

THE NATIONAL COMPANY LAW TRIBUNAL

COURT VI, NEW DELHI

IA 2838/PB/2021

IN

Company Petition No. (IB) – 15/(PB)/2017

*Under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016 read with Rule 11 of
NCLT Rules, 2016.*

IN THE MATTER OF:

M/S. CLUTCH AUTO LTD.

(Presently Undergoing Liquidation)

....Corporate Debtor

AND IN THE MATTER OF-

M/S CLUTCH AUTO LTD.

(Presently Undergoing Liquidation)

THROUGH MR. ARUNAVA SIKDAR

LIQUIDATOR OF

M/S CLUTCH AUTO PVT. LTD. & ANR

C-10, LGF, LAJPAT NAGAR-III

NEW DELHI - 110024

.... Applicant

Versus

KOTAK MAHINDRA PRIME LTD.

2ND FLOOR, KOTAK HOUSE,

SEC 125, NOIDA,

UTTAR PRADESH-201301

...Respondent

CORAM:

SHRI. MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

SHRI RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

Appearance –

For the RIICO

Mr. Anuj Bhandari & Mr. Rajat Gupta, Advocates In IA No. 662/22 and Respondent in In IA No. 967/22 & IA No. 92/24.

For the Liquidator

Mr. Kanishk Khetan, Adv

For the ED

Mr. Zoheb Hossain, Mr. Vivek Gurnani Mr. Vivek Gaurav Ms Abhipriya Rai, Counsels.

For the Respondent

Adv Udit Singh for the Respondent No. 2 in IA 92 of 2024. Mr. Manisha Agrawal Narain, Adv along with Mr. Sandeep Singh Somaria, Adv in IA 3274/2020.

ORDER

PER- MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

Order Pronounced on: 11.07.2024

1. The present application has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 by Applicant (Liquidator) under Section 60 (5) of Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 11 of the NCLT, Rules, 2016 seeking appropriate and necessary directions qua Kotak

Mahindra Prime Ltd. (Respondent) to provide No Objection Certificate (NOC) to the Applicant in respect of the Toyota Innova bearing number HR 51 BF 7820 (subject property). The applicant in the present application has prayed for the following relief/s –

- a. Allow the instant application;*
- b. Pass an order directing Respondent (Unsecured Financial Creditor) to issue NOC and other requisite form in favour of Applicant w.r.t. vehicle, bearing number HR51BF7820;*
- c. Pass such other or further order and other reliefs) as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case.*

2. A brief overview of the facts of the case, averred in the instant application, which are relevant for adjudication, are as under -

- a. It is not in dispute that the Respondent and the Corporate Debtor executed a Loan and Hypothecation Agreement for purchase of Toyota Innova (Subject Property) bearing number HR 51 BF 7820 and on 19.11.2019, the erstwhile liquidator, admitted the total claim of the Respondent for

Rs. 6,95,500/- in terms of the loan and hypothecation agreement dated 21.07.2015.

- b. However, the Claim filed by the Respondent in Form C makes it abundantly clear that it has no registered Security Interest/Charge as required under Section 77 of the Companies Act, 2013 is registered in favour of Respondent.
- c. That this Adjudicating Authority by the virtue of an order dated 10.04.2017 commence Corporate Insolvency Resolution Process (CIRP) proceedings against the Corporate Debtor on an application filed under Section 10 of IBC and appointed Mr Sandeep Kumar Gupta as the Interim Resolution Professional.
- d. Upon non receipt of a viable/favorable Resolution Plan, the Committee of Creditors (CoC) directed the erstwhile Resolution Professional to file an application before this Adjudicating Authority to initiate Liquidation proceeding qua the Corporate Debtor.
- e. In light of the aforementioned application, this Adjudicating Authority allowed the application for

initiating Liquidation proceeding of the Corporate Debtor and appointed the erstwhile Resolution Professional as the Liquidator of the Corporate Debtor as per the provisions of Section 34(1) IBC.

- f. Upon commencement of Liquidation process, the Respondent filed its claim for Rs. 6,91,762.00 as Financial Creditor by the virtue of form C dated 18.04.2019 along with the loan agreement and the statements. However, the Respondent failed to tender any documentary evidence to substantiate the alleged Charge over the contested property. The erstwhile Liquidator vide its email dated 19.11.2019 apprised the Respondent that their claim of Rs. 6,95,500/- was admitted.
- g. It has been averred that this Adjudicating Authority vide order dated 15.07.2020 appointed the Applicant as the Liquidator of the Corporate Debtor on an application preferred by the stakeholders of the Corporate Debtor. Thereafter, the Applicant, subsequent to the perusal of the documents and claims filed by the Respondent discovered that the Security Interest / Charge over the subject

property was not registered in accordance with Section 77 of the Companies Act, 2013 and the Applicant vide its email dated 19.12.2020 intimated the Respondent that in the absence of any documentary evidence required as per Regulation 12 of IBBI (Liquidation Process) Regulations, 2016, the Respondent cannot be treated as Secured Financial Creditor and its status has been altered to Unsecured Financial Creditor.

- h. It is an established position that no 'Charge' was registered under the provisions of Section 77(1) of the Companies Act 2013, with regards to the Subject Property.
- i. Further, the 'Charge' was not registered under Central Registry of Securitization Asset Reconstruction and Security Interest of India. Additionally, the 'Security Interest' was neither registered with the Information Utility'; nor under Section 7 of the Companies Act, 2013; no Application was preferred under Section 87, Companies Act, 2013; 'Charge' was not registered in the Securitization Asset Reconstruction and Security Interest of India wherein Section 52(3)(b) of the Code and

Regulation 21(b) of the (Liquidation Process), Regulation, 2016 are not complied.

- j. the Applicant vide its email dated 03.06.2021 requested the Respondent to provide NOC to the Applicant over the subject property enabling him to proceed with the sale of the vehicle and to distribute the sale proceeds accordingly, however, the Respondent failed to adhere with the request of the Applicant and hence the instant Application.

3. The Respondent has made the following submission/s to counter the present application -

- a. That the Respondent is the owner of the said vehicle and the said vehicle does not form part of liquidation estate, hence the present application shall be dismissed on this ground alone.
- b. Notwithstanding the submissions with regard to ownership made in the reply, it is has been averred that the Respondent has a valid and prior hypothecation over the said vehicle. Hence, the Liquidator cannot sell the said vehicle unless the Respondent relinquishes its

hypothecation over the said vehicle in accordance with the provision/s of IBC,2016.

- c. It has been avared that the Corporate Debtor had availed a loan of Rs.13,60,000/- (Rupees Thirteen Lakhs Sixty Thousand Only) which was to be repaid within 60 installments of Rs. 29,400/- (Rupees Twenty Nine Thousand Four Hundred Only) vide loan agreement bearing no. CF11964540 dated 30.08.2015. The Corporate Debtor failed to abide by the terms of the loan agreement and defaulted in payment of monthly installments.
- d. As on date there is total outstanding for an amount of Rs. 13,89,921 (Rupees Thirteen Lakhs Eighty Nine Thousand Nine Hundred Twenty One Only) is payable by the Corporate Debtor and the claim for the said amount has already been filed by the Respondent with the Applicant.
- e. Further, the Respondent was constrained to issue loan recall notice dated 06.02.2020 wherein the Loan Agreement entered into between the parties was terminated and Corporate Debtor was called upon to pay an outstanding amount of Rs.8,22,453/- (Rupees Eight

Lakhs Twenty Two Thousand Four Hundred Fifty Three Only) within period of seven days failing which the Respondent shall take legal recourse for repossession and sale of said vehicle.

- f. As per the terms of the loan agreement, Sole Arbitrator had to be appointed for adjudication of dispute between the parties. Accordingly, Ld. Sole Arbitrator was appointed and Respondent submitted his claim for repayment of outstanding amount and repossession of the said asset. The Ld. Sole Arbitrator after perusal of the documents placed on record passed an ex-parte final award on 11.02.2021 directing the Corporate Debtor to pay an amount of Rs.9,02,262/- (Rupees Nine Lakhs Two Thousand Two Hundred Sixty Two Only) and also awarded right of repossession and right to sell the said vehicle i.e. Toyota Innova bearing no. HR51BF7820 in favour of the Respondent.
- g. It is further submitted herein that the said car i.e. Toyota Innova does not form part of the liquidation estate as per Section 36 of IBC as the Corporate Debtor is not the owner

of the said vehicle. It is submitted herein that since Corporate Debtor failed to pay the entire 60 installment, the ownership of the car does not remain in the Corporate Debtor's hand but in the hands of the Respondent herein.

4. It has been contended by the respondent that the Respondent is the owner of the said vehicle and the said vehicle does not form part of liquidation estate, hence the present application shall be dismissed on this ground alone.

Analysis and Findings -

5. We have perused the documents placed on record by the Applicant and Respondent and considered the arguments tendered by the Counsels for the Applicant and the Respondent.

6. With regards to the ownership of the vehicle, which has been contested by respondent in the present case, we may refer to the annexure pertaining to the Registration Certificate of the aforesaid vehicle –

Cubic Capacity 2494 Wheel Base		Seating Capacity 7		U.Weight 1655 kgs	
As per Declared by Manufacturer					
Front Axle	Rear Axle	Other Axle	Tandem Axle		
Registered Axle	Rear Axle	Other Axle	Tandem Axle		
Front Axle	Rear Axle	Other Axle	Tandem Axle		
Additional particulars of alternative of additional Semi-trailer					
Type of Body			Unladen Weight		
Number, Description and Sizes of tyres on each					
Front Axle	Rear Axle	Other Axle	Tandem Axle		
Registered Axle Weight (in respect of each axle)					
Front Axle	Rear Axle	Other Axle	Tandem Axle		
H.P.A. License KOTAK MAHINDRA PRIME LTD,...					
Previous Details, if any..					
Name & Address					
One Time Tax		Registering Authority (MV) Faridabad			

GOVERNMENT OF HARYANA	
CERTIFICATE OF REGISTRATION OF MOTOR VEHICLE Form No. 23 RULE 48	
Registration No. HR51BF7820	
Owner's Name CLUTCH AUTO LIMITED	
S/D/W Of 0	
Full Address 12/4, MATHURA ROAD, FARIDABAD, 000000	
Class Of Vehicle L.M.V. (CAR)	
Owner Serial 1	
Type of Body SALOON	Month and Year of Mfg. 7/2015
Dealer Name and Address THIRTY SIX AUTOMOBILES P. LTD, 147 MILESTONE	
Make TOYOTA KIRLOSKAR MOTOR LTD	Color of Body GREYMETALLIC
Maker Classification INNOVA	Horse Power (B.H.P.)
Chassis No. MBJ11JV40075392330715	No. of Cylinders 4
Engine 2KDS554815	Fuel Used DIESEL
G.V. Weight kgs	Valid From 15-Sep-2015 Valid Upto 20-Aug-2030

7. In the aforementioned registration certificate, it is mentioned that the Corporate Debtor i.e. Clutch Auto Limited was the registered owner of the vehicle. While, the Respondent has been deemed to be the lessor. Thus, as per the Registration Certificate, the CD is the registered owner of the vehicle. Therefore, it forms a part of the Liquidation Estate in accordance with Section 36 of the IBC, 2016.

8. Further, it has been alleged by the Respondent that Hypothecation of the vehicle prior to the commencement of the CIRP against the Corporate Debtor amounts to a security claim over the vehicle.

9. In this regard we may refer to the view taken by the Hon'ble NCLAT in Volkswagen Finance Pvt. Ltd VS Shree Bala

Printopack Pvt Ltd & Ors. (02/ND/2020, Company Appeal(AT)(Ins)) -

“Even Section 125(4)(e) clearly shows that ‘Charge’ not being ‘Pledge’ on any movable property of the Company would require to be registered. Counsel for Appellant is arguing to claim that hypothecation of car is subject of Pledge in an effort to somehow get out from the requirement of Registration with Registrar. However, the distinction becomes irrelevant considering Section 77 of the Companies Act, 2013. Section 77 of the Companies Act 2013 which came into force on 01.04.2014, changed the wordings & the Company creating ‘Charge’ on its property or assets ‘tangible or otherwise’, is required to register the same.”

10. Additionally, it is pivotal to refer to Section 77(3) of the Companies Act, 2013 in order to elucidate the prerequisites to form a valid charge over the assets of the Corporate Debtor –

“Notwithstanding anything contained in any other law for the time being in force, no charge created by a company shall be taken into account by the liquidator [“appointed under this Act or the Insolvency and Bankruptcy Code, 2016, as the case may be,] or any other creditor unless it is duly registered under sub-section (1) and a certificate of registration of such charge is given by the Registrar under sub-section (2).”

11. It can be inferred from the aforesaid excerpt from the judicial precedent and Section 77 of the Companies Act, 2013 that mere hypothecation by the respondent would not be deemed to be a security interest against the vehicle. Consequently, hypothecation of the vehicle cannot be deemed to be a security interest in the present case owing to the fact that it has not been registered in accordance with Section 77(3) with the Registrar.

12. The Respondent has relied upon the Arbitral Award. Although the Arbitral Award was passed during the liquidation

proceedings, the learned arbitrator has not declared that the Respondent was the owner of the vehicle. Further, the Learned Arbitrator has only declared that the Bank is entitled for the claim of money.

13. However, the Respondent had already filed a claim before the Liquidator and the same has been admitted. Consequently, it can be concluded that the Respondent has already been deemed to be an Unsecured Creditor by the liquidator and its claim has been admitted accordingly.

14. Taking into consideration the facts and circumstances of the present case this Adjudicating Authority passes the following order -

15. The Respondent (Unsecured Financial Creditor) is directed to issue NOC and other requisite form/s in favor of Applicant w.r.t. vehicle, bearing number HR51BF7820, in order to enable the Applicant/Liquidator to proceed with the liquidation process.

16. Consequently, this Adjudicating Authority **allows** the application filed by the applicant.

-SD/-

(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

-SD/-

(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)