

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-IV

CP (IB) No.31/MB-I/2017

Under Section 60(5) of the I&B Code, 2016

Axis Bank Limited

... Applicant

Vs

Mr. Abhay Manudhane (Liquidator of Gupta Coal Pvt.
Ltd. & Ors.)

... Respondents

In the matter of:

Gupta Coal India Limited

... Corporate Debtor

Order pronounced on: 25.06.2024

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Justice Virendra Singh Bisht
Hon'ble Member (Judicial)

Appearances (via videoconferencing/physical):

For the Applicant(s) : Adv. Shyam Kapadia a/w Niyati Merchant

For the Liquidator(s) : Adv. P.S. Thakre, Company Secretary

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is a Company Petition filed under section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter called "Code") by a Corporate person, named Gupta Coal India Limited, seeking following relief;

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- a. *That this Hon'ble Tribunal be pleased to allow the present Application;*
 - b. *That this Hon'ble Tribunal be pleased to take appropriate action against the Respondent No.1/Liquidator for having committed contempt of this Hon'ble Tribunal by wilfully, deliberately and contumaciously disobeying and breaching the Order dated 21st March, 2024 passed in Misc. Application No.3424 of 2019;*
 - c. *That this Hon'ble Tribunal be pleased to direct the Respondent No.1/Liquidator to proceed with the distribution as per the tentative calculation sheet annexed at Annexure-F herein;*
 - d. *That pending the hearing and final disposal of the present Application, this Hon'ble Tribunal be pleased to stay distribution as indicated by the Respondent No.1/Liquidator vide its Letter dated 28th March, 2024 (Annexure-D herein);*
 - e. *For such other orders as this Hon'ble Tribunal deems fit;*
 - f. *For costs.*
2. The present Interlocutory Application is being filed by the Applicant (Orig. Respondent No.5 in Misc. Application No.3242 of 2019) and under Section 60(5) of the Code r/w Rule 11 of the NCLT rules, 2016 for seeking necessary orders and directions against the Respondent in light of the contemptuous conduct of the Respondent No.1/Liquidator of the Corporate Debtor ("Liquidator") in not complying with the Order dated 21st March, 2024 in Misc Application No.3424 of 2019, passed by this Tribunal, wherein the Liquidator was directed to distribute the proceeds in accordance with the principals laid down in the said Order. Respondent Nos.2 to 5 are the other secured creditors and Respondent Nos. 6 and 7 are the Promoters of the Corporate Debtors.
 3. The Applicant has sought that the proceeds from sale of all properties owned by the Corporate Debtor should be distributed as per the charge of lenders on the said assets, and accordingly, proceeds from such properties owned by the

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Corporate Debtor and exclusively mortgaged to the lender of GGRPL should first be paid to the Applicant and lender of GGRPL as per their charge on priority as more particularly laid down by this Tribunal vide its order dated 21.03.2024

4. This Tribunal had passed order dated 21.03.2024 at para 19 thereof it reads as *“We are of the considered opinion that the reasoning of the Insolvency Law Committee on this issue is accordance with the position as available under the Companies Act, 2013 also and is in accordance with the expectation of the financial creditor emerging out of the contractual arrangement between the creditor and the borrower in relation to their security interest. Accordingly, we have no hesitation to hold that the inter se priority of the secured creditor in relation to charge over the security must be respected and the distribution out of liquidation proceeds in that class should be in accordance with such inter se priority.”*
5. The Liquidator has filed written submission stating that though the said consortium has the first charge over the said mortgage assets but since they had not opted to realise their security interest i.e. the first charge on the said assets and therefore the said assets have become the part of the liquidation estate as per section 52 of IB Code, 2016 and therefore, these assets cannot be treated separately from the pool of liquidation estate and cannot be distributed only to the said consortium. He further submitted that the consideration of the inter se charge related priorities as discussed in the BLRC Report is mere an academic discussion and not a law as on date as enacted in IBC Code or any of its rules and regulations and therefore as on date the provisions of Section 52 read with Section 53 are applicable to deal with the proceeds of the liquidation estates.
6. We note that para 8.2 under Chapter 2 of Report of the Insolvency Law Committee February 2020 quoted the first ILC Report clarifying the Application of this provision on inter creditor or sub-ordination contracts between secured creditors by stating the following:

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“the Committee was of the opinion that it is sufficiently clear from a plain reading of Section 53(1)(b) that it intended to rank workmen’s dues equally with debts owned to secured creditors who have relinquished their security. Section 53(1)(b) does not talk about priority inter-se secured creditors. Thus, valid inter-creditor/subordination agreements would continue to govern their relationship. Further sub-section (2) of Section 53 must also be interpreted Accordingly. For instance, applying Section 53(2) in the context of Section 53(1)(b), any agreements between workmen and secured creditors which disrupts their pari passu rights will be disregarded by the liquidator. However, agreements inter-se secured creditors do not disturb the equal ranking sought to be provided by Section 53(1)(b) and therefore do not fall within the ambit of Section 53(2).

7. We note that the Committee clarified that for the purpose of the correct interpretation of Section 53(2), necessary clarification needs to be provided by inserting explanation u/s 53(2) to clarify the correct interpretation of the Section, as explained in First ILC Report, however, the Insolvency Law Committee Report has opined after considering the following principles emerging from the decision of the Hon’ble Supreme Court in the case of **ICICI Bank Limited v. SIDCO Leathers Limited & Ors (2006) 10 SCC 452**.

- a) Right to property was a constitutional right and right to recover money lent by enforcing a mortgage was also a right to enforce an interest in the property. Had the Parliament intended to take away such a valuable right of the first-charge holder, there was no reason for it to not state so explicitly.
- b) Section 48 of the Transfer of Property Act, 1882 (“TOPA”) clearly provides that claim of a first charge holder shall prevail over the claim of a second charge holder.
- c) Merely because the relevant section did not specifically provide for the rights of priorities over mortgaged assets, it would not mean that the provisions of section 48 of TOPA shall stand obliterated in relation to a company that has undergone liquidation.

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d) Deprivation of a legal right existing in favour of a person cannot be presumed in construing a statute and it is in fact the other way round and thus, a contrary presumption shall have to be raised.

e) Companies Act may be a special statute but if the special statute does not contain any provisions dealing with contractual and other statutory rights between different secured creditors, the specific provisions contained in the general statute shall prevail.

f) Section 529(1)(c) used the phrase "the respective rights of secured and unsecured creditors." This was to be interpreted as rights of secured creditors vis-à-vis unsecured creditors. It does not envisage respective rights amongst secured creditors

8. Our decision at para 19 of order dated 21.03.2024 is clearly unambiguous. Needless to say if the Liquidator was aggrieved with our decision he could have filed an appeal against the same. We note that the Liquidator has explained his position which appears to be bona fide explanation. Accordingly, we do not consider it appropriate to hold that the Liquidator has defied our order wilfully. However, we consider it appropriate to direct the Liquidator to make distribution in terms of our decision enumerated in para 19 of the order dated 21.03.2024 for the purpose of distribution requesting in inter-se priorities.
9. In view of the above the **IA 2668 of 2024** is **allow in terms of aforesaid direction**.

Sd/-
PRABHAT KUMAR
MEMBER (TECHNICAL)

Sd/-
JUSTICE VIRENDRASINGH BISHT
MEMBER (JUDICIAL)