii) for distribution of assets. Admittedly, Respondents 2 and 3 were first charge holders. They would have enjoyed priority in the event they had not relinquished their security interest. Once they elected for relinquishment of security interest, for distribution of assets they would be governed by the waterfall mechanism recognised under Section 53 of the

I&B Code mandating equal ranking amongst the Secured Creditors. Sale proceeds in such case have to be distributed equitably amongst the Secured Creditors who rank equally and it would be irrespective of any charge they were holding prior to relinquishment of security interest.

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.

12. We accordingly allow the appeal and set aside the impugned order. I.A. 514 of 2019 in CP(IB) No. 04/2017 is held to be maintainable and we allow the same with direction to the Liquidator to treat the Secured Creditors relinquishing the security interest as one class ranking equally for distribution of assets under Section 53(1)(b)(ii) of I&B Code and distribute the proceeds in accordance therewith.

**[Justice Bansi Lal Bhat]
Acting Chairperson**

**[Dr. Ashok Kumar Mishra]
Member (Technical)**

**[Dr. Alok Srivastava]
Member (Technical)**

NEW DELHI

5th April, 2021

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