

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
DIVISION BENCH – I, CHENNAI**

**IA(IBC)/530(CHE)2023 IN CP/243/2021**

*(filed under Section 60(5) and Section 36 of Insolvency & Bankruptcy Code,  
2016)*

*In the matter of M/s. Hotel Milestonnez India Private Limited*

**Amier Hamsa Ali Abbas Rawther**

**Liquidator**

For M/s. Hotel Milestonnez India Private Limited,

IP- PO 1727/2019-2020/12620

No R 94, SBIOA Unity Enclave, Mambakkam P.O.

Chennai-600 127

*...Applicant / Liquidator*

-Vs-

**State Bank of India,**

Stressed Assets Management Branch

No 32, Red Cross Building,

Montieth Road

Egmore

Chennai-600 008

*...Respondent No.1*

**Shri. M.Rajamanickam,**

No.19/6, Gandhi Nagar Main Road

Virugambakkam

Chennai- 600092

*...Respondent No.2*

**Shri. R. Ramachandran**

No.19/6, Gandhi Nagar Main Road

Virugambakkam

Chennai- 600092

*....Respondent No.3*

Order Pronounced on 9<sup>th</sup> February, 2024

CORAM:

**SANJIV JAIN, MEMBER (JUDICIAL)**  
**VENKATARAMAN SUBRAMANIAM MEMBER (TECHNICAL)**

For Applicant : E. Om Prakash, Senior Advocate  
Ms. Jayanti K Shah, Advocate  
For Respondent : Shri. Raghavalu Naidu, Advocate For R1  
Ms. Rishita Kishan, Advocate For R2 and R3

**ORDER**

**(Heard through video conferencing mode)**

This application under Section 60(5) and Section 36 of the Insolvency and Bankruptcy Code, 2016 (“IBC”) has been filed by the Applicant/Liquidator, **Mr. Amier Hamsa Ali Abbas Rawther** seeking following reliefs:

- A) *To pass an order directing the respondents to handover the physical possession of the mortgaged leasehold land of the Corporate Debtor ( both Express Lease, period since expired & implied lease) lands vide MOD dated 04.10.2023 registered as document No 3672 of 2013 & 3673 of 2013 used by Corporate Debtor into the Liquidation Estate of the Corporate Debtor.*
- B) *To pass and order directing the Liquidator-Applicant to add the mortgaged land ( Express lease since expired – 146 cents and implied lease – 132 cents ) vide MOD dated 04.10.2013 registered as document No 3672 of 2013 & 3673 of 2013 into the liquidation estate of Corporate Debtor and*
- C) *To pass any other order/orders that this Hon’ble Tribunal may deem fit and proper.*

**BRIEF FACTS:**

2. The Corporate Insolvency Resolution Process involving Hotel Milestonnez India Private Limited (Corporate Debtor) was initiated pursuant to a petition under Section 7 of the Code filed by State Bank of India (Respondent 1), the financial creditor before NCLT Chennai. The Corporate Debtor was admitted into CIRP on 19<sup>th</sup> April 2022 vide order No. *CP IB 243 of 2021* of the Adjudicating Authority. Public announcement was made on 22.04.2022.

3. The applicant was appointed as IRP and later confirmed as RP. The COC was formed with State Bank of India as the sole financial creditor. Form G was published on 04.07.22 and 01.08.22. Last date for submission of resolution plan was fixed on 10.10.22 which was subsequently revised to 26.10.22. No resolution plan was received by R.P. On 15.11.22 in the 8<sup>th</sup> COC meeting, it was resolved by COC with 100% majority to liquidate the Corporate Debtor. Adjudicating Authority on 15<sup>th</sup> Feb 2023 in *IA 1425 CHE 2022 in IBA 243 CHE 2021* ordered for the liquidation and appointed the applicant as liquidator.

**SUBMISSIONS BY APPLICANT:**

4. It is stated that State Bank of India (Respondent 1) holds, among other securities, mortgage of landed properties owned by the Respondents 2 and 3, wherein the hotel owned by the Corporate Debtor is constructed, by availing credit facilities from SBI. It is stated that SBI had initiated SARFAESI proceedings and took possession of the land premises in exercise of its power under Section 13 (4) of SARFAESI Act on 15.09.2015.

5. It is stated that as SBI had relinquished the rights of the property to Resolution Estate and consented to add the entire assets in the resolution estate. Accordingly, Form G was published adding the land in the names of the guarantors as resolution estate. It is stated that paper publication calling for Expression of Interest was made and there were 9 entities expressing the interest. It is stated that even though 9 EOIs were received, because of the landed properties in the name of suspended directors and hotel complex in the name of the Corporate Debtor, none of them was ready to provide EMD and submit the resolution plan, even though all of them carried out the due diligence.

6. It is stated that in the 3<sup>rd</sup> CoC meeting dated 25.07.2022 and 4<sup>th</sup> CoC meeting dated 05.09.2022, the issue of intermingling of assets of Corporate Debtor and the promoters into the resolution estate and thereby incorporating the same in Information Memorandum was discussed and it was decided by the CoC to send a letter to the personal guarantors, seeking their cooperation in conducting CIRP process by including the land parcels mortgaged by them to SBI, as a part of Resolution Estate in the Information Memorandum. Letter No 150 & 151 dated 07.09.2022 were served on the Respondents 2 and 3 seeking their support and cooperation in conducting the CIRP process by including the land parcels mortgaged by them to SBI in the Information Memorandum. It is stated that in liquidation process intermingling of assets of the CD and guarantors was also deliberated in the First Stake Holders Committee meeting conducted on 22.02.2023. It is stated that in all these meetings, Respondents 2 and 3 were present, representing the suspended promoter directors and neither of them opposed the proposal in the meeting nor responded to the letters served on them. In these circumstances, the respondents 2 and 3 are estopped from taking the plea that they would be prejudiced.

7. To support his case, Applicant relied upon Hon'ble NCLAT's decision in **Vanguard Credit and Holdings Private Limited –Vs- Kshitiz Chhawchharia, RP of Ramsarup Industries Limited in Company Appeal(AT) (Ins.) No. 1125 of 2019**, wherein it is held as under ;

141. *The Appellant Vanguard Credit and Holdings Private Limited being aggrieved by the Order in Company Application (I.B.) No. 462/K.B./2019 under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 in Company Petition No. (I.B.) 349/K.V./2019 has filed this Appeal.*

142. *The Appellant contends that the Adjudicating Authority has approved the Resolution Plan even though the Resolution Plan in respect of the Corporate Debtor envisages the transfer of land belonging to the Appellant and not the Corporate Debtor, measuring about 52.49 acres situated at Banskopa Inn Road, Gopalpur, Mouza, J.L. No 65, Durgapur in the Burdwan District, West Bengal (hereinafter referred to as "the said premises"). In the eyes of the law, the Appellant is a stranger to the Corporate Insolvency Resolution Process initiated against the Corporate Debtor.*

172. *Since Mr Ashish Jhunhunwala, the Appellant and the Corporate Debtor promoter, had filed An Application under Section 10 of I&B Code, 2016 of the Corporate Debtor. Therefore, after the same was admitted on 8 January 2019, he has been a part of almost all 'CoC' meetings from the beginning, including the 1st 'CoC' meeting, which was conducted on 7th February 2018. Time and again, various issues about the Durgapur unit/land had been discussed in the 'CoC' meetings in the presence of Mr Jhunhunwala. However, he failed even once to point out that the Appellant was to be treated as a separate entity, and the land could not be part of the Resolution Process. For the 1st time, in the 21st 'CoC' meeting held on 11 February 2019, Mr Ashish Jhunhunwala raised an objection stating that the land at the Durgapur does not belong to the Corporate Debtor. The same was done only at the fag end and when Mr Jhunhunwala realised that the 'CIRP' was at the final stage against his expectations. Therefore, with the only aim of spoiling the resolution process, such objections were raised at such a belated stage which is only an afterthought. For the 1st time on 20th February 2019, the Appellant wrote to the Resolution Professional stating that the land does not belong to the Corporate Debtor and to exclude from the Resolution Process. The same is also indicative that the Appellant is not a separate legal entity but is only acting on the whims and fancies of*

*Mr Ashish Jhunjhunwala. Therefore, the Corporate veil should be pierced, and the real Promoter/Management's acts and intention cannot be ignored.*

*173. In light of the discussion above, we find no merit in this appeal, and the appeal deserves to be dismissed.*

### **REPLY BY RESPONDENT NO1- STATE BANK OF INDIA**

8. It is stated that at the request of the Corporate Debtor, M/s. Hotel Milestonezz India Private Limited represented by Respondents 2 and 3 and personal guarantors M.Rajamanickam, R.Ramachandran, B.Sivagami, R.Manimegalai, SBI ( Respondent 1) sanctioned credit facilities vide sanction letter dated 27.11.2011 i.e. Rs 1.0 crore and Term Loan Facilities Rs.10.0 cr. The Corporate Debtor executed necessary loan documents, inter alia securing hypothecation of stocks and goods in favour of the bank and the guarantors executed guarantee deeds securing the repayment of credit facilities and also created mortgage on their properties in favour of bank and the Memorandum of Deposit of Title deeds was registered as Doc No 4839/2011, 776 of 2011 and 777 of 2011 dated 29.04.2011.

9. It is stated that at the request of the Corporate Debtor, the financial creditor sanctioned a Corporate Term Loan of Rs.5.25 cr on 17.05.2013.

The Corporate debtor executed necessary loan documents, the guarantors executed guarantee deeds and also extended the mortgage on their properties and registered Memorandum of Deposit of Title deeds registered as Doc Nos. 15705/2013, 3673/2013, 6472/2013, 6473/2013, 3672/2013 and 15456/2013 in favour of financial creditor.

10. It is stated that the loan account became NPA on 29.06.2013. The financial creditor filed O.A. No 760 of 2015 before Hon'ble DRT 2 Chennai, which passed a final order in favour of SBI on 24.07.2017 for a sum of Rs.13,55,51,172.80/- in full, jointly and severally by Corporate Debtor and guarantors, together with simple interest @12% p.a. from the date filing O.A. i.e. on 20.10.2015 till realisation. Recovery Certificate DRC No 463 of 2017 was issued on 27.09.2017 against the Corporate Debtor and the guarantors including Respondents 2 and 3.

11. It is stated that SBI, Respondent 1 had offered OTS on various dates i.e. 06.12.2017, 03.10.2018, 03.09.2019 and 19.10.2010 which were not honoured. It is stated that 2<sup>nd</sup> and 3<sup>rd</sup> respondents had sought time from the Adjudicating Authority for submission of proposal on 09.10.2023, 20.11.2023 and again time was taken upto 14.12.2023. It is stated that no concrete proposal was brought up.

12. It is stated that the security interest was created by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on their free hold rights on the property belonging to them and on the lease hold rights by the Corporate Debtor. Thus SBI, Respondent 1 has got the composite security interest on the entire land and building in which Corporate Debtor was carrying on the hotel business.

13. It is stated that by virtue of the mortgage created by respondents 2 and 3 , SBI already obtained mortgage decree vide DRT order dated 24.07.2017 and recovery certificate dated 27.09.2017 against Corporate Debtor, as well as respondents 2 and 3. It is stated that 1<sup>st</sup> respondent initiated proceedings under SARFAESI Act 2002 on the properties mortgage created by Respondents 2 and 3 and taken symbolic possession of the same, however, the same could not be enforced for the reason that the same may not fetch the market value without the building constructed there on.

14. It is stated that the respondent bank has relinquished its security interest on free hold rights created by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent on the land alone. It is stated that on such relinquishment of security interest to the estate of the Liquidator of the Corporate Debtor, the realisation of

composite land and building would fetch maximum realisable value and respondents 2 and 3 would not be prejudiced by the action of the bank.

### **REPLY BY RESPONDENTS NOS 2 & 3**

15. It is stated that the instant application is not maintainable for the following reasons:

- A) The properties mortgaged by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents do not form part of the Liquidation Estate.
- B) Without prejudice, 2<sup>nd</sup> and 3<sup>rd</sup> respondents have rights of redemption of mortgage, by the remedies available under the SARFAESI Act.
- C) The applicant has not disclosed on what authority of law- either under Code or Regulations, there under, he has sought the assets of respondents 2 and 3 to be included as part of the liquidation estate.
- D) As regards formation of liquidation estate for recovery, Sub-sections (3) and (4) of Section 36 of the Code enlist the assets which would fall or not fall within the liquidation estate of Corporate Debtor respectively. It is stated that the assets of the guarantors are nowhere included in in Section 36(3) of the Code.

16. It is stated that the mortgaged properties alone were valued at over Rs.40 crore by 1<sup>st</sup> respondent's panel valuer in the year 2015. The bid

value proposed for the Corporate Debtor including the mortgaged properties is only Rs. 30 crore as denoted in auction notice.

17. It is stated that the 1<sup>st</sup> respondent had only expressed its interest to relinquish its security interest. It does not *ipso facto* transfer the title to the Corporate Debtor.

18. It is stated that it is an admitted fact that 2<sup>nd</sup> and 3<sup>rd</sup> respondents created mortgage in favour of the 1<sup>st</sup> respondent and that Corporate Debtor had used the leased properties for creating various utilities to run its business. It is stated that the Corporate Debtor and personal guarantors are separate entities and their assets and liabilities are distinct and separate.

19. It is stated that both the suspended directors had submitted a proposal of Compromise under Section 230 of Companies Act 2013 vide letter dated 11.05.2013 which was discussed in Third Stakeholders Consultation Committee on 15.05.2023 and voted against with 97.17% vote.

20. It is stated that the respondents 2 and 3 have filed Writ Petition bearing *W.P. No 16239 of 2023* and Miscellaneous Petitions *15631 of 2023, 15632 of 2023 and 15634 of 2023* before Hon'ble High Court Madras. It is stated that Hon'ble High Court has not granted any stay.

21. Respondents 2 and 3 have relied upon Hon'ble NCLAT judgement in **Nitin Chandrakant Naik vs Sanidhya Industries LLP [2021 SCC Online NCLAT 302]** in their favour.

### ANALYSIS AND FINDINGS

22. Heard the counsels of the applicant and the respondents

### 23. FACTUAL POSITION.

23.1. In the present case, land properties are owned by Respondents 2 and 3 (Guarantors) on which hotel building was constructed by Corporate Debtor, by taking loan from SBI (Respondent No.1).

Details of the properties in question are as under:

S. No	Property 1	Property 2
Owner of land	R.Ramachandran Respondent No 3	Rajamaickam Respondent No 2
Description	146 cents- S.NO 112/7 of No 150 Sandha Vellore Village with S.NO 112/9	132 cents- S No 112/6 Sandha Vellore Village
Owner of	Hotel Milestonnez	Hotel Milestonnez

building	( Corporate Debtor)	( Corporate Debtor)
Nature of building	Main hotel	Swimming Pool, hotel Utility services rooms and related services
Lease	Lease agreement dated 18 <sup>th</sup> March 2010- 10 years lease	No express lease agreement
MOD No	3672 of 2013 dated 04.10.2013	3673 of 2013 dated 04.10.2013

23.2. The properties of guarantors were also included in the *Form G* while inviting *Expression of Interest* from Prospective Resolution Applicants.

23.3. SBI, Respondent No.1 states that it has relinquished its security interest on free hold rights on the land created by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent and on such relinquishment of security interest to the estate of the Liquidator of the Corporate Debtor, the realisation of composite land and building would fetch maximum realisable value and respondents 2 and 3 would not be prejudiced by the action of the bank.

23.4. Respondents 2 and 3 submit that the Corporate Debtor and personal guarantors are separate entities and their assets and liabilities are distinct and separate.

23.5. The Writ Petition filed by Respondents 2 and 3 in Hon'ble Madras High Court relates to the declaration of Corporate Debtor's account as Non-Performing Asset by Respondent 1 and no stay has been granted by Hon'ble High Court on the liquidation proceeding.

## **24. LEGAL PROVISIONS**

Let us examine the legal provisions.

24.1. Regulation 37 of IBBI Insolvency Resolution Process for Corporate Persons 2016 states that:

*37. A resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets, including but not limited to the following:-*

*(a) transfer of all or part of the assets of the corporate debtor to one or more persons;*

*(b) sale of all or part of the assets whether subject to any security interest or not;*

*2 [(ba) restructuring of the corporate debtor, by way of merger, amalgamation and demerger;]*

*(c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;*

*[(ca) cancellation or delisting of any shares of the corporate debtor, if applicable;]*

*(d) satisfaction or modification of any security interest;*

*(e) curing or waiving of any breach of the terms of any debt due from the corporate debtor;*

*(f) reduction in the amount payable to the creditors;*

*(g) extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;*

*(h) amendment of the constitutional documents of the corporate debtor;*

*(i) issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;*

*(j) change in portfolio of goods or services produced or rendered by the corporate debtor;*

*(k) change in technology used by the corporate debtor; and*

*(l) obtaining necessary approvals from the Central and State Governments and other authorities.]*

*4[(m) sale of one or more assets of corporate debtor to one or more successful resolution applicants submitting resolution plans for such assets; and manner of dealing with remaining assets.]*

#### **24.2. IBC Section 36-Liquidation estate states as follows;**

*(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:—*

*(a) assets owned by a third party which are in possession of the corporate debtor, including—*

*(i) assets held in trust for any third party;*

*(ii) bailment contracts;*

*(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;*

*(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and*

*(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;*

*(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;*

*(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;*

*(d) assets of any Indian or foreign subsidiary of the corporate debtor; or*

*(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.*

*(emphasis provided).*

24.3. Discussion paper floated by Ministry of Corporate Affairs under the aegis of IBBI, on 18.01.2023, acknowledges the issues of **intermingling of assets** in CIRP and discusses about the possible solution as under:

*“ it is being considered that the Code may be amended to provide that in a case where the secured creditor has taken possession of secured asset of the guarantors of CD ( security interest over which was created to secure the repayment of CD’s debt) under SARFAESI Act,2002, that is linked to CD’s assets, she may have the option to sell the assets through a special window created under CIRP process.”*

It is to be noted that no further amendment has taken place in Code or Regulation about this, post the discussion paper.

24.4. Various legal citations are available, both, in favour of joint sales of properties of CD and guarantors and against it in CIRP and liquidation process. A few of them are listed below:

#### **24.4.1. In favour of joint sale of assets in CIRP**

i) In *Punjab National Bank Vs Sandwoods Infratech Projects (P) Ltd & Ors*  
Citation (2024) [ibclaw.in 04 NCLAT](#)

*A. Whether in Resolution Plan all securities for any debt due to the secured creditors can be unconditionally released and transferred in favour of the Corporate Debtor?*

*It is well settled that after moratorium is declared under Section 14 of the IBC, there arises prohibition on enforcement of any security interest created by the Corporate Debtor in respect of its property.(p18)*

*Regulation 37 of the CIRP regulations dealing with “Resolution Plan” is also particularly relevant having been framed to provide for measures, as may be necessary, for CIRP of the Corporate Debtor for maximization of the value of its assets. This Regulation and its underlying spirit has been analysed and dissected by this Tribunal in the matter of Edelweiss Asset Reconstruction Company Ltd. v. Mr. Anuj Jain and Ors. [\(2023\) ibclaw.in 420 NCLAT](#).(p18)*

*The scheme as delineated by Regulation 37 of CIRP Regulations fully supports the view that if a claim is filed by a Financial Creditor and the claims of the Financial Creditor is part of the CIRP, their security interest can very well be dealt with in the resolution plan. Amplifying this concept further, this Tribunal has held in a recent judgement in the matter of ICICI Bank Ltd v BKM Industries Ltd and Anr. [\(2023\) ibclaw.in 716 NCLAT](#) that reference to the value of its security interest by a dissenting Financial Creditor neither carries any meaning nor any substance as the entitlement of the dissenting financial creditor is specified in Section 30(2)(b) of the IBC.(p19)*

*From the ratio laid down by this Tribunal in Edelweiss Asset Reconstruction Company Ltd. v. Mr. Anuj Jain and Ors. [\(2023\) ibclaw.in 420 NCLAT](#) and ICICI Bank Ltd v BKM Industries Ltd and Anr. [\(2023\) ibclaw.in 716 NCLAT](#), it is amply clear that the statutory construct of the IBC read with Regulation 37 of CIRP*

*Regulations provides an enabling framework for CoC to exercise its commercial wisdom to approve a resolution plan of any Corporate Debtor which provides that all securities for any debt due to the secured creditors can be unconditionally released and transferred in favour of the Corporate Debtor.(p20)*

*Clause 6.5(ii) and (vii) of the present resolution plan does not suffer from any infirmity or arbitrariness for having provided for assignment of securities of the Appellant nor can it be found to be non-compliant to the provisions of Section 30(2)(e) of the IBC.(p20)*

*Merely raising the pretext that such assignment would adversely affect the recovery proceedings from the guarantors and collateral securities of third parties thereby making it inequitable for the Appellant/Financial Creditor lacks substance. The reference made by the Appellant to the judgements of the Hon'ble Apex Court in the State Bank of India v. Ramakrishnan & Anr. and Lalit Kumar Jain v. Union of India (2021) [ibclaw.in 61 SC](#) matter is distinguishable as when those judgements were passed, provisions of Part-III of the IBC was not yet notified and was not applicable to Personal Guarantors of the Corporate Debtor.(p20)*

#### **24.4.2. In favour of joint sale of assets in Liquidation**

*i) In Punjab National Bank Vs. Vindhya Vasini Industries Limited, (2018) [ibclaw.in 47 NCLT](#) NCLT, Mumbai bench has approved for sale of personal guarantors property along with liquidation assets by liquidator as under:*

*The CoC passed a resolution for liquidation of the Corporate Debtor. While considering the application for liquidation, a question was raised whether the process of liquidation can also be initiated against a property belonging to a mortgagor to the Bank. The Adjudicating Authority noted that the debt in question was intricately linked with the property mortgaged and can not be segregated in the process of liquidation proceedings. It allowed the liquidator to liquidate the said property under section 60 (2) of the Code.*

ii) Hon'ble NCLAT in **Ayan Mallick Vs. Pratim Bayal, Liquidator & Ors.** [Company Appeal (AT) (Insolvency) No. 456 of 2022] - (2022) ibclaw.in 362 NCLAT held that

*5. We have considered submissions of learned counsel for the parties and perused the record. When the Adjudicating Authority is satisfied that joint sale shall bring maximization of assets of the Corporate Debtor and the possession of the properties of the Guarantors have already been taken under SARFAESI and both land and factory need to be sold together to maximize the value of the assets, we fail to see that how the Appellant shall be prejudiced in any manner. We do not find any error in the order of the Adjudicating Authority rejecting the I.A. We dismiss the Appeal. We, however, observe that it shall be open to the Appellant to take such remedy under SARFAESI with regard to auction in accordance with law.*

#### **24.4.3. Against joint sale of assets in CIRP**

i) In *Nitin Chandrakant Naik Vs Sanidhya Industries LLP* [2021 SCC Online NCLAT 302], Hon'ble NCLAT held that

*By the Impugned Order, the Adjudicating Authority allowed the Application filed by Respondent No.3- Resolution Professional seeking approval of the Resolution Plan approved by the Committee of Creditors which plan was submitted by Respondent No.1-'Sanidhya Industries LLP'. Aggrieved by the approval of the Resolution Plan, the Appellants have filed this Appeal mainly on the ground that the Resolution Plan has provision to transfer personal properties of the Appellants who had given their personal properties as security in favour of the Corporate Debtor, whom Corporate Debtor took loan.*

*The Appeal claims and it is argued on behalf of the Appellants that the Resolution Plan approved made provision of transfer of personal properties of the Appellants. It is claimed that the personal properties of the Shareholders/ Directors cannot form part of the Resolution Plan*

*under Regulation 37 of the CIRP Regulations. Resolution Plan has to be with respect to the property of the Corporate Debtor and cannot enforce action against the properties of Shareholders/ Directors or Guarantors without proceeding against them. If the Creditor desires the Creditor has to proceed against the Guarantor under SARFAESI Act, 2002, Indian Contract Act, 1972 or the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, which proceedings could have been filed before the DRT as Part III of the Insolvency and Bankruptcy Code, 2016 (“IBC” for short) which has not yet been notified. The Appellants alleged that the Information Memorandum published by Respondent No.3-Resolution Professional did not show the personal properties of the Appellants as properties of the Corporate Debtor.*

*For the above reasons, we hold under Section 61(3) of the IBC that the Resolution Plan as approved by the Adjudicating Authority is in contravention of the provisions of law as discussed above and there have been material irregularities in exercise of powers by the Adjudicating Authority when it directed the Appellants (in para 26 of the impugned order (referred supra)), that the owners of the premises as mentioned in the judgment shall enter into Tripartite Agreements for transfer of the premises (as mentioned in para 18 of impugned order). In fact, if para 18 is seen, after describing the properties in the chart there is also portion added which says that the Financial Creditors shall be at liberty to proceed against the properties of the Promoters erstwhile Directors/ Guarantors “other than those mentioned above to recover their balance”. This, in the Resolution Plan would be blank cheque given to proceed even with regard to any other property also of the Personal Guarantors. In our view, without resorting to appropriate proceedings against the Personal Guarantors of Corporate Debtor this is irregular exercise of powers.*

#### **24.4.4. Against joint sale of assets in liquidation**

i) In *Base Corporation Ltd. Vs. Pegasus Assets Reconstruction Company Pvt. Ltd.* –Citation: (2023) ibclaw.in 13 NCLT, NCLT Bengaluru Bench held that:

*Liquidator of Corporate Debtor cannot put the asset of Personal Guarantor for e-auction during the liquidation of the Corporate Debtor, as it not form part of the Liquidation Estate assets*

**CONCLUSION:**

25 . In the present case :

- i) Hotel Building is owned by Corporate Debtor and the land on which construction was done belongs to guarantors i.e. Respondent 2 and 3.
- ii) Value maximisation will happen only, if the land and building can be sold together.
- iii) Respondent 1, i.e. SBI had taken physical possession of the guarantors property under SARFAESI Act and had also obtained Decree and Recovery Certificate.
- iv) SBI , Respondent 1 is the sole secured financial creditor in CIRP process and in its favour both CD's assets and Guarantors assets have been mortgaged. So it will be the sole secured claimant in realisation of assets of CD and that of guarantors.
- v) There was no opposition from Respondents 2 and 3, for proposal of intermingling of assets of CD and guarantors, during discussions in the various COC and Stakeholders Consultation Committees where both the respondents were present in the meetings. Letter No

150 & 151 dated 07.09.2022 addressed to the Respondents 2 and 3 seeking support and cooperation in conducting CIRP process by including land parcels mortgaged by them to SBI in Information Memorandum did not evoke any response.

26. In *Nitin Chandrakant Naik Vs Sanidhya Industries LLP [2021 SCC Online NCLAT 302]*, the case law relied by Respondents 2 and 3, it is found that the properties of guarantors were not part of the Information Memorandum and this was the main ground for NCLAT setting aside the resolution plan approved by Adjudicating Authority. In the present case, the guarantors assets were included in Information Memorandum during CIRP process and later included in liquidation asset and the same was discussed in CoC meetings and Stake Holders Committee meeting and not objected by Respondents 2 and 3. So *Nitin Chandrakant Naik* case law would not apply to the facts of the present case.

27. NCLAT's decision in *Ayan Mallick Vs. Pratim Bayal, Liquidator & Ors. [Company Appeal (AT) (Insolvency) No. 456 of 2022] supra* about joint sale will be more appropriate in the present case for the following reasons:

- i) Sale of Hotel without land on which it is constructed or land without hotel building will not fetch any value,
- ii) The assets of guarantors were included in Information Memorandum of CIRP.
- iii) The respondents 2 and 3, by their action of not opposing the intermingling of assets till the filing of the counter are estopped from opposing it now.

28. We find that after the Discussion Paper brought out by IBBI regarding the intermingling of assets of the Corporate Debtor with that of guarantors in January 2023, no amendments have been brought out enabling intermingling of assets.

29. To summarise, based on the facts of the case and the legal provisions we are of the view that:

- a) As per current provisions of law, intermingling of assets is not possible, as explained above.
- b) The proposal of SBI, Respondent 1 *to relinquish the security interest in the land properties of guarantors to the estate of the Liquidator of the Corporate Debtor* does not conform to any of the current provisions (Section 36 of IBC Code) or regulations, as discussed earlier.
- c) In the said circumstances the relief as sought for by the Applicant i.e. seeking to handover physical possession of

mortgaged leasehold land of the Corporate Debtor and directing the Liquidator-Applicant to add the mortgaged land into the liquidation estate of Corporate Debtor **cannot be granted.**

30. However, taking into consideration the peculiar facts and circumstances of the present case and also in the light of the Judgment of the Hon'ble NCLAT in the case of **Ayan Mallick Vs. Pratim Bayal, Liquidator & Ors. (supra)**, we issue directions as follows;

- (i) In order to maximize the value of the assets of the Corporate Debtor, the Applicant along with the Respondent No. 1 (SBI) shall take steps to conduct a Joint Sale of the Properties of the Corporate Debtor and the Guarantor both under IBC, 2016 and SARFAESI Act, 2002, by issuing a Joint e-Auction Sale Notice.
- (ii) It is made clear that the Respondents 2 and 3, (whose properties have been taken possession under SARFAESI Act 2002), shall have their rights and remedies available under the SARFAESI Act.

31. With the above said directions, IA(IBC)/530(CHE)/2023 stands disposed of.

**-Sd-**

**VENKATARAMAN SUBRAMANIAM**  
MEMBER (TECHNICAL)

**-Sd-**

**SANJIV JAIN**  
MEMBER (JUDICIAL)