

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

MA/457/2018 in CP/511/IB/2017

(Under Section 52(4) of the Insolvency and Bankruptcy Code, 2016)

In the matter of **M/s. Cethar Limited**

Asset Reconstruction Company India Limited

(in its capacity as Trustee of Arcil AST – I Trust)

Having its Registered Office at

The Ruby, 10th Floor,

29 Senapati Bapat Marg, Dadar (West)

Mumbai – 400 028

Through Mrs. Manjula, Authorized Signatory

... Applicant

-Vs-

Venkatramanrao Nagarajan

Liquidator of M/s. Cethar Limited

New No.29, Kavarai Street,

West Mambalam,

Chennai – 600 033

JM Financial Asset Reconstruction Company Ltd.

(impleaded as 2nd Respondent vide order
dated 29.04.2019 passed in MA/126/2019)

... Respondent

Order Pronounced on 1st April 2021

CORAM :

R. SUCHARITHA, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

For Applicant : M.S. Krishnan, Senior Advocate
For Abitha Banu, Advocate

For Respondent : R. Subramaniam, Advocate for R1,
R. Sugumaran, Advocate for R2

ORDER

Per: R. SUCHARITHA, MEMBER (JUDICIAL)

1. The Applicant is an Asset Reconstruction Company, as defined under the provisions of the SARFAESI Act, 2002 and registered with the Reserve Bank of India.

2. The Corporate Debtor viz. Cethar Limited, had borrowed loan from IDFC Bank and committed default in the repayment of the loan and as a result of which the account of the Corporate Debtor has been declared as Non Performing Asset (NPA). Thereafter, the said IDFC Bank vide Assignment Deed dated 08.10.2013 assigned the debt to the Applicant herein consequent upon the declaration of the debt as NPA. The Applicant initiated recovery proceedings for the recovery of a sum of Rs.13,89,40,525/- before the DRT – I, Chennai in OA No. 284/2016. As things stand thus, one of the Operational Creditors of the Corporate Debtor viz. M/s. Lloyds Insulations India Ltd. filed an application under Section 9 of IBC, 2016 before this Tribunal against the Corporate Debtor and this Tribunal vide order dated 16.06.2017 admitted the application and initiated the CIRP against the Corporate Debtor and appointed the 1st Respondent herein as the Interim Resolution Professional. Thereafter, since no viable Resolution Plan was forthcoming, the



Corporate Debtor was ordered for Liquidation by this Tribunal vide order dated 25.04.2018 passed in MA/32/IB/2018.

3. The Applicant is a secured creditor of the Corporate Debtor. It is stated that the a Factory Unit (Unit VII) situated at Boothagudi and Melapachangudi Village, Illupur Taluk, Viralimalai, Pudukottai District and the Plant & Machinery available inside the said units are hypothecated to the Applicant herein. It was also submitted that the ICICI bank has pari passu charge in the existing assets of the Corporate Debtor and at present these mortgaged property and hypothecated machineries are in the possession of the Liquidator.

4. It was submitted by the Learned Senior Counsel for the Applicant that the Applicant being a secured creditor has expressed his willingness to stand outside the purview of liquidation proceedings under Section 52 of IBC, 2016 by their letter dated 23.05.2018 and also requested the Liquidator to hand over the physical possession of the movable and immovable properties described in the schedule to the Applicant to enable the Applicant to proceed under the SARFAESI Act. It was submitted that the said issue was also discussed during the meetings held on 19.06.2018 and 18.07.2018. The Applicant vide his letter dated 10.07.2018 has also informed the Liquidator that they are proceeding with the

OA pending before DRT – I, Chennai. It was submitted that inspite of the Applicant expressing his willingness to stand outside the liquidation process, the Liquidator has not handed over the physical possession of the property to the Applicant and unless the physical possession of the property is handed over to the Applicant, it is not possible for the Applicant to exercise its rights under the SARFAESI Act. Under the said circumstances, it was submitted by the Learned Senior Counsel for the Applicant that in order to protect the interest of the Applicant and to enable the Applicant to realize the secured asset under Section 52 of IBC, 2016 it is necessary that the possession of the Scheduled property is handed over to the Applicant.

5. The 1st Respondent has filed its preliminary counter before this Tribunal on 28.11.2018, wherein it is stated that the said Unit VII situated at Boothagudi and Melapachangudi Village, Illupur Taluk, Viralimalai, Pudukottai District consist of 164.05 acre of land and the break-up of the security details are as follows;

IDFC (Now ARCIL – the Applicant herein) First Pari Passu Charge	80.53 Acre
First Pari Passu Charge to ICICI, Canada – ECB Loan Second Pari passu charge for Working capital facilities to ICICI (now JM ARC, the 2 nd Respondent)	38.52 Acre
Consortium of Bank First Charge	45.00 Acre
TOTAL	164.05 Acre

6. It was submitted that some of the machinery belong to the Consortium lending bankers and the stocks which are exclusively charged to the Consortium Bankers are stored in Unit VII. Further, the first charge holder M/s. ICICI Bank Canada, who hold around 38% of the total of the security interest of the Applicant had till date not yet communicated in writing that they would be enforcing their interest either under Section 52 of IBC, 2016. Hence the request of the Applicant for handing over of the possession of the entire Unit VII could not be acceded by the 1st Respondent and could not be made possible in the those circumstances. Further, it is stated that the Unit VII constitutes the biggest assets of the Corporate Debtor and most valuable and the cost of the security and other administrative expenses pertaining to the said unit is also too high and the applicant has not even spared a single penny for the CIRP cost and inspite of the repeated request made by the 1st Respondent, the Applicant has not chosen to pay any amount. Further, it was submitted that the inspection of the factory premises and the plant and machinery allowed by the Respondent as and when the requests are received from the Applicant and it was informed that handing over the possession of the Applicant would endanger the interest of other security interest holders and other stakeholder and could not be acceded by the Respondent.



7. In reply to the same, the Applicant has filed rejoinder, wherein it has been stated that the Applicant is having exclusive charge in respect of the property to an extent of 28.41 acre at Boothakudi Village, Pudukottai District, and exclusive charge in respect of the property to an extent of 13.60 acre at Boothakudi Village, Pudukottai District and Mortgage in respect of property to an extent of 4.44 acre at Pudukottai District, Iluppur Taluk, Boothakudi Village and first pari passu charge in respect of a property to an extent of 38.52 acre at Boothakudi Village and thus, the Applicant has right to sell the property to an extent of 85 acre. Further it was submitted that the Applicant has pari passu charge over the plant and machinery of the Corporate Debtor in regard to Unit VII with other lenders. It is stated in the rejoinder that the Liquidator has failed to act as per the provisions of the Insolvency and Bankruptcy Code, 2016 and that the Respondent has not called for any meeting of the stakeholders including the Secured Creditor, for more than 6 months and the Liquidator is conducting the proceedings only by sending irrelevant e-mails without conducting any meetings of the stakeholders. Further, it is stated that the breakup of costs and expenses of the liquidation have not been provided to the stakeholders in spite of repeated request. It is also alleged in the rejoinder that there is no transparency in the liquidation process and as on date no Financial Creditors are aware as to what is the status of the assets of the Corporate Debtor and



the Liquidator is trying to act in the detriment of the interest of the Financial Creditors and all the stakeholders. It is stated in the rejoinder that the Liquidator has represented before this Tribunal that the total extent of the property is 164 acre and it is not possible to segregate 80.53 acre which is claimed by the Applicant, however, in his e-mail dated 10.01.2019, the Liquidator has called upon the Applicant to sell the assets within 7 days and hence the said dual and contradictory approach of the Liquidator shows the *malafide* intention.

8. In the meantime, the M/s. JM Financial Asset Reconstruction Company Limited filed MA/126/2019 to implead themselves as proposed 2nd Respondent in the present MA/457/2018, which was allowed by this Tribunal and accordingly, the M/s. JM Financial Asset Reconstruction Company Limited was impleaded as the 2nd Respondent in the present Application.

9. When the matter came up for hearing before this Tribunal on 23.01.2019, in order to resolve the dispute between the parties, this Tribunal directed the Liquidator to convene the meeting of the stakeholders and to resolve the issue pertaining to Unit VII and also directed the Liquidator to file the status report in relation to the same. The Liquidator has accordingly convened the meeting of the Stakeholders on 06.02.2019 and also filed the status report



before this Tribunal. A perusal of the said status report posits the fact that the meeting was attended by all the stakeholders excluding Indian Overseas Bank and Karur Vysya Bank (who have realized their security interest by standing outside the liquidation) and that it was decided in the said meeting by all the Members of the Bank and Institution not to hand over the possession to the Applicant for the Unit VII as sought by them for various reasons set out in the minutes and it was also suggested by the other members to direct the Applicant and related security interest holders to bring the properties for sale under their applicable laws or provisions at an earliest occasion.

10. Subsequently, when the matter came up for hearing before this Tribunal on 06.03.2019, this Tribunal has passed the following order;

Counsel for the Applicant is present. The Liquidator is present. It has been submitted with one voice that the parcel of lands comprising 85 acres and 41.40 acres are to be sold together to maximize the value of the property.

The Applicant has chosen to sell the same under SARFAESI Act and the parcel of lands comprising of 41.40 is to be disposed of through e-auction by the Liquidator on the same day having common condition of both the parties that the preference will be given to the prospective buyers who could buy both the parcels of lands and the proceeds of 85 acres of land is to be paid to the Applicant and in case the consideration is more than the claim of the Applicant, then rest of the amount will be paid to M/s. JM Financial Asset Reconstruction Co. Ltd., which has filed MA/126/2019 in the present MA claiming to have second charge on the said parcel of land. The said charge has admittedly been created without the consent of the Applicant.



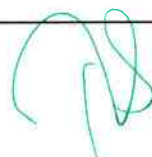
It is noted that MA/126/2019 has been filed in MA/457/2018 in CP/511/IB/2017 for seeking prayer for impleading M/s. JM Financial Asset Reconstruction Co. Ltd. as a Respondent party in MA/457/2018 filed in CP/511/IB/2017. The contents of the Application show that M/s. JM Financial Asset Reconstruction Co. Ltd. is a necessary and proper party.

However, Counsel for the Applicant has submitted that M/s. JM Financial Asset Reconstruction Co. Ltd. will have no claim as his charge is second one and without satisfaction of the claim of the Applicant, M/s. JM Financial Asset Reconstruction Co. Ltd. will not be legally entitled to any share out of the proceeds of the parcel of land measuring 85 acres. However, he has fairly admitted that in case the proceeds of the parcel of land measuring 85 acres is more than the claim of the Applicant in MA/457/2018, the same will be paid to M/s. JM Financial Asset Reconstruction Co. Ltd. In view of it, MA/126/2019 filed by M/s. JM Financial Asset Reconstruction Co. Ltd is allowed and it is arrayed as Respondent in MA/457/2018.

It has been submitted that on the parcel of land measuring 85 acres, some machineries are lying, out of which some of the machineries are hypothecated with the Applicant and rest of the machineries are belonging to some other Creditors. Therefore, the Liquidator is directed to identify the machineries of the Applicant, and other Creditors.

Put up on **29.04.2019 at 10.30 A.M.**

11. The respective parties have filed their written submissions. The Liquidator in his written submission has sought recourse to Regulation 21A of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. It is the contention of the Learned Counsel for the Liquidator that as per Regulation 21A of the IBBI (Liquidation Process) Regulations, 2016 the Applicant is required to pay its share as in case it had relinquished the security interest, to the liquidator within 90 days from the Liquidation commencement date. Further sub - regulation (3) of Regulation



21A states that where a secured creditor fails to comply with sub – regulation (2), the asset, which is subject to security interest, shall become part of the Liquidation estate.

12. The Learned Counsel for the Liquidator submitted that since the Applicant as per Regulation 21A of the IBBI (Liquidation Process) Regulations, 2016 has failed to pay their share, then automatically by operation of sub – regulation (3) of Regulation 21 of IBBI (Liquidation Process) Regulations, 2016, the assets over which the Applicant is having security interest will form part of the Liquidation estate. It was further contended by the Learned Counsel for the Liquidator that the said amendment to Regulation 21A of the IBBI (Liquidation Process) Regulations, 2016 came into force on 06.01.2020 and by efflux of time, 90 days have lapsed and the Applicant has failed to pay the cost in respect of their proportionate share over which they exercise their security interest.

13. The Learned Counsel for the Liquidator further contended that the amendments to the liquidation regulations apply to the existing Liquidations also, except where as in the case of the amendment to Regulation 4 of the Liquidation Regulations the same was specified in the amendment itself as not covering the existing regulations. Further, it was contended that the very fact

the IBBI has not issued any clarification that the amendment dated 06.01.2020 would only apply to Liquidation after 06.01.2020, makes it clear that the amendments made to Regulation 21A of the IBBI (Liquidation Process) Regulations, 2016 on that date apply to existing Liquidations also. Hence, it was contended by the Learned Counsel for the Liquidator that the Applicant by its own failures to adhere to the requirement of Regulation 21A of the IBBI (Liquidation Process) Regulations, 2016 having lost its security interest to the Liquidation Estate has to necessarily only go through Regulation 53 of the IBC, 2016 and realize its dues as per the provisions thereof.

14. The Learned Senior Counsel for the Applicant in rebuttal submitted that the amended Regulations are not applicable to the present case. It was submitted that the Regulation 21A (2) and (3) which came into force on 06.01.2020 has no application in the present case, for the reasons that the order of liquidation was passed on 25.04.2018 and 90 days have expired on 24.07.2018 on which date no such Regulation was in existence. It was submitted that the Liquidator, with an intention to grab the property, is trying to rely on Regulation 21A (3) with retrospective effect which is not permitted under the law. Hence, it was submitted that the plea of the Liquidation that in terms of Regulation 21A(3), the Secured Asset has become a part of the liquidation estate is unsustainable.

15. Heard, the submissions made by the Learned Counsel for both the parties. From the submissions made, it is seen that the following issues emanated for consideration before this Tribunal;

- (i) *Whether the amended Regulation 21A of the IBBI (Liquidation Process) Regulations, 2016 which came into force on 06.01.2020 can be given retrospective effect.*
- (ii) *Whether the Applicant is entitled to claim the possession of the entire Unit VII comprising of 164.05 acre, when they purportedly have security interest over only 85 acre of land.*

16. In so far as issue No. 1 is concerned, it is the cardinal principle in the rule of law that every statute is prospective in nature, unless it is expressed in the statute that it has retrospective operation. In relation to the IBBI (Liquidation Process) Regulations, 2016, it is seen that the said Regulation first came into force on 15.12.2016 and thereafter, it was amended on 01.04.2018, 22.10.2018, 25.07.2019, 06.01.2020, 24.04.2020 and finally on 13.11.2020. Thus, the IBBI (Liquidation Process) Regulations, 2016 have been amended for a total of 6 times since it came into existence. The IBBI vide its Circular No. IBBI/LIQ/024/2019 dated 26.08.2019, upon saddled with queries from the stakeholders with respect to the applicability of the



amended regulations to the Liquidation process, has clarified that the Amended Regulations are not applicable to the Liquidation Processes, which had commenced before coming into force of the said Amended Regulations and that they are applicable only to the Liquidation processes, which commenced on or after the said Amended Regulations came into force. Thus, this circular amply clarifies the issues as to the prospective applicability of the Amended Regulations to the Liquidation process of the Corporate Debtor. Thus, we are of the considered view that, since the Liquidation process in relation to the Corporate Debtor has commenced on 25.04.2018, the IBBI (Liquidation Process) Regulations, 2016, which was prevalent at that point of time only will apply to the facts and circumstances of the present case.

17. In so far as issue No. ii, the question which arise is the realization of the security interest by the Applicant, who is a secured creditor of the Corporate Debtor. It is significant to refer to Regulation 37 of the IBBI (Liquidation Process) Regulations, 2016, at this point, which is as follows;

37. Realization of security interest by secured creditor

- (1) A secured creditor who seeks to realize its security interest under section 52 shall intimate the liquidator of the price at which he proposes to realize its secured asset.
- (2) The liquidator shall inform the secured creditor within twenty one days of receipt of the intimation under sub-

regulation (1) if a person is willing to buy the secured asset before the expiry of thirty days from the date of intimation under sub-regulation (1), at a price higher than the price intimated under sub-regulation (1).

(3) Where the liquidator informs the secured creditor of a person willing to buy the secured asset under sub-regulation (2), the secured creditor shall sell the asset to such person.

(4) If the liquidator does not inform the secured creditor in accordance with sub-regulation (2), or the person does not buy the secured asset in accordance with sub-regulation (2), the secured creditor may realize the secured asset in the manner it deems fit, but at least at the price intimated under sub-regulation (1).

(5) Where the secured asset is realized under sub-regulation (3), the secured creditor shall bear the cost of identification of the buyer under sub-regulation (2).

(6) Where the secured asset is realized under sub-regulation (4), the liquidator shall bear the cost ²²[***] incurred to identify the buyer under sub-regulation (2).

(7) The provisions of this Regulation shall not apply if the secured creditor enforces his security interest under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) or the Recovery of Debts and Bankruptcy Act, 1993 (51 of 1993).

18. The Applicant in the present case, by their letter dated 23.05.2018 informed the Liquidator that as per Section 52(1) (b) of the IBC, 2016, the Applicant is initiating action under SARFAESI proceedings against the Unit VII under the provisions of Section 13(4) of the SARFAESI Act and accordingly, requested the Liquidator to arrange for immediate handing over of the aforesaid asset to the Applicant. Thus, from this letter dated 23.05.2018, it is clear that the Applicant is willing to enforce its security interest as per the provisions of the SARFAESI Act, 2002 and not as per the



Regulation 37(7) of the IBBI (Liquidation Process) Regulations, 2016.

19. It is to be noted here that under Section 52(1) of the IBC, 2016, there are two routes to realise 'security interest' as mentioned in clauses (a) and (b) therein. The Applicant herein did not relinquish its 'security interest' as per Section 53 of the Code, but chose to enforce it under Section 52(1)(b) by realizing the security interest by way of SARFAESI Proceedings. At this juncture, it is to be noted that to enforce the 'security interest' under Section 52(1)(b), the Creditor must either have 'exclusive charge' or 'sole first charge', which would enable it to enforce its 'security interest'.

20. Section 52 of IBC, 2016, in its plain language, is clear that after enforcement of right under Section 52 by one of the 'Secured Creditors', no other 'Secured Creditor' can enforce his right subsequently for realization of the amount for the same secured assets, as the excess amount by way of proceeds pursuant to the first enforcement is deposited in the account of the Liquidator.

21. As to the present case, it is seen that property of the Corporate Debtor i.e. Unit VII situated at Boothagudi and Melapachangudi Village, Illupur Taluk, Viralimalai, Pudukottai District consist of a total of 164.05 acre. The Applicant in the

present application and in the rejoinder has stated that it is having exclusive charge in respect of the property to an extent of 28.41 acre and 13.60 acre and first pari passu charge over the property to the extent of 38.52 acre. However, the Applicant has failed to place on record any documents to substantiate such statement. In the absence of the documents placed on record which shows the security interest created in favour of the Applicant, this Tribunal is unable to come to the conclusion as to which part and parcel of land, the Applicant has 'Exclusive charge', 'sole first charge' or 'pari passu charge'. Further, the registration of charges in respect of the aforementioned properties has also not been placed on record. In the absence of such documents, which form vital part of the prayer as sought for by the Applicant, this Tribunal is unable to proceed further in this matter. Only if the aforementioned documents are placed on record, then this Tribunal would be in a position to examine whether the Applicant has security interest to stand outside the liquidation.

22. From the stakeholders committee meeting held on 06.02.2019, it is seen that 41.40 acre of land at Boothakudi and Melapachakudi Village, Illupur Taluk, Pudukottai District, which is situated at the back side of Unit VII which is exclusively charged in favour of the Consortium Member Banks and Institution and since the said property is located at the backside of the unit / compound

wall, which do not have any separate pathway, the realizable value is too low as there are no direct entry via main gate to them and there is a land lock type of a situation.

23. It is to be noted here that the 2nd Respondent has filed its written submissions and the Learned Counsel for the 2nd Respondent submitted that the 41.40 acre of land that was mortgaged to the consortium is located behind the land forming part of Unit VII mortgaged to the Applicant herein and the ICICI Canada, in which the 2nd Respondent is a charge holder. It was submitted that the access to the said 41.40 acre is only through the land forming part of and appurtenant to the vacant land available in Unit VII. It was submitted that if the Applicant is handed over the possession and permitted to sell the unit VII under any law exclusively, the value of 41.40 acre of land mentioned above would reduce drastically and the 2nd Respondent would be at the mercy of the person purchasing Unit VII and would be budged to sell the 41.40 acre for a throw away price. Hence in the interest of all the stakeholders, the extent of 85 acres and 41.40 acre be sold at a single lot, either by the Applicant or by the Liquidator and the 2nd Respondent has submitted that he is ready and willing to co-operate with the Applicant or the Liquidator as the case may be.



24. Thus, in view of the reasons stated *supra*, we are of the view that once the Secured Creditor has expressed his willingness to stand outside the liquidation process, the Liquidator cannot have any hold over the said property and as such the property over which the secured creditor exercises his security interest would not form part of the 'Liquidation Estate' and the Liquidator is duty bound to hand over the physical possession of the said property to the Secured Creditor. However, it is to be noted here that to enforce the 'security interest' under Section 52(1)(b), the Creditor must either have 'exclusive charge' or 'sole first charge', which would enable it to enforce its 'security interest'. As discussed *supra*, in view of the documents not being placed on record in order to substantiate the fact as to which property the Applicant is having 'exclusive charge' and 'sole first charge', this Tribunal hereby directs the Liquidator to identify the properties over which the Applicant is having 'exclusive charge' or 'sole first charge' and to hand over the physical possession of the same to the Applicant in order to exercise their security interest. It is also made clear that the properties over which the Applicant is having 'second charge' or 'pari passu' charge is to be held within the possession of the Liquidator and necessarily the said property forms part of the 'Liquidation Estate'.



25. Further, out of the sale proceeds, the Applicant after appropriating the sum towards their dues, the remaining amount of the sale proceeds will go into the account of the liquidation estate, which will be distributed in accordance with Section 53 of IBC, 2016. If the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the Applicant, the unpaid debts of Applicant shall be paid by the liquidator in the manner specified in clause (e) of sub-section (1) of section 53. Upon realization of the assets, if the amount of the insolvency resolution process costs which is due by the Applicant, if any, shall be deducted from the proceeds of the sale and the same shall be transferred to the Liquidator to be included in the Liquidation Estate as per Section 59(8) of IBC, 2016.

26. With the above directions, the Application stands **disposed of.**

-sd-
(ANIL KUMAR B)
MEMBER (TECHNICAL)

-sd-
(R. SUCHARITHA)
MEMBER (JUDICIAL)

Raymond