

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 593 of 2019

[Arising out of Order dated 10th May, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in M.A. No.1392/2019 in C.P. No.382/IB/MB/MAH/2018]

IN THE MATTER OF:

JM Financial Asset Reconstruction Company Ltd.
3rd Floor, B Wing,
Suashish IT Park, Plot No.68E,
Off. Dattapada Road,
Opp. Tata Steel, Borivali (East),
Mumbai – 400066.

.... Appellant

Versus

1. Finquest Financial Solutions Pvt. Ltd.
602, Boston House, Next to Cinemax,
Suren Road, Andheri (East),
Mumbai – 400093.Respondent No.1
2. Mr. Ravi Shankar Devarakonda,
Liquidator of the Corporate Debtor,
Reid & Taylor (India) Ltd.,
Marathon Innova IT Park,
B2/501 & C – 501,
5th Floor, Off. G.K. Marg,
Lower Parel (West), Mumbai 400 013. Respondent No.2
3. Edelweiss Asset Reconstruction Company
(Acting in its capacity as Trustee EARC Trust)
Edelweiss House, Off. CST Road,
Kalina, Mumbai – 400 098. Respondent No.3
4. L&T Finance Limited,
Brindavan, Plot No.177,
C.S.T. Road, Kalina
Santacruz (East), Mumbai – 400 098. Respondent No.4
5. Bank of India,
Plot No.C-5, G-Block,
Bandra-Kurla Complex,
Bandra (East), Mumbai – 400 051. Respondent No.5
6. Union Bank of India,
Asset Recovery Branch,
66/80, Union Bank Building,

- 5th Floor, Mumbai Samachar Marg,
Fort Mumbai. Respondent No.6
7. Punjab National Bank,
Asset Recovery Management Branch,
C-91, 1st Floor, PNB Pragati Tower,
G Block, Bandra Kurla Complex,
Bandra East, Mumbai – 400 051. Respondent No.7
8. Asset Reconstruction Company (India) Ltd.,
The Ruby, 29,
Senapati Bapat Marg,
Dadar (West), Mumbai. Respondent No.8

Present:

For Appellant: Mr. Darpan Wadhwa, Senior Advocate,
Mr. Abhishek Anand, Mr. Tushar Tyagi,
Mr. Toyesh Tiwari, Advocates

For Respondents: Mr. Kaustubh Prakash, Advocate for Respondent
No.2.

Ms. Nimita Kaul, Advocate for Respondent No.3.

**Mr. Amit Singh Chauhan with Mr. Hemant
Chauhan, Advocates for Respondent No.4.**

**Mr. Sanjeev Sagar with Ms. Nazia Parveen,
Advocates for Respondent No.6.**

**Mr. Rajesh Kumar Gautam, Ms. Khushboo
Aggarwal, Mr. Vibhu Sharma, Advocates for
Respondent No.7.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

A Miscellaneous Application was filed by Finquest Financial Solutions Pvt. Ltd. under Section 60(5) r/w Section 52 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the '**I&B Code**') and Regulation 37 of the Insolvency and Bankruptcy Board of India (Liquidation

Process) Regulations, 2016 before the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in the Liquidation proceeding against Reid and Taylor India Limited ('Corporate Debtor') with prayer to permit it (Applicant) to sell/ dispose of the secured assets of the 'Corporate Debtor', more particularly the assets mentioned in Annexure 1 and 2 therein to realize its 'security interest' in accordance with the provisions of the I&B Code.

2. The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench by 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. (Applicant) with observation that the said Applicant is entitled to realize the 'security interest' as provided under Section 52(1)(b) r/w Regulation 37 of the IBBI (Liquidation Process) Regulations, 2016.

JM Financial Asset Reconstruction Company Limited, one of the 'Secured Financial Creditor' of the same very asset has challenged the impugned order dated 10th May, 2019.

3. Learned Counsel for the Appellant submitted that the Adjudicating Authority failed to consider that 1st Respondent sought to exclusively realize its alleged 'security interest' under Section 52 of the I&B Code by standing outside the liquidation process to the exclusion of other 'Secured Creditors' of the same very asset. It was submitted that the Adjudicating Authority has passed the order without appreciating the fact that 1st Respondent - Finquest Financial Solutions Pvt. Ltd. proceeded on the mistaken belief that it has an exclusive first charge over the secured assets mentioned in Schedule-1 and

that it is legally entitled to enforce the alleged 'security interest' to the detriment of similarly placed secured 'Financial Creditors' of the 'Corporate Debtor'.

4. According to the learned Counsel for the Appellant, the 1st Respondent is not entitled to unilaterally enforce the alleged 'security interest' over which other 'Financial Secured Creditors' (having more than 75% of the debt of 'Corporate Debtor') also have a legally binding first charge over the same secured asset. The fact that the Appellant and the other lenders are first *pari-passu* charge holders over the property mentioned in Schedule-1 is also admitted by the 1st Respondent.

5. It was contended that the Adjudicating Authority whilst passing the impugned order, failed to appreciate that it has no power under Section 52 r/w Regulation 37 of the IBBI (Liquidation Process) Regulations, 2016 to decide disputed question of fact with regard to realization of 'security interest' by a 'Secured Creditor'. Further, while passing such impugned order, the Adjudicating Authority failed to notice that it has no such power to decide inter-se issue of priority of charges between the 'Secured Creditors'.

6. Learned Counsel appearing on behalf of 'Liquidator' (2nd Respondent) made a limited submission with regard to unpaid CIRP cost and unpaid Liquidation cost to keep the 'Corporate Debtor' running as going concern. Referring to Section 36(3) of the I&B Code, it was submitted that the said liquidation estate shall comprise all liquidation estate assets, including the assets of the 'Corporate Debtor', in respect of which a 'Secured Creditor' has relinquished 'security interest'. Therefore, where any 'Secured Creditor' does not relinquish or realizes the 'security interest' over an asset in terms of

Section 52 of the I&B code, the said asset shall not form part of the liquidation estate. It was mentioned that the asset in question, i.e., the Mysore Plant, which 1st Respondent sought to realize its ‘security interest’ over, amounts to approximately 91% of the total assets of the ‘Corporate Debtor’. Therefore, liquidation estate in the present case, would comprise of the remaining 9% of the total assets of the ‘Corporate Debtor’. The sale proceeds to be generated from the sale of Mysore Plant would likely to be substantially less than the debt amount due towards 1st Respondent, hence, no excess amount/ surplus fund in terms of Section 52(7) of the I&B code would be tendered to the Liquidator.

7. The details in respect of the claims admitted for ‘Financial Creditors’ during the ‘Liquidation’ period and the corresponding security available for realization as has been shown, are as follows: -

	Finquest	Other FCs
Admitted claim in Liquidation	INR 1141.24 Cr	INR 3735.07 Cr
Value of assets that are available for realization	INR 165.51 Cr (Value of immovable and movable fixed assets as per Letter received from Finquest intimating price at which it proposes to realise the assets (INR 165.51 Cr))	~INR 2 Cr (Realizable value Current assets – Non-moving and slow-moving inventory, netted off with any advance received against sale/ jobwork. Receivable from debtors age over 1 year and company has negligible amount of cash and cash equivalents)

8. It is informed that admitted Liquidation claim of Finquest Financial Solutions Pvt. Ltd. is Rs.1141.24 crores, whereas admitted Liquidation claim of other ‘Financial Creditors’ is Rs.3735.07 crores. The liquidation value of 91% of the total assets, if allowed in favour of the Finquest Financial Solutions Pvt. Ltd., would be Rs.165.51 crores, which will be less than

Rs.1141.24 crores. On the other hand, for other 'Secured Creditors' against the same secured assets, against Rs.3735.07 crores, only a sum of Rs.2 crores will be realized from 9% of the rest of the total assets of the 'Corporate Debtor'.

9. Learned Counsel appearing on behalf of 1st Respondent submitted that 1st Respondent - Finquest Financial Solutions Pvt. Ltd. is the sole first charge holder *qua* the Mysore Plant of the 'Corporate Debtor' on the basis of the documents available on record. The alleged claim of 3rd Respondent – Edelweiss Asset Reconstruction Company of sharing the first *pari passu* charge along with 1st Respondent-Finquest Financial Solutions Pvt. Ltd. is untenable, false and misleading, as they were aware that same was subject to a NOC from 1st Respondent- Finquest Financial Solutions Pvt. Ltd., which was never granted to the said Appellant.

10. It was contended that the Adjudicating Authority has held that there is no disputed question with respect to who the first charge holder is, and therefore, the question of decision on undisputed facts does not arise. Learned Counsel for the 1st Respondent-Finquest Financial Solutions Pvt. Ltd. submitted that the said Respondent is the sole first charge holder over the Mysore Factory assets. Reliance has been placed on Memorandum of Entry dated 12th June, 2009 in favour of India Debt Management Pvt. Ltd. and IDM's Assignment Deed dated 31st August, 2016, which were issued in favour of 1st Respondent. Reliance has also been placed on ICICI Bank's Assignment Deed dated 10th October, 2016 to 1st Respondent- Finquest Financial Solutions Pvt. Ltd. and also to the Index of Charges of the 'Corporate Debtor' as per records of the Ministry of Corporate Affairs website.

11. Therefore, according to the learned Counsel for the 1st Respondent-Finquest Financial Solutions Pvt. Ltd., Respondent Nos.3 to 8 are holders of 'Second or Subservient Charges' over the assets of the 'Corporate Debtor'. Respondent No.3-Edelweiss Asset Reconstruction Company and Respondent No.4-L&T Finance Limited alleged first charge was subject to NOC from R1-Finquest Financial Solutions Pvt. Ltd.

12. Learned Counsel for the Appellant placed reliance on Section 52(1) of the I&B Code, which provides for two routes to realise 'security interest' as mentioned in clauses (a) and (b) therein. It was submitted that 1st Respondent-Finquest Financial Solutions Pvt. Ltd. did not relinquish its 'security interest' as per Section 53 of the Code, but chose to enforce it under Section 52(1)(b) by filing a Miscellaneous Application. According to him, Section 52(1)(b) provides for a mechanism where a 'Financial Creditor' can enforce the 'security interest', which is undisputed and is prior/ superior to the claims of other 'Secured Creditors' holding charge over the subject assets. To enforce the 'security interest' under Section 52(1)(b), the Creditor must either have 'exclusive charge' or 'sole first charge', which would enable it to enforce its 'security interest'.

13. Reliance has also been placed on Transfer of Property Act, 1881, which recognizes the principle of 'first charge'. Section 48 of the Transfer of Property Act states that the right to payment of a first charge holder shall prevail over all subsequent or subservient charges created on the same asset.

14. Learned Counsel for the 3rd Respondent-Edelweiss Asset Reconstruction Company Limited submitted that equitable and fair treatment of 'Secured Creditors' should be made as held by this Appellate

Tribunal and the Hon'ble Supreme Court in numerous cases. According to him, there is a dispute regarding first charge, which has not yet been adjudicated by the Senior Civil Judge, Taluka Nanjangud, District Mysore, Karnataka in Suit No.84 of 2013. The adjudication regarding the first charge on the 'security interest' by the Adjudicating Authority in the impugned order is wrong in view of the pendency of the aforesaid suit preferred by 1st Respondent in May 2013, prior to the proceedings initiated under the IBC Code.

15. It was further submitted that there is no distinction made between the 'Secured Creditors' under the IBC Code. Referring to decision of this Appellate Tribunal in **"S.C. Sekaran vs. Amit Gupta & Ors. – Company Appeal (AT) (Insolvency) No.495 & 496 of 2018"** and **"Y. Shivram Prasad vs. S. Dhanapal & Ors. – Company Appeal (AT) (Insolvency) No.224 of 2018"** disposed of on **27th February, 2019**, it is submitted that the Liquidator has not followed the procedure under Sections 230-232 of the Companies Act, 2013 to save the 'Corporate Debtor' from Liquidation.

16. The 5th Respondent–Bank of India is a consortium leader and holds a charge over the property namely - Thandya Industrial Estate at Thandavapura, Taluka Nanjangad, District-Mysore mortgaged to Appellant, 1st Respondent and 3rd Respondent. It was submitted that the Adjudicating Authority without appreciating the fact, has passed the impugned order allowing the Application filed by 1st Respondent on the wrong presumption that 'security interest' was exclusively mortgaged to Respondent No.1 and the documents on record support the claim of 1st Respondent as first charge holder of all immovable properties of the 'Corporate Debtor'. Ministry of

Corporate Affairs' portal depicts the register of charges created in favor of 1st Respondent way back in 17th September, 2009.

17. It was submitted that 1st Respondent along with Member Banks namely – UCO Bank (assigned to Appellant – JM Financial Asset Reconstruction Company Limited), Lakshmi Vilas Bank and ICICI Bank, held the 'security interest' on a *pari passu* charge basis and was duly recorded in the Memorandum of Entry dated 16th June, 2012 by the 'Corporate Debtor' in favour of IDBI Trusteeship Services Ltd. 1st Respondent was not entitled to be given possession of the 'security interest' for being appropriated towards its dues for the reason that such action would give undue advantage to one of the 'Secured Creditor' over the other and would lead to a situation where the consortium funding would become difficult and futile.

18. We have heard learned Counsel for the parties and perused the record.

19. The Adjudicating Authority in impugned order dated 10th May, 2019, while giving details of list of fixed assets of the 'Corporate Debtor' as shown in Annexure-1 and Annexure-2 has also noticed the Memorandum of Entry dated 12th June, 2009 and Assignment Deed dated 31st August, 2016 as executed between IDM (Assignor) and Finquest Financial Solutions Private Limited (Assignee), other records including Assignment Agreement dated 10th October, 2016 executed between ICICI Bank Limited and Finquest Financial Solutions Private Limited were also noticed apart from first *pari-passu* charge over the Schedule-A properties and second charge over the Schedule B properties. Statement of claims filed by the Liquidator has also been recorded while passing the impugned order and giving a direction in favour of 1st Respondent.

20. The Adjudicating Authority in the impugned order dated 10th May, 2019 has perused the copy of Suit No.84 of 2013 filed in the Court of Civil Judge, Sr. Division at Nanjangud, Karnataka by IDM as a first charge mortgage for enforcement of their 'security interest'. The written statement filed therein on 19th September, 2013 by UCO Bank and case status was also noticed. Though, the aforesaid facts were noticed by the Adjudicating Authority, it has not deliberated into issue whether in such circumstances, while there is a pendency of the suit, stated to be filed by 1st Respondent-Finquest Financial Solutions Private Limited (Assignee), it was proper for it to pass any order on such issue of first charge over the secured assets in question.

21. From the record we find that a Recovery Certificate has been issued by the Debts Recovery Tribunal in O.A. No.711/2015, wherein it has been ordered that Edelweiss Asset Reconstruction Company, along with other Banks are entitled to recover a sum of Rs.2495,49,98,442.20/-. It was further ordered that in case of failure to pay the said amount within 30 days, i.e., by 19th January, 2017, they are entitled to recover the same from the sale of the scheduled properties, which includes the immovable property of the 'Corporate Debtor' at Mysore.

22. The Adjudicating Authority, though noticed the aforesaid fact, but inspite of the same has proceeded to pass the order giving a finding that 1st Respondent has first charge over the secured assets in question, which is 91% of the assets of the 'Corporate Debtor'.

23. Section 53 relates to 'distribution of assets'. Clause (b)(ii) of Section 53 relates to '*debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52*'.

24. "Secured Creditor" is defined in Section 3(30) means "*a creditor in favour of whom security interest is created*'.

25. "Security Interest" is defined in Section 3(31) means as follows: -

"3(31) "Security Interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee;"

26. Therefore, it is clear that a 'Creditor' in whose favour right of 'security interest' has been created, i.e., right, title or interest or a claim to property, which includes mortgage, charge, hypothecation or assignment from relinquish its 'security interest' or may claim under Section 52 of the I&B Code, which reads as follows: -

"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 of 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.”

27. Section 52(1)(b) allows a ‘Secured Creditor’ during liquidation proceeding to realise 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, realises 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 realise 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 realise 'security interest' after proof of the existence 'security interest' in accordance with clauses (a) and (b) of sub-section (3) of Section 52.

30. As per sub-section (4) of Section 52, a 'Secured Creditor' may enforce, realise, 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 realise 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 realise 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 realise 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.

[Justice S. J. Mukhopadhaya]
Chairperson

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

(Kanthi Narahari)
Member (Technical)

NEW DELHI

11th December, 2019

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