

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II**

I.A.NO. 2234/MB/C-II/2020

In
CP (IB) 02/MB/C-II/2018

Under section 60(5) of the Insolvency and
Bankruptcy Code, 2016

In the matter of

Morgan Securities & Credits Pvt. Ltd.

... Applicant

Versus

Videocon Industries Ltd.

Through,

Abhijit Guhathakurta, Resolution Professional

...Corporate Debtor/Respondent

In the matter of

State Bank of India

...Financial Creditor

Versus

Videocon Industries Limited

... Corporate Debtor

Order Pronounced on 29.09.2021

Coram:

Hon'ble Member (Judicial) : Mr. Ashok Kumar Borah

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Financial Creditor : Mr. Abhishek Puri, Advocate

For the Resolution Professional : Mr. Ameya Gokhale

ORDER

Per: Ashok Kumar Borah, Member (Judicial)

1. The present application has been filed by the Applicant, who is a Financial Creditor and Member of the Committee of Creditors (CoC) under Section 60 of the Insolvency and Bankruptcy Code, 2016. The Applicant Submitted a Claim of Rs. 325.81 Crores as against the Corporate Debtor of which The Respondent Resolution Professional had admitted Rs. 76.45 crores.
2. The Applicant submits that on 29.04.2013, an arbitral Award was passed in favour of the Applicant and against the Corporate Debtor with respect to the dispute arising out of non-payment of amount loaned/discounted by the Applicant.
3. The Applicant submits that on 27.08.2020 served Addendum to the proof of Claim by way of letter claiming that a charge or/and a security interest has been created in favour of the Financial Creditor to the extent of Rs. 20 Crores in the assets of the Corporate Debtor. The Applicant further put forward that till November 2020, the Respondent, Resolution Professional did not communicate any

decision with respect to the status of the Applicant as a “Secured Financial Creditor” to the extent of security of Rs. 20 Crores.

4. Thereafter, on 11.11.2020 in meeting of the CoC, SBI mentioned that the distribution workings will be based on the detailed break-up of the secured and unsecured creditors obtained from the RP team and share the same with CoC. Subsequently on 12.11.2020, the present Applicant/ Financial Creditor was listed as “unsecured creditor” towards entire claim of Rs. 76.45 Crores.
5. It is submitted by the Applicant that a categorical and solemn undertaking of the Status of the Applicant as “Secured Creditor” has been given by the Corporate Debtor in petition under section 9 of the Arbitration and Conciliation Act, before the Hon’ble High Court of Delhi to offer as security Rs. 20 Crore to cover financial debt owned to the Applicant and the same has been duly recorded inter-alia, in Order dated 14.08.2013 and 01.10.2013 passed by the Hon’ble Delhi High Court.
6. Thereafter, vide order Dated 11.11.2019 passed in MA 1521/2019, MA 1467/2019 and in MA 3302/2019, this Tribunal found that the sum of Rs.20 crores lying with the Registrar General upon encashment of the Bank Guarantee, is the “Security Interest” of the Applicant. However, the NCLAT vide order dated 22.01.2020 passed in Corporate Debtor Appeal bearing No. 20 of 2020, where by it has held that the amount of Rs. 20 crores lying with the Registrar General, Delhi High court upon encashment of the Bank Guarantee **cannot** be termed as “Security Interest” of the Applicant merely because it was deposited against the Award Amount of Rs. 76.45

crores. The Hon'ble Supreme Court of India vide Order dated 16.03.2020 dismissed Civil Appeals No. 1729, 1739-1740 and 1811 of 2020 filed against the Judgement dated 22.01.2020 passes by the Hon'ble Appellate Authority. Accordingly, the custody of amount must be given to Corporate Debtor and it has been ruled that the amount is the "asset" of the Corporate Debtor and the Applicant has no security interest with respect to the amount deposited.

7. The Applicant submitted that through Order passed by the Hon'ble Delhi High Court dated 14.08.2013 and 01.10.2013 tantamount to creation of charge/security interest in favour of the Applicant, by operation of law. Applicant submits that the undertaking by the Corporate Debtor to offer asset as a security falls within the definition of a charge under Section 3(4) of the Insolvency and Bankruptcy Code, 2016 and/or within definition of a security interest under Section 3(31) of the Code and therefore, the Applicant is a secured Financial Creditor having security interest to the extent of Rs. 20 Crores in the assets of the Corporate Debtor.
8. During the Pendency of the objections u/s 34 against the Arbitral Award, the Hon'ble Adjudicating Authority vide order dated 06.06.2018 admitted the captioned Insolvency petition against the Corporate Debtor and the CIRP Process against the Corporate Debtor Company.
9. The Applicant submits that since the custody of Rs. 20 crore lying with the Registrar General of the Hon'ble Delhi High Court upon encashment of the Bank Guarantee has now been given to the

Corporate Debtor and it has been ruled that the deposited amount is the “asset” of the Corporate Debtor as recorded in the Order dated 01.10.2013 by the Hon’ble Delhi High Court to the extent that *“unencumbered assets will be offered as security to broadly cover the amount awarded in favour of the petitioner”* has now come into effect/ operation.

10. The Applicant has brought our notice to the Definition of “Charge” and “Security Interest” at Section 3(4) and Section 3(31) under the Insolvency and Bankruptcy Code, 2016 respectively:

3(4) “charge” means an interest or lien created on the property or assets of any person or any of its undertakings or both, as the case may be, as security and includes a mortgage

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:

Therefore, relying to the above definitions, the Applicant considers himself a Financial Creditor having Security interest/ charge to the extent of Rs. 20 crores in the assets of the Corporate Debtor.

11. Lastly, the Applicant prays this Tribunal to clarify that the Applicant be treated as a “Secured Financial Creditor” of the Corporate Debtor, in as much as a charge or/and a security interest has been created in favour the Applicant to the extent of Rs. 20 Crores in the assets of the Corporate Debtor, b y the operation of Law and by the virtue of the undertakings given by the Corporate Debtor before the Hon’ble Delhi High Court.

Submission on behalf of the Corporate Debtor

12. The Respondent have filed their reply dated 21.02.2021. The Respondent submits that the Applicant has filed the present Application to seek clarification from the Tribunal that the Applicant to be treated as the “Secured Financial Creditor” of the Corporate Debtor. The basis on which such declaration is sought by the Applicant is that an undertaking which was made by the Corporate Debtor before the Hon’ble Delhi High Court to offer its assets as a security to cover the awarded amount which falls within the definition of “charge” and “security interest” of the Code.
13. The Respondent submits that the Applicant has patently incorrectly and wrongly purported to read an undertaking into the orders passed by the Hon’ble Delhi High Court. The relevant portions of the three orders passed by the Delhi High Court were presented by the Respondent herein below:
- (i) Order dated 14th August, 2013 (Annexed as “***Annexure A-2***”)
“Mr Sethi, learned senior counsel for the respondent no. 1, says that he will obtain instructions as to whether any security can be offered by respondent no. 1 qua the amount awarded in favour of the petitioner.”
- (ii) Order dated 1st October, 2013 (Annexed as “***Annexure A-3***”)
“Mr. Das, learned counsel for the respondent, says that he will seek instructions with regard to any unencumbered asset(s) which the

respondent company, can offer as security, to broadly cover the amount awarded in favour of the petitioner vide award dated 29.04.2013.

Mr. Das also says that this court could consider, in the alternative, a bank guarantee being furnished by the respondent.

Learned counsel for the petitioner says that he would have no objection to the alternative mode of security offered by the respondent.”

(iii) Order dated 13th November, 2013 (Annexed as “*Annexure A-4*”)

“Mr Sethi, learned senior counsel for Videocon Industries Ltd. (VIL), says that for the moment, VIL will be able to furnish a bank guarantee in the sum of Rs. 20 crores. He says that the bank guarantee will be furnished within two weeks from today.

Accordingly, VIL is directed to furnish a bank guarantee in the name of the Registrar General of this court within the time-frame indicated hereinabove by Mr Sethi..Mr Sethi also says that endeavors will be made to bridge the gap by the next date of hearing. The said bank guarantee will be kept alive till further orders of the court.” (emphasis supplied)

14. The Corporate Debtor submits that it is clear from the text of the three Orders reproduced herein above that the counsel for the Corporate Debtor (respondent before the Delhi High Court) was to take instructions from his clients on (i) whether security can be created on unencumbered assets of the Corporate Debtor or (ii) whether bank guarantee will be furnished on behalf of the Corporate Debtor. Counsel for the Applicant before the Delhi High Court himself accepted the Bank Guarantee on behalf of the Corporate Debtor thereby giving a go-by to any option for creating security. The Hon’ble Delhi High Court passed an order directing the Corporate

Debtor to only furnish a Bank Guarantee. Once the Bank Guarantee was furnished, there was no question of creating security over any assets of the Corporate Debtor. It is also pertinent to note that the Delhi High Court has not identified any assets over which such purported security was to be created and has neither passed any orders for creation of any security over assets of the Corporate Debtor. Hence, it is therefore clear that there is no “undertaking” to create security which was given by the Corporate Debtor before the Delhi High Court, and absent any such undertaking, no reliefs can be granted to the Applicant.

15. The Respondent submits that the Applicant has sought to rely on *Indian Bank v. Official Liquidator*(1998) 5 SCC 401 to contend that orders/ decrees passed by courts wherein assets are offered as security / are charged shall operate as “charge by operation of law” and that registration of charge is required only with respect to charge created by the company and not for charge by operation of law. It is submitted that this judgment does not assist the case of the Applicant for the following reasons:
 - a. As demonstrated above, there is no charge by operation of law since there is no undertaking given by the Corporate Debtor as contended by the Applicant.
 - b. Without prejudice to the above, the IBC being a complete code in itself only recognizes security interest as defined under Section 3(31) of IBC and does not recognize creation of charge by operation of law. Under this provision, 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..”. Therefore, because a security interest in the manner as recognized by the IBC has not been created, the Applicant cannot read into the provision of Section 3(31), especially on the basis of a judgment that predates the IBC. Further, also by virtue of Section 238 of the IBC, it is submitted that security / charge outside the scope of Section 3(31) is not recognized by the IBC.

- c. The judgment of *Indian Bank* deals with registration of charge created by operation of law vis-à-vis Section 125 of the Companies Act, 1956. This judgment has no application to creation of security interest under Section 3(31) of the IBC.
- d. It is pertinent to note that the preliminary decree passed in *Indian Bank* matter, and the judgment in *Praga Tools Ltd. v. Official Liquidator of Bengal Engineering Co.* (1984) 56 Comp Cas 214 (Cal) referred to therein (See para 9 of the *Indian Bank* judgment at page 10 of the Applicant's Written Submissions), specifically identified the asset over which such charge was considered to have been created (See para 13 of the judgment at page 12 of the Applicant's Written Submissions). Additionally, in both said decisions, a specific order was passed by the Court which provided the manner in which the security interest could be enforced. Without such asset being identified and an order directing the manner of enforcement of security over such asset being passed, the question of creation of

security interest / charge, whether by the company or by operation of law, does not arise. In the facts of the present matter, no security over an identified asset was created / undertaken to be created, and no order for enforcement of any such security has been passed. Therefore, the judgment in *Indian Bank* has no application to the present matter.

16. The Respondent submits that the Applicant has also sought to rely on the judgment passed by the Hon'ble Supreme Court of India in *State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling Co.* (1995) 2 SCC 19 to contend that charge by operation of law can extend to entire property and assets of the Corporate Debtor. It is submitted that this judgment has no application to the facts of the present case, since this case pertains to creation of **statutory** first charge on the property of the company. (See para 8 of the judgment at page 18 of the Applicant's *Written Submissions*) In the present case, the Applicant contends that there is a charge created by way of an undertaking and the same cannot be equated with a statutory charge. In any event and without prejudice to the foregoing, it is submitted that according to the provisions of Section 3(31) of the IBC read with Section 238, the purported undertaking cannot amount to creation of security interest over any or all assets of the Corporate Debtor.

17. The Respondent submits that the Applicant has also sought to rely on the judgment of the Hon'ble Bombay High Court in the matter of *State of Maharashtra v. Official Liquidator* 2004 SCC Online 1090 to submit that persons having charge by operation of law have been treated to be secured creditor. It is submitted that this judgment does

not have any application, because like in the case of *National Iron*, this judgment also deals with statutory charges, which are different from a purported charge created by an “undertaking” before a Court. In this judgment, the Hon’ble Bombay High Court has observed that the moot question that arose was whether the applicant therein could be treated as “secured creditor” by operation of law (*See para 4 at Page 21 of the Applicant’s Written Submissions*). It is submitted that the facts of this judgment are distinguishable from the facts of the present matter and therefore the said judgment has no application to the present matter.

18. It is further submitted by the Corporate Debtor that none of the above judgments have any application to the present case in view of the following:
 - a. provisions of Section 238 of the IBC override anything inconsistent in any other law for the time being in force and any instrument having effect by virtue of such law;
 - b. each of the said judgments was passed prior to the enactment of the IBC, andand that none of the judgments deal with security interest created within the meaning and scope of Section 3(31) of IBC which defines “security interest” for the purposes of IBC.
19. It is submitted by the Corporate Debtor that this Applicant has already been held to be an unsecured creditor by the National Company Law Appellate Tribunal and the Hon’ble Supreme Court of India has refused to interfere with this finding of the Appellate Tribunal. Accordingly, the present Application ought not to be

entertained by this Hon'ble Tribunal. This is substantiated herein below:

- a) This Applicant filed an Application being M.A. No. 3302 of 2019 before this Hon'ble Tribunal in respect of a fixed deposit of Rs. 20 crore in the name of Registrar General of the Delhi High Court. The fixed deposit was created by encashment of a Bank Guarantee of the same amount deposited by the Corporate Debtor in the name of the Registrar General of the Delhi High Court pursuant to an order under Section 9 of the Arbitration and Conciliation Act, 1996. The Applicant by way of the said Miscellaneous Application prayed for a declaration that the fixed deposit is an asset of the Applicant and that the Registrar General should be directed to transfer this amount to the Applicant. This Hon'ble Tribunal vide order dated 11th November 2019 held that the said fixed deposit is an asset of the Corporate Debtor and that the same should be transferred to the Corporate Debtor (*at Annexure A/12 of the Application at Page 163*). The Applicant filed an appeal before the Hon'ble National Company Law Appellate Tribunal, which was dismissed by the Appellate Tribunal and it was held that the fixed deposit is an asset of the corporate debtor.

- b) This Tribunal in its order dated 11th November 2019 made a remark that the amount of Rs. 20 crores is a "security interest" in the Applicant's favour. An appeal was filed by the Resolution Professional on behalf of the Corporate Debtor impugning this remark. The Appellate Tribunal vide its judgment dated 22nd January 2020 held (*at Annexure A/13 of the Application at Page 170*):

“16. For the reason aforesaid, while we uphold the finding given by the Adjudicating Authority that the amount of Rs. 20 Crore is an asset of the Corporate Debtor, we hold that the observation that the amount was ‘a security interest in Morgan’s favour’ being against the facts and law is set aside.”

- c) The Appellate Tribunal held that there is no security interest created in favour of the Applicant. The Supreme Court vide Order dated 16th March 2020 was pleased to dismiss an appeal challenging the Order of the Appellate Tribunal dated 20th January, 2020 (at Annexure A/14 of the Application at page 179).
- d) And that the present Application has been filed seeking a clarification and declaration from this Hon’ble Tribunal that the Applicant be treated as a secured financial creditor in as much as a charge and/ or security interest has been created in favour of the Applicant to the extent of the Rs. 20 Crores. It is submitted that the previous round of litigation initiated by the Applicant, it has been conclusively held that there is no security interest in favour of the Applicant and that the sum of Rs. 20 crores is the asset of the Corporate Debtor.
20. It is submitted by the Corporate Debtor that the Applicant is approaching this Hon’ble Tribunal after significant delay despite being aware for a long time that it was classified as an unsecured creditor by the Resolution Professional. Therefore, this Application is a mere afterthought and the Applicant is trying to create a case where none exists. The Application therefore deserves to be dismissed. This is substantiated herein below:

- a) It may be noted that the Applicant was aware in the year 2019 itself that it was classified as an unsecured creditor by the Resolution Professional. In its Application being M.A. No. 3302/ 2019 referred to herein above, the Applicant pleaded, as an alternate case, that the amount of Rs. 20 crores deposited in the Fixed Deposit with the Registrar General of the Delhi High Court is a security interest within the meaning of Section 3(31) of the IBC. The Applicant also sought to contend that, in the event of liquidation of the Corporate Debtor, the Applicant being a secured creditor ought to be permitted to realize its “security interest” under Section 52 on the amount of Rs. 20 crores since the IBC is a complete code dealing with resolution and liquidation process of the corporate debtor. (*See paragraph 29 and 30 of Applicant’s M. A. No. 3302/ 2019 at Annexure A/11 at Page 156-157 of the present Application*).
- b) As stated above, the order passed by this Hon’ble Tribunal dated 11th November, 2019 wherein it was held that a “security interest” was created in favour of the Applicant was challenged by the Resolution Professional to this limited extent before the Appellate Tribunal, and the Hon’ble Appellate Tribunal held vide order dated 20th January, 2020, that there was no such security interest created in favour of the Applicant. The Supreme Court vide order dated 16th March 2020 dismissed the Appeal challenging the said order of the Appellate Tribunal. Thus, the Applicant was aware at least from 20th January 2020 (if not earlier) that it was

classified as an unsecured creditor. Despite this knowledge, it chose to file the present Application only in November 2020 after resolution plans were put to vote before the Committee of Creditors of the Corporate Debtor. This goes to show that the Applicant has approached this Hon'ble Tribunal with significant delay and therefore this Application deserves to be dismissed.

21. It is submitted by the Corporate Debtor that if the Applicant believed that there was an "undertaking" which amounted to creation of security in its favour, the Applicant should have made this case in its first Application. It is submitted that the Applicant did not however make any such case being fully aware that in fact there was no such undertaking.
22. The Corporate Debtor prayed that this Application therefore is an attempt by the Applicant to agitate the same issue before this Hon'ble Tribunal on the basis of different grounds. On the basis of the aforesaid submissions as also the submissions made by way of the Affidavit in Reply by the Resolution Professional and the submissions made before this Hon'ble Tribunal, it is submitted that the present Application deserves to be dismissed with costs.

FINDINGS

23. Having considered the submissions of the Counsel appearing for the Applicant and the Respondent and on perusal of the records placed

before this Tribunal, we have noticed that the Applicant had already been held to be “Unsecured Creditor” by the Hon’ble National Company Law Appellate Tribunal. Further, the said amount of Rs. 20 Crores was also held to be an asset of the Corporate Debtor. In the Order dated 11.11.2019 passed by this Hon’ble Tribunal made a remark that the amount of Rs. 20 Crore is a “security interest” in the Applicant’s favour. Pursuant to this the Respondent, Resolution Professional preferred an Appeal and the Appellate Tribunal vide its Judgment dated 22.01.2020 held that :

“16. For the reasons aforesaid, while we uphold the finding given by the Adjudicating Authority that the amount of Rs. 20 Crore is an asset of the Corporate Debtor, we hold that the observation that the amount was ‘a security interest in Morgan’s favour being against the facts and law is set aside”.

24. The Appellate Tribunal also held that there is no security interest created in favour of the Applicant. Further, the Supreme Court vide order dated 16.03.2020 also dismissed the Appeal filed by the Applicant on the grounds as to not to interfere with the impugned orders passed by the Tribunal. Therefore, it can be seen that the Applicant has again filed the present Application as a second attempt to declare them a Secured Financial Creditor.

25. Further it has also been seen that there is a delay on the part of the Applicant to file the Application despite being aware that it was classified as unsecured Financial Creditor way back by the Resolution

Professional. The Applicant is relying on the basis of an Undertaking which in fact was incorrectly and wrongly purported to read as undertaking. Therefore the present Application is an attempt on the part of the Applicant to agitate the same issue before this Tribunal on the basis of different grounds.

26. With the aforesaid observations, we hereby are not inclined to allow the present Application. In view of the above **IA 2234 of 2020 in CP No. 02 of 2018 is rejected with No Costs.**
27. Ordered Accordingly. File to be consigned to records.

Sd/-

**SHYAM BABU GAUTAM
MEMBER (TECHNICAL)**

Sd/-

**ASHOK KUMAR BORAH
MEMBER (JUDICIAL)**