

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

**I.A. No.254/2023
in
C.P. (IB) No. 377/7/HDB/2018**

UNDER SECTION 60(5) OF IBC, 2016 READ WITH RUE 11 AND 13 OF THE NCLT RULES, 2016

IN THE MATTER OF

STATE BANK OF INDIA

VERSUS

M/s VARAM BIO ENERGY PRIVATE LIMITED

BETWEEN:

M/s INDO UNIQUE FLAME LIMITED
1st Floor Kothari Building
301, WHC Road, Dharampeth
NR Sudama Talkis
Maharashtra-440010

....APPLICANT

VERSUS

MR. VIKAS PRAKASH GUPTA
LIQUIDATOR OF VARAM BIO
ENERGY PRIVATE LIMITED & ORS.
G-19, Shreewardhan Complex
Mezzaine Floor, Besides Landmark
Building, Ramdaspath, Wardha Road
Nagpur, Maharashtra – 440010

...Respondent No.1

State Bank of India
14th Floor, Madame Cama Road
Nariman Point, Mumbai – 400021

...Respondent No.2

Date of Order: 06.07.2023

Coram:

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

Counsels present:

For the Applicant : Shri Avinash Desai, Senior Advocate for Mr. Hritik
Shekhar Srivastava, Advocate

For R-1 King & Partridge
For R-2 Shri Yash Vardhan, Advocate

Per : Bench

ORDER

1. This application is filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 Read With Rule 11 and 13 of the National Company Law Tribunal Rules, 2016 seeking following reliefs :
 - a) Declare the decision as regards to the distribution of sale proceeds in stakeholders meeting dated 28.09.2022 as null and void.
 - b) Directions to the Liquidator to distribute the proceeds from the sale of assets of the Corporate Debtor under liquidation, equally among all the secured creditors of the Corporate Debtor as envisaged under Section 53 of the Code;
 - c) Directions to State Bank of India, i.e., Respondent No.2 to refund the amount as mentioned in the distribution chart with interest at the

rate of SBI prime lending rate to the Liquidator for recalculation and redistribution to all Secured creditors, irrespective of nature of charges;

- d) 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

- e) To pass any such orders as may be deemed fit, proper and necessary in the instant case.

2. The averments germane to this Application in brief are:

- (a) The Applicant is a company incorporated under the Companies Act,1956/2013 having its registered office at 301, 1st Floor Kothari Building, WHC Road, Dharampeth, Nagpur-440010, and is engaged into the business of Coal Washery and Transportation Service. The Applicant is being represented by Mr. Vipul Hariom Choudhary, authorized signatory and Director. A copy of the Board Resolution dated 05.08.2021 is marked as **ANNEXURE A-1 – page 26.**

- (b) It is stated that the instant Application has been filed aggrieved with the decision of the Liquidator in the Stakeholder Consultation Committee Meeting dated 28.09.2022 to proceed with the distribution of the sale proceeds received in liquidation proceedings solely on the basis of legal opinion dated 03.10.2022 by ignoring the settled law laid down by the Hon'ble National Company Law Tribunal Appellate Tribunal (NCLAT) in the matter of **Oriental Bank of Commerce vs Anil Anchalia and Anr. Being Comp. App. (AT) (Ins) No.547 of 2022** and has proceeded to distribute the sale proceeds of the assets of the Corporate Debtor to only one Secured Creditor namely State Bank of India (Respondent No.2 herein) despite objections being raised by the Applicant and other creditors, who is admittedly also the charge holder for the term loan extended by it.
- (c) The Applicant herein had entered into an agreement dated 11.08.2015 with the Corporate Debtor for the purpose of financing the operations of the 10 MW Biomass Plant in Bhandara, Maharashtra and also financing the start-up cost and afterward operating the plant in consideration of interest which was approved by the Lenders to the extent of Rs.7 Crores in the year 2015 and that according to the agreement the Applicant herein obtained the sole charge on all the fuel/stores inventory and/or receivables

up to the value of the amount invested as working capital as on that date, outstanding start-up cost along with accrued interest, and outstanding share of margin of the Applicant. The Financial Creditor was having exclusive charge over the assets of the Corporate Debtor and that an NOC dated 17.06.2015 was obtained from the financial creditor for the purpose of the creation of charge over the current assets of the Corporate Debtor in the form of the consent to the Agreement followed by execution of Deed of hypothecation dated 03.02.2016 by the parties which was subsequently registered with ROC on 11.02.2016. Copy of the Agreement dated 11.08.2015, Hypothecation dated 17.02.2016, NOC dated 17.06.2015, approval by SBI dated 12.08.2015 and Registration of charge with MCA are annexed as **ANNEXURE -A-4(Colly.)**

- (d) Later on, one of the Financial Creditors of the Corporate Debtor classified the account of the Corporate Debtor as Non-performing Asset which led to filing of a Petition under Section 7 of the IBC before this Tribunal. This Tribunal vide Order date 18.07.2019, initiated Corporate Insolvency Resolution Process (CIRP') against the Corporate Debtor.
- (e) Since no successful resolution came-forth, the COC resolved to liquidate the Corporate Debtor which was allowed vide order dated 08.07.2021. Pursuant to the said order the Liquidator caused public announcement

invited claims from the creditors of the Corporate Debtor vide public announcement dated 15.07.2021. Copy of the Order dated 08.07.2021 along with the public announcement dated 15.07.2021 are as **ANNEXURE A-6 (Colly) – pages 96-103.**

- 2.7 It is submitted that the Applicant herein who has funded the Corporate Debtor by providing working capital and as agreed by both the Lenders, the Applicant herein is the first charge holder of the current assets, filed its claim as a Secured Financial Creditor of the Corporate Debtor for an amount of Rs.28,22,26,049/- before Respondent No.1 vide Form-D dated 07.08.2021. According to the Applicant, though it is having First pari passu charge over all the current assets including receivables and movable properties of the Corporate Debtor and despite issuance of NOC from State Bank of India (Respondent No.2 herein), the said Bank is still claiming to have exclusive first charge over the properties and assets of the Corporate Debtor.
- 2.8. The Liquidator (Respondent No.1) upon receiving the claim of the Applicant, had admitted only a part of the claim amount filed by the Applicant. Aggrieved by the decision of the Liquidation, the Applicant moved an Application before this Tribunal bearing IA No.434/2022 for acceptance of its full claim which was allowed by this Tribunal vide Order

dated 18.07.2022 directing the Liquidator (Respondent No.1) for fresh consideration of claims on the basis of the additional documents provided.

Copy of Order dated 18.07.2022 is annexed as **ANNEXURE A-8**.

2.9 It is pertinent to mention that once above direction was given to the Liquidator, the Liquidator had accepted the claim of the Applicant. Copy of the minutes of the Stakeholders Consultation Committee (SCC) dated 27.09.2021 is as **ANNEXURE A-9**.

2.10 Despite several attempts by the Liquidator to sell the assets of the Corporate Debtor on “as is where is” basis, due to high reserve price of the assets it repeatedly failed. Thus, it was decided upon in 7th SCC meeting held on 22.02.2022, to reduce the reserve price of the assets of the Corporate Debtor to Rs.7.80 Crores and pursuant to public announcement on 28.02.2022, the Liquidator was successful in receiving Expression of Interest for sale of assets of the Corporate Debtor on ‘as is where is’ basis at the Reserve Price of Rs.7.80 crore. Consequently, in the e-auction conducted on 14.03.2022 Nirbhaya Industries was declared as successful bidder having quoted a bid value of Rs.7.85 crores.

2.11 The Liquidator after receipt of the entire sale proceeds of Rs.9,02,05,866/- from the successful bidder, which also comprised of GST amount of Rs.1,15,62,326/- and an interest component of

Rs.1,43,540/-, had issued sale certificate to successful bidder on 05.07.2022. Copy of the Sale Certificate dated 05.07.2022 is as **ANNEXURE A-12 – pages 130-131.**

- 2.12 It is contended that the Liquidator instead of distributing the proceeds of sale of the assets of the Corporate Debtor among the stakeholders as per Section 53 of the Code within 90 days from the receipt of the aforementioned amount, has decided in the 8th Stakeholders Consultation Committee held on 28.09.2022 (shared on 07.10.2022), to proceed with distribution on the basis of the legal opinion and contends that Respondent No.1 chose to outsource the decision-making process by seeking a legal opinion, which is not permitted under the IBC. The Applicant being a secured financial creditor is having the same footing/level as the Respondent No, which has been totally ignored by the Liquidator.
- 2.13 The Applicant further emphasized that the admitted claim amount of SBI as Secured Financial Creditor is Rs.62,70,40,457/- whereas the realized amount from sale of assets is Rs.7.85 crores only. Accordingly, no amount from the realization of sale of assets, is being made available for distribution to other secured creditors.
- 2.16 The Applicant further contends that the Liquidator while arriving at the aforementioned incorrect decision, has wrongly observed that “Clause

(b) and (e) of section 53 clearly distinguishes the secured creditors who have relinquished their charge and the secured creditors who did not relinquish the charge on assets and puts first the interest of secured charge holders who have relinquished their security interest”. According to the Applicant, the reasoning provided by the Liquidator is absolutely erroneous as Section 53 of the Code nowhere differentiates between Secured Creditors holding first charge and second charge and the distribution of amount being contrary to law is liable to be declared as null and void on this ground alone.

2.22 It is further contended that the distribution as given effect to in the month of October 2022 is liable to be set aside in light of the judgment of the Hon’ble National Company Law Appellate Tribunal (NCLAT) dated 26.05.2022 in the matter of Oriental Bank of Commerce vs Anil Anchalla and An. Comp App. (AT) (Ins.) No.547 of 2022, wherein the Hon’ble NCLAT while relying upon the judgment of Hon’ble Supreme Court in Resurgence ARC Private Limited vs. Amit Metalik Limited and Anr.- 2021SC OnLine SC 409, has categorically held that Secured Creditors after having relinquished their security interest, could not exclusively claim any amount realized from secured assets, once they have elected for relinquishment of security interest and thus, they would be governed by

the waterfall mechanism as provided under Section 53 of the Code. Thus, the distribution by the Liquidator being contrary to the law laid down by the Hon'ble NCLAT in the aforementioned judgment, is liable to be set aside and the excess amount be returned by State Bank of India.

2.23 Hon'ble NCLAT while deciding the case in re Oriental Bank of Commerce (supra) also took into consideration the order passed by its coordinate bench in Company Appeal (AT) (Ins.) No.731 of 2020 "Technology Development Board vs. Mr. Anil Goel & Ors" as well as the stay Order passed by Hon'ble Supreme Court on 29.06.2021 in the Civil Appeal No.2359/2021. The Hon'ble NCLAT has categorically held as follows:

"6 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 place on the judgment looses its importance in view of the subsequent judgment of the Hon'ble Supreme Court dated 13.05.2021 M/sAmit Metaliks Ltd.(supra). The issue is no more res integra and no error is committed by the Adjudicating Authority on rejecting the Application filed by the Appellant. There is no merit in the Appeal. The Appeal is dismissed."

2.24 Thus submitting prayed the Tribunal 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, which is a binding precedent instead of placing reliance on the order in the matter of Technology Park.

3. Counter is filed by 1st Respondent/Liquidator denying the averments made in the Application and contending as under:-
 - 3.1 It is informed that one PTC India Financial Services Limited filed an Application (I.A. No.1341 of 2022) assailing the distribution of proceeds from the sale of assets of the Corporate Debtor under liquidation. The Applicant herein is the 3rd Respondent in the said Application and has taken out this Application with similar pleadings and very same reliefs.
 - 3.2 The alleged grievance of the Applicant pertains to the distribution of proceeds undertaken by the 1st Respondent as per Section 53 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “Code”). It is the allegation of the Applicant that the Liquidator / 1st Respondent ought to have distributed proceeds from the sale of assets of the Corporate Debtor under liquidation, equally amongst the secured financial creditors of the Corporate Debtor. The Applicant is therefore seeking directions against the Respondents to re-distribute the proceeds

from sale of assets of the Corporate Debtor equally amongst the secured financial creditors on a misconceived notion that it is a secured creditor.

3.4 The Liquidator in his counter has questioned the locus of the Applicant to even question the distribution of the assets by the Liquidator and that it is aggrieved as a secured creditor. According to the Liquidator the documents on record demonstrate that the Applicant does not have a valid charge and the onus lies upon the Applicant to establish that it is a secured creditor.

3.5 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, (Com. App. (At) (ins.) No.547 of 2022 order dated 26.05.2022*, wherein the said judgement has been 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). It is further contended that in the Technology Board case, the order of NCLT affirmed and protected the inter se priority of charges however, NCLAT had taken a contrary view and directed to treat all the secured creditors at par under Section 53 (1) of the Code. It is further submitted that the Hon'ble Supreme Court has granted stay of the operation of the

Judgment impugned in the case of Kotak Mahindra Bank Limited Vs. Technology Development Board & Ors vide its order dated 29.06.2021.

3.6. In the background of the above, the Respondent states that the instant application is not maintainable either in law or on facts on record. The Respondent has transversed the status of the Applicant as under:-

- (i) The lender Banks and the Corporate Debtor had a Consortium Agreement and the terms therein would indicate that there was ceding of second charge on the current assets. The said Consortium Agreement further indicates that the Debtor was obliged to obtain the prior permission of the 2nd Respondent in writing for availing any credit facility.
- (ii) The Applicant and the Debtor had executed a MOU on 28.01.2015 which was merely for operating the Plant. The lead Bank issued NOC dated 17.06.2015 and the MOU of the Applicant and Debtor was disregarded to the extent it conflicted with the security ranking of the lead Bank. Thus, the lenders had the first charge of the primary securities and it had ceded second charge over current assets.
- (iii) The Applicant concluded another agreement on 11.08.2015 with the Debtor to operate the Plant and this agreement was akin to the MOU referred above. The MOU contained a proposal for creating sole charge to the Applicant on certain items mentioned therein like fuel, stores

inventory etc. However, this was subject to execution of a hypothecation agreement and consequent registration pursuant to approval by lender Banks.

- (iv) Subsequently, the hypothecation agreement dated 17.02.2016 was executed without the written approval of the lender Banks and the rights secured under the hypothecation deed are invalid as it was always subject to approval of the Banks. Hence the lead Bank held prior right on all the assets including current assets. The so-called hypothecation executed without the knowledge of the lenders will not bind on the banks and Applicant has no right whatsoever as it was subject to approval.

- 3.7 As regards to the grievance of the Applicant with respect to relinquishment of security interest by secured creditors and the distribution of assets under Section 53 of the Code and that under Section 53(1)(b), the legislature has only expressed intention of maintaining equality in respect of distribution of proceeds among the dues of workman and secured creditors, but no distinction whatsoever has been expressed between the secured creditors, is concerned, the Liquidator submits that the above contention is misconstrued since 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.

- 3.8 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. It is further averred that the 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. Thus submitting, prayed the Tribunal to dismiss the Application.

4. **Counter is filed by the Respondent No.2 State Bank of India, inter-alia, contending as under:-**

- 4.1 It is submitted that the Corporate Debtor has availed financial assistance in the form of (1). Term Loan (2). Working Capital (3). Cash Credit (4). Funded Interest Term Loan from the Financial Creditor and the said facilities have been extended from time to time. Subsequently, the Corporate Debtor has further availed Term Loan from State Bank of Hyderabad (“e-SBH”).
- 4.2 To secure the 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. 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 State Bank of India Consortium.*

4.3. It is stated that when the Corporate Debtor after availing the aforesaid loan facilities violated the terms of Sanction Letters and other loan documents and committed defaults in repaying the loan amounts, the account of the Corporate Debtor was classified as Non-Performing Asset. Thereafter, the SBI took action by preferring Original Application No.147 of 2015, before the Hon'ble Debt Recovery Tribunal-1, Chennai for recovering the outstanding dues. Subsequently, this Tribunal had also admitted the petition filed by SBI under Section 7 of the Code on 18.07.2019 and ordered commencement of CIRP against the Corporate Debtor. Later when there was no resolution plans received by the CoC for its consideration, the CoC in its 4th meeting held on 13.01.2020 resolved to seek Liquidation of the Corporate Debtor. Accordingly, this Tribunal

vide its Order dated 08.07.2021 ordered liquidation of the Corporate Debtor.

- 4.4 Pursuant to submission of the claim by the Applicant for an amount of Rs.68,83,38,157/-, the Liquidator admitted the claim of Rs.62,70,40,457/. It is further clarified that SBI has relinquished the security interest into the Liquidation Estate of the Corporate Debtor.
- 4.5 The Liquidator in the 7th Stakeholders Consultation Committee (“SCC”) meeting held on 22.02.2022 had apprised the members of SCC that despite Public Announcement on 01.02.2022 for the sale of the assets of the Corporate Debtor at the reserve price of Rs.8,40,00,000/-, the Liquidator was not successful in receiving EOI, it was agreed by the members of SCC to fix the reserve price at Rs.7,80,00,000/-.
- 4.7 Accordingly, the Liquidator made public announcement on 28.02.2022 inviting EOI for sale of assets of the Corporate Debtor at the Reserve Price of Rs.7,80,00,000/-. E-auction was held on 14.03.2022 for the sale of the assets of the Corporate Debtor, wherein one bidder M/s Nirbhaya Industries was declared as successful bidder for an amount of Rs.7,85,00,000/-.

4.6 The entire sale consideration of Rs.9,02,05,866/- including GST amount of Rs.1,15,62,326/- and interest component of Rs.1,43,540/- has been paid by the successful bidder and consequently, sale certificate issued by the Liquidator in favour of successful bidder on 05.07.2022. Thereafter, the sale proceeds realized by the Liquidator has been distributed to the SBI having first charge over the security interest as per the provisions of the Code for the following reasons:-

- (i) That the Corporate Debtor had entered into a Memorandum of Understanding (“MoU”) dated 28.01.2015 with the Applicant for operating the Corporate Debtor. Thereafter, SBI has issued No-Objection dated 17.06.2015 on certain terms and conditions. One of the important conditions of the No-Objection is that, SBI will continue to have first charge in respect of all the properties including the Plant & Machinery which are primary securities to the consortium banks. The details of the properties were also enclosed to the No-Objection as Annexure No.1. Relevant clause is extracted below :-

Clause-2

Notwithstanding anything contained in the MoU entered into between the company and the investors we state that the consortium banks will continue to have first charge in respect of all the properties including the Plant & Machinery which are primary securities to the consortium banks.

(ii) Thereafter, the Applicant and the Corporate Debtor entered into Agreement dated 11.08.2015. The said Agreement was subject to conditions mentioned in the No-Objection dated 17.06.2015 issued by SBI. Copy of the Agreement is filed. As per the Agreement dated 11.08.2015 the possession of the said Plant, Machinery and Land shall always be deemed to be with Corporate Debtor and all the fixed assets and land are provided to the Banks, i.e., SBI as security and would have the sole charge on all the Plant, Machinery and Fixed Assets. It was further agreed between the Corporate Debtor and the Applicant that, only upon approval of the lenders of the Corporate Debtor, Corporate Debtor and the Applicant shall enter into a hypothecation agreement for securing the amounts due to Applicant by hypothecation of the fuel/stores inventory and receivables of the Corporate Debtor. However, the Applicant has failed to place on record any document wherein, SBI has consented or approved for execution of the Hypothecation Agreement. The Corporate Debtor was asked to start the operation at the earliest by SBI vide its letter dated 12.08.2015.

4.7 According to Respondent No.2/SBI, the submission of the Applicant that it has obtained No-Objection from SBI for the purpose of creation of charge over the assets of the Corporate Debtor and that it has first pari-

passu charge over all the current assets including receivables and movable properties of the Corporate Debtor is false, baseless and misleading.

4.8 It is submitted that, the Liquidator vide public announcement dated 28.02.2022 invited EOI for sale assets of the Corporate Debtor, i.e., Sale of Biomass Power Plant at Bhandara including machinery, building and associated power distribution structures of the Corporate Debtor situated on 119745 Sq.Mtrs of the lease hold land of the Corporate Debtor at the Reserve Price of Rs.7,80,00,000/-. E-auction was held on 14.03.2022 for the sale of the assets of the Corporate Debtor, wherein one bidder M/s Nirbhaya Industries was declared as successful bidder for an amount of Rs.7,85,00,000/-. It is further averred that SBI/2nd Respondent herein had first charge over the said assets and no charge was created in favour of the Applicant. Therefore, amount realized from the sale of the said asset was rightly distributed to SBI by the Liquidator.

4.9 The 2nd Respondent by relying on Section 48 of the Transfer of the Property Act, 1882 (“TP Act, 1882”), submits that the claim of the first charge holder shall prevail over the claim of the second charge holder and that when there is an inter-se priority of charge on a particular asset, the amount so realized 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.

- 4.10 It is further submitted by 2nd Respondent that issue with respect to the 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), wherein it was held that the claim of the first charge holder shall prevail over the claim of the second charge holder in a case where the debts due to both the charge holders, are to be realized from the asset of the mortgagor, the first charge holder will have to be paid first.
- 4.11 It is further submitted that the Secured Creditor either has an option to relinquish the security interest into the liquidation estate or realize its security interest by standing out of the liquidation proceeding and the 2nd Respondent deny the submission of the Applicant that the secured creditor which relinquishes the security interest into the Liquidation Estate has no right to claim any amount realized from the secured assets.
- 4.12 It is the contention of the 2nd Respondent that Section 53 of the Code does not distinguish between the first charge holder and a second charge holder and does not explicitly state about the inter-se priority of charges amongst

secured creditors. The 2nd Respondent emphasized on the language used in Section 53(1) (e) “**following dues shall rank equally between and among**”, and submits that the same indicates the secured creditor having first charge and second charge over the security interest cannot be treated equally.

4.13 The submission of the 2nd Respondent is that Hon’ble NCLAT while deciding the matter of Oriental Bank of Commerce v. Anil Anchalia and Anr, has referred to Hon’ble Supreme Court decision in the matter of Resurgence ARC Private Limited V. Amit Metaliks Limited and Anr, which is being relied upon by the Applicant in support of its case. However, the issue that fell for consideration before the Hon’ble Supreme Court in the above-mentioned case was distribution of assets under Resolution Plan to a Dissenting Financial Creditor and not on the issue with regard to treatment of secured creditor having first and second charge over the security interest.

4.14 Further Hon’ble NCLAT in the case of Oriental Bank of Commerce v. Anil Anchalia and Anr (“Oriental Bank of Commerce”) had also made reference to another judgment of the Hon’ble NCLAT in the matter of Technology Development Board v. Anil Goel, Liquidator of Gujarat Oleo Chem Limited and Ors (“Technology Development Board”) which has

been challenged before the Hon'ble Supreme Court vide Civil Appeal No.2359/2021 and the Hon'ble Supreme Court has granted stay on the Order. Thereafter, order of the Hon'ble NCLAT in the matter of Oriental Bank of Commerce has also been challenged before the Hon'ble Supreme Court, vide Civil Appeal No.4664/2022, and since the Hon'ble Supreme Court has seized off the issue with respect to treatment of the secured creditor having first and second charge of the security interest which is directly and substantially the issue in the captioned I.A., the 2nd Respondent has urged this Tribunal to dismiss the IA.

4.15 Further submitting, the Ld. Counsel for 2nd Respondent/SBI stated that the Liquidator has rightly, in accordance and compliance with the provisions of the Insolvency and Bankruptcy Code, 2016 ("**Code**"), distributed the proceeds from sale of assets ("**Security Interest / Assets of the Corporate Debtor**") under the Liquidation to the State Bank of India.

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 M/s Indo Unique Flame Limited against the Liquidator and SBI challenging the distribution of proceeds from the sale of corporate debtor under liquidation.
 - 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:

“The Representative of Indo Unique Flame Limited enquired the reasons and why he should not be categorized as a secured first charge holder when the charge is registered with MCA and NOC obtained from SBI has been submitted with liquidator.”
 - 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.

- e) 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.*

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

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) 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 water fall mechanism and has no scope for adding other sub-classes.

h) 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.

i) With the above directions IA No.254/2023 is disposed of.

SD/-
(Charan Singh)
Member (Technical)

SD/-
(Dr. N. Venkata Ramakrishna Badarinath)
Member (Judicial)

Binnu