THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

I.A. 852 OF 2021

Under Section 60 (5) of Insolvency & Bankruptcy Code, 2016

IDBI Bank Limited

...**Applicant**

In the matter of

C.P.(IB) No. 2889/MB/2019

Kotak Mahindra Bank Limited

.... **Financial Creditor**

Vs.

Gupta Synthetics Limited

...**Corporate Debtor**

Order delivered on: 21/11/2023

Coram:

Shri Prabhat Kumar Hon'ble Member (Technical)	**Justice Shri V.G. Bisht** Hon'ble Member (Judicial)

Appearances:

For the Applicant : Attendance not marked on the attendance sheet

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Application IA 852/2021 is filed by IDBI Bank Limited ("Applicant"), the financial creditor and Committee of Creditor ("CoC")

member in the Liquidation Process of M/s Gupta Synthetics Limited ("Corporate Debtor") u/s 42 read with 60(5) of the Insolvency & Bankruptcy Code, 2016 ("Code") for directions to Ms. Jovita Reema Mathias ("Respondent No. 1" or "Liquidator") to (i) treat and classify the claims of Respondent No. 3 & 4 in accordance with security documents; and (ii) release the proceeds amounting to Rs. 3,90,67,706/- received from sale of D.T. & D-Tex unit of the Corporate Debtor which is exclusive charged to the Applicant as the pending application pertains to the common securities charged to the lenders not the exclusively charge security. Respondent No. 2 to 4 are Banks and Financial Institutions who are co-lenders to the Corporate Debtor i.e. State Bank of India, Kotak Mahindra Bank Limited and Edelweiss Assets Reconstruction Company Limited respectively.

2. The Corporate Debtor was admitted for corporate insolvency resolution process under the Code in September 2019. However, the resolution process failed to rehabilitate the Corporate Debtor and consequently, this Tribunal , on 14th July 2020, passed liquidation order against the Corporate Debtor and appointed Ms. Jovita Reema Mathias (Liquidator) as the liquidator of the Corporate Debtor.
3. The Applicant filed its claim aggregating to Rs. 197.61 Crores on 03.08.2020. The Applicant has stated that the last security over the immovable assets of the Corporate Debtor was created on 26.3.2008 in terms of 2nd Supplemental memorandum of Deposit of Title deeds for extension of Equitable Mortgage which inter-alia created 1st pai-passu charge for the facilities sanctioned by the respective lenders.
   3.1. Thereafter, though certain reliefs and concession by way of restructuring were granted by these lenders, however, no security was created in respect of restructured/additional facilities sanctioned by these lenders. Hence, it is pleaded that these restructured/ additional facilities remain unsecured in absence of any security/ loan documentation.

3.1.1. It is further stated that the principles for security creation have been totally ignored by the Respondent No. 1, while re-assessing claims of the Respondent No. 3 & Respondent No. 4. Further, the security documents dated 26.03.2008 creating charge on assets of the company in favour of lenders have been completely disregarded, and unsecured claim of Respondent No. 3 for Rs. 71,29,16,236.05 has been reclassified as secured based on Undated legal opinion of an Advocate of Respondent No. 3 and Consent terms dated 10.01.2017 filed before the DRT. However, it is explicitly clear that no documentation was done to create security for the restructured/ additional facilities sanctioned to the Borrower subsequent to sanction letter dated 21.7.2009. It is also stated that, in banking practice/ law, none of the aforesaid documents constitutes creation of charge/ security. DRT Decree only entitles a lender to recover its dues from the Borrower/ Guarantors, and they only have residual charge on the assets of the borrower subservient to the existing charge holders. However, in gross misuse of Liquidator's authority, not only the claims have been reclassified as Secured Creditor but are treated on part with the First Charge holders.

3.1.2. Further, the unsecured claim of Rs. 25,82,16,137.98 filed by Respondent No. 4 has been classified as secured claim based on RoC charge modification modifying the consortium charge of Rs. 180.94 crore to the extent that the debt of Oriental Bank of Commerce is assigned to it vide assignment agreement dated 29.3.2019. In nowhere states the said unsecured facilities.

3.1.3. Accordingly, the Applicant contended that the Liquidator had granted preferential treatment to Respondent No. 3 & Respondent No. 4 by enhancing their claim to be secured more than what they were entitled as secured creditors.

3.2. The Applicant also holds an undisputed exclusive charge of the D.T. & D-Tex unit being Plant and Machinery including building/ civil structure ("Unit") which is forming part of a larger manufacturing unit at Silvassa, which has been sold by Respondent No. 1. Being the exclusive charge holder, the Applicant is legally entitled to receive the entire sale proceeds of the said unit from the Respondent No. 1, however, consequent to order dated 9.12.2020 passed by this Tribunal in IA 2228/2020 on an application filed by Respondent No. 2, the Liquidator put on hold the distribution of proceeds of this sale as well, though that Order did apply to the distribution in relation to such sale proceeds.

3.3. Respondent No. 3 i.e. Kotak Mahindra Bank filed reply stating that the in the Minutes of the Meeting of the Second Stakeholders Consultation Committee meeting held on 7.12.2020, the liquidator himself has recorded that none of the lenders have registered their charges after the restructuring including IDBI and SBI. Further, the sanction letter dated 21.04.2010 issued by the applicant itself mandates at clause 17 thereof that "*Charges created in favor of the Bank will be registered with the Registrar of Companies within 30 days from the date of creation.*" It was further stated that in the absence of new charge having been created with the Registrar of Companies post 2008, only the facilities of the Applicant as recorded in the security documents executed in 2008, pre-restructuring, are validly secured. Accordingly, the terms and conditions and the extent of the facilities granted by the Applicant to the Corporate Debtor have been modified and the same were required to be filed with the Registrar of Companies as rightly held by the Liquidator. It was further stated that the Master Circular-Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances dated 1.7.2009 is applicable to the present case, as that circular deals with accounting norms and provisioning.

4. We have heard the Counsel and perused the material on record.

4.1. It is undisputed fact that the facilities enjoyed by the Corporate Debtor from all consortium lenders came to be restructured and the charges in relation to none of the restructured facility was registered in terms of section 77(1) read with 79(b) of the Companies Act, 2013. It is also undisputed fact that all the consortium lenders were aware of extent of charge and facilities granted by the other lenders. We find that the Omkara Assets Reconstruction Limited filed a modification of charge in terms of Section 77(1) read with 79(b) upon assignment of debt of Oriental Bank of Commerce (Earlier assigned by OBC to the R-4) by Respondent No. 4 in its favor, and such filing states all the credit facilities, including the facilities granted under restructuring also. Respondent No. 3 has defended its charge on the basis of consent terms stating that the amounts under consent terms to be secured.

4.1.1. We further finds that Original charge was created in relation to amount of principal, including overdue principal component, and interest accrued but not paid on such facilities, including the penal interest etc. Accordingly, we feel that it would not be tenable to content that there has occurred modification in the terms and conditions of the credit facilities, merely because the overdue cash credit facilities or unpaid interest is rechristened as new facility. It is undisputed fact, that none of the lenders sought modification of charge after restructuring of their facilities around the same time.

4.1.2. Though on the strict interpretation of provisions of section 77(b) of the Companies Act, 2013 and corresponding provision in section 135 of 1956 Act, we find that registration of modification was mandatory, we feel that the term 'modification' should be liberally construed in favor of lenders in a manner that such construction does not prejudice the security interest of existing lenders where security interest came to be acquired by other lenders with knowledge of existence of such security interest. In the present case, every lender had full knowledge of obligations due to other lenders, and security interest created in each of such lender.

4.1.3. We find that Regulation 21 of the Liquidation Process Regulations, 2016 govern the Liquidation of the Companies, and provides that the security interest can be proved by a lender in Liquidation proceedings of the Corporate Debtor. Since, the Liquidation Regulations govern the Liquidation of Corporate Debtor, we feel the legislature has consciously provided for three evidences for proving the security interest, as against the only evidence provided whether the provisions of Regulation 21 of the Liquidation Process Regulations, 2016 providing for three documents to prove security interest are alternate in nature, and such security interest can be proved by either of said evidence, and if proved by either of said evidence, would it over-ride the provisions of Section 77(3) of the Companies Act, 2013 of the Companies Act, 2013. Section 238 of the Code provides that "*The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law*". The Regulations are framed by Insolvency & Bankruptcy Board of India in terms of power vested in it u/s 240 of the Code.

4.1.4. All the three clauses contain evidence with different authorities in relation to lending by the Institutions/Banks. The clause (b) and (c) are disjoined by the word 'or', implying that clause (a) and clause (b) are also to be read in alternate to one another. It follows therefrom that existence of security interest can be provided either by (a) the records available in an information utility, if any; or (b) certificate of registration of charge issued by the Registrar of Companies; or (c) proof of registration of charge with the CERSAI. We are of considered view that if the provisions of Regulation 21 of the Liquidation Process Regulations, 2016 are interpreted in the manner, as done by the Liquidator and supported by the Kotal, it would render the clause (a) and clause (c) of Regulations otiose. It is trite law that every word in the legislation ought to be assigned a meaning, and the legislation is to be constructed harmoniously so as to give meaning to every word contained in the statute.

4.1.5. Accordingly, we are of considered opinion that the Liquidator shall decide claims of the Respondent No. 3 & 4 in terms of directions in IA 2228/2020. The present classification based on DRT order in case of Respondent No. 3 is not correct, as it does not create fresh security interest, and even if any such security interest is created, the same remains subordinate to already created security interest. In so far as, the classification of whole of claim of Respondent No. 4 as secured creditor is concerned, we find that the present assignee i.e. Omkara Assets Reconstruction had only modified the charge as assignee, no new security interest came to be created.

4.1.6. As far as, treatment of Respondent No. 2 is concerned, we have given directions to the Liquidator vide our Order of even date in IA 2228/2020. Similar directions shall apply to the case of the Applicant in so far claim of applicant having been classified as Unsecured is concerned, and the Liquidator shall determine the same accordingly.

4.2. As regards distribution of sale proceeds of D-Tex Unit where the Applicant had first charge, and all the lenders had general charge, in terms of earlier charge creation providing for charge on all future charges, we hold that the charge of Respondent No. 2 to 4 is subservient to the charge of the Applicant in relation to assets of said Unit. Accordingly, the sale proceeds of the said unit amounting to Rs. 3,90,67,706/- shall first be paid to the Applicant towards satisfaction of their debt, and if any thing remains after satisfaction of their debt, such amount shall be distributed amongst all other secured creditors holding general charge over this property.

5. With the aforesaid directions, IA 852/2021 is disposed of as allowed.

Sd/-	**Sd/-**
Prabhat Kumar	**Justice V.G. Bisht**
Member (Technical)	Member (Judicial)