

IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI

IA(IBC)/784(CHE)2022 IN CP/1011/IB/CB/2018

(filed under Section 35 (1)(m) & (n) and Section 60(5) of IBC Code with Regulation 9 of IBBI (Liquidation Process) Regulation 2016 read with Rule 11 of the NCLT Rules)

In the matter of M/s. AKR Holdings Private Limited

N.Kumar,

Liquidator of M/s. AKR Holdings Private Limited

Old no 8 New no 3 Third Street

Race View Colony Guindy

Chennai 600032

... Applicant

-Vs-

1. Indian Overseas Bank
Assistant Recovery Management Branch
Annexe Building, Third Floor, Central Office,
763, Anna Salai
Chennai 600002

... 1st Respondent

2. M/s. Tamilnadu Mercantile Bank,
SME Branch,
48 D&C, 7th Street (Middle)
Biryant Nagar,
Thoothukudi 628008

... 2nd Respondent

Appearances:

For Applicant : S.Sathyarayanan, Advocate

For Respondent 1 : M.L.Ganesh, Advocate

For Respondent 2 : A.G.Sathyarayana, Advocate

Along With

MA(IBC)/123(CHE)2021 IN CP/1011/IB/CB/2018

(Filed under Section 60(5) & Section 65 of Insolvency & Bankruptcy Code, 2016)

In the matter of M/s. AKR HOLDINGS PRIVATE LIMITED



Indian Overseas Bank,
Asset Recovery management Branch,
Annexe Building, Third Floor
Central Office,
763, Anna Salai,
Chennai-600 002

... Applicant

-Vs-

1. N.Kumar
The Liquidator,
M/s. AKR Holdings Private Limited
59, MKN Road , Guindy,
Chennai 600032
2. Tamilnad Mercantile Bank ,
SME Branch
48 D&C, 7th Street (Middle)
Briyant Nagar
Thoothukudi 628008

Appearances:

For Applicant : M.L.Ganesh, Advocate

For Respondent1 : S.Sathyannarayanan, Advocate

For Respondent2 : A.G.Sathyannarayana, Advocate

ALONG WITH

IA(IBC)/640(CHE)2022 IN CP/1011/2018

(Filed under Section 60 (5) of the Insolvency and Bankruptcy Code 2016 read with Rule 11 of the National Company Tribunal Rules, 2016)

In the matter of M/s. AKR HOLDINGS PRIVATE LIMITED

Tamilnad Mercantile Bank Limited,
SME Branch,
48 D&C , 7th Street 9 (Middle)



Briyant Nagar,
Thoothukudi 628008.

...Applicant

-Vs-

1. N.Kumar,
Liquidator of AKR Holdings Private Ltd
59, MKN Road, Guindy,
Chennai 600032

Appearances:

For Applicant : A.G.Sathyanarayana, Advocate
For Respondent : S.Sathyanarayanan, Advocate

Order Pronounced on 05th January, 2024

CORAM:

SANJIV JAIN, MEMBER (JUDICIAL)
VENKATARAMAN SUBRAMANIAMMEMBER (TECHNICAL)

COMMON ORDER

(Heard through Physical mode)

IA IBC 784 (CHE) 2022 is an application under Section 35 (1)(m) & (n) and Section 60(5) of IBC Code with Regulation 9 of IBBI (Liquidation Process) Regulation 2016 read with Rule 11 of the NCLT Rules filed by Liquidator of AKR Holdings Pvt Ltd with **Indian Overseas Bank (herein after referred to as IOB)** as Respondent 1 and **Tamilnad Mercantile Bank Ltd (herein after referred to as TMB)** as Respondent 2 seeking following reliefs :



- i) *Direct the 1st and 2nd Respondent to handover original title documents pertaining to the property situated at 60 MKN Colony Guindy , Chennai to the applicant.*
- ii) *Pass such further or other orders/reliefs as may be deemed fit and proper in the facts and circumstances of the case and thus render justice.*

2. **MA IBC 123 (CHE) 2021** is an application filed by Indian Overseas Bank (IOB) under Section 60 and Section 65 of Insolvency and Bankruptcy Code read with Rule 11 of NCLT Rules 2016 against Liquidator of AKR Holdings Pvt Limited as Respondent 1 and Tamilnadu Mercantile Bank Ltd (TMB) as Respondent 2 seeking following reliefs:

- i) *Declare the 2nd respondent as an unsecured creditor in the liquidation proceedings.*
- ii) *Take up the matter on emergent basis as the liquidator is in the process of distribution of the sums realised and*
- iii) *Pass such and other order as deemed fit in the circumstances of the case and thus render justice.*

3. **IA IBC 640 (CHE) 2022** is an application filed by Tamilnadu Mercantile Bank Ltd (TMB) under Section 60 (5) of the Insolvency and Bankruptcy Code 2016 read with Rule 11 of the National Company Tribunal Rules, 2016 with Liquidator of AKR Holdings Private Limited as Respondent seeking following reliefs:



- a) That the Adjudicating Authority issue suitable directions to the Respondent to distribute the sale proceeds of the Corporate Debtor as per Section 53 of the code.
- b) That the Adjudicating Authority pass such orders or further orders which may deem to be fit and proper in the interest of justice.

BRIEF HISTORY:

4. On an Application under Section 7 of Insolvency and Bankruptcy Code 2016 filed by a financial creditor M/s Global Infra against AKR Holdings Private Ltd , the Corporate Debtor , the Adjudicating Authority had vide its order dated 15.11.2018 in **CP/1011/(IB)/CB/2018** ordered the Corporate Insolvency Resolution Process and appointed Mr. Muthiah Thevar Rajapandian as IRP. Subsequently, the IRP was appointed as the Resolution Professional. The Corporate Debtor was sent to liquidation by Adjudicating Authority vide its order dated 07.06.2019 in **MA no IBC 524 CHE 2019 in CP /1011/(IB)/CB/2018**, appointing N. Kumar, as liquidator.

5. It is stated that from the initiation of CIRP of the Corporate Debtor, there was non-cooperation on the part of the promoter/ suspended directors. An application MA/IBC/415/CHE/2019 under Section 19(2) of IBC was filed against suspended directors.



6. It is stated that suspended directors entered into many fraudulent / avoidance transactions and appropriate applications for avoidance transactions have been filed before the adjudicating authority.

7. It is stated that on verification of records, it was found that Corporate Debtors' property situated at Thirukazhukundram was fraudulently alienated by suspended directors of the Corporate Debtor, without prior consent of the secured financial creditors who had charge over the said property. The RP/ Liquidator has filed an application **IA/IBC/314/CHE/2021** before the adjudicating authority with respect to the said fraudulent transaction which is pending for adjudication before this Tribunal.

8. It is stated that M/s. AKR Holdings Pvt Ltd, the Corporate Debtor was a Corporate Guarantor to IOB, for the facilities availed by M/s. AKR Home Depot Pvt Ltd and M/s. AKR Infrastructure Ltd and both the borrowers defaulted in repayment and their accounts were classified as NPA. Towards the loans availed by M/s. AKR Home Depot Pvt Ltd and M/s. AKR Infrastructure Ltd, the Corporate Debtor had mortgaged their properties at Thirukazhukundram Taluk and a house and ground measuring 6568 ¼ Sqft at 60 MKN Colony, Guindy, Chennai to IOB.



9. It is stated that the Corporate Debtor stood as Corporate Guarantor to TMB for the facilities availed by M/s. Matrix Metal Traders Pvt Ltd and created mortgage of the same immovable property situated at 60 MKN Road, Guindy Chennai.

10. It is stated that the liquidator had conducted four e-auctions for sale of the immovable property of the Corporate Debtor located at 60 MKN Road Guindy Chennai. First three auctions conducted were unsuccessful and after that liquidator was able to take physical possession of the above property and the fourth e-auction conducted on 25.08.2021 was successful. Sale Certificate was issued and registered in favour of the successful bidder after receipt of sales consideration of Rs.5.08 crore on 31.01.2022.

11. It is stated that both IOB and TMB are the stakeholders who claim for distribution of the sale proceeds and have filed MA/IBC/123/CHE/2021 and IA/IBC/640/CHE/2022 which are also being dealt along with the current applications filed by Liquidator.

12. It is stated that the property in question is a house with ground measuring 6568 $\frac{3}{4}$ Sq.ft at Door No 60 , MKN Road, Guindy, Chennai 600032, acquired by Corporate Debtor vide Sale Deed dated 29.10.2010 bearing document no 5311 of SRO Velacherry.



13. It is stated that Corporate Debtor AKR Holdings Pvt Ltd had executed Memorandum of Deposit of Title Deeds dated 23.11.2010 in favor of IOB confirming deposit of title deeds on 11.11.2010 for loans sanctioned to M/s. AKR Vyapaar Ltd and AKR Home Depot Pvt Ltd.

14. It is stated that AKR Holdings Pvt Ltd, Corporate Debtor had on 08.09.2016 created a Simple Mortgage in favor of TMB for loan sanctioned to M/s. Matrix Metal Traders Pvt Ltd. The above charge was registered with Registrar of Companies under Section 77 of Companies Act 2013 and also with Central Registry of Securitisation of Asset Reconstruction and Security of India (CERSAI) with Asset ID 200013711797 and Security Interest ID 400013740840.

15. It is stated that when the original title deeds were requested from both the banks for valuation purposes, it was found that both the banks had same documents bearing no 5311 of 2010 dated 29.11.2010.

ARGUMENTS ON BEHALF OF LIQUIDATOR:

16. It is submitted that on the successful completion of e-auction of property located at 60 MKN Road, Guindy on 25.08.2021 and after receipt of the sale



consideration of Rs.5.08 cr, Sale Certificate was issued by the liquidator in favor of the buyer on 31.01.2022.

17. It is submitted that the purchaser of the property has been requesting the liquidator to hand over the original title documents and liquidator has sought direction from the tribunal asking both the banks to hand over the original title deeds pertaining to the said property. It is further submitted that the proceeds realized from sale are yet to be distributed to the stakeholders in accordance with Section 53 of IBC Code, due to pendency of the cases filed by both the banks.

18. It is submitted that the liquidator had sent an email dated 13.11.2020 to TMB and IOB providing clarification on the claims and the status of the claimants in page 9 and 10 of application in IA 640 CHE 2022 that it is treating both the financial creditors as Secured Creditors with pari-passu ranking.

ARGUMENTS ON BEHALF OF INDIAN OVERSEAS BANK (IOB)

19. It is submitted that AKR Home Depot Pvt Ltd and AKR Infrastructure Ltd (for whom AKR Holdings Pvt Ltd the Corporate Debtor had given corporate guarantee and security) had defaulted and were classified as NPA. IOB had filed OA no 682 of 2015 in Debt Recovery Tribunal against its borrowers arraying Corporate Debtor as one of the defendant. The suit was



decreed in Bank's favor on 17.07.2017 and Recovery Certificate dated 21.09.2017 for a sum of Rs.11,27,57,994.98 was issued with a clause that on failure of payment of adjudicated amount within 30 days, same shall be recovered from sale of mortgaged properties including that of the Corporate Debtor. It is submitted that due to non-payment within 30 days, the decree is converted as sales decree. It is submitted that when CIRP was initiated against AKR Holdings and claims were called for, Tamilnadu Mercantile Bank staked its claim stating that amongst other things, there was a mortgage held by it over the property at 60 MKN Road Guindy.

20. It is submitted that in the CoC meeting dated 06.03.2019, Tamilnadu Mercantile Bank Ltd had admitted that Corporate Debtor had committed a fraud with respect to Title Deed and Sale deed bearing no 5311 of 2010 and also advised COC that it has lodged a criminal complaint against the erstwhile directors of the Corporate Debtor and reported the matter to RBI. It is submitted that these things are reflected in minutes of COC placed as Annexure 4 (Pages 26-30 in typeset to Application in MA 123 CHE 2021.)

21. It is submitted that Encumbrance Certificate dated 26.01.2019 submitted as Annexure in pages 31-33 in typeset to Application in MA 123 CHE 2021 , shows i) an encumbrance vide MOD 5679/2010 dated 23.11.2010 in favor of Indian Overseas Bank for Rs.21.80 crore and ii) another encumbrance vide



MOD 5558/2016 dated 08.09.2016 for Rs. 5 crore in favor of Tamilnad Mercantile Bank Ltd.

22. It is submitted that fraud invalidates the mortgage in favor of TMB. Even otherwise, mortgage in favor of IOB was created and registered in 2010 prior to the mortgage created in favor of TMB in 2016.

23. It is submitted that IOB had objected the liquidator classifying TMB as secured creditor with pari- passu ranking as that of IOB, on the grounds that the documents which were mortgaged with TMB are the fabricated title deeds. It is submitted that liquidator had taken the decision based on the fact that TMB had the charges registered with ROC and also with CERSAI and so was termed as secured creditor along with IOB. It is submitted that the liquidator has relied on Regulation 21 of IBBI Liquidation Process Regulations 2016, for including TMB as secured creditor which is wrong. Liquidator had not considered Section 3 (31) of IBC Code which defines Security Interest as right, title or interest. In the instant case, as title deeds based on which mortgage created for TMB were found to be forged or fabricated, there can be no mortgage and there can be no security interest.



24. It is submitted that TMB may be treated as Unsecured Creditor in the liquidation proceedings and liquidator may complete the distribution process.

ARGUMENTS ON BEHALF OF TAMILNADU MERCANTILE BANK LTD (TMB):

25. It is submitted that AKR Holdings Pvt Ltd ,Corporate Debtor is the Corporate Guarantor for the facilities availed by M/s. Matrix Metal Traders Pvt Ltd with TMB and Corporate Debtor mortgaged the immovable property at 60 MKN Road Guindy by way of registered simple mortgage by depositing the title deeds in the year 2016 as security .

26. It is submitted that there is a valid charge registered in favor of TMB under Section 77 of the Companies Act 2013 and no other charges were registered. (Copy of the Proof of Charge is enclosed herewith as Annexure 1 in page 7 of application in IA 640 CHE 2022.)

27. It is submitted that TMB had taken possession of MKN Road, Guindy property under SARFAESI Act and issued Sales Notice twice. Paper publication of Possession Notice was issued on 09.11.2017 and Sale Notices were issued on 30.12.2017 and 19.03.2018. It is submitted that IOB had not raised any objection to the above actions of TMB.



28. It is submitted that TMB has filed the claim with liquidator on 24.06.2019, by relinquishment of security interest under Section 52 of IBC and liquidator admitted the claim and declared TMB as the sole secured creditor of Corporate Debtor. (Copy of admission of claim as secured creditor is enclosed as Annexure 2 in page 9 of application in IA 640 CHE 2022.)

29. It is submitted that liquidator sold the property only 2 years after the date of liquidation order and realized Rs.5.08 crore during August 2021. It is submitted that TMB is the sole secured creditor and as per Regulation 42(2) of Liquidation Process (IBBI) Regulations 2016, the proceeds from sale should be distributed within a period of 90 days. It is submitted that TMB sent a representation on the above lines to Liquidator on 28.01.2022 which is enclosed as Annexure 3 in page 11-12 of application in IA 640 CHE 2022.

30. It is submitted that, the Adjudicating Authority may issue suitable directions to the liquidator to distribute sale proceeds of the Corporate Debtor as per section 53 of IBC Code.

ANALYSIS & FINDINGS:

31. We have heard learned counsels of the parties and perused the records.



32. From the minutes of the 4th COC meeting dated 06.02.2019 (in Annexures to IA 314), it is found that IOB and TMB were the only financial creditors who were the members in the Committee of Creditors.

33. IOB has Memorandum of Title deeds created by the Corporate Debtor in 2010 in its favor, in respect of Guindy property and Thirukhazhukundram properties. This MOD has also been registered with Registrar of Assurances, Velachery, which is reflected in Encumbrance Certificate taken in 2022. It has also obtained Recovery Certificate from DRT to sell the immovable property of Corporate Debtor. Since charge in favor of IOB was created in 2010 i.e. prior to enactment and implementation of Companies Act 2013, the proviso under Section 125 of Companies Act 1956 will be applicable and not Section 77 of Companies Act 2013. IOB had not filed the Charge with Registrar of Companies under Section 125 of Companies Act 1956.

34. TMB has MOD from Corporate Debtor for Guindy Property and registered it with Registrar of Assurances, Velachery in 2016, which is reflected in Encumbrance Certificate taken. Further, charge of TMB on Corporate Debtor's property is reflected in ROC website and also been updated in CERSAI portal. However, TMB has filed a police complaint



stating that a fraud has been committed by the erstwhile promoters of the Corporate Debtor by submitting fabricated title deeds.

35. In the above backdrop, both IOB and TMB are claiming that they alone are the sole secured creditors and as such they are entitled to Rs.5.08 crore money realized from sale of asset in liquidation as per waterfall mechanism specified under Section 53 of IBC.

36. It is stated by TMB that liquidator had vide e-mail dated 25th November 2019 treated IOB as unsecured creditor (Page 8 of typeset in application to IA 640 CHE 2022). However in the same application typeset in page 9, there is an e-mail from the liquidator dated 13th Nov 2020 with a heading 'Clarification of claims and status of the claimant' wherein he has concluded *'In view of the above facts and circumstances it is concluded that both the financial creditors are financial creditors with pari-passu ranking. If any of the above secured creditor are aggrieved they can prefer application before NCLT Chennai seeking their direction.'* Hence, liquidator has treated both IOB and TMB as secured creditors with pari-passu ranking.

37. Let us examine the facts and legal position to determine the eligibility.

38.1 **Section 3 (30) of IBC** states 'Secured Creditor means a creditor in favor of whom security interest is created'.

38.2 **Section 3 (31) of IBC** states Security Interest means



‘right, title or interest or a claim to property created in favor 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;’

38.3 **Section 52 (3) of IBC** code states as

(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.

38.4 **Regulation 21 of IBBI Liquidation Process Regulations 2016** deals with proving of security interest. The existence of a security interest may be proved by a secured creditor on the basis of a) The records available in an Information Utility, if any; b) The certificate of registration of charge issued by the Registrar of Companies or c) proof of registration of charge with the Central Registry of Securitization Asset Reconstruction and Security Interest of India.



38.5 Regulation 42 of Liquidation Process (IBBI) Regulations 2016 talks about Distribution as under: 1) Subject to the provisions of Section 53, the liquidator cannot commence distribution before the list of stakeholders and the asset memorandum has been filed with the Adjudicating Authority. 2) The liquidator shall distribute the proceeds from realization within 90 days from the receipt of the amount to the stakeholders 3) Insolvency resolution process costs if any and the liquidation costs shall be deducted before such distribution is made.

38.6 Section 53 of IBC deals with priority in distribution of proceeds in liquidation, where in Secured creditor is ranked higher at 53(1)(b)(ii) compared to unsecured creditors who are ranked at 53(1)(d). The relevant provision is as under:

“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, namely :—

(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 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.”

38.7 Section 125 of the Companies Act, 1956 deals with charges created against property of the company. The Section is reproduced as under:

125. Certain charges to be void against liquidator or creditors unless registered.

(1) Subject to the provisions of this Part, every charge created on or after the 1st day of April, 1914, by a company and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration in the manner required by this Act within¹ thirty] days after the date of its creation:² Provided that the Registrar may allow the particulars and instrument or copy as aforesaid to be filed within thirty days next following the expiry of the said period of thirty



days on payment of such additional fee not exceeding ten times the amount of fee specified in Schedule X as the Registrar may determine, if the company satisfies the Registrar that it had sufficient cause for not filing the particulars and instrument or copy within that period.]

(2) Nothing in subsection (1) shall prejudice any contract or obligation for the repayment of the money secured by the charge.

(3) When a charge becomes void under this section, the money secured thereby shall immediately become payable.

(4) This section applies to the following charges:-

(a) a charge for the purpose of securing any issue of debentures;

(b) a charge on uncalled share capital of the company;

(c) a charge on any immovable property, wherever situate, or any interest therein;

(d) a charge on any book debts of the company;

(e) a charge, not being a pledge, on any movable property of the company;

(f) a floating charge on the undertaking or any property of the company including stock-in-trade;

(g) a charge on calls made but not paid;

(h) a charge on a ship or any share in a ship;

(i) a charge on goodwill, on a patent or a licence under a patent, on a trade mark, or on a copyright or a licence under a copyright.

(5) In the case of a charge created out of India and comprising solely property situate outside India, thirty days after the date on which the instrument creating or evidencing the charge or a copy thereof could, in due course of post and if despatched with due diligence, have been received in India, shall be substituted for thirty days after the date of the creation of the charge, as the



time within which the particulars and instrument or copy are to be filed with the Registrar.

(6) Where a charge is created in India but comprises property outside India, the instrument creating or purporting to create the charge under this section or a copy thereof verified in the prescribed manner, may be filed for registration, notwithstanding that further proceedings may be necessary to make the charge valid or effectual according to the law of the country in which the property is situate.

(7) Where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not, for the purposes of this section, be treated as a charge on those book debts.

(8) The holding of debentures entitling the holder to a charge on immovable property shall not, for the purposes of this section, be deemed to be an interest in immovable property.

39. Based on the above legal tenets, we have to decide which of the financial creditor i.e. IOB or TMB qualify to be treated as secured creditor to get priority in distribution and waterfall mechanism under Section 53 of IBC.

IOB'S CLAIM AS SECURED CREDITOR

40. Dates and events regarding security creation by IOB are as under:

S. No	Date	Events
1	11.11.2010	Deposit of title deeds created by AKR Holdings Pvt Ltd with IOB for their property measuring 6568 sq.ft. in MKN Road, Guindy
2	23.11.2010	Memorandum of Deposit of Title deeds regd on Doc no



		5679/2010 witnessing the creation of mortgage in favour of IOB.
3	25.08.2015	O.A. No 682 of 2015 filed by IOB before DRT II Chennai for recovery of Rs.9,10,99,446/-
4	08.09.2016	Simple Mortgage created by AKR Holdings P Ltd in favour of TMB for the same MKN Road Guindy property
5	08.09.2016	Registration of charge in favour of TMB with Registrar of Companies
6	08.09.2016	Memorandum No 5558/2016 registered witnessing mortgage in favour of TMB
7	07.10.2016	Charge registered with CERSAI in favour of TMB.
8.	17.07.2017	Decree passed in OA 682/2015 allowing the OA and confirming the mortgage in favour of IOB
9.	21.09.2017	Recovery Certificate issued by DRT for Rs. 11,20,57,994/-
10.	15.11.2018	Commencement of CIRP of AKR Holdings Pvt Ltd

41. ARGUMENTS AS TO WHY IOB SHOULD NOT BE TREATED AS SECURED

CREDITOR:

1. As per Regulation 21 of IBBI Liquidation Process Regulations 2016 , the existence of a security interest may be proved by a secured creditor on the basis of-a) the records available in an Information Utility, if any; b) the certificate of registration of charge issued by the Registrar of Companies or c) proof of registration of charge with the Centra Registry of Securitisation Asset Reconstruction and Security Interest of India. *IOB has not registered the charge with any of the above agencies.*
2. Section 125 of Companies Act 1956 states that certain charges are void against liquidator or creditors unless registered. Section 77 of



Companies Act 2013 also reiterates that. *The mortgage in favour of IOB has not been registered with ROC or with CERSAI.*

3. Hon'ble High Court of Kerela in *Kerala State Financial Enterprises Vs Official Liquidator (2007) 74 SCL 221 (Ker)* has held that if the charge had not been registered under Section 125 of the Companies Act 1956, then undisputedly the Applicant has to be considered as an unsecured creditor and has to stand in queue with the other creditors to receive its dues as and when assets of the company are collected for distribution in accordance with law'. The said judgement was upheld by Hon'ble Supreme Court in the appeal and was reported in (2006) 133 CompCas 915 (SC). A similar view was taken by Hon'ble Bombay High Court in *'The Antifriction Bearings Corporation Limited & Another vs State of Maharashtra & Others'* reported in AIR 1999 Bom 37.
4. NCLAT in *Volkswagen Finance Private Ltd vs Shri Balaji Printopack Pvt Ltd & Other (Company Appeal (AT) Insolvency No 02 of 2020 dated 19.10.2020)* held

To reiterate, in the instant case, as the 'Security Interest' was neither registered with the 'Information Utility'; nor under Section 125 of the Companies Act, 1956/Section 77 of the Companies Act, 2013; no Application was preferred under



Section 87 of the Companies Act, 2013; 'Charge' was not registered in the Securitisation Asset Reconstruction and Security Interest of India, we are of the opinion that Section 52(3)(b) of the Code and Regulation 21(b) of the (Liquidation Process), Regulation, 2016 are not complied with and the ratio laid down by the Hon'ble Apex Court in *Kerala State Financial Enterprises Ltd. (Supra)* and this Tribunal in *India Bulls Finance Ltd. (Supra)* is squarely applicable to the facts of this case. Hence, we hold that when in present matter 'Charge' was not registered as per the provisions of Section 77 (1) of the Companies Act 2013 and as envisaged under the Code, the Creditor cannot be treated as a 'Secured Creditor'.

42. ARGUMENTS IN FAVOR OF TREATING IOB AS SECURED CREDITOR:

1. IOB has obtained DRT order and Recovery Certificate in its favour, by virtue of which it will be treated as secured creditor.
2. Hon'ble Kerala High Court in *Kerala State Finance corporation Trivandrum vs CK Sivasankara Paniker & ors, 1978 TAX L.R. 1860* talks about interaction between section 125 of Companies Act and a decree obtained on the basis of mortgage as under



"...Section 125 applies to every charge created by the company in so far as any security of the company's property is conferred thereby. It cannot be said that a decree by which the company's property is ordered to be sold for realization of the amount due to the creditor is a charge created by the company. It may be that the decree is based on a mortgage created by the company. But, once that mortgage has merged in the decree the relationship of the parties is governed by the terms of the decree and the decree creating a charge is not hit by Section 125 of the Act (See *Subrahmanyam v. Muttuswami*, AIR (1941) FC 47). If the charge has not matured in a decree, no doubt, S. 125 will apply and the charge will be void against all creditors and the Liquidator...."

3. In *SICOM Limited vs Sundaresh Bhat*, NCLAT Company Appeal AT Insolvency No 470 of 2021 it is stated that

28. The Volkswagen case (*supra*) was not a case where there was any Decree or judgment in favour of the Appellant so as to get over the requirement of registration as mandated by Section 77 sub-section (3). The Company Appeal (AT) (Insolvency) No. 470 of 2021 21 present is a case where the Appellant is relying on judgment and order of the Debt Recovery Tribunal dated 26th April, 2017, where on account of default in depositing the money as directed by the DRT, the default clause permitting sale of mortgage and hypothecation of asset became operative. Thus, the judgment in Volkswagen case does not help the Appellant in the present case.



26. The order passed by the Debt Recovery Tribunal dated 26th April, 2017 is an order adjudicating the dispute between the Appellant and the Corporate Debtor and after adjudication, the order passed by the Tribunal is akin to a Decree. The order dated 26th April, 2017 indicates that 30 days' time was allowed to the defendants (one of which was Corporate Debtor) to make the payment, failing which the amount was to be recovered from the sale of mortgaged and hypothecated properties. When the sale of Company Appeal (AT) (Insolvency) No. 470 of 2021 19 mortgaged and hypothecated was directed as per judgment of the Debt Recovery Tribunal, the mortgage and hypothecation no longer remained the matter of contract, rather it was the part of the judgment of the Tribunal and the non-registration of charge as required by Section 77 of Companies Act, 2013 does not in any manner affect enforceability of the order dated 26th April, 2017.

33. We thus, are of the view that Adjudicating Authority committed error in rejecting the claim of the Appellant to be of 'secured creditor'. By virtue of judgment and order of the Debt Recovery Tribunal, the Appellants were entitled to recover their dues from the secured assets and they having relinquished the security interest according to Section 52 of the IB Code, as was requested by the Liquidator, in the liquidation proceedings, they have to be treated as 'secured creditor'. In result, we allow the appeal and set aside the order dated 28th April, 2021 of the Adjudicating Authority and allow the Application being I.A. No.33 of 2021 filed by the Appellant and direct the Respondent/ Liquidator to correct the classification of claim of the Appellant as 'secured'. No order as to costs.

43. In the present case, IOB had taken mortgage of two properties of the Corporate Debtor and registered Memorandum of Deposit of Title Deeds



with Registrar office in Velachery. It has not registered the charge with Registrar of Companies or with CERSAI. But it has obtained a decree against Corporate Debtor from DRT and also a Recovery Certificate for Rs. 11,20,57,994/-.

44. The judgements of Hon'ble NCLAT and High Courts as mentioned above, state that by virtue of the order of DRT, an applicant can be treated as secured creditor, even if the charge has not been registered with Registrar of Companies under Section 125 of Companies Act 1956 or Section 77 of Companies Act 2013. Based on the above discussions, **we hold that Indian Overseas Bank as the secured creditor.**

TMB'S CLAIM AS SECURED CREDITOR

45. Dates and events regarding security creation by TMB are as under:

S. No	Dates	Events
1	08.09.2016	Simple Mortgage created by AKR Holdings P Ltd in favour of TMB for the same MKN Road Guindy property
2	08.09.2016	Registration of charge in favour of TMB with Registrar of Companies
3	08.09.2016	Memorandum No 5558/2016 registered witnessing mortgage in favour of TMB
4	07.10.2016	Charge registered with CERSAI in favour of TMB.
5	17.08.2017	Demand Notice issued under SARFAESI Act by TMB
6	03.11.2017	Possession Notice issued under SARFAESI by TMB
7.	09.11.2017	Paper publication of Possession Notice issued by TMB
8.	30.12.2017	Sale Notice issued under SARFAESI Act by TMB and paper publication of Sale Notice
9.	16.03.2018	Sale Notice under SARFAESI Act by TMB



10.	19.03.2018	Paper publication of Sale Notice issued by TMB
11.	15.11.2018	Commencement of CIRP of AKR Holdings Pvt Ltd
12.	07.06.2019	Liquidation order issued against CD in MA No. 524 of 2019

46. Arguments as to why TMB should be considered as secured creditor

are as under:

1. Charge has been registered with Registrar of Companies under Section 77 of Companies Act.
2. Security charge registered with CERSAI.
3. It complied with the conditions prescribed in Regulation 21 of IBBI Liquidation Process Regulations 2016 to treat it as a secured creditor.

47. Arguments as to why TMB should not be considered as secured creditor are as under:

- i) The simple mortgage in favor of TMB was created by providing fabricated document of title. Further, earlier mortgage created in favor of IOB on the same property was hidden and a fabricated encumbrance certificate with nil encumbrance was given to TMB.

TMB has lodged a Police Complaint on 04.02.2019 before Superintendent of Police Thoothukudi against erstwhile directors of AKR Holdings Pvt Ltd on the following lines:



At the time of sanctioning of loan, we have obtained legal opinion from our Panel Advocates, M/s.Bright Associates, Chennai on 06.04.2016 and Mr.Dhanasekar David, Thoothukudi on 15.07.2017. Both of them have confirmed the genuineness of the title deeds after verifying the original title deeds lodged in the bank.

Now, it was found that the document lodged in the bank as well as the EC obtained for the subject property, certified copy obtained from SRO dated 30.01.2019 for verification of genuineness of lodged documents all together are fabricated documents.”

2. The Police complaint was given on 04.02.2019 and the aforesaid statement reaffirmed by TMB in fourth COC meeting held on 06.02.2019 and the recorded minutes duly attested by TMB as follows:

ii) In Agenda 8 of Minutes of the Fourth COC meeting dated 06.02.2019, TMB discussed about the fraud committed by erstwhile directors of the Corporate Debtor by forging document of title as under:

AGENDA No.8:

“Further, it is reported by the secured financial creditor, Tamil Nadu Mercantile Bank (TMB) to the COC that M/s.AKR Holdings Private Limited (CD), has committed a fraud in respect of the property title deeds, Sale Deed document No.5311/10 dated 29.10.2010 in the name of M/S.AKR Holdings Private Limited.

And simple mortgage with the Bank (TMB) Document No.5528/2016 dated 08.09.2016 for Rs.5,00,00,000/- (Rupees Five Crores Only), the TMB has lodged criminal complaint against the present and previous directors of M/s.AKR Holdings Private Limited., for committing alleged fraud and the same was also reported to RBI through FMR-L.



However, the TMB has registered a simple mortgage over the property and valid charge with Registrar of Companies for the loans granted to M/s.Matrix Metal Traders Private Limited.. based on the Corporate Guarantee by AKR Holdings Private Limited, in the subject property."

iii) There is a possibility that TMB could have found out about the earlier encumbrance, if an independent enquiry was conducted in the Registrar office, Velachery.

iv) In Black's Legal Dictionary' fraud' is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right;

v) It is stated that fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetrated or saved by the application of any equitable doctrine including res judicata. (See *Ram Chandra Singh vs Savitri Devi and Ors*(2003(8) SCC 319).

Fraud as it is well known vitiates every solemn act. Fraud and justice never dwell together.

vi) In *Bhaurao Dagdu Paralkar vs State of Maharashtra* reported in *Manu/SC/0495/2005*) Hon'ble Supreme Court observed as follows: " a 'fraud' is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is cheating intended to get an advantage. (See *S P*



Changalvaraya Naidu vs Jagannath (Manu/SC/1092/1994:AIR1994SC853)”. In Commnr. of Customs (Preventive) vs M/s. Aafloat Textiles (I) P ltd and Ors (Civil Appeal no 2447 of 2007) Hon’ble Supreme Court has held similar views.

vii) In the present case, TMB has only one security of MKN Road property Guindy. It has registered charge with Registrar of Companies and CERSAI , by which they are complying the provisions of Regulation Regulation 21 of IBBI Liquidation Process Regulations 2016 . However, this security was created using forged title deed and encumbrance certificate, suppressing the fact about prior charge created in favor of IOB, on the same property. TMB has lodged a Police Complaint on 04.02.2019 before Superintendent of Police Thoothukudi against erstwhile directors of AKR Holdings Pvt Ltd.

48. Based on the above legal points and facts of the present case, as fraudulent transactions are void ab-initio, we are of the view that there is no security available to TMB and it is an unsecured creditor.

CONCLUSION

49. It is normally stated that IBC proceedings are summary in nature and determination of fraud and forgery based on documentary evidences do not come under the purview of NCLT. However, in the current case there is no dispute about forgery, as TMB itself had filed a police complaint against the



erstwhile directors of the Corporate Director for fraud and forgery. This tribunal has to decide as to whether a mortgagee gets any rights over the security created based on the forged documents.

50. In **IA IBC 784 (CHE) 2022**, the liquidator has sought the following relief:

'Direct the 1st and 2nd Respondent to handover original title documents pertaining to the property situated at 60 MKN Colony Guindy, Chennai to the applicant.'

51. **MA IBC 123 (CHE) 2021**, Indian Overseas Bank (IOB) has sought the following main relief *"Declare the 2nd respondent (TMB) as an unsecured creditor in the liquidation proceedings."*

52. **IA IBC 640 (CHE) 2022** filed by Tamilnadu Mercantile Bank Ltd (TMB), it has sought the following main relief: *That the Adjudicating Authority issue suitable directions to the Respondent (liquidator) to distribute the sale proceeds of the Corporate Debtor as per Section 53 of the code.*

53. All the three applications viz. **IA IBC 784 (CHE) 2022**, **MA IBC 123 (CHE) 2021** and **IA IBC 640 (CHE) 2022** are **disposed of** with the following directions:

1. Liquidator has to treat IOB as Secured Creditor and TMB as unsecured Creditor for distribution of the sale proceeds as per Section 53 of IBC.



2. Liquidator may hand over the original title deeds to the auction purchaser. Clearance, if required, may be obtained from the investigating officials dealing with forged title deeds.

-Sd -

VENKATARAMAN SUBRAMANIAM
MEMBER (TECHNICAL)

-Sd -

SANJIV JAIN
MEMBER (JUDICIAL)