



IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II

IA No. 3/2024

In

CP (IB) 1738/MB/ of 2017

Under Section 60 (5) of the Insolvency and
Bankruptcy Code, 2016

Bank of Baroda

Through its Authorized Representative

Having office At –

Zonal Stressed Assets Recovery Branch,
(SOSARB) Meher Chamber, Ground Floor,
Ballard Estate, Mumbai – 400 001.

... Applicant

V/s

Mr. Ajit Kumar

Resolution Professional of
M/s Omkar Speciality Chemicals Ltd.
Having registered office at – 1A, Sanskrit
Apartment GH-22, Sector 56, Gurgaon,
Haryana – 122 011.

..... Respondent No. 1

Axis Bank Limited

Having registered office at – 7th Floor Axis
House, C-2 Wadia International Centre,
Pandurang Budhkar Marg, Worli Mumbai –
400 025.

..... Respondent No. 2

NKGSB Co-operative Bank Limited

Having registered office at – Laxmi Sadan,
361, V.P. Road, Girgaum, Mumbai – 400
004.

..... Respondent No. 3

IA No. 3/2024
In
CP (IB) 1738/MB/ of 2017



IN THE MATTER OF

M/s Ela Enterprise

... Operational Creditor

V/s

Omkar Speciality Chemicals Ltd.

... Corporate Debtor

Order delivered On :- 08.10.2024

Coram:

**Anil Raj Chellan
Member (Technical)**

**Kuldip Kumar Kareer
Member (Judicial)**

Appearances:

For the Applicant : Counsel, Kunal Kanungo i/b Counsel,
Gaurav Jalendra

For the Respondent No. 1/RP: Counsel, Amey Hadwale a/w Counsel,
Geeta Lundwani

For the Respondent No. 2: Counsel, Nausher Kohli a/w Counsel,
Shivani Varade

For the Respondent No. 3: Counsel, Sagar Wagle a/w Counsel, Gisa
Rasquiulla, Counsel, Kashyap Sampat

ORDER

Per: Anil Raj Chellan, Member (Technical)

1. The present application is filed by Bank of Baroda under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ('the Code'), inter alia, challenging the process of Corporate Insolvency Resolution Process ('CIRP') carried out by the Respondent No. 1 and particularly the admission of claims of Respondent no. 2 and Respondent 3 as secured



creditors. The Applicant seeks the following reliefs:

- This Tribunal be pleased to allow the present application.
- This Tribunal be pleased to direct Respondent No. 1 to reclassify the claims submitted by Respondent No. 2 and 3 that is Axis Bank and NKGBS Bank, as unsecured on account of failure to obtain NOC from the Applicant bank before creating the charge over assets which were exclusively secured in favor of the Applicant bank.

Facts of the case:

2. Omkar Speciality Chemicals Limited ('Corporate Debtor') approached the Applicant bank to avail credit facilities. The bank vide its sanction letter dated 15.01.2009 sanctioned the fresh credit facility of Rs. 32.10 crores to the Corporate Debtor. The said credit facilities were exclusively secured by way of the creation of security on multiple assets.
3. The Corporate Debtor, thereafter, approached the Applicant bank for the purpose of availing a corporate loan of Rs. 50 Crores. The Applicant bank vide its sanction letter dated 22.10.2015 approved the request with certain conditions. The said loan was exclusively secured by multiple assets.
4. A Company Petition bearing CP(IB) No. 1738/MB/2017 was filed under section 9 of the Code before this Hon'ble Tribunal. This Tribunal vide its order dated 05.12.2022 initiated the corporate insolvency resolution process (CIRP) against the Corporate Debtor and appointed Mr. Atrun Ramchandra Gaikwad as the interim



Resolution Professional ('IRP').

5. As per the order of the Tribunal, a public announcement in Form A was published by the IRP on 22.12.2022. The Applicant bank submitted its claim as per the Code. The IRP fully accepted the claim to the tune of Rs. 2,90,05,81,881 (Two Hundred Ninety Crore Five Lakhs Eighty-One Thousand Eight Hundred and Eighty-One) as a secured financial creditor.
6. During the course of CIRP, IRP received claims from Respondent No. 2 and Respondent No. 3 i.e Axis Bank and NKGSB Co-operative Bank Ltd. The IRP admitted them also as Secured Financial Creditors.
7. IRP duly convened the 2nd meeting of COC on 06.02.2023, wherein the members of COC resolved to replace the IRP and appoint Respondent No. 1 as Resolution Professional of the Corporate Debtor. Pursuant to the resolution passed by the COC, an application was filed in this Tribunal. The Tribunal in I.A no. 777 of 2023, appointed Respondent No. 1 as the Resolution Professional (RP) of the Corporate Debtor vide order dated 15.03.2023.
8. In the 4th meeting of COC convened by the RP, Respondent No. 1 informed the members that the claims of Respondent No. 2 and Respondent No. 3 are assumed to be secured based on the charge registered at the MCA portal by the Corporate debtor. RP also informed that no NOC has been found pertaining to the creation of charge nor for sharing of charge on pari passu basis.
9. The members of COC suggested that Respondent No. 1 should take legal opinion on the determination of the status of the claim of



Respondent No. 2 and 3. In the legal opinion, it was stated that the Resolution Professional does not have any adjudicatory powers to determine or question the validity of a charge as registered by the ROC.

Submissions of the Applicant:

10. The Applicant submitted that during the course of CIRP, the Applicant bank became aware of the fact that Respondent no. 2 and Respondent no. 3 are considered as Secured Financial Creditors.

11. It is submitted that the following assets are exclusively charged in favour of the Applicant bank as security for the credit facilities sanctioned by it. No objection certificate was not obtained from the Applicant bank by either the Corporate Debtor or the Respondents No. 2 and 3 for the purpose of creating a charge on the assets of the Corporate Debtor which were exclusively secured in favor of the Applicant bank. The assets are: -

Security Interest created in favor of Respondent No. 2
Pai Pasu Charge on entire fixed assets of the Company with WC Banker both present and future.

Security Interest created in favor of Respondent No. 3
Primary Security: -



1. Hypothecation of Stocks;
2. Hypothecation of Book Debts (net of group debtors and debtors above 90 days.)

Collateral Security: -

1. Registered Mortgage of Non-agricultural land bearing survey No. 9 Hissa No. 2 at karwai owned by Pravin Herlekar and Anjali Herlekar.
2. Pledge of fixed deposit of Rs. 300.00 Lakhs.
3. Personal Guarantee of Pravin Shivdass Herlekar.
4. Personal Guarantee of Anjali Pravin Herlekar.
5. Personal Guarantee of Rishikesh Pravin Herlekar.

12. The said assets are exclusively secured for the credit facilities sanctioned by the Applicant bank. It is submitted that there can be no agreement for the creation of a charge on the block of assets of the Corporate Debtor which are exclusively secured in favor of the Applicant bank without obtaining the prior permission of the first charge holder i.e. the Applicant bank.

13. As per the report generated by the Central Registry of Securitization Asset Reconstruction and Security Interest of India (CERSAI), only the Applicant bank has exclusive charge on the assets of the Corporate Debtor.

**Reply of the Respondent No. 1:**

14. In reply Respondent No. 1 submitted that Respondent No. 2 and 3 were classified as secured creditors as per the CIRP Regulations. In the legal opinion taken by the RP, on the recommendation of the COC, it was stated that the RP has to follow the mandate of Regulation 21 of the Liquidation Regulation while ascertaining the existence of security interest. Also, it was stated that the RP has no adjudicatory power in this case.

15. It is submitted that the following documents were submitted by Respondent no.2 and 3 with their claims: -

a) Axis Bank (Respondent No.2)

- i) Deed of Hypothecation dated 15.12.2015 executed between Corporate Debtor and Axis Bank showing Hypothecation of current assets (stocks and book debts) of the Corporate Debtor.
- ii) Search report provided by KUS Associates and Accountants, Mumbai showing charge against the assets of Corporate Debtor in favor of Respondent no. 2.

b) NKGSB Bank (Respondent No.3)

- i) Composite Hypothecation Agreement dated 22.05.2017.
- ii) Mortgage deed dated 23.05.2017 between Praveen Herlekar, NKGSB Bank, and the Corporate Debtor.



iii) Certificate of registration of charge dated 15.06.2017 duly reflected on the MCA portal showing the creation of charge on stock and book debts of the Corporate Debtor.

16. It is further submitted that as per the definition of “security interest” in Section 3 (31) of the Code, the documents provided by Respondent No.2 and No.3 are enough to consider them as secured creditors. Respondent No. 1 has decided to treat Respondent Nos. 2 & 3 based on the Code, Regulations, and section 77 of the Companies Act, 2013.
17. As per the judgement of the Hon’ble Supreme Court in *Kerala State Financial Enterprises Ltd. v. Official Liquidator, High Court of Kerala, (2006) 10 SCC 709*, a charge which is not registered as per the Companies Act would be void. This is further affirmed by Hon’ble NCLAT in its judgment dated 19th Oct 2020 in *Volkswagon Finance Private Limited v. Shree Balaji Printopack Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 02 of 2020]*, wherein it was held that in order to claim the status of a secured creditor, the financial creditor will have to prove its security interest in a manner as embodied under Regulation 21 of the Liquidation Regulations and /or Section 77 of the Companies act 2013. It is submitted that Respondent has followed the directions given in the above judgments.
18. Respondent No. 1 submitted that in the sanction letter of Respondent



No. 2 i.e. Axis Bank, “*pending NOC from BOB*”, was written. Similarly in the sanction letter of Respondent No. 2, “*NOC from Bank of Baroda and Axis Bank to be submitted*” was written. However, none of them have been able to furnish the NOC.

19. It is further submitted that Respondent No. 1 has still considered them as secured creditors as RP has no power to adjudicate. The Hon’ble Supreme Court in **Swiss Ribbons Pvt. Ltd. V/s Union of India on 25th January, 2019**, stated: -

“The resolution professional has no adjudicatory powers. Unlike the liquidator, the resolution professional cannot act in a number of matters without the approval of the committee of creditors under Section 28 of the Code, which can, by two-thirds majority, replace one Rp with another, in case they are unhappy with his performance. Thus, the resolution professional is really a facilitator of the resolution process, whose administrative functions are overseen by the committee of creditors and by the Adjudicating Authority.”

In the absence of NOC, the RP will need to adjudicate whether Respondent No.2 and 3 can be considered as Secured creditors. As per the above-mentioned judgment of the Hon’ble Supreme Court, RP has no adjudicatory powers.

Submissions of the Respondent No. 2:

20. Respondent No. 2, a Secured Financial Creditor of the Corporate Debtor i.e. Axis Bank, submits that the application is invalid and filed



with mala fide intent.

21. It is submitted that in lieu of the credit facilities granted to the Corporate Debtor vide sanction letter dated November 13th, 2015 and December 7th, 2015, the Corporate Debtor executed certain facility and security documents in favour of Respondent no. 2.
22. Respondent no. 2 has submitted that the Deed of Hypothecation dated December 15th, 2015 creating a charge on current assets, stocks and book debts is valid. There are two Demand Promissory Notes executed in favour of the bank. Mr. Pravin Herlekar and Mr. Omkar Herlekar have also provided guarantees which are still valid. As further security, the Corporate Debtor hypothecated all plant and machinery and also hypothecated all the stock in trade both present and future.
23. It is submitted that the Applicant has failed to demonstrate how the consideration or object of the deed of the hypothecation is of such a nature that it would defeat the provisions of the law if permitted. Also, the deed of hypothecation is a legal and enforceable document as it was never cancelled.
24. It is submitted that the Applicant has claimed that NOC was not received. The responsibility of acquiring the NOC was of the Corporate Debtor. The absence of the NOC, at the most implies that



Respondent No. 2 holds a subservient charge over the current assets of the Corporate Debtor. It cannot diminish the validity of the deed of hypothecation.

25. It is further submitted that once the lender holding the prior charge on the subject property has filed the claim and participated in the CIRP of the Corporate Debtor by ceding the same to the common pool, the requirement to obtain the NOC cannot exist.

26. It is submitted that Mr. Pravin Herlekar and Mr. Omkar Herlekar executed a Deed of Guarantee dated December 15th, 2015. Even if the Deed of Hypothecation over the assets is invalid, Respondent No. 2 still holds its status as a secured creditor because of the Deed of Guarantee. The Deeds of Personal Guarantee are sufficient to establish a security interest under the Code.

27. It is further submitted that Section 3 (31) of the Insolvency and Bankruptcy Code, 2016 states *"security interest" means right, title or interest or a claim to property, created in favor of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person: Provided that security interest shall not include a*



performance guarantee. As per this definition, Respondent No. 2 is a secured creditor on the basis of the Deed of Guarantee alone.

28. It is further submitted that the Hon'ble NCLAT in the case of **SVA Family Welfare Trust and Another Vs Ujaas Energy Ltd and Others (2023 SCC OnLine NCLAT 518)** established that personal guarantees executed by promoters can be treated as 'security interest' in favor of secured creditors.

Submissions of the Respondent No.3:

29. Respondent No. 3, a Secured Financial Creditor of the Corporate Debtor i.e. NKGSB Banks, submits that the application is invalid and filed with mala fide intent.
30. It is submitted by Respondent No.3 that in the year 2017, the Corporate Debtor approached Respondent No. 3 with a request to sanction working capital facilities for its operations. The Corporate Debtor previously banking with Citi Bank, requested Respondent No.3 to take over the facilities of Citi Bank. Respondent No. 3 took over the facilities and sanctioned 25,00,00,000 as a Cash-Credit facility.
31. The sanctioned facilities were secured by way of charge on the following properties of the Corporate Debtor: -



<u>Description</u>	<u>Type Of Charge</u>
Primary Security	
Paid Stock	Hypothecation
Book Debts	Hypothecation
Collateral Security for Proposed Facility	
Non-Agricultural Land Bearing survey o. 9, Hissa No.2 at Kharwai owned by Pravin Herlekar and Anjali Herlekar	Registered
Fixed Deposit of Rs. 300.00 Lacs	Pledge
Personal Guarantees of: - 1. Mr. Pravin Shivdas Herlekar 2. Mrs. Anjali Pravin Herlekar 3. Mr. Rishikesh Pravin Herlekar	

32. It is submitted that the Corporate Debtor and Respondent No. 3 executed multiple deeds as security.

33. Respondent No.3 submits that security interest in favor of Respondent No. 3 stands duly registered with the Registrar of Companies in accordance with the Companies Act, 2013. Also, as per Regulation 21 of the Liquidation Process Regulation, Respondent No. 3 has proved its security interest.

34. It is submitted that, in the absence of an NOC, at the most the charge of Respondent No. 3 on the assets of the Corporate Debtor as 'subservient'. Section 48 of the Transfer of Property Act, 1882 states



that:- “Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.” The Hon’ble Telangana High Court in the case of **Andhra Pradesh State Financial Corporation v. Kotak Mahindra Bank & Ors. (AIR 2019 53)** stated that “As per Section 48, every right created later in a point of time in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.”

35. It is submitted that the question for consideration is not whether there is a valid “*pari passu charge*”, but whether there is a charge at all created in the favor of Respondent No. 3.
36. It is submitted that as the Applicant does not challenge the validity of the security documents, therefore on the basis of these documents, Respondent No. 3 is rightly classified as a secured creditor by RP.

Rejoinder by Applicant: -

37. It is submitted that Respondents No. 2 and 3 had prior knowledge of the existence of the security interest. The charges of Respondent No. 2 and 3 were registered over MCA after the registration of the charge of BoB.



38. It is submitted that the purported deeds of hypothecation creating pari-passu security interest are void. As per section 23 of the Indian Contract Act, the consideration of these contracts is unlawful.
39. It is submitted that in the absence of NOC, the Corporate Debtor cannot create a subservient charge. It is a settled position of law that the court should not make an endeavor to look at implied terms of contracts and normally a contract should be read as it reads, as per its express terms. Further, the Personal Guarantee given by Promoter/ Suspended Director does not create a security interest.
40. It is submitted that the registration of charge with ROC is a mere formality and the charge can only be created after the NOC is provided. Therefore, when the actual creation of the charge itself is void, the certificate of registration of the charge cannot be considered as proof of security interest.

Analysis and Decision

41. We have heard the Counsel for the parties and have perused the documents on record.
42. The facts are not in dispute in the present matter. The Applicant as well as Respondent Nos. 2 and 3 have granted financial assistance to the Corporate Debtor on certain securities created by the Corporate Debtor



on its assets and furnishing of personal guarantees by promoters. It is also not in dispute that the security/security interest was created in favour of the Applicant in the year 2012 while in favour of Respondent Nos. 2 and 3 was created subsequently in the years 2016 and 2017 respectively, without obtaining any NOC or pari passu letter from the Applicant. The charge created in favour of the Applicant was registered with RoC since 2012, while the charges created in favour of Respondent No. 2 and Respondent No. 3 were registered with RoC on 20.01.2016 and 22.05.2017.

43. During the 4th meeting of COC, Respondent No. 1 informed the members that the claims of Respondent No. 2 and Respondent No. 3 are assumed to be secured based on the charge registered at the MCA portal by the Corporate Debtor. The contention of the Applicant is that in the absence of a NOC from the Applicant there is no validity or enforceability to the documents (Deed of Hypothecation and Mortgage) created by the Corporate Debtor and the documents purportedly creating a charge in favour of Respondent No. 2 and 3 are void ab initio on the basis of Section 23 and 24 of the Indian Contract Act, 1872. The Ld. Counsel for the Applicant has submitted that as per Section 24 of the Indian Contract Act, 1872 any agreement with an unlawful consideration is void. Even under Section 23 of the Indian Contract Act, 1872 the consideration or



object of any agreement is considered unlawful when it involves or implies injury to the person or property of another. The consideration or object of the agreement/document creating a charge in favour of Respondent Nos. 2 and 3 is, therefore, unlawful and void. It is further contended that the registration of charge over the assets of the Corporate Debtor with the RoC/MCA portal is a mere formality that follows after the creation of charge and the charge can only be created with an NOC. When the actual creation of charge is itself void, due to the absence of NOC of the Applicant, the certificate of registration cannot be considered as a proof of security interest.

44. On the contrary, the Respondents have contended that valid security documents have been executed by the Corporate Debtor in favour of Respondents No. 2 and 3. Non-receipt of NOC from the Applicant, as the exclusive charge holder over the current assets and immovable property of the Corporate Debtor, would not render the security documents invalid. It is argued that the absence of NOC from the Applicant, at most implies that Respondent Nos. 2 and 3 hold a subservient charge over the assets of the Corporate Debtor but it cannot and does not diminish the validity or enforceability of the security documents nor does it alter the status of Respondent Nos. 2 and 3 as a secured financial creditor under the Code.



45. We have thoughtfully considered the rival contentions of the parties. It is observed that the following documents were submitted by Respondent Nos. 2 and 3 with Respondent No. 1 to prove their claim:

Respondent No. 2

- a. Deed of hypothecation dated 15.12.2015 executed between the Corporate Debtor and Respondent No. 2 creating hypothecation of assets of the Corporate Debtor.
- b. Certificate of Registration of charge duly reflected on MCA portal evidencing creation of charge on assets of the Corporate Debtor.

Respondent No. 3

- a. Composite hypothecation agreement dated 22.05.2017.
- b. Mortgage deed dated 23.05.2017 executed in respect of immovable properties by Corporate Debtor in favour of Respondent No. 3.
- c. Certificate of registration of charge dated 15.06.2017 duly reflected on MCA portal evidencing the creation of charge on assets of the Corporate Debtor.

46. As far as the contention that the security documents executed in favour of Respondent Nos. 2 and 3 are void it is observed that the charges are registered with RoC way back in the years 2016 and 2017 which is deemed to be public notice. However, the Applicant has not taken any steps to challenge the charge creation in favour of Respondent Nos. 2 and



3 and the alleged breach of contract with the Applicant. At no stretch of the imagination, we can accept that the contract or covenant with the Applicant will automatically invalidate subsequent documents executed by the Corporate Debtor on the basis of Sections 23 and 24 of the Indian Contract Act, 1872.

47. It is also relevant to observe Section 48 of the Transfer of Property Act which reads as under:

Section 48. Priority of Rights created by transfer.— Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

A plain reading of the above section makes it clear that multiple mortgages can be created on the same immovable property but subject to the doctrine of priority. In so far as the deed of hypothecation is concerned it is a method of creation of security of movable property. Nothing on record to show that execution of hypothecation is invalid when the sanction letter issued by Applicant itself states only the first



charge on the assets of the Corporate Debtor. In the circumstances, we are not persuaded by the argument that the documents executed by the Corporate Debtor in favor of Respondent No.2 & 3 are invalid.

48. At this juncture it is imperative to look at the definition of secured creditor and security interest as provided in the Code.

Section 3(30)- “secured creditor” means a creditor in favour of whom security interest is created;

Section 3(31)- “security interest” means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee.

49. In the case of *Volkswagen Finance Private Limited Vs. Shree Balaji Printopack Pvt. Ltd.*, [Company Appeal (AT) (Insolvency) No. 02 of 2020], the Hon’ble NCLAT while considering a claim rejected by the liquidator in the liquidation process under the Code observed that the financial creditor will have to prove its security interest in a manner as embodied in regulation 21 of the Liquidation Regulation and/or Section 77 of the



Companies Act, 2013. The RP cannot ignore the fact that the charges created in favour of Respondent Nos. 2&3 are duly registered in accordance with Section 77 of the Companies Act, 2013.

50. In the case of SVA Family Welfare & Anr. V. Ujaas Energy Ltd & Ors (Company Appeal (AT) (Ins.) No. 266 of 2023, the Hon'ble NCLAT recognized the security interest executed by the personal guarantor in favour of the financial creditor. Hence, even the personal guarantees executed by the promoters of the Corporate Debtor could be considered as security interest under the Code.
51. In view of the foregoing discussions, we are of the view that non-obtaining of NOC from the Applicant does not ipso facto invalidate the security documents executed in favour of Respondent Nos.2&3. Further, considering the fact that security documents have not been declared void by a court/authority of competent jurisdiction and the charges created thereunder have been duly registered with the RoC/MCA portal in accordance with the provisions of the Companies Act, 2013, we are of the view that the decision of Respondent No.1 to classify the claim of Respondent No.2 & 3 as secured financial debt is just and proper, and ought not to be interfered with.

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52. In the light of the foregoing discussion, we do not find any merit in the application and, therefore, the **IA no. 3/2024** is hereby **dismissed** with no order as to costs.

Sd/-
ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
(MEMBER JUDICIAL)