

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, COURT-II
KOLKATA**

IA. (IB) No. 471/KB/2022

In

C.P. (IB) No. 2078/KB/2019

*An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016
read with Rule 11 of NCLT Rules, 2016;*

And

In the matter of :

Trimurti Associates Private Limited

...Financial Creditor

-Versus-

In the matter of:

BKM Industries Limited

...Corporate Debtor

-And-

In the matter of

ICICI Bank Limited, registered under Banking Regulation Act, 1949 and
Companies Act, 2013 having its registered office at ICICI Bank Tower, Near Chakli
Circle, Old Padra Road Vadodara, Gujarat 390007 branch office at 3A Gurusaday
Road, Kolkata – 700019

...Applicant/Financial Creditor

-Versus-

1. Mr. Pratim Bayal, The Resolution Professional (for BKM Industries Limited),
having his office at CK-104, Sector 2, Kolkata – 700091

...Resolution Professional/Respondent No. 1

2. The Committee of Creditors of BKM Industries Limited (in CIRP)

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ICICI Bank v. Pritam Bayal&Anr.
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...Respondent No. 2

Date of hearing: 02/11/2022

Order Pronounced on : 01/03/2023

Coram:

Shri Rohit Kapoor, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Counsels appeared through Video Conferencing/Physical

Mr. Rishav Banerjee, Adv.	:	For Resolution Professional
Mr. A.K. Awasthi, Adv.		
Mr. Rajarshi Banerjee, Adv.		
Mr. Ratnanko Banerji, Sr. Adv.	:	Fir ICICI Bank Ltd.
Ms. Pooja Chakrabarti, Adv.		
Ms. Kiran Sharma, Adv.		
Mrs. Manju Bhuteria, Adv.	:	For Successful Resolution Applicant
Ms. Meenakshi Manot, Adv.		
Mr. A. Jain, Adv.		
Mr. Pranit Bag, Adv.	:	For the Respondent / Syama
Mr. Snehashis Sen, Adv.		Prasad Mookerjee Port, Kolkata
Mr. Abhishek Banerjee, Adv.		
Ms. Urmila Chakraborty, Adv.	:	For the Applicant in IA 1101 of 2022
Ms. Madhuja Barman, Adv.		
Mr. AbhradipMaity, Adv	:	For CGST / Applicant in IA 836 of
2022, 780		of 2022 & 451 of 2022
Mr. Ratnanko Banerji, Sr. Adv.	:	For the Applicant in IA 916 of 2022,
929 of		
Ms. Urmila Chakraborty, Adv.		2022 & 930 of 2022
Mr. Aditya Mondal, Adv.		

ORDER

Per: Balraj Joshi, Member (Technical)

1. The Court convened through hybrid mode.
2. This is an application by ICICI Bank seeking directions on the Resolution Professional to take into account the priority of distribution of the plan realizations taking into account the priority assigned to the dissenting financial creditors who are also secured creditors.

Submissions of the learned Senior Counsel appearing for the Applicant

3. The Applicant *i.e.* ICICI Bank is a secured Financial Creditor of BKM Industries Limited. Pursuant to the admission of the Corporate Debtor into Corporate Insolvency Resolution Process, the Applicant submitted its claim for an amount of Rs.15.52Crore with the Interim Resolution Professional on 14 January 2021. The claim was admitted.
4. It is further submitted that the Applicant is the sole term lender having first pari passu charge over the movable and immovable properties of the Corporate Debtor situated at Medak (Andhra Pradesh) and Silvassa (Dadra and Nagar Haveli) as security for its outstanding dues vis-a-vis the Corporate Debtor.
5. It has been contended that while determining the calculation methodology of the creditor's proportional share the interest of the dissenting Creditor having a security interest have not been taken into consideration and they have been treated at par with the other creditors who are eligible to get the realizations from the plan in terms of Section 53 of the Code.
6. Mr. Ratnanku Banerji, learned Sr. Counsel appearing on behalf of the Applicant submits that the applicant has been grossly prejudiced because of decision of the Resolution Professional for accepting and recommending a plan to the Committee of Creditors ("CoC") wherein the Applicant has been treated at par with the other creditors thereby making him eligible to get a far lesser value of the proceeds of the plan than he otherwise is entitled to as per Code. Mr. Banerji led us through to the provisions of section 30 (2)b of the

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Code, which *inter alia* provides for payment of the debt of the Financial Creditors who do not vote in favour of the Resolution Plan in such a manner, as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with section 53 (1) of the Code in the event of liquidation of the Corporate Debtor.

7. Mr. Banerji placed further reliance on explanation 1 of the said provision of the Code which states that for removal of doubts it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.
8. Even under the erstwhile winding up regime under the provisions of the Companies Act, prior to the enactment of the Code, the Hon'ble Supreme Court dealt with the instant question of law in the matter of ICICI Bank vs. Sidco Leathers Ltd. [2006 10 SCC 452], wherein the intent of the legislature vis-à-vis the provisions of Section 529 and Section 529A of the Companies Act, 1956 was interpreted. The Hon'ble Supreme Court while taking note of provisions of Section 48 of Transfer of Property Act, 1882, observed that the claim of first charge holder shall prevail over the claim of the second charge holder and on occasions, where debts due to both the first charge holder and the second charge holder are to be realised from the property belonging to the mortgagor, the first charge holder will have to be repaid first i.e., the amounts would be distributed basis the security available with each of the creditors.
9. It is also submitted that the fact that there are no provisions of the Code which abrogates security interest during insolvency resolution, the field continues to be occupied by settled law protecting the sanctity and inter priority rights amongst creditors on the basis of security interest *se inter alia* under the Transfer of Property Act, 1882. These principles and provisions, not being in conflict with the provisions of the Code, are not overridden by the provisions of Section 238 of the Code, which only comes into play only in the event of conflict.
10. That in the event, the priority of a secured creditor having first charge as its security interest is ignored, then there would be no incentive for a secured

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financial creditor to opt for resolution of a company under the Code and rather such a secured financial creditor would opt for the liquidation of a company by enforcing its security interest outside the purview of the provisions of the Code. The primary objective of the Code is to maximize the value of the assets of a corporate debtor through insolvency regime in a time bound manner and the essence of the enactment of the Code would be lost, in the event a secured financial creditor is not incentivised for resolution of a corporate debtor.

Submission of learned Counsel appearing on behalf of the Resolution Professional

11. Shri Rishav Banerjee, Ld. Counsel appearing for the Resolution Professional stated that the Applicant is a dissenting secured Financial Creditor, who did not vote in favour of the Resolution Plan.
12. The resolution plan of the successful Resolution Application has been approved by the 78.79% Committee of Creditors (COC) of the Corporate Debtor in their commercial wisdom and an application for approval of resolution plan has already been filed by the Resolution Professional.
13. The entire case of ICICI Bank is premised on the basis that ICICI Bank holds a higher value of security interest and is thus entitled to a higher share as per section 53 of the Code. It is also the contention of the ICICI Bank that the security interest created in favour of the ICICI Bank by the Corporate Debtor is being taken away by way of the approved resolution plan. Such contention of the ICICI Bank is legally flawed as per regulation 37(1)(d) of CIRP Regulations, 2016, a Resolution Plan can include satisfaction or modification of any security interest. Thus, a Resolution Plan can deal with the security interest created in favour of the ICICI Bank.
14. The Applicant has disputed the methodology of computation of its proportional share of the amount to be paid to the Applicant in the event of liquidation of the Corporate Debtor i.e. the Liquidation Value of the Corporate Debtor, that is receivable by it from the Resolution Applicant

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under section 30(2)(b) of the Code read with section 53(1)(b)(ii) of the Code on account of being a dissenting Financial Creditor.

15. The learned Counsel submitted that section 30(2)(b) read with section 53(1) only presupposes a notional relinquishment of security interest, by a dissenting financial secured creditor, to the liquidation estate as per section 52(1)(a) Code. Section 30(2)(b) of the Code does not concern any value that could notionally be realized by the Applicant if it were to proceed under section 52(1)(b) of the Code. Section 52 of the Code is merely invoked in section 53(1) insofar as a relinquishment of security interest is governed by section 52(1)(a) of the IBC. Any notional realisation by the Applicant as per section 52(1)(b) of the Code and further subsections of section 52 of the Code is irrelevant in the context of determining entitlement of a dissenting financial creditor under section 30(2)(b) of the Code.
16. Shri Rishav Banerjee, further stated that CoC has worked out the distribution in accordance with the law and there is no reason for any misapprehension on this count.
17. The Applicant is being paid a sum of money to achieve compliance with section 30(2)(b), which stipulates a minimum payment of the liquidation value receivable by such dissenting secured financial creditor under section 53(1). The learned Counsel placed reliance on India Resurgence ARC Private v. Amit Metaliks Limited and Another 2021 SCC Online SC 409,

“18. In the case of Jaypee Kensington (supra), the proposal in the resolution plan was to the effect that if the dissenting financial creditors would be entitled to some amount in the nature of liquidation value in terms of Sections 30 and 53 of IBC read with Regulation 38 of the CIRP Regulations, they would be provided such liquidation value in the form of proportionate share in the equity of a special purpose vehicle proposed to be set up and with transfer of certain land parcels belonging to corporate debtor. Such method of meeting with the liability towards dissenting financial creditors in the resolution plan was disapproved by the Adjudicating Authority; and this part of the

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order of the Adjudicating Authority was upheld by this Court with the finding that the proposal in the resolution plan was not in accord with the requirement of 'payment' as envisaged by clause (b) of Section 30(2) of the Code. In that context, this Court held that such action of 'payment' could only be by handing over the quantum of money or allowing the recovery of such money by enforcement of security interest, as per the entitlement of a dissenting financial creditor. ... "[Emphasis supplied]

18. The learned Counsel submitted that *inter se* priority of charges held by secured creditors is irrelevant when determining payout to secured creditors under section 53(1) of the Code.

19. He has brought to our notice following judgments:

- i. ***Technology Development Board v. Anil Goel [Company Appeal (AT) (Insolvency) No.731 of 2020***(paragraphs 9-11)
- ii. ***India Resurgence ARC Private v. Amit Metaliks Limited and Another 2021 SCC Online SC 409***(paragraphno. 17) which reads as follows;
"Thus, what amount is to be paid to different classes or subclasses of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest."

Rejoinder to the reply of the Respondent

20. Mr.Ratnanko Banerji submitted that no reliance can be placed on Technology Development Board operation of the said judgment has been stayed by the interim order of the Hon'ble Supreme Court by its order dated June 29, 2021, in Stressed Asset Stabilisation Fund v. Technology Development Board [C.A. No. 2206/2021].

21. However, Mr.Ratnanko Banerji appearing for ICICI Bank placed reliance on para no. 21 of India Resurgence ARC which states that;

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“The limitation on the extent of the amount receivable by a dissenting financial creditor is innate in Section 30(2) (b) of the Code and has been further exposted in the decisions aforesaid. It has not been the intent of the legislature that a security interest available to a dissenting financial creditor over the assets of the Corporate Debtor gives him some right over and above other Financial Creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors.”

Analysis and Findings

22. Heard the learned counsel on both the sides and perused the pleadings. The matter essentially relates to the prayer of ICICI bank to treat them at par with the assenting financial creditors as they are also in the category of Secured financial creditor. At the outset we place reliance on para No. 22 of *Amit Metaliks supra*. which states as under:

“It needs hardly any emphasis that if the proposition suggested on behalf of the appellant were to be accepted, the result would be that rather than insolvency resolution and maximisation of the value of assets of the Corporate Debtor, the processes would lead to more liquidations, with every secured financial creditor opting to stand on dissent. Such a result would be defeating the very purpose envisaged by the Code; and cannot be countenanced. We may profitably refer to the relevant observations in this regard by this Court in Essar Steel as follows:--

“ Indeed, if an “equality for all” approach recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivised to vote for liquidation rather than resolution, as they would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved. This would defeat the entire objective of the code which is

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to first ensure that resolution of distressed assets takes place and only if the same is not possible should liquidation follow.”

23. In the facts and circumstances, we also hold just because of the fact that a creditor enjoys the protection of a security interest he cannot be treated any higher than the other creditors, who may have financed the Corporate Debtor while not enjoying any kind of protection in the shape of a security interest and thus such creditors have consistently run the risk of not getting paid their dues in the shape of realisation from the security interest or otherwise for a considerably longer period while the secured creditor was very happily staying put with the protection of a security interest for if it so happens, then all the secured creditors would like to give dissenting view in the CoC, which will not lead to the maximization of the value of the Corporate Debtor and thus defeating the very purpose of resolution envisaged in the Code.
24. In view of the above, we do not find any reason to interfere in the commercial wisdom of the CoC and accordingly reject the prayer of the applicant.
25. Accordingly, IA 471/KB/2022 shall stand rejected.
26. The Registry shall e-mail copy of this order to the Counsel on record for the Applicant and for the Respondents, and the Resolution Professional, for information and for taking necessary steps.
27. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Order signed on 01 March, 2023

Zia/GGRB_LRA