

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 1510 of 2019**

**[Arising out of Impugned Order dated 20th November 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Chennai Bench, Chennai in Miscellaneous Application No.1052 of 2019 in Company Petition (IB) No. CP/646/CB/2017]**

**IN THE MATTER OF:**

**Mr Srikanth Dwarakanath, Liquidator of  
Surana Power Limited – In Liquidation  
Having its Registered Office at:  
F-67, 68 & 69, SIPCOT Industrial Complex  
Gummudipoondi, Thiruvallur – 601201  
Tamil Nadu, India**

**...Appellant**

**Versus**

**Bharat Heavy Electricals Limited  
A Company incorporated under the  
provisions of the Companies Act, 1956  
Having its Registered Office at:  
"BHEL House", Siri Fort,  
New Delhi – 110049**

**...Respondent**

**Present:**

**For Appellant : Mr Puneet Singh Bindra and Mr Akash Singh,  
Advocates**

**For Respondent : Mr Punit Tyagi and Ms Swastika Chakravarti,  
Advocates  
Mr P.L. Narayanan and Mr G Balaji, Advocates**

**J U D G M E N T**

**[Per; V. P. Singh, Member (T)]**

This Appeal emanates from the Impugned Order dated 20<sup>th</sup> November 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Chennai Bench, Chennai, whereby the Adjudicating Authority has dismissed the Miscellaneous Application No.1052 of 2019 in Company Petition (IB) No. CP/646/CB/2017 for seeking permission to cause the sale

of assets of the Surana Power Limited in Liquidation under Regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016, based on the consent given by a majority of Secured creditors. The Parties are represented by their original status in the main petition for the sake of convenience.

2. Brief facts of the case are as follows:

The Adjudicating Authority has admitted the Company Petition mentioned above under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short '**I&B Code**') for initiation of CIRP vide Order dated 20<sup>th</sup> January 2019. When no resolution was approved, then Corporate Debtor was ordered to be liquidated, and Appellant was appointed as Liquidator. After that during liquidation, the Respondent succeeded in Arbitration proceeding against the Corporate Debtor and exparte award was passed in favour of the Respondent. Based on the Arbitral Award the Respondent had been granted lien over the equipment and goods lying at the site of the Corporate Debtor (Secured Assets) and charged over its entirely or partially erected facilities at the site of the Corporate Debtor was created. The Secured Assets, on which the Respondent had been granted lien or a charge is the one which is already hypothecated to all other Secured Creditors vide Hypothecated Deed dated 24<sup>th</sup> September 2010.

3. The Liquidator could not commence a liquidation process on account of the some of the secured lenders not intimating in time about their decision concerning relinquishment of their securities. The Respondent is

one of the last Secured Creditor who remain to intimate about the decision on relinquishment.

4. After that vide letter dated 23<sup>rd</sup> August 2019 the Respondent informed about unwillingness to relinquish their Security Interest in the Asset of the Corporate Debtor. Further, all the Secured Creditors have relinquished their Security Interest into the liquidation estate of the Corporate Debtor except the Respondent. Consequently, the Secured Creditors with a value of 73.76% of the secured assets have relinquished the Security Interest into the liquidation estate. However, the Liquidator was unable to proceed with any further sale of assets without the receipts of relinquishment of Security Interest from all the Secured Creditors to whom the said assets are charged. In the circumstances, as stated above, the Liquidator filed a Misc. Application No.1052 of 2019 seeking permission from the Adjudicating Authority to sell the assets of the Corporate Debtor. The said Application was rejected by the Adjudicating Authority by the Impugned Order, feeling aggrieved by this Order; this Appeal has been preferred.

5. This Appeal has been filed mainly on the ground that:

- i) That the Adjudicating Authority has failed to appreciate that ten out of eleven Secured Creditors, representing together 73.76% (in value of the admitted claims) of the total Secured assets have relinquished their Security Interest into the liquidation estate and only because of the Respondent, who has decided not to relinquish its Security Interest, the Liquidator is unable to proceed any further with the sale of assets.

- ii) The Adjudicating Authority has further failed to appreciate that the Secured Creditors other than the Respondent had a prior charge over the Secured Assets by a deed of hypothecation executed in the year 2010 i.e. much before the Arbitral Award dated 24<sup>th</sup> January 2018.
- iii) It is further contended that the Adjudicating Authority has failed to consider that the Secured Assets on which the Respondent has a lien or a charge are also hypothecated to all other Secured Creditors vide Clause 3(vii) of the Deed of Hypothecation dated 24<sup>th</sup> September 2010.
- iv) The Adjudicating Authority has failed to appreciate that the Code does not provide for different categories of Secured Creditors neither based on nature of Charge/Security Interest nor based on the ranking of the respective charge.
- v) The Adjudicate Authority has also failed to appreciate that the Appellant/Liquidator is to attempt to undertake the sale of the Corporate Debtor on a slump sale basis, which is not possible if the Security Interest of the Respondent is not relinquished.
- vi) The Respondent in its Written Submissions contends that the Respondent has exercised its rights in terms of Section 52 of the Code. Under Section 52(1)(b) Respondent chose to realize its security interest as per provision of Section 52(iv) of the Code. The Respondent's right under Section 52 is unqualified and

unbridled. It is further contended that exercise of the Respondent's right under Section 52 cannot be subjected to the majority of the Secured Creditors, who have relinquished their Security Interest. It is also contended that the Corporate Debtor never acquired unencumbered right, title or interest in the goods. Consequently, the hypothecation of the goods by the Corporate Debtor to the Banks would always be subject to the Respondent's lien.

6. Heard the arguments of the Learned Counsel for the parties and perused the records.

7. The Learned Adjudicating Authority has rejected the Application mainly on the ground that BHEL is a Secured Creditors, entitle to proceed under Section 52 to realize its Security Interest. The Appellant Liquidator cannot cause the sale of asset filing under Section 52 in the manner as specified under Section 53 of the Code unless the charge holder relinquishes the Security Interest.

8. It is essential to point out that all the Secured Creditors having a value of 73.76% in the Secured Assets have relinquished their Security Interest to the liquidation estate to the Corporate Debtor, to enable the Liquidator to proceed under Regulation 32 of the IBBI (Liquidation Process), Regulations, 2016 and dispose of the assets of the Corporate Debtor. However, on account of the Respondent refusal to relinquish its Security Interest and in the light of the proviso to Regulation 32, the Liquidator can

sell the Assets on the receipt of the relinquishment of Security Interest by all the Secured Creditors having charge over the Secured Assets.

9. Appellant further contends that due to Respondent refusal to relinquish their Security Interest deadlock situation is created wherein the Appellant is not able to sell the Secured Creditors due to the legal bar of the proviso to Regulation 32 of the Liquidation Process Regulations, which requires the relinquishment from all the Secured Creditors before proceeding with the sell of such Secured Assets.

10. The Adjudicating Authority has held that the Respondent's lien has a preference over the charge created in favour of the remaining Secured Financial Creditors.

11. The Appellant contends that the view taken by the Adjudicating Authority is violative of the waterfall mechanism as provided under Section 53 of the Code.

12. Appellant further contended that during the pendency of Appeal, the Respondent's had addressed a letter dated 27th January 2020 to the Appellant which was received by the Appellant on 01st February 2020, *interalia*, notifying their intention to realize the Security Interest concerning the Secured Asset.

13. It is essential to point out that the Adjudicating Authority has failed to appreciate that all the Secured Creditors are on the same footing regardless of the mode of creation of charge.

14. In this case, the Respondent happens to be a Secured Operational Creditor by an Arbitral Award dated 24th January 2018 by which the Respondent claims lien over the supplied equipment and goods lying at the site of the Corporate Debtor. It is important to mention that soon after passing this Award, CIRP started against the Corporate Debtor. Admittedly, all other Secured Creditors (Financial Creditors) relinquished their Security Interest to the liquidation estate. But a deadlock situation is created because the Respondent refuses to relinquish its Security Interest. Therefore, in the light of proviso to Regulation 32 to the Liquidation Process Regulation, the Liquidator cannot proceed to sell the assets of the Corporate Debtor, despite more than 73% of the Secured Creditors having relinquished their Security Interest.

15. It is pertinent to mention that the Respondent is also a Secured Creditor at par with the remaining ten other Secured Creditors. Enforcement of security interest is governed by the SEC 13 of the SARFAESI Act. As per terms of Section 13(9) of the SARFAESI Act, 2002 any steps about the realization of assets by the Secured Creditors requires confirmation from the Creditors having at least 60% of the value of total debt. The relevant provision is as under:

***"13. Enforcement of security interest.—(1)***  
*Notwithstanding anything contained in Section 69 or Section 69-A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.*

*(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).*

*[Provided that—*

*(i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and*

*(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee;]*

*(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.*

*[(3-A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate [within fifteen*



*days] of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:*

*Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17-A.]*

*(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:—*

*(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;*

*[(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:*

*Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:*

*Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;]*

*(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;*

*(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.*

*(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.*

*(5-A) Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorized by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.*

*(5-B) Where the secured creditor, referred to in sub-section (5-A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of Section 13.*

*(5-C) The provisions of Section 9 of the Banking Regulation Act, 1949 (10 of 1949) shall, as far as may be, apply to the*

*immovable property acquired by secured creditor under sub-section (5-A).]*

*(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.*

*(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.*

*[(8) Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,—*

- (i) the secured assets shall not be transferred by way of lease assignment or sale by the secured creditor; and*

*(ii) in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.]*

***(9) [Subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of] financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than [sixty per cent] in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:***

*Provided that in the case of a company in liquidation, the amount realized from the sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act, 1956 (1 of 1956):*

*Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such Company, who opts to realize his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of Section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the Liquidator in accordance with the provisions of Section 529-A of that Act:*

*Provided also that Liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of Section 529-A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the Liquidator shall intimate the estimated amount or workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the Liquidator:*

*Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the Liquidator:*

*Provided also that the secured creditor shall furnish an undertaking to the Liquidator to pay the balance of the workmen's dues, if any.*

*Explanation.—For the purposes of this sub-section,—*

*(a) "record date" means the date agreed upon by the secured creditors representing not less than [sixty per cent] in value of the amount outstanding on such date;*

*(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.*

*(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction*

*or a competent court, as the case may be, for recovery of the balance amount from the borrower.*

*(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relating to the secured assets under this Act.*

*(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorized in this behalf in such manner as may be prescribed.*

*(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor."*

16. In the present case, the Secured Creditors which 73.76% in value have already relinquished the Security Interest into the liquidation estate. Thus, it would be prejudicial to stall the liquidation process at the instance of a single creditor having only 26.24% share (in value), in the secured assets. The Respondent does not hold a superior charge from the rest of the Secured financial creditors in the secured Assets. The above provision of SARFAESI Act will be applicable in this case to end this deadlock, and the decision of 73.76% of majority Secured Creditors, who have relinquished the Security Interest shall also be binding on the dissenting secured creditors, i.e. Respondent.

17. Learned Counsel for the Respondent has placed reliance on the decision of the Hon'ble Tribunal passed in case of JM Financial Asset Reconstruction Company Ltd. Vs. Finquest Financial Solutions Pvt. Ltd. and Others 2019 SCC OnLine NCLAT 918.

18. In the above mention case, this Appellate Tribunal has held that:

*"27. Section 52(1)(b) allows a 'Secured Creditor' during liquidation proceeding to realize its 'security interest' in the manner specified in the said Section.*

*28. If Section 52 is read in its totality, then it will be evident that a 'Secured Creditor' as per sub-section (2) of Section 52, realizes its 'security interest' under clause (b) of sub-section (1), is required to inform the Liquidator of such 'security interest' and identify the asset subject to such 'security interest' to be realized.*

*29. As per sub-section (3) of Section 52, before any 'security interest' is realized by the 'Secured Creditor' under Section 52, on receipt of Application, the Liquidator is required to verify such 'security interest' and permit the 'Secured Creditor' to realize only such 'security interest', the existence of which may be provide 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. Therefore, it is clear that it's the Liquidator, who is to permit the 'Secured Creditor' to realize 'security interest' after proof of the existence' security interest' in accordance with clauses (a) and (b) of subsection (3) of Section 52.*

*30. As per sub-section (4) of Section 52, a 'Secured Creditor' may enforce, realize, settle, compromise or deal with the secured assets in accordance with such law as is applicable to the*

*'security interest' being realized and to the 'Secured Creditor' and apply to the proceeds to recover the debts due to it.*

**31.** *Under sub-section (5) of Section 52, if in the course of realization of 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 under sub-section (6) of Section 52. Otherwise in normal course, there is no provision to file an application under Section 52 before the Adjudicating Authority for enforcement of any right by 'Secured Creditor'.*

**32.** *As noticed above, the Application under sub-section (6) of Section 52 can be filed before the Adjudicating Authority and the Adjudicating Authority on receipt of such an application from the 'Secured Creditor' under sub-section (5), who in the course of realization of a secured asset faces resistance from the 'Corporate Debtor' or any person connected therewith in taking possession of, selling or otherwise disposing off the security.*

**33.** *Sub-section (7) of Section 52 provides that after enforcement of 'security interest' under sub-section (4) of Section 52, if an amount by way of proceeds is in excess of the debts due to the 'Secured Creditor', the 'Secured Creditor' is required to deposit the same in the account of the Liquidator.*

**34.** *Therefore, it is clear that after enforcement of right under Section 52 by one of the 'Secured Creditor', no other 'Secured Creditor' can enforce his right subsequently for realization of the amount for the same secured assets, as the excess amount by way of proceeds pursuant to the first enforcement is deposited in the account of the Liquidator.*



**35.** *In view of the above position, we hold that only one 'Secured Creditor can enforce his right for realization of its debt out of the secured assets as per Section 52.*

**36.** *There is nothing on record to suggest that 1st Respondent has moved before the Liquidator in terms of sub-section (2) of Section 52 for realizing the 'security interest'. It is also not clear whether the records of such 'security interest' has been maintained by an information or utility or in the manner as specified by the Board or verified by the Liquidator.*

**37.** *It is not the case of 1st Respondent, who as 'Secured Creditor', who wanted to realize, settle, compromise or deal with the secured assets or applied to proceed with recovery of the debts due to it in accordance with law.*

**38.** *In absence of any allegation that there is resistance in recovering the secured assets, the question of entertaining the Application by the Adjudicating Authority under sub-section (6) of Section 52 does not arise. Therefore, we hold that except the manner as prescribed under sub-section (2), (3) and (4) of Section 52, if a 'Secured Creditor' directly applies before the Adjudicating Authority for allowing it to recover the secured assets under sub-section (6) of Section 52, such Application is not maintainable.*

**39.** *As in the present case, we find that all the 'Secured Creditors' have claimed right over the same secured asset, which is 91% of the total secured asset and particularly when a suit is pending for declaration, as to which 'Secured Creditors' has the first charge, in such a case, it was not open to the Adjudicating Authority to allow the Application filed by the 1st Respondent to realize the 'security interest' under Section 52.*

**40.** *In any case, as the Adjudicating Authority has no jurisdiction to entertain the Application under sub-section (6) of*

*Section 52 in absence of any cause of action as per sub-section (5) of Section 52, the Application preferred by 1st Respondent is not maintainable.*

**41.** *In the present case, as the Liquidator has abdicated its power and the Adjudicating Authority without any jurisdiction by the impugned Order dated 10th May 2019 directed the Liquidator to handover the symbolic possession of the fixed assets of the 'Corporate Debtor' to Finquest Financial Solutions Pvt. Ltd. with a finding that the said Applicant is entitled to realize the 'security interest' without noticing the aforesaid provisions as discussed above, the impugned Order dated 10th May, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai cannot be upheld. The aforesaid impugned Order is accordingly set aside.*

**42.** *The matter is remitted to the Liquidator to proceed in accordance with law, following Section 53 r/w Section 52 of the I&B Code. If one or more 'Secured Creditors' have not relinquished the 'security interest' and opt to realize their 'security interest' against the same very asset in terms of Section 52(1)(b) r/w Section 52(2) & (3), the Liquidator will act in terms of Section 52(3) and find out as to who has the 1st charge ('security interest') from the records as maintained by an information utility or as may be specified by the Board and pass an appropriate order. If any dispute is pending before the Court of Law, the question as to who has the exclusive 1st charge, the Liquidator may inform the same to the parties and may proceed as per Section 52(3) of the I&B Code. The Appeal is allowed with the aforesaid observations and directions. No costs."*

19. It is pertinent to mention that the facts of the present case are different from that in the case of JM Financial Asset Reconstruction

Company Ltd. (supra) because in this case, the Liquidator has already concluded that the respondents charge on the Secured Assets is not exclusive. Therefore, the Respondent can realise a Security Interest as per provision Section 13(9) of the SARFAESI Act. Since the Respondent does not have a requisite 60% value in Secured Interest, therefore, the Respondent does not have right to realize its security interest, because it would be detrimental to the Liquidation process and the interest of the remaining ten Secured Creditors.

20. In the circumstances, as stated above, we allow the Appeal and set aside the impugned Order dated 20<sup>th</sup> November 2019 and direct the Appellant/Liquidator to complete the Liquidation Process in the light of direction above. No order as to costs.

[Justice Venugopal M.]  
Member (Judicial)

[V. P. Singh]  
Member (Technical)

[Shreesha Merla]  
Member (Technical)

**NEW DELHI**  
**18<sup>th</sup> JUNE, 2020**

*pks/nn*