

**THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)
(through web-based video conferencing platform)**

I.A. No. 296/2020

in

CP (IB) No. 630/Chd/HP/2019

(Admitted under Section 9 of IBC, 2016)

Under Section: 60(5) of IBC, 2016

r/w Rule 11 of the NCLT Rules, 2016

In the matter of:

Ashish Dhillon

...Operational Creditor

Vs.

M/s Ram Hari Cars Private Limited

...Corporate Debtor

And In the matter of I.A. No. 296/2020

Central Bank of India

Member of CoC in the CIRP of Corporate Debtor,
having its office at:

Regional Office, Shimla, Combermere Complex,
The Mall, Shimla, Himachal Pradesh- 171001

...Applicant

Vs

1. Ravinder Kumar Goel

The IRP/RP in the matter of M/s Ram Hari Autos Pvt. Ltd.

Flat No. 211, Platinum Tower, Peer Muchalla, Dhakoli
Sahibzada Ajit Singh Nagar
Punjab- 160104

...Respondent/RP

2. Kartar Singh

Address- 64/2, Near Block 1
Near Chowk,
Tehsil- Sadar, Distt.-

3. Saravjit Kaur

W/o Late Sukhveer Singh
Address- Post Office Gohar
Tehsil- Chachyot, Gohar (63)
Mandi, Himachal Pradesh- 75029

4. Santa Singh

S/o Late Sukhveer Singh
Address- Post Office, Gohar
Tehsil- Chachyot, Gohar (63)
Mandi, Himachal Pradesh- 75029

...Respondents/CoC Members

Order delivered on: 01.07.2024

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. L.N. GUPTA, MEMBER (TECHNICAL)**

Present:

For the Applicant : Mr. Arpit Chawla, Advocate

**For the RP : Mr. Nitin Kant Setia, Advocate,
Mr. Ravinder Kumar Goel, RP-in-person**

**Per: Sh. Harnam Singh Thakur, Member (Judicial)
Sh. L.N. Gupta, Member (Technical)**

ORDER

**Per: Sh. Harnam Singh Thakur, Member (Judicial)
Sh. L.N. Gupta, Member (Technical)**

1. The present application is filed by the Central Bank of India (hereinafter referred to as the "**Applicant Bank**"), a member of the Committee of Creditors (hereafter referred to as the "**CoC**"), constituted in the matter of M/s Ram Hari

Cars Private Limited (hereinafter referred to as the “**Corporate Debtor**”), undergoing the Corporate Insolvency Resolution Process (“**CIRP**”), against RP Mr. Ravinder Kumar Goel (hereinafter referred to as the “**IRP/RP**”), under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “**the Code**”) seeking the following directions as reliefs:

- a. documentary evidence on basis of which the claims of the Unsecured Financial Creditors were admitted and the CoC was constituted; and financials pertaining to the Corporate Debtor to be provided by the IRP/RP to the Applicant Bank in pursuance of Section 21(9) and 21(10) of the Code;
- b. Re-constitution of the CoC after proper verification of claims and re-initiation of the CIRP in view of the fraudulent, illegal actions taken by the IRP/RP in collusion with other CoC members;
- c. Release of the land/building/assets other than that in the name of the Corporate Debtor in the possession of IRP/RP, and;
- d. Replacement of the current IRP/RP with another resolution professional, ensuring maximization of the value.

2. It is averred in the application that:

- i. The Corporate Debtor was admitted into CIRP by this Adjudicating Authority vide order dated 14.02.2020 in the matter titled **Ashish Dhillon vs. M/s Ram Hari Cars Pvt. Ltd.**, having **CP (IB) No. 630/Chd/Hp of 2019**, under Section 9 of the Code, whereby Mr. Ravinder Kumar Goel was appointed as an Interim Resolution Professional. In the public announcement made in Form-A dated

- 17.02.2020, the last date for submission of the proof of claims was specified as 02.03.2020. The representative of the Applicant Bank filed its claim amounting to Rs.3,46,24,219/- (Rs. Three Crores Forty-Six Lakhs Twenty Four Thousand Two Hundred Nineteen rupees) only on 06.03.2020.
- ii. The IRP/RP without taking cognizance of the charge created on the assets of the Corporate Debtor in favour of the Applicant Bank (being the secured financial creditor), constituted the CoC consisting of only unsecured creditors by illegally admitting the claims of two alleged unsecured financial creditors, namely Kartar Singh and Heights International, on provisional basis and convened the 1st CoC meeting on 16.03.2020.
 - iii. The IRP/RP vide email dated 19.03.2020 conveyed to the Applicant Bank about admission of its claim and eligibility to become a member of CoC. The Applicant Bank inquired about the financials of the Corporate Debtor and documents pertaining to the said unsecured financial creditors and the basis on which their claims were accepted and the CoC was constituted, to which no satisfactory reply or any documentary evidence was given by the RP.
 - iv. The Applicant Bank further sent an email dated 21.05.2020 requesting the above, to which the RP replied vide email dated 21.05.2020, asking the Applicant Bank to visit its office to inspect the record of the Corporate Debtor and informed the Applicant Bank about the 2nd CoC

meeting to be held on 28.05.2020. Vide email dated 21.05.2020, RP conveyed to the Applicant Bank its voting share of 52.76%.

- v. The Applicant Bank vide emails dated 22.05.2020 and 24.05.2020, requested the RP to incorporate the following agenda:
- a. *In pursuance to section 21(9) & (10) you are requested to provide all financial information in relation to corporate debtor during the CIRP from commencement of CIRP till date.*
 - b. *As you are aware that Central Bank of India though stake holder in the account was not part of 1st COC meeting held on 16.03.2020, so we had right to discuss deliberate and voted upon the agenda. So you are requested to put in front of upcoming COC, the agenda item no. 1, agenda item no. 3, agenda item no. 6, agenda item no. 7, agenda item no. 8, agenda item no. 9, agenda item no. 10 and agenda item no.11 already discussed in the 1st COC held on 16.03.2020 for deliberation, discussion and for voting.*
 - c. *To discuss and deliberate upon all action taken by your good self as IRP/RP i.e. since the commencement of CIRP till date and further discussion, deliberation and on way forward.*
 - d. *To present the status of affairs of the corporate debtor from the date of commencement of CIRP till date including:*
 - e. *To present the steps taken by the RP in connection with missing demo cars of the corporate debtor as stated in the 1st CoC.*
 - f. *To present the steps taken by the RP in connection with trade receivables of the corporate debtor till date.*
 - g. *To present all the financial information pertaining to the corporate debtor including receipts, cash flows etc. along with annexures, in relation to the corporate debtor since the commencement of CIRP in pursuance of section 21 (9) and 21(10) of the IBC code 2016 till date*
 - h. *To present before the CoC any kind to preferential payments/transactions highlighted till date.*
 - i. *To present the status of interim finance raised by the RP including the source of the said interim finance, the scope/objectives which would be fulfilled through the said interim finance raised etc. and discussion on the way forward.*
 - j. *To discuss upon the limit of expenses/budget/upper limit/threshold of the expenditure that the RP would be allowed to make in reference to the appointment of various professional including legal counsel etc. and other expenses.*
 - k. *To discuss upon way forward for the resolution in course of ongoing CIRP of corporate debtor.*

- The RP vide its email dated 25.05.2020 conveyed to the Applicant Bank that the suggested agenda were being circulated to other members of the CoC.
- vi. In the 2nd meeting of the CoC held on 28.05.2020, the IRP/RP apprised the Applicant Bank and the CoC members that a Registered Valuer and Transaction Auditor were appointed by him and their fees would be decided by him as he had been authorized for the same in the 1st CoC meeting.
 - vii. The RP vide email dated 08.06.2020 sent a report on the reconstitution of the CoC by adding two more Unsecured Financial Creditors, namely Santa Singh and Saravjit Kaur, who had given personal guarantees to the Applicant Bank to secure the loan taken by the Corporate Debtor, and a Recovery Certificate bearing (RC No. 37/2020) was issued against them by the Hon'ble DRT, Chandigarh, in the Original Application titled '*Central Bank of India vs. M/s Ram Hari Cars Pvt. Ltd.*' filed by the Applicant Bank for the recovery of the debts against the Corporate Debtor.
 - viii. No payment was received by the Applicant Bank from the two personal guarantors. The RP admitted their claims of Rs. 3,07,36,160/- each, and gave them a voting share of 24.18% each, thereby reducing the voting share of the Applicant Bank from 52.76% to 27.25%. The relevant part of the said email is re-iterated overleaf:

Committee of Creditors of Ram Hari Autos Private Limited			
Sr. No.	Name of the Creditor	Amount of claim admitted	% Share
1	Kartar Singh	9839832	7.74
2	Heights International	21158703	16.65
3	Central Bank of India	34624419	27.25
4	Santa Singh	30736160	24.18
5	Saravjit Kaur	30736160	24.18
	Total Claims Received	127095274	100

- ix. As per the objects stated in the M.O.A. of the Corporate Debtor at point 17 of Part (B) states as under:

"To borrow from any state financial corporations, banks or other financial institutions any terms loans or other sums on such securities and other charges as stipulated by the financial corporations or banks with mortgage on all or any property of the company whether present or future or both".

The above shows that the Corporate Debtor was allowed to borrow from State Financial Corporations, banks, and other financial institutions, and the admitted claims of the two unsecured financial creditors do not belong to the above-mentioned category.

- x. The balance sheet of the Corporate Debtor as on 31.03.2019 and the provisional balance sheet as on 14.02.2020 states the unsecured loan taken from Kartar Singh as Rs. 37,12,000/- while the claim admitted by the RP is Rs. 98,39,832/- and the unsecured loan taken from Height International was Rs. 1,09,25,000/- while the claim admitted by the IRP/RP amounted to Rs. 2,11,58,703/-.
- xi. A complaint against the RP was filed by the Applicant Bank with the IBBI, Delhi, on 25.06.2020, for his professional misconduct.

3. The Respondent RP filed its reply dated 14.07.2022 vide diary no. 00465/6 stating that, on account of filing of I.A. No. 419 of 2020 under Section 33(2) of the Code for Liquidation of the Corporate Debtor, the present application has been rendered infructuous, as no relief claimed by the Applicant Bank survives. It was discussed in the 3rd meeting of the CoC held on 15.07.2020 that there are no business assets of the Corporate Debtor and in view of the absence of any possibility of any resolution, it was decided to liquidate the Corporate Debtor with 73.20% voting power. The Respondent RP has not given its consent to act as the Liquidator and has prayed in the application for appointment of the Liquidator by this Adjudicating Authority. The Respondent RP has further submitted the following:

- i. The records of the ROC depict the creation of charge on the land and building belonging to the third-party guarantors, obtained by the promoters of the Corporate Debtor from two individuals which was mortgaged with the Applicant Bank for obtaining loan, on which the Applicant Bank created a charge, treating it as a property of the Corporate Debtor, and the same is punishable under the HP Tenancy Reform Act, 1972. There are no immovable assets in the name of the Corporate Debtor.
- ii. The RP received its first communication from the Applicant Bank on 09.03.2020, after 7 days from the last date of submission of claims, i.e., 02.03.2020 after the constitution of the CoC on 07.03.2020. Thus, the claim of the Applicant Bank could not be verified for the purpose of the first CoC.

- iii. The source of the interim finance, as alleged by the Applicant Bank not to have been disclosed by the RP, is mis contended, as the need for interim finance was mentioned at item no. 9 in the notice of 1st meeting of the CoC vide email dated 09.03.2020 and the RP was authorized by the CoC to raise interim finance from the sources available. However, no interim finance is raised by the RP, as the CIRP has ended and the CoC has passed a resolution to liquidate the Corporate Debtor.
- iv. The RP vide email dated 21.05.2020 conveyed to all CoC members including the Applicant Bank about reconstitution of the CoC and the queries of the Applicant were duly incorporated in the 2nd CoC meeting.
- v. With respect to allegation of missing demo cars, it is submitted that the Corporate Debtor was a dealer of the brand MAN trucks and no demo vehicles were found with Corporate Debtor as of the date of taking charge of the assets of the Corporate Debtor. The Corporate Debtor stopped its business in 2015 and no action was taken by the Applicant Bank to recover any of its assets or secure their custody.
- vi. The RP did not receive any books of accounts of the Corporate Debtor as the promoter/director claimed that the same are in the possession of IDBI Bank, and the matter is pending before this Adjudicating Authority under an application filed by IDBI Bank.
- vii. The RP appointed two registered valuers for land and building, and securities, and financial assets as per Regulation 27 of the IBBI Regulations, 2016. No valuers were appointed for plant and machinery

on account of its non-availability on the date of taking charge of the Corporate Debtor.

viii. The Respondent RP concluded that the financial creditors lodged their claims with interest calculated up to 14.02.2020, whereas in the balance sheet, the figure is shown without interest as the Corporate Debtor has not booked accrued interest. The interest calculation is as per the agreement of these financial creditors with the Corporate Debtor and the same has been checked and verified by him while admitting their claims.

4. No reply was filed by the other Respondents.
5. The Applicant Bank filed its written submissions dated 18.06.2024 vide diary no. 00465/9.
6. During arguments, the Ld. Counsel for the Applicant Bank stated that the RP had erred in law by giving the personal guarantors the status of financial creditor. As per Section 5(8) of the Code, which defines financial debt as: *"financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money."* But no such disbursement was ever made against the consideration for the time value for money by the said personal guarantors. Further, the Hon'ble NCLAT, in its judgment ***Lalit Mishra & Ors. vs. Sharon Bio Medicine Ltd. (Company Appeal Insolvency no. 164 of 2018)*** held that :

"The guarantor cannot exercise its right of subrogation under the Contract Act as proceedings under the IBC are recovery proceedings. The object of the proceedings under the IBC is to revive the company and the focus on maximization of value of its assets and not to ensure

that the credit is available to all stakeholders. Thus, no such recovery can be made by guarantors."

As per Section 140 of the Indian Contract Act, 1962, i.e., Right of Subrogation - a personal guarantor can get the rights of the financial creditor towards the principal borrower only upon payment of money to the financial creditor and not before.

- i. Further, reliance is placed on ***Neeraj Bhatia vs. Davinder Ahluwalia & Ors. (Company Appeal (AT) (Insolvency) No. 142 of 2017***, wherein the Hon'ble NCLAT upheld that if the personal guarantor has not paid anything to the bank, in that case, the personal guarantor cannot claim to be a financial creditor as defined in Sections 5(7) & 5(8) of the IBC, 2016.
- ii. Reference is made to the Hon'ble NCLAT's judgment in the matter of ***Jayant Banerjee vs. Shashi Agarwal & Ors. [Company Appeal (AT) (Insolvency) No. 348 of 2020]*** whereby the Hon'ble NCLAT held:

" 85. Based on the above discussion, we are of the considered opinion that the Constitution of the Committee of Creditors violates the proviso to Section 21(2) of the Code 2016 read with 12(3) of CIRP Regulations. Therefore, the Constitution of the creditors' committee is a nullity in the eye of law that vitiates the entire CIRP. Liquidation is like a death knell for the corporate entity/corporate person. Liquidation based on the resolution of the CoC, which consists of related party Financial Creditors having 77.20 % vote share, is a matter of grave concern. Hon'ble Supreme Court in the case of Phonix ARC (supra) has described the entering of such related party Financial Creditors in the Committee of Creditors as an act of commercial contrivances through which these entities sought to enter the COC, which could affect the other independent Financial Creditors. An order for liquidation of corporate debtor based on the sole decision of re An order for liquidation of corporate debtor for the existence of the corporate debtor, cannot be sustained. It is also pertinent to mention that when the Constitution of the Committee of Creditors itself is found to be tainted, then the decision of that COC cannot be validated on the pretext of exercise of commercial wisdom.

87. We further observe that the corporate insolvency process in the instant case is totally in disregard of the provision of the Code and Regulations thereunder. The formation of the Committee of Creditors in the instant case is a nullity in the eyes of the law. Since the illegally constituted committee of creditors took the decisions at every stage of CIRP. Therefore, the entire corporate insolvency resolution process of the Corporate Debtor is found to be vitiated. Therefore, the impugned order of liquidation passed by the Adjudicating Authority deserves to be set aside."

7. Countering the submissions made by the Ld. Counsel for the Applicant Bank, the Ld. Counsel for the Respondent RP contended that the two personal guarantors, Santa Singh and Saravjit Kaur had extended personal guarantees to the Applicant Bank for the loans secured by the Corporate Debtor and these guarantees have been invoked by the bank and recovery certificates have been issued against them by the Ld. DRT-I, Chandigarh. Once the guarantees have been invoked by the bank and the recovery process is underway, it gives these persons an unequivocal right to claim from the principal borrower the equivalent of the amount of the decree and the recovery certificate, and it is immaterial whether the amount so far has been recovered or not. The Respondent RP cited the following reasons for the inclusion of the personal guarantors in the CoC:

- a. The definition of "claim" in Section 3(6) of the Code includes not only a right to payment but also a right to remedy for breach if such breach gives right to a right to payment, whether such a right is matured or unmatured on the date of admission of the CD into solvency. Thus, a personal guarantor is eligible to file a claim equivalent to the amount for which recovery certificate has been issued.

- b. Under the Code, personal guarantor's right to subrogation is extinguished and is not protected under Section 14 of the Code, as moratorium is not applicable to him. He is not made a part of the process, which ensures maximum recovery from the corporate debtor and eases his liability to some extent. Lastly, he is not discharged from the obligations under the guarantee given by him. It is only in cases where the creditors discharge the guarantor from his obligations that he can be kept out of the CoC.
- c. Hon'ble NCLAT, in its judgment dated 12.07.2022, in the case of ***IDBI Trusteeship Services Ltd. vs. Abhinav Mukherji and Ors, Company Appeal (AT) Insolvency No. 356 of 2022***, framed the issue:

“(c) Whether the Appellant can make a claim on the basis of the Guarantee Deed which was never invoked pre-commencement of the CIRP, and remained uninvoked even as on the date of filing of the Claim, thereby meaning that Right to Payment has not yet accrued.”

Thus, the claim to be admissible has to be based on an invoked guarantee.

The Ld. Counsel for the RP prayed that I.A. No. 419 of 2020, which is for the liquidation of the CD be considered and the issue of the admission of claim of personal guarantor in the context of participation in the CoC at the time of liquidation be left open to the wisdom of the new Liquidator who may be appointed by this Tribunal.

8. We have heard the arguments made by the counsels appearing for both parties and perused the documents filed by the Applicant Bank as well as Respondent RP. The basic argument involved in the case in hand is whether the two personal guarantors against whom guarantees have been invoked and a decree/a Recovery certificate has been obtained by the Applicant Bank can be

made part of the CoC. The Ld. Counsel for the Applicant Bank relied upon Section 140 of the Indian Contract Act, 1872, which reads thus:

*“140. Rights of surety on payment or performance - Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, **the surety upon payment or performance of all that he is liable for**, is invested with all the rights which the creditor had against the principal debtor.”*

(Emphasis placed)

In the case in hand, the personal guarantors namely, Santa Singh and Saravjit Kaur have not paid anything to the Creditor, i.e., the Applicant Bank on behalf of the borrower, i.e., the Corporate Debtor. The words “*surety upon payment*” used in Section 140 of the Contract Act, amply makes it clear that until and unless the payment is made, the right of subrogation does not accrue in favor of the guarantor. To attract the provisions of Section 140 of the Indian Contract Act and for inclusion of the personal guarantors in the CoC, Guarantors must have paid the debt on behalf of the Corporate Debtor to the Applicant Bank to step into the shoes of the Creditor.

9. Since the Guarantors have not discharged the debt of the Principal Borrower, they cannot step into the shoes of the Financial Creditor and participate in the CoC. In the light of the discussion foregoing, **I.A. No. 296/2020 stands allowed to the effect that the CoC shall be reconstituted within a period of week, and also the agenda of Liquidation of the Corporate Debtor shall be placed for discussion and vote before the reconstituted COC.**

10. As regards to the prayer regarding release of the property, which is not in the name of the Corporate Debtor, we would like to refer to Section 36 of IBC,

2016 which stipulates what all can be included in the Liquidation estate of the Corporate Debtor. The contents of Section 36 read thus:

36. Liquidation estate. -

(1) For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor.

(2) The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

(3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following: -

(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;

(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;

(c) tangible assets, whether movable or immovable;

(d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;

(e) assets subject to the determination of ownership by the court or authority;

(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;

(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;

(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and

(i) all proceeds of liquidation as and when they are realised.

(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.

From the abovesaid provision, it is evident that the assets which are not in the name of the Corporate Debtor and are owned by third parties cannot form part of the Liquidation estate which, in other words, depicts that the Corporate Debtor has no ownership rights over such assets. Hence, we find RP has no reason to keep possession of the assets under prayer.

11. We, therefore, consider it appropriate to direct the RP to release the possession of those assets, which are not in the name of the Corporate Debtor, to their lawful owners within a period of two weeks.
12. **The IA stands allowed accordingly.**

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(HARNAM SINGH THAKUR)
MEMBER (J)