

S.No.1

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
06-07-2023 AT 10:30 AM**

IA (IBC) 1341/2022 & IA (IBC) 254/2023 in CP (IB) No. 377/7/HDB/2018
u/s. 7 of IBC, 2016

IN THE MATTER OF:

State Bank of India

...Financial Creditor

VS

Varam Bioenergy Private Limited

...Corporate Debtor

C O R A M:-

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)**

ORDER

IA (IBC) 1341/2022

Orders pronounced, recorded vide separate sheets. In the result, this Application is allowed and disposed of.

IA (IBC) 254/2023

Orders pronounced, recorded vide separate sheets. In the result, this Application is allowed and disposed of.

**Sd/-
MEMBER (T)**

**Sd/-
MEMBER (J)**

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – I**

**IA.NO. 1341 OF 2022
IN
CP (IB) No. 377/7/HDB/2018**

*Under Section 60(5) of the Insolvency & Bankruptcy Code, 2016 read with rule
11 of the National Company Law Tribunal Rules, 2016.*

IN THE MATTER OF

State Bank of India

... Petitioner

V/s.

Varam Bioenergy Private Limited

... Corporate Debtor

IN THE MATTER OF

PTC India Financial Services Limited
Through authorized Representative,
Ms. Priyadharshini Singh
Office at 7th Floor, Telephone Exchange Building
8 Bhikaji Cama Place
New Delhi-110066

... Applicant

And

1. Vikas Prakash Gupta
Resolution Professional of Varam
Bioenergy Private Limited
G-19, Shreewardhan Complex,
Mezzanine Floor, Besides Landmark
Building, Ramdaspath, Wardha Road, Nagpur,
Maharashtra – 440010
Email: liqoffice.varam@gmail.com.

2. State Bank of India
14th Floor, Madame Cama Road,
Nariman Point, Mumbai-400021.

3. Indo Unique Flame Limited
1st Floor Kothari Building,
301, WHC Road, Dharampeth,
NR Sudama Talkis,
Maharashtra 440010

... Respondents

Date of Order: 06.07.2023

CORAM:-

Dr. Venkata Ramakrishna Badarinath Nandula, Hon'ble Member (Judicial)
Shri. Charan Singh, Hon'ble Member (Technical)

PARTIES/COUNSELS APPEARANCE:-

For the Applicant : Ms.Varsha Banerjee and Mr.Amir Bavani,
Counsels.
Liquidator : Mr.Vikas Prakash Gupta.
For liquidator/R.1 : King and Partridge law firm.
For Respondent No.2 :Mr.Yash Vardhan, Counsel.

PER: BENCH

ORDER

1. This Petition is filed by the Applicant of PTC India Financial Services Limited Under Section 60(5) of the Insolvency & Bankruptcy Code, 2016 read with rule 11 of the National Company Law Tribunal Rules, 2016 to grant the following reliefs:

a) To declare the decision as regards distribution of sale proceeds in stakeholders meeting dated 28.09.2022 as null and void;

- b) To direct the liquidator to distribute the proceeds from the sale of assets of the Corporate Debtor under liquidation, equally among all the secured creditors i.e. the SBI and Applicant Financial Creditors of the Corporate Debtor as envisaged under section 53 of the Insolvency and Bankruptcy Code ('Code'), and:
- c) To direct SBI i.e., Respondent No.2 to refund the amount as mentioned in the distribution chart (annexed as part of Annexure A-1 (Colly) with interest @ SBI prime lending rate to the Liquidator for recalculation and redistribution to all Secured creditors, irrespective of nature of charges;
- d) To grant ex-parte ad interim stay on distribution of the proceeds of the sale of the assets of the Corporate Debtor to State Bank of India during the pendency of the instant Application;

Or

In the alternative in case proceeds already distributed, then direct SBI to secure the entire amount distributed to them in a No Lien Interest bearing account during the pendency of the instant application; and/or,

2. The averments put forth by the Applicant of M/s PTC India Financial Services Limited are:

- a. The corporate debtor was allowed to be liquidated by this Hon'ble Tribunal vide order dated 08.07.2021. Thereafter the liquidator had invited claims from the creditors. Subsequently, Applicant filed his claim in Form D as

secured financial creditor for an amount of Rs.43,46,78,538, on 11.08.2021.

- b. Since, the Applicant is also held equity share capital of the corporate debtor, therefore a claim under Form-G dated 11.08.2021 was also filed by the Applicant before liquidator vide email dated 11.08.2021 claiming an amount of Rs.4,398,00,000/-.
- c. It is averred that liquidator made public announcement on 28.02.2022 for inviting EOI for sale of assets of the corporate debtor on 'as is where is basis at the reserve price of Rs.7.80 Crores. Nirbhaya Industries is the successful bidder having quoted bid value for Rs.7.85 Crores. Accordingly the liquidator issued sale certificate to successful bidder on 05.07.2022.
- d. It is averred that the admitted claim amount of SBI as financial creditor is Rs.62,70,40,457/- wherein the realized amount from the sale of assets is Rs.7.85 Crores only.
- e. It is averred that the Liquidator acted contrary to the relevant regulations of Insolvency and Bankruptcy Board of India and Section 53 of the Code and instead of distributing the proceeds of the sale of assets of the Corporate Debtor among the stakeholders as per Section 53 of the Code, the liquidator is decided to proceed on the basis of the legal opinion.
- f. It is averred that the liquidator wrongly distributed the sale proceeds only to one Secured Financial Creditor namely SBI. No amount from the

realization of sale of assets has been made available for distribution to the Applicant, despite the applicant being a Secured Financial Creditor.

- g. Respondent with regard to this gave reasoning that Section 53, protests the ranking amongst the secured creditors and first charge holder cannot be equated with the second charge holder, which is not correct. The objection raised is nowhere mentioned in the Code under Section 53.
- h. It is averred that the distribution as given effect to by the Liquidator is liable to be set aside in light of the judgment of the Hon'ble National Company Law Appellate Tribunal, dated 26.05.2022 in the matter of "*Oriental Bank of Commerce vs Anil Anchalia and Anr. Being Comp. App. (AT) (Ins.) No.547 off 2022.*"
- i. Therefore, in the light of the above facts, the Applicant is constrained to file the present Application stating that the balance of convenience lies in favour of the Applicant.

3. Counter filed by the Respondent No.1:

- a. It is averred that the instant application is not maintainable and has been filed on misappreciation of the law laid down in Chapter –III of the Code. Thus the Application deserves to be dismissed.
- b. The Applicant has placed reliance on the Judgment passed by Hon'ble NCLAT, New Delhi in the matter of Oriental Bank of Commerce vs Anil Anchalia and Anr, wherein the said judgement was challenged and is

pending before Hon'ble Supreme Court in Civil Appeal No.4664 of 2022 and is tagged along with the Civil Appeal No.2359 of 2021(Kotak Mahindra Bank Limited: Vs Technology Development Boards & Ors).

- c. It is averred that the instant case pertains to relinquishment of security interest by secured creditors and the distribution of assets under Section 53 of the Code. It is an admitted fact that the 2 Respondent, SBI holds the primary/1" charge over the assets of the Corporate Debtor and the Applicant holds only a 2nd charge/subordinate charge. The contentions of the Applicant is that under Section 53(1)(b) the legislature has only expressed intention of maintaining the equality in respect of distribution of proceeds among the dues of workman and secured creditors however, no distinction whatsoever has been expressed between the secured creditors holding 1 charge and 2nd charge.
- d. It is further submitted that the plain reading of Section 53 clearly depicts protection of ranking of charges amongst the secured creditors. Clause (b) lists two types of debts, namely workman's dues and debts owed to a secured creditor. The use of the specific words "... Following debts which shall rank equally between and among the following:-" is of importance. The condition precedent warrants an enquiry not only on the equality of ranking between the workman's dues and debts owed to secured creditors but also on the equality among the workman's dues and among the secured

creditors. There are these two conditions that are to be satisfied while considering priority of distribution.

- e. The above reasoning is further forfeited and derived from the reasoning stated in the matter of ICICI Bank Limited Vs SIDCO Leathers Limited wherein the Hon'ble Supreme Court interpreted Sections 529 and 529(A) of the Companies Act, 1956, which deals with the ranking of claims of the liquidator.
- f. It is averred that liquidator has rightly distributed the proceeds from the sale of the assets of the corporate debtor as reiterated in the order of SIDCO Leathers by Hon'ble Supreme Court of India. Further the actions of liquidator cannot be faulted upon in view of the suggestions and recommendations made in the Insolvency Law Committed Report dated 26.03.2018.
- g. In view of the facts the above Application is liable to be dismissed.

4. Counter filed by SBI/Respondent No.2:

- a. Respondent No.2 denied the averments made by the Applicant and submitted that the same is liable to be dismissed.
- b. It is submitted that SBI is the secured financial creditor, corporate debtor has availed financial assistance in the form of **Term loan, working capital, cash credit and funded interest term loan** from the financial creditor. The said facilities has been extended from time to time.

- c. It is averred that, in order to avail financial assistance from SBI and e-SBH, the Corporate Debtor has executed Joint Term Loan dated 18.07.2007 and Supplemental and Amendatory Agreement dated 29.08.2012. It is pertinent to mention that, as per Article-II of the Joint Term Loan dated 18.07.2007, the Corporate Debtor has created following security in favour of SBI and e-SBH.

ARTICLE II

The borrower agrees that the said facilities together with the interest, compound interest, additional interest, liquidated damages, costs, charges, expenses and other monies payable in respect thereof will be secured in favour of the said banks by:

- a) *A First charge by way of equitable mortgage of all the immovable properties and assets of the borrower company.*
- b) *A First charge by way of hypothecation of all movable machinery, spares tools all the present and future*
- c) *Second Charge on the Current Assets including Raw Materials, Semi-Finished and Finished goods.*
- d) *Other collaterals as per the sanction terms both present and future excluding such property and assets as may be permitted by the said banks from time to time to the satisfaction of the SBI Consortium.*

- d. It is submitted that, as per Section 48 of the TP Act, 1882, the claim of the first charge holder shall prevail over the claim of the second charge holder. This rule is enunciated by the maxium "Qui priorest temporepotiorestjure" which means "who is prior in time is better in law". Therefore, when there is an inter-se priority of charge on a particular asset, the amount so realised from the sale of the said asset has to be paid first to the first charge holder

towards satisfaction of its debt and if there is any balance remaining the same will be paid to the second charge holder.

- e. It is submitted that, issue with respect to rights of the first charge holder and second charge holder came up for consideration before the Hon'ble Supreme Court in the matter of ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Ors. ("Sidco Leathers Ltd") The Hon'ble Supreme Court at Para No. 19 to 21 of the above-mentioned Judgment held as under.

Para No.19

Section 529A of the Companies Act does not ex facie contain a provision (on the aspect of priority) amongst the secured creditors and, hence, it would not be proper to read there into things, which the Parliament did not comprehend. The subject of mortgage, apart from having been dealt with under the common law, is governed by the provisions of the Transfer of Property Act. It is also governed by the terms of the contract. The Punjab National Bank granted loan to the 1st Respondent herein knowing fully well that, over the assets of the mortgagor, the Appellant held the first charge. It in no uncertain terms stated that the charges created by reason of the loan agreement entered into by and between itself and the 1st Respondent was subservient to the charges of the appellant as also the Respondent Nos. 3 and 4. The admission of the PNB in this behalf is absolutely clear and explicit. Even in the suit filed by it for recovery of the mortgage money as against the 1st Respondent, it not only in no uncertain terms stated that the Appellant and Respondent Nos. 3 and 4 herein were the first charge holders in respect of movable and immovable properties of the 1st Respondent, but its prayers in regard thereto were also limited, as would appear from prayer (f) made in the suit.

Para No.20.

While enacting a statute, the Parliament cannot be presumed to have taken away a right in property. Right to property is a constitutional right. Right to recover the money lent by enforcing a mortgage would also be a right to enforce an interest in the property. The provisions of the Transfer of Property Act provide for different types of charges. In

terms of Section 48 of the Transfer of Property Act claim of the first charge holder shall prevail over the claim of the second charge holder and in a given case where the debts due to both, the first charge holder and the second charge holder. are to be realized from the property belonging to the mortgagor, the first charge holder will have to be repaid first. There is no dispute as regards the said legal position. Such a valuable right having regard to the legal position as obtaining in common law as also under the provisions of the Transfer of Property Act, must be deemed to have been known to the Parliament. Thus, while enacting the Companies Act, the Parliament cannot be held to have intended to deprive the first charge holder of the said right. Such a valuable right, therefore, must be held to have been kept preserved. [See Workmen of Firestone Tyre and Rubber Co. of India (P) Ltd. v. Management and Ors.MANU/SC/0305/1973 (1973)ILLJ278SC I If the Parliament while amending the provisions of the Companies Act intended to take away such a valuable right of the first charge holder, we see no reason why it could not have stated so explicitly. Deprivation of legal right existing in favour of a person cannot be presumed construing the statute. It is in fact the other way round and thus, a contrary presumption shall have to be raised.

Para No. 21.

Section 529(1)(c) of the Companies Act speaks about the respective rights of the secured creditors which would mean the respective rights of secured creditors vis-a-vis unsecured creditors. It does not envisage respective rights amongst the secured creditors. Merely because Section 529 does not specifically provide for the rights of priorities over the mortgaged assets, that, in our opinion, would not mean that the provisions of Section 48 of the Transfer of Property Act in relation to a company, which has undergone liquidation, shall stand obliterated. If we were to accept that inter se priority of secured creditors gets obliterated by merely responding to a public notice wherein it is specifically stated that on his failure to do so, he will be excluded from the benefits of the Dividends that may be distributed by the Official Liquidator, the same would lead to deprivation of the secured creditor of his right over the security and would bring him at par with an unsecured creditor. The logical sequitor of such an inference would be that even unsecured creditors would be placed at par with the secured creditors. This could not have been the intendment of the legislation. The provisions of the Companies Act may be a special statute but if the special statute does

not contain any specific provision dealing with the contractual and other statutory Phly between different kinds of the secured creditors, the specific provisions ontained in the general statute shall prevail.

- f. Respondent No.2 referred to Section 52(1) and Section 53 1(A)(b) (i) &(ii) of the code, which is as below:

Section 52

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.

Section 53

(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,

(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 ARY 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.

- g. Thus the respondent denies that Section 53 does not distinguish between first charge holder and second charge holder. Further stated that the judgment of Hon'ble NCLAT in the matter of Oriental Bank of Commerce is challenged before Hon'ble Supreme Court, which is still pending for adjudication.
- h. Thus stated the liquidator has rightly distributed the sale proceeds to the SBI in accordance with the provisions of the Code. Thus prayed to dismiss the application filed by the Applicant.

5. After hearing learned counsels from both sides and after perusal of written statements and other documents submitted to the Tribunal, the point for consideration is

Point: “Whether inter se ranking of the charges among Secured Financial Creditors existing before initiation of CIRP will be recognized while distributing the sale proceeds in liquidation under Section 53(1) of IBC, 2016”.

6. Our observations in this regard are as under:
- a. This is an application filed by one of the secured financial creditor i.e PTC India Financial Services Limited against the Liquidator, and SBI challenging the distribution of proceeds from the sale of corporate debtor under liquidation. The third respondent is M/s. Indo Unique Flame Limited, who has also filed a similar Application, IA No.254/2023 against the Respondent No.1&2.
 - b. In the stake holders meeting dated 28.09.2022, an opinion on the basis of a legal decision was taken to distribute the proceeds from the sale of assets of the corporate debtor as per the inter se ranking of charges and accordingly liquidator has given full amount to SBI who is the first charge holder amongst the Secured financial creditors. Some relevant extract from the above said report are reproduced below:

“PTC India Financial Services are secured creditors with second charge on the movable and immovable fixed assets of the corporate debtor.”

“Liquidator assured the financial creditors that as per Regulation 43 of the liquidation regulations, undertaking from the eligible stakeholders shall be taken wherein they are required to refund the amount of money which has been paid to them in excess if any to which they are not entitled to or no subsequently become entitled on the basis of decision of any court or authority. Accordingly, the same shall be taken from the SBI before the funds are distributed”.

- c. The Applicant herein has alleged that the act of liquidator is contrary to the Section 53(1) of the IBC, 2016 and he has wrongly distributed the sale proceeds to only one secured financial creditor i.e SBI and not made justice to the Applicant despite Applicant being a secured financial creditor.
- d. Applicant further pleaded that Section 53(1) does not stipulate any inter se ranking amongst secured financial creditor and all the secured financial creditors are in one category and there is no ranking or sub-clause like first charge holder or second charge holder amongst the secured financial creditors. The Applicant has relied on the Judgment of Hon’ble NCLAT dated 26.05.2022 in the matter of Oriental Bank of Commerce Vs Anil Anchalia and Anr. Being Comp.App(AT) (Ins) No.547/2022. The relevant portion of the judgment is reproduced below:

In a recent judgment delivered by this Appellate Tribunal in Company Appeal (AT) (Ins.) No. 644 of 2021 dated 06.05.2022-"Indian Bank vs. Charu Committee of GB Global Ltd. & Anr.", a similar contention raised by the Indian Bank which was secured creditor who was Dissenting Financial Creditor was repelled. After relying the judgment of the Hon'ble

Supreme Court in M/s. Amit Metaliks Ltd. (supra), this Tribunal in paragraphs 27 and 28 laid down following:-

27. The Judgment of the Hon'ble Supreme Court, in the above case, is that when the extent of value received by the creditors under Section 53 is given which is in the same proportion and percentage as provided to the other Financial Creditors, the challenge is to be repelled."

We thus, do not find any merit in the submissions of the Learned Counsel for the Appellant. The submission that earlier judgment of this Tribunal in "Technology Development Board" having been stayed by the Hon'ble Supreme Court on 29.06.2021, no reliance can be placed on the said judgment loses its importance in view of the subsequent judgment of the Hon'ble Supreme Court dated 13.05.2021 M/s. Amit Metaliks Ltd. (supra). The issue is no more res integra and no error is committed by the Adjudicating Authority in rejecting the Application filed by the Appellant. There is no merit in the Appeal. The Appeal is dismissed.

7. The respondents have placed reliance on Section 48 of the Transfer of Property Act, 1882, accordingly to which the claim of first charge holder shall prevail over the claim of second charge holder. In our view the contention of the respondents is not maintainable as Section 53(1) very clearly states that “

Section 53(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” and IBC being a new law, it will certainly prevail upon the Transfer of Property Act, 1882.

8. In this case the issue revolve around Section 53(1) of IBC, 2016 and therefore the said section is reproduced below:

Section 53

- (2) *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,*
- (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 ARY 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.*

9. On careful examination of Section 53(1), case laws and other facts as discussed above we are of the view that Section 53(1) does not recognize any inter se ranking of charges among financial creditors existing before initiation of CIRP for distribution of sale proceeds under liquidation. Section 53(2) also further clarifies that liquidator shall disregard any contractual arrangement between recipient under Sub-Section 53(1) with equal ranking if disrupting the order of priority. Also, Section 53(1) very clearly defines the classes and order of waterfall mechanism and has no scope for adding other sub-classes.

10. In view of the above we allow this Application and direct the respondents as under

1. The 2nd Respondent (SBI) is hereby directed to refund the amount as per the undertaking given by them to the Liquidator as referred in minutes of SCC meeting dated 07.10.2022.
2. Liquidator is directed to re-calculate and redistribute the amount to all secured financial creditors putting all of them on same pedestal irrespective of priority of charge.

11. With the above directions IA No.1341/2022 is disposed of.

SD-
Charan Singh
Member Technical

-SD-
Dr. Venkata Ramakrishna Badarinath Nandula
Member Judicial

pavani