

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH – I**

MA No. 3424 of 2019

In

CP (IB) No. 31 of 2017

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

Filed by:

Abhay Manudhane

Liquidator of Gupta Coal India Private Limited.

...Applicant

Versus

State Bank of India

...Respondent No.1

L&T Infrastructure Finance Company Limited

...Respondent No.2

IDBI Bank limited

...Respondent No.3

Punjab National Bank

...Respondent No.4

Axis Bank Limited

...Respondent No.5

Mr. Padmesh Gupta

...Respondent No. 6

Mrs. Anuradha Gupta

...Respondent No.7

In the matter of

Gupta Coal India Private Limited.

...Corporate Debtor

Order delivered on: 21.03.2024

Coram:

Hon'ble Member (Judicial) : Justice V.G. Bisht

Hon'ble Member (Technical) : Mr. Prabhat Kumar

Appearances:

For the Applicant : Mr. P. S. Thakre, Authorized
Representative

For the Respondent No.1 : Mr. Ajinkya Kurdukar

For Respondent No.2 to 5 : Mr. Nishith Dhurva

ORDER

Per: Justice V.G. Bisht, Member (Judicial)

1. The present Application is filed by the Liquidator of the Corporate Debtor seeking the following reliefs:
 - a) Direct the Respondents No. 1 to 5 who are the lenders of GGRPL to issue NOC for the sale of assets and handover the original documents of ownership of the said assets to the Applicant liquidator of Corporate Debtor.
 - b) To direct the lenders of GGRPL stating that they are forming part of liquidation estate of Corporate Debtor and accept the proceeds of Liquidation estate.
 - c) To direct respondent Nos. 6 & 7 to give their consent for selling their portion of assets mortgaged by them in favour of Respondent No. 1 to 5

and permit the applicant to sell the properties jointly owned by applicant and respondent No 6&7, proceeds of which will be distributed amongst the co-owners as per their share in property.

Submissions Advanced by the Applicant and Brief Facts of the case

2. The present Application is moved by the Applicant/Liquidator seeking a direction from this Tribunal to Respondent No.1 to 5 to issue a No Objection Certificate for sale of assets owned by the Corporate Debtor. The said assets belonging to the Corporate Debtor were mortgaged in favor of lenders being Respondent No.1 to 5 to secure the loan availed by Gupta Global Resources Private Limited, a subsidiary company of the Corporate Debtor.
3. A Corporate Guarantee was executed by the Corporate Debtor in favor of the lenders of its subsidiary Gupta Global Resources Private Limited. The particulars of assets are reproduced hereinbelow:

Sr. No	Particulars of assets	Ownership
1	Office Block No 601 in Shriram Towers, Nagpur	The asset is partly owned by company along with Mr. Padmesh Gupta, Guarantor to lenders
2	Office Block No 602 in Shriram Towers, Nagpur	Owned by Company exclusively
3	Office Block No 603 in Shriram Towers, Nagpur	The asset is partly owned by company along with Mrs Anuradha Gupta, Guarantor to lenders
4	Land at Ramagundam	Owned by Company exclusively

4. The Liquidator submits that the assets specified above at Sr.No.1 and 3 are owned jointly by the Corporate Debtor along with the erstwhile promoters of Mr. Padmesh Gupta and Mrs. Anuradha Gupta. The promoters/Respondent No. 6 and 7 have vide their affidavit-in-reply dated 02.01.2020 granted their no-objection to the Liquidator to dispose of the property.
5. As far the issue pertaining to lenders is concerned, the Liquidator submits that lenders of the subsidiary i.e. Gupta Global Resources Private Limited have filed their claim and the same been verified and admitted by the Liquidator. Further, it is submitted that the stakeholders have not chosen to realize their security interest and no intimation to that extend has been received by the Liquidator. Accordingly, now a considerable time has elapsed since commencement of Liquidation proceedings, the assets are deemed to be a part of the Liquidation estate.
6. As a sequel to the above, the Liquidator requested the lenders to handover the original title deeds and issue a No Objection Certificate to enable the sale of assets. The Liquidator submits that the Respondents No.1 to 4 are agreeable to the sale of assets and have no objection to the same, the said fact is recorded in our order dated 02.12.2020. However, Respondent No. 5 i.e. Axis Bank vide its letter dated 06.09.2019 confirmed its willingness to relinquish its security interest and handover the original documents subject to lenders of GGRPL having first charge on the mortgaged properties be given priority in the distribution of sale proceeds basis the charge.
7. Respondent No.5 submits that the properties owned by the Corporate Debtor should be distributed as per the charge of lenders on the same and proceeds from the sale should be first paid to the lenders of GGRPL. The Respondent No. 5 has relied on Deed of ratification cum rectification to the indenture of mortgage dated 11.03.2015 in support of

its contention, however the said deed is not placed on record for perusal of this bench.

8. We have perused the records and considered the submissions advanced by the learned counsel for respective parties.
9. At the outset it is observed, as far as prayer clause (a) is concerned the NOC is provided by all the lenders and is annexed by the Respondent No. 1 in its affidavit-in-reply, furthermore Respondent No. 6 and 7 have provided their consent to sell the property vide their affidavit in reply. Accordingly, prayer clause (a) and (c) are rendered infructuous.
10. Coming to prayer clause (b) a direction is sought by the Liquidator to the lenders of GGRPL that they will be forming part of the Liquidation estate and accept the proceeds of the Liquidation estate. However, it is Axis Bank's contention that the lenders be given priority in terms of the charge created. Accordingly, the issue before us is how are inter se priorities between secured financial creditors to be treated upon relinquishment of their security interest while distributing sale proceeds in liquidation under Section 53 of the Code?
11. In order to answer this question, it is important to consider 2018 Insolvency Law Committee Report wherein the above issue was addressed and the following was reported -
"...the Committee was of the opinion that it is sufficiently clear from a plain reading of section 53(1)(b) that it intended to rank workmen's dues equally with debts owed to secured creditors who have relinquished their security. Section 53(1)(b) does not talk about priority inter-se secured creditors. Thus, valid inter-creditor/subordination agreements would continue to govern their relationship. Further sub-section (2) of section 53 must also be interpreted accordingly. For instance, applying section 53(2) in the context of section 53(1)(b), any agreements between workmen and secured creditors which disrupts their pari passu rights

will be disregarded by the liquidator. However, agreements inter-se secured creditors do not disturb the equal ranking sought to be provided by section 53(1)(b) and therefore do not fall within the ambit of section 53(2). The Committee felt that there was no requirement for an amendment to the Code required since a plain reading of section 53 was sufficient to establish that valid inter-creditor and subordination provisions are required to be respected in the liquidation waterfall under section 53 of the Code.”

12. This interpretation of Section 53 of the Code regarding treatment of inter se priorities in the liquidation waterfall mechanism was also supported by the 2020 Insolvency Law Committee Report wherein it was suggested that an Explanation be inserted under Section 53(2) to clarify the correct interpretation of the Section, as explained in the First ILC Report.
13. However, these suggestions have yet not been incorporated in the Code by way of an amendment in the existing IBC framework that protects the inter-se priorities of secured financial creditors in the liquidation waterfall mechanism. Nonetheless, we note that the Law Committee had deliberated this aspect at length and had only advised insertion of the explanation to clarify the position. It is trite law that explanation merely seeks to explain the law as it stands and does not enlarge the scope of the main provision. Accordingly, it can be said that the Insolvency Law Committee was in favour of respecting inter se priorities after taking note of **A Ramaiya, Guide to the Companies Act (17th edn, LexisNexis 2010) 5297** stating that subordination agreements inter-se creditors were respected in winding up proceedings.
14. At this juncture, it is apposite to mention that we are aware of the order passed by the Hon'ble National Company Law Appellate Tribunal (“NCLAT”) in *Technology Development Board v. Anil Goel & Ors. [Company Appeal (AT) (Insolvency) No.731 of 2020]* wherein it was held that secured creditors who release their security interest during

liquidation under Section 53 of the Insolvency & Bankruptcy Code, 2016, do not receive inter-se priority. The relevant paragraph from the judgement is reproduced below-

*“10. In **“ICICI Bank vs. Sidco Leathers Ltd. & Ors. (2006) 10 SCC 452”**, the Hon’ble Apex Court, while taking note of Section 48 of Transfer of Property Act, observed that the claim of first charge holder shall prevail over the claim of the second charge holder and where debts due to both the first charge holder and the second charge holder are to be realised from the property belonging to the mortgager, the first charge holder will have to be repaid first. The Hon’ble Apex Court observed that while enacting the Companies Act parliament cannot be held to have intended to deprive the first charge holder of the said right. Such a valuable right must be held to have been kept preserved. It referred to an earlier judgment titled **‘Workmen of Firestone Tyre and Rubber Company of India vs. Management & Ors.’** observing that if such valuable right of first charge holder was intended to be taken away, Parliament, while amending the Companies Act would have stated so explicitly. The view taken by the Adjudicating Authority on the basis of judgment of Hon’ble Apex Court in **“ICICI Bank vs. Sidco Leathers Ltd. (supra)”** (which is pre-IBC), ignoring the mandate of Section 53 of I&B Code which has an overriding effect and came to be enacted subsequent to the aforesaid judgment rendered by Hon’ble Apex Court explicitly excluding operation of all Central and State legislations having provisions contrary to Section 53 of I&B Code, is erroneous and cannot be supported.*

11. For the foregoing reasons the impugned order holding that the inter-se priorities amongst the Secured Creditors will remain valid and prevail in distribution of assets in liquidation cannot be sustained.”

15. We are cognisant of the fact that appeals have been filed against the judgement of the NCLAT i.e. **Technology Development Board v. Anil Goel & Ors.** and **Oriental Bank of Commerce vs. Anil Anchalia** before the

Hon'ble Supreme Court. However, these appeals are still pending adjudication and there is a stay on operation of *Technology Development Board* (supra) and the decision in the case of *Oriental Bank of Commerce* (supra) also delivered by the Hon'ble NCLAT on a similar issue is tagged along.

16. Further NCLT, Hyderabad Bench has recently, in the case of *PTC India Financial Services Ltd. v. Vikas Prakash Gupta & Ors. and Indo Unique Flame Limited v. Vikas Prakash Gupta & Anr. [IA. No. 1341 of 2022 and I.A. No.254/2023 in CP (IB) No. 377/7/HDB/2018]* following the decision of Hon'ble NCLAT in *Technology Development Board* (supra) held the same position, i.e., Section 53(1) of the Code does not recognize any inter-se ranking of charges among the financial creditors of a corporate debtor, as existing before the initiation of its CIRP, for the distribution of sale proceeds during liquidation.

17. We notice that the Insolvency Law Committee Report has opined after considering the following principles emerging from the decision of the Hon'ble Supreme Court in the case of *ICICI Bank Limited v. SIDCO Leathers Limited & Ors (2006) 10 SCC 452*.

- a) *Right to property was a constitutional right and right to recover money lent by enforcing a mortgage was also a right to enforce an interest in the property. Had the Parliament intended to take away such a valuable right of the first-charge holder, there was no reason for it to not state so explicitly.*
- b) *Section 48 of the Transfer of Property Act, 1882 (“TOPA”) clearly provides that claim of a first charge holder shall prevail over the claim of a second charge holder.*
- c) *Merely because the relevant section did not specifically provide for the rights of priorities over mortgaged assets, it would not mean that the provisions of section 48 of TOPA shall stand obliterated in relation to a company that has undergone liquidation.*

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- d) Deprivation of a legal right existing in favour of a person cannot be presumed in construing a statute and it is in fact the other way round and thus, a contrary presumption shall have to be raised.*
- e) Companies Act may be a special statute but if the special statute does not contain any provisions dealing with contractual and other statutory rights between different secured creditors, the specific provisions contained in the general statute shall prevail.*
- f) Section 529(1)(c) used the phrase "the respective rights of secured and unsecured creditors." This was to be interpreted as rights of secured creditors vis-à-vis unsecured creditors. It does not envisage respective rights amongst secured creditors.*

18. Accordingly, the Committee opined that the principles stated above that emerge from the ICICI case are also applicable to the issue at hand under section 53 of the Code.
19. We are of the considered opinion that the reasoning of the Insolvency Law Committee on this issue is in accordance with the position as available under the Companies Act also and is in accordance with the expectation of the financial creditor emerging out of the contractual arrangement between the creditor and the borrower in relation to their security interest. Accordingly, we have no hesitation to hold that the inter se priority of the secured creditor in relation to charge over the security must be respected and the distribution out of liquidation proceeds in that class should be in accordance with such inter se priority.
20. In light of the above, we direct the Liquidator to examine the charge held by the lenders and distribute the proceeds accordingly. Since, the lenders have relinquished their security interest they will form part of the Liquidation estate and proceeds will be distributed in accordance with the principle laid down hereinabove.

21.MA No. 3424 of 2019 allowed in terms of directions passed hereinabove.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)

21.03.2024
Priyal

Sd/-

JUSTICE V.G. BISHT
MEMBER (JUDICIAL)