

**We THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

**IA No. 244/2022
In
CP (IB) No.396/Chd/HP/2018**

**Under Section 52, 53, & 60(5) of
the Insolvency and Bankruptcy
Code, 2016**

In the matter of:

JM Financial Asset Reconstruction
Company Limited.

...Petitioner/Operational Creditor

Versus

Inka Foods Private limited

...Respondent/corporate debtor.

And

In the matter of IA No.244/2022

HP Financial Corporation
New Himrus Building, Circular Road,
Shimla-1

...Applicant

Versus

1. Sh. Ashok Kumar Gupta
Corporate Office 304 D.R., Chamber 12/56,
Desh Bandhu Gupta Road, Karol Bagh,
New Delhi.

..Respondent/Resolution Professional.

2. JM Financial Asset Reconstruction Co. Ltd.
7th Floor, Cnergy Appasaheb Marathe, Prabhadevi,
Mumbai.

.. Non-Applicant/Financial Creditor.

3. Inka Foods Pvt. Ltd.
Ropar Raod, Nlagarh, District Solan.
Himachal Pradesh.

...Respondent/Corporate Debtor.

Judgment delivered on: 07.02.2023

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)**

Present:

For Applicant in IA No.244/2022 : Mr. Harinder Pal Singh, Advocate
**For respondent No.1 and 3
in IA No.244/2022 :** Mr. Viren Sharma, Advocate
**For respondent No.2 in IA
No.244/2022 :** Mr. Sahil Bhatia, Advocate

PER: SUBRATA KUMAR DASH, MEMBER (TECHNICAL)

JUDGMENT

IA No. 244/2022

The present application has been filed by the Himachal Pradesh Financial Corporation (HPFC)-financial creditor under Section 52, 53 and 60(5) of Insolvency and Bankruptcy code, 2016 for the disbursement of the sale proceeds on the basis of the priority of the charge.

2. It is submitted by the applicant that the corporate debtor has created an equitable mortgage by depositing the title deed of the company in favour of the applicant. As per the second charge Agreement dated 03.05.2008 executed between the applicant-financial creditor/HPFC, Indian Overseas Bank and the corporate debtor, the applicant shall have the priority in realizing its security interest from the sale of the mortgaged property.

3. It is further submitted that the applicant has filed its claim dated 05.02.2020 for an amount of Rs. 9,49,72,555/- with the Resolution Professional. The Resolution Professional has given a voting share of only 33.2% to the applicant against the voting share of 66.8% given to the Indian Overseas Bank. As per the

sale certificate dated 10.05.2021, the secured assets of the corporate debtor have been sold for Rs. 5,80,00,000/- by respondent No. 1. The applicant is seeking the release of sale proceeds as per proof of claim submitted by the applicant.

4. Reply has been filed by respondent No. 1 & 2 vide Diary No.00857/01 dated 24.05.2022 and 00857/2 dated 15.09.2022 respectively.

Reply of respondent No. 1

5. It is submitted by respondent No. 1 that CoC, in its 6th meeting dated 27.09.2019, approved the liquidation of the corporate debtor. Vide order dated 10.01.2020, this Adjudicating Authority has allowed the application filed by the Resolution Professional for liquidation under Section 33(2) of the Insolvency and Bankruptcy Code, 2016. The applicant filed its claim in Form D dated 18.02.2020 to the tune of Rs. 9,49,72,555/- and as per Clause 8A of the above form, the applicant relinquished its security interest in favour of the liquidation estate. It is further submitted that respondent No. 2 filed its claim in form D dated 07.02.2020 to the tune of Rs. 19,24,54,292.88/- and as per Clause 8A of Form D, respondent No. 2 has relinquished its security interest in favour of liquidation interest.

6. It is submitted by the respondent that the only asset of the corporate debtor forming part of the liquidation estate under Section 36 of the Code was the sole land and damaged building situated at Ropar Road, Nalagarh, Himachal Pradesh. As per the e-auction dated 07.04.2020, the successful bidder submitted the entire amount of the bid on 07.05.2021, and subsequently, the respondent issued the sale certificate dated 10.05.2021 to the successful bidder.

7. The respondent relied on the judgment dated 05.04.2021 passed by the Hon'ble NCLAT in the matter of ***Technology Development Board vs. Mr. Anil***

Goel and Ors.; Company Appeal (AT) (Ins) No. 731 of 2021 for distribution of the proceeds released from the sale of assets of the corporate debtor. It is submitted that in view of the above judgment, Section 53 of the Code does not discriminate between the secured creditors on the basis of charge or security held by the secured financial creditor once the financial creditor has opted to release its charge in favour of the liquidation estate. Further, the legal opinion sought by the liquidator also followed the above decision of the Hon'ble Appellate Authority.

8. It is submitted that respondent No. 2 has undertaken/ assured to indemnify the loss, if any, caused to the liquidator/liquidation estate on account of the release of the amount in the ratio of admitted claim to the other secured creditor who has first charge over the assets of the corporate debtor.

9. It is submitted that the present application was first listed before this Adjudicating Authority on 08.04.2022, i.e., 09-10 months after the distribution of sale proceeds by the liquidator and six months after filing of dissolution application by the respondent herein. Accordingly, the respondent has distributed the sale proceeds in terms of the provision of Section 53 of the Code.

Reply by respondent No. 2

10. The respondent has denied the averments made by the applicant. It is submitted that the judgment dated 05.04.2021 passed by the Hon'ble NCLAT in the matter of **Technology Development Board vs. Mr Anil Goel and Ors.**; Company Appeal (AT) (Ins) No. 731 of 2021 has been stayed by the Hon'ble Supreme Court vide order dated 29.06.2021 and is sub-judice, the distribution of sale proceeds realised from the sale of assets of the corporate debtor in terms of Section 53 of Code by the liquidator/respondent No. 1, in the present case is still

justified as per the decision dated 26.05.2022 of Hon'ble NCLAT in the matter of **Oriental Bank of Commerce (Now Punjab National Bank) vs Anil Anchalia & Anr.** Company Appeal (AT) (Insolvency) No. 547 of 2022. It is further submitted that the present application filed by the applicant challenging the distribution of sale proceeds was filed after nearly a year of such distribution, and thus, the same is barred by delay and laches.

11. We have heard the learned counsel for the applicant and respondents and carefully perused the written submissions and records available.

12. In this context, a reference is made to the judgment of the Hon'ble Supreme Court in the matter of India Resurgence **ARC Private Limited vs Amit Metaliks Limited and Anr.** 2021 SC onLine SC 409, where it has held the following in paragraphs No. 17, 19, 20 and 21:

"17. Thus, what amount is to be paid to different classes or subclasses of creditors in accordance with provisions of the Code and the related Regulations is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.

19. In Jaypee Kensington(supra), this Court repeatedly made it clear that a dissenting financial creditor would be receiving the payment of the amount as per his entitlement; and that entitlement could also be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him. It has never been laid down that if a dissenting financial creditor is having a security available with him, he would be entitled to enforce the entire of security interest or to receive the entire value of the security available with him. It is but obvious that his dealing with the security interest, if occasion so arise, would be conditioned by the extent of value receivable by him.

20. The extent of value receivable by the appellant is distinctly given out in the resolution plan i.e., a sum of INR 2.026 crores which is in the same proportion and percentage as provided to the other secured financial

creditors with reference to their respective admitted claims. Repeated reference on behalf of the appellant to the value of security at about INR 12 crores is wholly inapt and is rather ill-conceived.

21. The limitation on the extent of the amount receivable by a dissenting financial creditor is innate in Section 30(2)(b) of the Code and has been further expounded in the decisions aforesaid. It has not been the intent of the legislature that a security interest available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above other financial creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors."

13. We also take note of the decision of the Hon'ble NCLAT in the matter of **Small Industries Development Bank of India(SIDBI) Vs. Vivek Raheja, RP, M/s. Gupta Exim (India) Pvt. Ltd.** (2022) ibclaw.in 744 NCLAT and **Union Bank of India Vs. Resolution Professional of M/s Kudos Chemie Ltd. & Ors** (2022) ibclaw.in 514 NCLAT, wherein the decisions of this Adjudicating Authority, holding that the distribution of the proceeds of the plan value as per the value of security possessed by the financial creditor is not in accordance with the legislative scheme as delineated in section 53(1) of the Code, was challenged. The Appellate Authority, in the above-said cases affirming the view taken by this Adjudicating Authority, held that the decision of the Committee of Creditors and the Adjudicating Authority to distribute the proceeds of the plan value as per the voting share of the secured creditor is in consonance with the provisions of Section 30(2)(b) of the Code.

14. In view of the above, we observe that the applicant and respondent No. 2 has relinquished their security interest in favour of the liquidation estate of the corporate debtor. We further hold that the liquidator has correctly distributed the amount as per the voting share of the secured creditor under Section 53 of the

Code as the secured-financial creditor having first charge over the relinquished security interest does not hold priority among the other secured-financial creditors falling within the mechanism under Section 53 of the Code. Thus, the present application fails and dismissed accordingly.

Sd/-

(Subrata Kumar Dash)
Member (Technical)

Sd/-

(Harnam Singh Thakur)
Member (Judicial)

February 07, 2023

PB/ASH