

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

**I.A. No. 3592 of 2023
In
C.P. No. 1330 of 2020**

Under Section 60(5) of
Insolvency & Bankruptcy Code,
2016 r/w Rule 11 of
National Company Law
Tribunal Rules, 2016

**Unity Small Finance
Bank Limited
(Formerly known as
Punjab & Maharashtra
Cooperative Bank
Ltd.)**

.....Applicant

v/s

**Sripatham
Venkatasubramanian
Ramkumar
Resolution
Professional for
Privilege Industries
Limited**

.....Respondent

In the matter of

Unity Small Finance
Bank Limited
(Formerly known as
Punjab & Maharashtra

Cooperative Bank Ltd.)
...Petitioner

v/s

Privilege Industries Limited
....Corporate Debtor

Order Dated: 08.01.2024

Coram:

Hon'ble Reeta Kohli, Member (Judicial)
Hon'ble Madhu Sinha, Member (Technical)

Appearance:

For the Petitioner:

For the Applicant/Resolution Professional: Adv Gaurav Joshi (PH)

ORDER

Per: Ms. Reeta Kohli, Member (Judicial)

1. *This Interlocutory Application is filed by Unity Small Finance Limited (Formerly known as Punjab and Maharashtra Cooperative Bank Limited) (Hereinafter referred to as the “Applicant”) for seeking the following reliefs:-*
 - a) *Allow the instant Application filed by the Applicant; and*
 - b) *Quash the decision of the Resolution Professional bifurcating the claim of the Applicant as secured and unsecured financial debt;*
 - c) *Direct the Respondent i.e. the Resolution Professional to reflect the entire claim of the Applicant amounting to Rs. 142,10,78,941/- as secured financial debt without classification as secured and unsecured financial debt;*

- d) Restrain the Committee of Creditors (CoC) from proceeding with voting on the resolution plans during the pendency of the instant application;*
- e) Stay the convening of any meetings of the Committee of Creditors (CoC) meetings during the pendency of the instant Application;*
- f) Grant an ex-parte ad interim order in terms of prayer (c) and (d);*
- g) Remove the Respondent No. 1 to act as Resolution Professional of the Corporate Debtor due to apparent violation of provisions of the Code; and/or*
- h) Pass any other Order that this Ld. Tribunal deems necessary in the interests of justice.*

Brief Facts and Submission of the Applicant

1. Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor with effect from 15.02.2023 by this Hon'ble Bench of National Company Law Tribunal (NCLT) on an Application under Section 7 which was filed by the Punjab and Maharashtra Cooperative Bank.
2. On 03.03.2023, the Applicant submitted its claim Form C, with the Insolvency Resolution Professional (IRP). On 06.03.2023, the IRP published the list of creditors at the website of the Insolvency and Bankruptcy Board of India (IBBI) wherein the claim of the Applicant was admitted as Secured Financial Creditor.
3. It is the case of the Applicant that it extended Mortgage Overdraft Limit to the Corporate Debtor vide Sanction Letters, dated 04.11.2011 and 07.01.2013, for a sum of Rs. 35 crores and 10 crores respectively against prime security of charge over the book debts of the Corporate Debtor as well as charge over immovable properties of guarantors and mortgagor.
4. **As per Sanction Letter, dated 04.11.2011, following securities were provided:-**
 - a) Mortgage of immovable property situated at village Thrikkakara, Tulla Kannyanur, District Emakulam. Kerla, Survey No. 717/5,

Block No. 5, admeasuring 70 acres standing in the name of Blue Star Realtors Private Limited, and

- b) Mortgage of land situated at village Deewanmn and Chulne, Taluka Vasai, district Thane of Mr. Rakesh Kumar Wadhawan and
- c) Book Debts of the Corporate Debtor

As per Sanction Letter, dated 07.01.2013, following security was provided:-

- a) Registered Mortgage of Non-agriculture land at village Dewanman, Taluka Vasai Dist- Palghar admeasuring 1,33,550 sq. mtrs. Standing in the name of Mr. Rakesh Kumar Wadhawan

The above facilities were secured by following guarantors:

1. Mr. Rakesh Kumar Wadhawan
 2. Mr. Sarang Kumar Wadhwan
5. Hence, the Applicant is a secured financial creditor in terms of Section 5(7) read with Section 3(30) of the Insolvency and Bankruptcy Code, 2016 ("Code"). It was further submitted that even this Hon'ble Tribunal had taken note of the fact that the Applicant had secured the overdraft facility extended by creation of security interest in the Corporate Debtor.
6. The Committee of Creditors (CoC), consisting of another secured financial creditor with 79.61% voting rights as well, in its first meeting voted in favour of the replacement of IRP with the Respondent and hence this Hon'ble tribunal vide order dated 31.03.2023, allowed the replacement.
7. The Applicant therefore once again submitted its Claim Form C, dated 31.05.2023. On perusal of the six Resolution Plans submitted by the Prospective Resolution Applicants on 21.07.2023, the Applicant was shocked to note that the Respondent without any prior intimation to or deliberation with the Applicant bifurcated the admitted claim of the Applicant of Rs. 142,10,78,941/- into secured claim of Rs. 2,53,13,885/- and unsecured claim of Rs. 139,57,65,086/- thereby arbitrarily bifurcating the voting share of the Applicant into 0.36% as

Secured Financial Creditor and a voting share of 20.04% as Unsecured Financial Creditor in the CoC.

8. The Applicant, vide its email dated 07.08.2023, categorically asked the Respondent about the details and grounds on which it is treated as secured creditor for an amount of Rs. 2,53,13,885/- however, the Respondent had not provided any rationale, nexus or logic behind the above bifurcation of the claim of the applicant, despite the entire claim of the Applicant being secured by book debts of the Corporate Debtor.
9. The Applicant addressed emails dated 02.08.2023 and 08.08.2023 requesting for reinstatement of the Applicant as secured financial creditor but in vain. The Respondent vide its email dated 11.08.2023 and at another instance declined the request of the Applicant raising frivolous ground of non-registration of charge by the Applicant over asset of the Corporate Debtor.
10. The Applicant relies on the judgement of the Hon'ble Supreme Court in **Paschimanchal Vidyut Vitran Nigam Ltd. v. Raman Ispat Private Limited & Ors. Civil Appeal Nos. 7976 of 2019**, wherein the objection of the Resolution Professional of registration of charge under section 77 of the Companies act, 2013 in order to classify the creditor as secured creditor was ignored.
11. It was further submitted by the Applicant that from the following documents and facts, it can be clearly adduced that the Applicant herein is a secured financial creditor for its entire admitted claim amount:-
 - A. Sanction Letters dated 04.11.2011 and 17.01.2013
 - B. Letter of Lien and set off dated 04.11.2011 clearly demonstrating that the book debts were charged against the facility extended, thereby, making the Applicant herein a secured creditor of the Corporate Debtor.
 - C. Memorandum of entry of title deeds, dated 04.11.2011
 - D. Deed of Mortgage, dated 07.02.2013, clearly demonstrates that the Corporate Debtor is one of the Borrowers and is one of the mortgagor of the immovable properties mentioned therein

- E. NeSL report annexed by the Applicant, dated 30.06.2020 clearly demonstrating the default, the outstanding against the Corporate Debtor and the immovable property mortgaged by the Corporate Debtor for securing the repayment facility.
12. It was submitted that the Respondent having exercised the power of adjudication, exceeded his jurisdiction as provided in terms of Section 18(b) of the Code and Regulation 13(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.
13. The Applicant also cited the judgement of the Hon'ble Supreme Court in the matter of **Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta & Ors. [(2020) 8 SCC 531]** wherein it was held that a Resolution Professional (RP) has no power to adjudicate a claim. The RP can only verify each claim as on the insolvency commencement date and thereupon, maintain a list of creditor containing the names of creditors with the amounts claimed by them, the amounts admitted by him, and the security interest, if any, in respect of such claims.

Submission by the Respondent

1. It is the case of the Respondent that the present Application was filed after the compliant resolution plans were being put to vote by the CoC on 09.08.2023. Thus it is evident that the Applicant is challenging its status towards the end of the CIRP of the Corporate Debtor as an afterthought to derail the process and therefore on this ground itself the present Application ought to be dismissed.
2. The Respondent further submitted that the list of creditors as on 06.03.2023 on the website of the IBBI, undoubtedly shows the claim of the applicant under the category of "Secured Creditors". However, the IRP had categorically carved out that the claim of the Applicant covered by the security interest was Rs. 2,53,13,855/- only.

3. The Respondent claims that the Applicant was well aware that the claims of the Corporate Debtor were to be reverified by him as it was informed in the 2nd Meeting of the CoC on 05.05.2023.
4. The Respondent vide email dated 22.05.2023, had sought clarifications from the Applicant but did not receive any reply. The relevant ad verbatim content of the email is reproduced as under:-

Dear Sir,

With reference to the revised claim form dated 03.03.2023, request you to provide the following clarifications/documents

a) Dues as at CIRP commencement date i.e. 15th February, 2023 as the existing claim is at 20th February 2023

b) Loan Documents listed out in SL.No. 11 to SL.No. 20 of the EOW memo dated 4th December 2013

Request you to provide the above sought documents at the earliest.

5. On 06.06.2023, the Respondent split and classified the claim of the Applicant as Rs. 2,53,13,855/- (being as secured creditor) and Rs. 1,39,57,65,086/- (being as unsecured creditor) with voting share of the Applicant being 0.36% as secured creditor and 20.4% as unsecured creditor respectively. The same was uploaded on the website of the IBBI and a copy of the list of creditors to the CoC of the Corporate Debtor was emailed to the Applicant on the same day.
6. On 24.07.2023, when 6 resolution plans were opened in presence of the Prospective Resolution Applicants and CoC, the Respondent and the Applicant both sought an increase in the value provided for unsecured creditors. Furthermore, on 08.08.2023, in the negotiation meeting with H1 Bidder i.e. SNJ Breweries Private Limited (“SNJ”), THE Applicant informed SNJ that the value given to the unsecured creditors needs to be increased.
7. There were various correspondences between the Applicant and Respondent from 02.08.2023 and 11.08.2023, wherein the Applicant kept insisting that it is a secured creditor while the Respondent indicated that as per the applicable law and the documents available on record, the Applicant was 0.36% as secured creditor and 20.4% as

unsecured creditor of the Corporate Debtor. In its email dated 11.08.2023, the Respondent categorically requested for providing the following documents:

- A. Form No. CHG-1 filed by the Corporate Debtor with the Registrar of Companies to register a charge on its assets, and
 - B. Form No. CHG-2, the certificate issued by the Registrar of Companies, which evidences the registration of charge on assets of the Corporate Debtor along with the document executed by the Corporate Debtor creating security interest on assets of the Corporate Debtor, which led to the filing of the same with the Registrar of Companies.
8. The voting lines for the resolution plan were closed by the Resolution Professional on 23.08.2023 at 6:00 PM, by which time the resolution plan of SNJ was approved by the CoC with a 79.6% majority. A Letter of Interest was accordingly issued to SNJ and an Application for approval of SNJ's Resolution Plan bearing Diary No. 2709138/07471/2023 was filed.
9. The Respondent also submitted that not even a single document which shows that a valid charge has been created by the Corporate Debtor on its assets in favour of the Applicant has been provided to it by the Applicant. Most importantly, neither any charge in favour of the Applicant has been recorded with the Registrar of Companies ("RoC") nor the same is reflected on the website of the Ministry of Corporate Affairs ("MCA"). Section 77 of the Companies Act, 2013 mandates that no charge can be taken into account unless it is registered and a certificate is provided by the RoC. Moreover, it is pertinent to note that the Applicant has not arrayed book debts as a security in the filings made under Section 7 of the Code and the record of default authenticated through NESL also does not specify about book debts and has details only about the registered mortgage of non-agriculture land.
10. It is also evident that the claim of the Applicant is secured by assets not belonging to the Corporate Debtor, thus it would

necessarily mean that the Applicant has no security interest against the corporate Debtor and therefore cannot be a secured creditor of the Corporate Debtor.

11. The Respondent further specified that the effect of treating the Applicant as secured creditor would lead to its unjust enrichment as this would entitle the Applicant to recover dues under CIRP of the Corporate Debtor as secured creditor and also enforce the securities outside the CIRP.

Order

1. The main gist of the present Application is that the Applicant has been aggrieved by the action of the Respondent of arbitrarily classifying his entire claim Rs. 142,10,78,941/- into secured claim of Rs. 2,53,13,885/- and unsecured claim of Rs. 139,57,65,086/- thereby bifurcating the voting share of the Applicant into 0.36% as Secured Financial Creditor and a voting share of 20.04% as Unsecured Financial Creditor in the CoC. On the other hand, it is the case of the Respondent that the bifurcation was already done by the IRP, and since he was a qualified professional, the Respondent maintained the same position of the Applicant. However, he was ready to consider the request of the Respondent to be classified as a secured creditor to the extent of the full due amount of Rs. 142,10,78,941/- provided the following documents were provided to him (as per email of the Respondent dated 11.08.2023):-

- Form No. CHG-1 filed by the Corporate Debtor with the Registrar of Companies to register a charge on its assets, and
- Form No. CHG-2, the certificate issued by the Registrar of Companies, which evidences the registration of charge on assets of the Corporate Debtor along with the document executed by the Corporate Debtor creating security interest on assets of the Corporate Debtor, which led to the filing of the same with the Registrar of Companies.

2. Documents placed on record of this Tribunal by the Applicant are as follows:-

- Sanction Letters dated 04.11.2011 and 17.01.2013
- Letter of Lien and set off dated 04.11.2011 clearly demonstrating that the book debts were charged against the facility extended, thereby, making the Applicant herein a secured creditor of the Corporate Debtor.
- Memorandum of entry of title deeds, dated 04.11.2011
- Deed of Mortgage, dated 07.02.2013, clearly demonstrates that the Corporate Debtor is one of the Borrowers and is one of the mortgagor of the immovable properties mentioned therein
- NeSL report annexed by the Applicant, dated 30.06.2020 clearly demonstrating the default, the outstanding against the Corporate Debtor and the immovable property mortgaged by the Corporate Debtor for securing the repayment facility.

It is pertinent to note that the Prime Security which is Registered Mortgage of Non-agriculture Land at village Dewanman, Taluka Vasai Dist- Palghar admeasuring 1,33,550 sq. mtrs. standing in the name of Mr. Rakesh Kumar Wadhawan mentioned in the Sanction Letter dated 07.01.2013 has a market value of Rupees Eleven Hundred Crores, which is a huge sum and also much beyond the Due Amount in addition to the other securities.

Therefore, to appreciate the case of both the parties, it is essential to consider the concept of Mortgage Overdraft and the formalities associated with its registration.

3. Mortgage Overdraft Facility is an account with a discretionary credit limit: a reserve for unplanned purchases and expenditure that one can access quickly. It is backed by security interest which shall mandatorily be registered under Section 77 of the Companies Act, 2013. Pursuant to the same, Form No. CHG-1 is filed by the Corporate Debtor with the Registrar of Companies to register a charge on its assets, and Form No. CHG-2, the certificate is issued by the Registrar of Companies, which evidences the registration of charge on assets of the Corporate Debtor. It is clearly evident that both these documents

are filed and obtained by the Corporate Debtor. The RP, on commencement of CIRP, is vested with the management of the Corporate Debtor. Hence the RP in the present case, i.e. **Sripatham Venkatasubramanian Ramkumar** should have already been in possession of these Documents and therefore it was inappropriate on part of the RP, for asking of these Documents from the Applicant who may or may not be in possession of the same. Hence, bifurcating the claim of the Applicant on this ground in our considered opinion is not appropriate. In addition, the RP has also failed to make any submissions with respect to splitting of the claim of the Applicant into secured and unsecured creditor. His duty further extended to justifying the bifurcation of the Applicant's claim on valid grounds and also provide a rationale behind the quantum of such bifurcation.

4. Section 3(30) of the Code defines a secured creditor as follows- ***“secured creditor” means a creditor in favour of whom security interest is created.*** Section 18(b) of the Code and Regulation 13(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 casts a duty on the Resolution Professional to receive, collate and verify the claims of the Creditors of the Corporate Debtor and to rationally bifurcate their claims into secured and unsecured creditors category and to also justify the quantum of such bifurcation.
5. In light of the above stated facts and circumstances of the present Application and the existing provisions of law, the Resolution Professional is directed to reconsider the claim of the Applicant with due application of mind and taking into account the above stated documents placed on record of this Tribunal.

6. Hence, in conclusion, the present **I.A. 3592 of 2023** is allowed to the extent of quashing the decision of the RP bifurcating the claim of the Applicant and RP is further directed to reconsider the claim of the Applicant on the strength of documents placed on record at the earliest.

SD/-
MADHU SINHA
MEMBER (TECHNICAL)

SD/-
REETA KOHLI
MEMBER (JUDICIAL)

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