

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT II, MUMBAI BENCH
INTERLOCUTORY APPLICATION NO. 2620 OF 2023**

**IN
CP(IB) NO. 2043/MB/2018**

*Application u/s 60(5)(b) of the Insolvency and
Bankruptcy Code, 2016.*

In the matter of:

BIZLOAN PRIVATE LIMITED

...Applicant

v/s

**MR. AMIT CHANDRASHEKHAR PODDAR
LIQUIDATOR FOR AUTOCOP(INDIA)
PRIVATE LIMITED**

.... Respondent

In the matter of

GOLDSUN AUTO PRIVATE LIMITED

...Operational Creditor

v/s.

AUTOCOP(INDIA) PRIVATE LIMITED

...Corporate Debtor

Order pronounced on 19.12.2023.

Coram:

Shri. Kuldip Kumar Kareer : Member Judicial.

Shri. Anil Raj Chellan : Member Technical.

Appearances (in physical mode)

For the Applicant: Adv. Prakhar Mittal i/b BGK Law Associates.

For the Respondent: Adv. Arjun Sathees i/b India Law LLP.

ORDER

Per: Shri. Kuldip Kumar Kareer, Member Judicial.

1. This is an application under Section 60(5)(b) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) filed by the Applicant seeking directions to the Respondent/Liquidator to classify the Applicant as a “Secured Financial Creditor” instead of “unsecured Financial Creditor” in the course of liquidation of the Corporate Debtor. The Respondent herein has treated the debts due to the Applicant as unsecured financial debts instead of secured financial debt for the reason that the charge on the asset of the Company has not been registered with the Registrar of Companies (“RoC”) u/s 77 of the Companies Act, 2013 and therefore, in the opinion of the Liquidator/Respondent, the debt due to the Applicant cannot be treated as secured financial creditor under the provisions of the Code.

Case of the Applicant (in brief):

2. The Applicant i.e. Bizloan Pvt Ltd, being a Non-Banking Financial Company, is one of the Financial Creditors of the Corporate Debtor. The Corporate Debtor had applied for and availed credit facility in the form of Sales Bill Discounting and Purchase Bill Discounting from the Applicant. The quantum of credit facility sanctioned was Rs. 50 lakhs in each of the above-two facilities. Accordingly, the Corporate Debtor had executed the loan application forms and two corresponding sanction letters dated 27.02.2019 and 28.03.2019 were issued and contemporaneously, two corresponding Loan Agreements/Facility Agreements were executed by the Corporate Debtor and the disbursal commenced under the facility which were in the nature of short-term loans having bullet repayment on the respective due dates. This arrangement was continuous and recurring in nature and the aforesaid outstanding were to be discharged by the bullet repayment on the agreed dates falling due as under: -
- I) FOR SANCTION LETTER DATED 27.02.2019- On 21.12.2021, 29.12.2021, 03.01.2022 and 29.01.2022 totaling to Rs. 41,85,497/-
- II) FOR SANCTION LETTER DATED 28.03.2019- On 05.02.2022, 07.02.2022 and 09.02.2022 totaling to Rs.27,82,322/-

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However, the Corporate Debtor failed to honour the repayment schedule as per the loan agreements/sanction letters and thus, the entire claim of the Applicant became due and payable.

3. CIRP was initiated against the Corporate Debtor by this Hon'ble Tribunal vide Order dated 16.03.2022 passed in the above-captioned Company Petition. Public Announcement in Form 'A' was made in 24.03.2022. The Applicant filed two separate claim forms on 04.04.2022 for each loan facility extended to the Corporate Debtor. The claims filed by the Applicant were admitted in full by the Resolution Professional ('RP') on 11.04.2022. Thereafter, the RP published invitation for expression of interest in Form 'G' on 18.07.2022. The Applicant received a copy of the final resolution plan dated 16.12.2022 from the RP/Respondent vide e-mail dated 20.12.2022. On perusal of the resolution plan, the Applicant came to know that the Applicant has been wrongfully and erroneously classified as unsecured financial creditor instead of secured financial creditor.
4. The Applicant states that the charge is duly registered with CERSAI records, which is publicly accessible. The Applicant ought to have classified as a secured financial creditor. This issue was immediately brought to the notice of the RP

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and on 06.02.2023, the RP obtained a legal opinion from a firm named 'India Law' on classification of the Applicant as secured creditor. The Applicant has annexed a copy of the above-referred legal opinion, which categorically states that the Applicant is a secured financial creditor. However, the CoC objected to it and consequently, the RP classified the Applicant as unsecured creditor.

5. Being aggrieved by the wrongful decision of CoC, the Applicant herein had impugned the classification before this Tribunal when the Corporate Debtor was in CIRP. However, when the application came on board, the CoC had already resolved to liquidate the Corporate Debtor. This Hon'ble Tribunal had passed the liquidation order u/s 33 of the Code against the Corporate Debtor on 19.05.2023 in IA No. 1562/2023. Hence, the erstwhile application was not pursued by the Applicant as the fresh claims were required to be filed before the Liquidator. On 30.05.2023, the Applicant thus filed its claim again with the RP (now Liquidator) in compliance with Regulation 18 of the IBBI (Liquidation Process) Regulations, 2016. The Liquidator appointed is same as the resolution professional in CIRP. Thus, the Liquidator is most likely to classify the Applicant as an unsecured creditor again upon collation of claims and hence, the Applicant is constrained to approach this Tribunal with the present application.

6. **Reply of the Respondent:** The Respondent has filed his Affidavit-in-Reply dated 13th September, 2023. The main contentions of the Respondent are briefly stated hereinbelow:

- i. The Respondent had obtained a legal opinion from a law firm named India Law LLP, according to which the Applicant should be considered as secured financial creditor. However, the same was not acceptable to the members of CoC of the Corporate Debtor. The majority CoC members also objected to the said legal opinion on the additional ground that in the absence of a No Objection Certificate (NOC) taken from other secured financial creditors while sanctioning the aforesaid credit facilities to the Corporate Debtor. Hence, the Applicant should not be considered as a secured financial creditor. The Respondent then granted liberty to all the CoC members to seek their respective legal opinions.
- ii. A contrary legal opinion was received by the Respondent vide email dated 20.02.2023 from the Axis Bank, a secured financial creditor of the Corporate Debtor. The said legal opinion opined that the Applicant cannot be considered as a secured financial creditor merely on the basis of filing their charge with CERSAI. The provisions of Section 20 of the

SARFAESI Act, 2002 clearly state that the provisions of this Act pertaining to the Central Registry shall be in addition to and not in derogation of any of the provisions contained, inter alia, in the Registration Act, 1908 and the Companies Act, 1956. The said legal opinion further stated that as per Sec.77(3) of the Companies Act, 2013, it is clear that no charge shall be taken into account by the liquidator under the Companies Act or under the IBC, 2016 unless the charge is registered u/s 77(1) of the Companies Act, 2013.

- iii. The Respondent submits that in the light of conflicting legal opinions received in the matter from India Law LLP and Axis Bank, the Respondent has continued to classify the Applicant as 'Unsecured Financial Creditor' in the List of Stakeholders. However, such classification of the Applicant is subject to the requisite orders passed by this Hon'ble Tribunal.

FINDINGS

7. We have heard the Counsel for the parties and have gone through the records.
8. By way of this Application, the Applicant has sought direction to the Liquidator to classify its claim as Secured Financial Creditor instead of Unsecured Financial Creditor. It has been pointed out by the Counsel for the Applicant

that in respect of the credit facility of INR 100,00,000 (Rupees One Crore Only) advanced to the Corporate Debtor vide Sanction Letter dated 27.02.2019 and 28.03.2019, the claims were admitted by the RP in full without any reduction. However, it came to the notice of the Applicant that it has been wrongly classified as Unsecured Financial Creditor instead of a Secured Financial Creditor which is wrong and needs to be rectified. In this regard the Counsel for the Applicant has pointed out that the charge in respect of the loans advanced to the Corporate Debtor was duly registered with Central Registry of Securitization Asset Reconstruction and Security Interest of India ('CERSAI') created under the SARFEASI, which is equivalent to a charge registered with Registrar of Companies in terms of Regulation 21 of the Liquidation Process Regulations, 2016.

9. On the other hand, the Counsel for the Liquidator has argued that an objection was received from the CoC Members against the treatment of the Applicant as Secured Creditor on the ground that while sanctioning the credit facilities to the Corporate Debtor, no NOC was obtained from the other Secured Financial Creditor and therefore, the Applicant cannot be treated as a Secured Creditor. Apart from that, it has further been contended by the Counsel for the Liquidator that as per Section 20 of the SARFEASI Act, the provisions under the Act are

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in addition and not in derogation of any of the provisions of the Registration Act, 1908 and the Companies Act, 1956, etc. Therefore, according to the Counsel for the Applicant, SARFEASI Act does not override the provisions of Section 77 of the Companies Act, 2013 which clearly provides that no charge created by a company shall be taken into account by the Liquidator unless it is duly registered u/s 77(1) of the Companies Act and a certificate of registration is also issued by a Registrar under Section 77(2) of the said Act. The Counsel for the Liquidator has prayed for the dismissal of the Application.

10. We have considered the aforesaid contentions raised by the Counsel for the parties and have carefully gone through the records.

11. Before adverting to the rival contentions raised by the Counsel for the parties we deem it appropriate to reproduce section 77(3) of the Companies Act which reads as under: -

“(3) Notwithstanding anything contained in any other law for the time being in force, no charge created by a company shall be taken into account by the liquidator³[appointed under this Act or the Insolvency and Bankruptcy Code, 2016 (31 of 2016), as the case may be,] or any other creditor unless it is duly registered under sub-section (1) and a

certificate of registration of such charge is given by the Registrar under sub-section (2).”

(Emphasis Supplied)

12. A perusal of the aforesaid section 77(3) of the Companies Act clearly shows that the Liquidator is not supposed to take into account any charge created by a Company unless it is duly registered u/s 77(1) and a certificate of registration of such charge is given by the Registrar under 77(2) of the said Act. It is pertinent to point it out here that Section 77(3) was amended on 15.11.2016 to provide that the Liquidator appointed under the IB Code, 2016 shall not take into account any charge which is not registered with the Registrar of Companies. Since the amendment in Section 77(3) of the Companies Act came simultaneously with the advent of the IB Code, 2016, the provisions of Section 77(3) cannot be over looked by the Liquidator even by resorting to Section 238 of the Code. If the intention of the legislature had been otherwise, the aforesaid amendment in Section 77(3) of the Companies Act would not have been carried out to prevent a Liquidator appointed under IBC from considering any charge other than the one Registered under Section 77(3) of the Companies Act. Therefore, in our considered view, on the strength of Regulation 21, it cannot be successfully argued that even if the charge is not registered with the Registrar of Companies, but it is registered with the Central Registry of Securitization

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Asset Reconstruction and Security Interest of India, the same is liable to be treated as a valid charge for treating a creditor as a secured one.

13. As a result of brief discussion, **we hold that** on the basis of the charge registered with Central Registry of Securitization Asset Reconstruction and Security Interest of India, **the Applicant cannot be treated as Secured Creditor**. Therefore, **IA 2620 of 2023** filed by the Applicant is liable to be **dismissed** being devoid of any merit, it is ordered accordingly:

ORDER

- a. **I.A. No. 2620 of 2023** in CP(IB) No. 2043 of 2018 is hereby **dismissed**.
- b. There shall be no order as to costs.
- c. Accordingly, the instant I.A. stands disposed off on above terms.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)