

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,**  
**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No.601 of 2024**

(Arising out of Order dated 23.02.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in IA No.4004 of 2023 in Company Petition 1330/(IB)-MB-V/2020)

**IN THE MATTER OF:**

Unity Small Finance Bank Ltd.  
Through its Authorised Representative  
40, Basant Lok, Vasant Vihar,  
New Delhi-110057.

Also at:

1<sup>st</sup> Floor, Vinay Bhavya Complex,  
CST Road, Kalina, Mumbai-400098.

... Appellant

Versus

1. Sripatham Venkatasubramanian Ramkumar  
Resolution Professional for  
Privilege Industries Limited  
1605, Block 1, Myhome Vihanga,  
Gachibowli, Hyderabad, Telangana-500032.

2. Committee of Creditors  
Through Omkara Asset Reconstruction  
Company Limited  
47<sup>th</sup> Floor, Kohinoor Square  
N.C. Kalekar Marg, R.G. Gadkari Chowk,  
Shivaji Park, Dadar (W), Mumbai-400028.

... Respondents

**Present:**

**For Appellant: Mr. Alok Dhir, Ms. Varsha Banerjee, Mr. Karan Grover, Advocates.**

**For Respondents: Mr. Arun Kathpalia, Sr. Advocate with Mr. Anand Sengar, Mr. Jash Shah, Mr. Varun Kalra, Advocates for R1**

**Mr. Aman Malik, Advocate for R2.**

**J U D G M E N T**

**ASHOK BHUSHAN, J.**

This Appeal by Financial Creditor of the Corporate Debtor – Privilege Industries Limited has been filed, challenging the order dated 23.02.2024 passed by National Company Law Tribunal, Mumbai Bench in IA no.4004

of 2023. IA No.4004 of 2023 filed by the RP for approval of Resolution Plan, has been allowed by the Adjudicating Authority. Aggrieved by which order, this Appeal has been filed.

2. Brief facts necessary to be noticed for deciding the Appeal are:

- (i) Punjab & Maharashtra Co-operative Bank Ltd. (erstwhile Lender/ “**PMC Bank**”) sanctioned mortgage overdraft facility to the Corporate Debtor vide Sanction letter dated 04.11.2011 and 17.01.2013. Various documents creating security interest in favour of the PMC Bank was executed including mortgage of immovable property situated at Village Thrikkakara, Tulka Kannyanur, district Ernakulam in the name of Blue Star Realtors Pvt. Ltd. and mortgage of land situated at Village Deewannmn and Chulne, Taluka Vasai, District Thane of Mr. Rakesh Kumar Wadhawan.
- (ii) The Corporate Debtor being unable to repay the overdraft amount, the account was declared as Non-Performing Asset (**‘NPA’**).
- (iii) The Ministry of Finance vidts its Gazette Notification amalgamated PMC Bank with the Appellant.
- (iv) The Adjudicating Authority vide order dated 15.02.2023 initiated Corporate Insolvency Resolution Process (“**CIRP**”) against the Corporate Debtor.
- (v) In pursuance to the publication made by the Resolution Professional (“**RP**”), Appellant field its claim on 03.03.2023. In

the List of Creditors published by IRP, the Appellant's claim only to the extent of Rs.2.53 crores was admitted as secured claim. On the request of the RP, the Appellant filed its revised claim in Form-C. The RP asked the Appellant to provide certain clarification by letter dated 22.05.2023.

- (vi) The RP sent list of updated claims to all Committee of Creditors ("CoC") Members, wherein the Appellant's claim is bifurcated into secured as well as unsecured. On 13.07.2023, final list of creditors was uploaded the RP, where claim of the Appellant for Rs.139,57,65,086/- was admitted as unsecured claim. The Appellant sent an email to the RP to accept the entire claim as secured creditor, which request was declined.
- (vii) Voting on the Resolution Plan commenced in pursuance of the Meeting dated 09.08.2023 and a decision was taken to file an Application for exclusion of 23 days from CIRP.
- (viii) The Appellant on 12.08.2023 filed an IA No.3592 of 2023 seeking quashing of the RP decision and seeking direction to declare the Appellant as secured creditor.
- (ix) The Resolution Plan of SNJ Breweries Private Limited was approved by the CoC and RP filed an IA No.4004 of 2023 on 30.08.2023 praying for approval of Resolution Plan.
- (x) IA no.3592 of 2023 was heard on 27.09.2023. The Appellant in October 2023 filed Form CHG-1 with the Registrar of Companies for creation of charges on the assets of the

Corporate Debtor. The Appellant also filed a charge on the CERSAI portal. On 08.01.2024, IA No.3592 of 2023 filed by the Appellant was decided, directing the RP to reconsider the claim of the Appellant on the basis of documents available on record. In pursuance of the order dated 08.01.2024, the RP reconsidered the claim of the Appellant and on 30.01.2024, declared the Appellant as unsecured creditor of the Corporate Debtor.

- (xi) On 09.02.2024, the Appellant filed an IA No.698 of 2024 seeking direction to RP to reverify the claim of the Appellant as secured creditor.
- (xii) On 23.02.2024, the Adjudicating Authority approved the Resolution Plan of the Corporate Debtor.
- (xiii) On 05.03.2024, IA No.796 of 2024 filed by the Appellant was heard and reserved for orders.
- (xiv) The Appellant aggrieved by the order approving the Resolution Plan, in which he has been distributed the amount as an unsecured creditor of the Corporate Debtor has come up in this Appeal.

3. We have heard Shri Alok Dhir, learned Counsel appearing for the Appellant; Shri Arun Kathpalia, learned Senior Counsel appearing for RP; and Shri Aman Mali, learned Counsel appearing for Respondent No.2.

4. The learned Counsel for the Appellant challenging the order passed by the Adjudicating Authority submits that Appellant being secured creditor, approval of the Resolution Plan is in contravention of Section 30, sub-section (2) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**IBC**”). It is further submitted that CIRP 180 days of period got completed on 13.08.2023, whereas the Plan was approved on 23.08.2023 with 79.61% vote share, in which Appellant has abstained. The period of CIRP having come to an end on 13.08.2023, the approval of the Plan after expiry of the CIRP period is contrary to the provisions of the IBC and deserved to be set aside on this ground alone. The Appellant is secured Financial Creditor of the Corporate Debtor and the RP without considering the scheme of the IBC has raised objection that there is no registration of charge under Section 77 of the Companies Act, 2013 filed by the Appellant and the Appellant cannot be treated as secured creditor. It is submitted that the Adjudicating Authority had directed the RP on 08.01.2024 to reconsider the claim of the Appellant and the objection raised by the RP was overruled. It is submitted that the mere fact that charge was not registered under Section 77 of the Companies Act, 2013, was no ground to reject the claim of the Appellant as secured Financial Creditor. It is submitted that the Appellant was entitled to be declared as secured Financial Creditor on the basis of sanctioned mortgage over draft facility to the Corporate Debtor by letter dated 04.11.2011 and 17.01.2013 as well as letter dated 04.11.2011 of the Corporate Debtor of Lien and Set-off. It is submitted that the Appellant’s Application challenging the decision of the

RP dated 30.01.2024 being pending consideration, the Adjudicating Authority committed error in approving the Resolution Plan.

5. Shri Arun Kathpalia, learned Senior Counsel appearing for Respondent No.1 – RP, submits that the Appellant has failed to prove creation of security interest on the assets of the Corporate Debtor by any document. The mortgage of the immovable property was created by Guarantor of the Corporate Debtor, Shri Rakesh Kumar Wadhawan of its immovable assets including non-agricultural land, which does not make the Appellant a secured creditor. Insofar as submission of the Appellant that CIRP has come to an end on 13.08.2023, it is submitted that on the basis of resolution passed by the CoC, of which the Appellant was also Member, i.e. in 7<sup>th</sup> CoC Meeting, a decision was taken to file an Application to seek extension of 23 days' time and the Application for exclusion of time was filed on 11.08.2023. During the hearing before the Adjudicating Authority, the aforesaid fact was brought to the notice and Adjudicating Authority being aware of the fact that Application for exclusion of time was filed, has approved the Resolution Plan. Hence, there is no error in the order approving the Resolution Plan on this ground. It is submitted that on the basis of Sanction Letter dated 04.01.2011, no security was created in the assets of the Corporate Debtor, nor the Sanctioned Letter itself mentions regarding creations of any security in the assets of the Corporate Debtor. The entire basis of the Appellant's submission is on the basis of creating security over book debts of the Corporate Debtor in Sanctioned Letter dated 04.11.2011. The fact that after the initiation of CIRP and after

the Appellant having declared as unsecured creditor, the Appellant took steps for filing CHG-1 Form with Registrar of Companies on 26.10.2023, clearly indicates that the Appellant was well aware that he is not a secured creditor. The Appellant could not have created charge over book debts of the Corporate Debtor in CERSAI portal after initiation of CIRP, which does not in any manner help the Appellant. In pursuance of the order of the Adjudicating Authority dated 08.01.2024, the RP reverified the claim of the Appellant and has come to the opinion that there are no document to prove creation of any security interest in favour of the Appellant. Hence, the Appellant was declared as unsecured creditor by letter dated 30.01.2024. Thus, the order dated 08.01.2024 was fully complied with and the Appellant having been declared unsecured creditor, approval of Resolution Plan, treating the Appellant as unsecured creditor does not suffer from any error. It is submitted that in any view of the matter, the Appellant has failed to prove that any security interest was created in the assets of the Corporate Debtor in favour of the PMC Bank. Hence, no error has been committed by the Adjudicating Authority in approving the Resolution Plan.

6. We have considered the submissions of learned Counsel for the parties and have perused the records. Both the parties relied on judgment of Hon'ble Supreme Court as well as this Tribunal in support of their submissions, which shall be considered while considering the submissions of the parties.

7. The question be answered in this Appeal, is as to whether the Appellant is secured creditor of the Corporate Debtor or not and whether

the decision of the RP declaring the Appellant as unsecured creditor is in accordance with law.

8. The Appellant in support of its submission has referred to Sanction Letter dated 04.11.2011 regarding enhancement of mortgage overdraft limit and another Sanction Letter dated 17.01.2013 regarding mortgage overdraft limit. Letter dated 04.11.2011 has been filed by the Appellant along with the Appeal, which is as follows:

“Ref. No./PM/CO/CREDIT/960(\*)/2010-11 Date : 04.11.2011

The Director/s,  
M/s. Privilege Industries Limited  
909, Dheeraj Arma, Anant Kanekar Marg.,  
Station Road, Bandra (East),  
Mumbai – 400 051.

Sir,

**Subject: Your application for Enhancement of Mortgage Overdraft Limit.**

With reference to your application for Mortgage Overdraft limit, we are pleased to inform that you have been sanctioned as follows:

|                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|-----------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Nature of Limit | Enhancement of Mortgage Overdraft Limit.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| Amount          | From Rs.30,00,00,000/- (Rupees thirty Crores Only) to Rs.35,00,00,000/- (Rupees Thirty Five Crore Only).                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| Prime Security  | 1) Mortgage of Immovable property situated at Village Thrikkakara, Taluka Kannyanur, district Ernakulam, Kerala. Survey No.717/5, Block No.5, admeasuring 70 Acres standing in the name of M/s Blue Star Realtors Private limited. The said property is already mortgaged for the credit facility of M/s. Dinshaw Trapinex Builders Pvt. Ltd.<br><br>2) Mortgage of Land situated at Village Deewanmn and Chulne, Taluka Vasai, District Thane admeasuring 34,388 Sq. mtrs standing in the nme of Mr. Rakesh Kumar Wadhawan (Details of property as per annexure attached). The said |

|                  |                                                                                                                          |
|------------------|--------------------------------------------------------------------------------------------------------------------------|
|                  | property is already mortgaged for the credit facility of M/s. Dineshaw Traplnex Builders Pvt. Ltd.<br><br>3) Book Debts. |
| Rate on Interest | 16.50% .a. (Floating Rate) subject to revision in rate of interest by bank from time to time or as per RBI Directives    |
| Repayment        | On Demand/ Annual renewal                                                                                                |
| Penal Interest   | 2% on overdrawn Amount                                                                                                   |
| Inspection       | Yearly                                                                                                                   |
| Sureties         | Mr. Rakesh Kumar Wadhawan                                                                                                |

SUBJECT TO COMPLIANCE OF FOLLOWING TERMS & CONDITIONS:-

1. All Terms and Conditions to be observed and documents to be submitted
2. Conditions for Mortgage of Property:
  - Mortgage of property to be put through as per Bank's procedure and requirement.
  - Our Bank's charge to be noted in Recover of Right (7/\*\*\*\*
  - All Original Title deeds pertaining to the said property should be submitted such as Chain of agreements, July transferred in name of Owners' name, registration and stamp duty paid receipts etc.
  - Inspection of property will be done by Bank official and cost for the same to be borne by applicant.
  - To ensure that all conditions stated in legal opinion report obtained for the said property for sustaining a clear and marketable title on the property are complied with.
  - Bank will register mortgage charge at Central Registry established under SARFAESI Act 2002. For creation and for any subsequent modification of security interest in favour of Bank, charges to be borne by the borrower.
3. Stamp & document charges as per State Stamp Act will have to be borne by you.
4. The rate of interest applicable for the proposed mortgage overdraft limit is 16.50% p.a. Floating rate (Monthly rest)

- subject to revision rate of interest of Bank from time to time or as per RBI directives from time to time.
5. The Company & Surety should execute necessary documents before disbursement.
  6. Board resolution of M/s. Privilege Industries Limited for applying enhancement of Mortgage Overdraft limit, authorizing director to execute bank documents and any other documents pertaining to said limit to be submitted.
  7. Company should maintain share linkage as per our Bank's norms.
  8. Company should undertake the following:
    - a. To authorize the Bank to deduct all the documentation, valuation charges and any other related charges in respect of the said credit facility to the account.
    - b. That the funds will not be utilized for speculative purpose.
    - c. That cheque will not be returned in the account for want of funds.
    - d. That the account will be operated within the sanctioned limit.
  9. Renewal of limits/ Review of loans

Limits is subject to renewal on annual basis. While Limit accounts will be reviewed annually by the Bank,

    - a) Borrower should submit request for renewal of limit along with latest Audited Financial Statements. Latest KYC documents, latest Statutory dues Paid certified by borrower's Chartered Accountant.
    - b) The documents should be submitted one month prior to expiry of the term to avoid withdrawal of limit/ operations.
    - c) Borrower should cooperate the Bank for submission of documents and charges for renewal/ review of credit facilities.
  10. The Bank shall have all the right to securities the secured assets and in the event of such securitization, the Bank is not bound to send a prior intimation as to that effect to the borrower and/or guarantor.
  11. All assets financed by the Bank and all such assets lodged as security and located at different places should be insured against all applicable risks for full market value thereof, with

the Bank Clause and the policy/ policies will be held by the Bank. The cost of the insurance will be borne by the applicant/s. It will be necessary for the borrower's to make punctual payment of all premium amounts and to ensure that no acts/ omissions occur in this regard which may invalidate such insurance during the currency of the advance.

12. In case of default in repayment of the Principle amount or interest amount thereon or any of the agreed Principle/ Interest or both of the limit on due date/s by the borrower, the Bank and/ or the RBI will have an unqualified right to disclose or publish the borrower name or the name of borrower company/ unit and its directors/ partners/ proprietors as defaulter in such manner and through such medium as the Bank or the name of the borrower company/ unit and its directors/ partner/ proprietors as defaulter in such manner and through such medium as the Bank or RBI in their absolute discretion may think fit.

Acknowledgment:

Please return to us the duplicate copy of this letter duly signed by the Director in Token of the acceptance of the terms and conditions stipulated herein above.

Yours faithfully,

Sd/-

I/We accept the above Terms and conditions

M/s. Privilege Industries Limited.

For PRIVILEGE INDUSTRIES LTD.

Sd/-

Director Authorised Signatory

Sd/-

Surety”

9. The above Sanction Letter itself refers to security by mortgage of immovable property and mortgage of land by M/s Blue Star Realtors Pvt. Ltd. and Mr. Rakesh Kumar Wadhawan respectively. The letter does not indicate creation of any other security assets in favour of PMB Bank in

assets of the Corporate Debtor. Subsequent letter dated 17.01.2023 again refers to the registered mortgage of non-agricultural land in the name of Mr. Rakesh Kumar Wadhawan. Letter dated 17.01.2023 is as follows:

“Ref. No./PM/CO/710/12-13

Date : 17.01.2013

M/s. Privilege Industries Limited  
9-09, Dheeraj Arma,  
Anand Kanekar Marg.,  
Station Road, Bandra (East),  
Mumbai – 400 051.

Sir,

**Subject: Your application for Mortgage Overdraft Limit.**

We draw your attention to the captioned subject and are pleased to inform that at your request, the company has been sanctioned a Mortgage Overdraft of Rs.10.00 Crore, on the following terms and conditions:-

|                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|---------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Nature of Limit                                                                       | Mortgage Overdraft Limit.                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Amount                                                                                | Rs.10.00 Crore (Rupees Ten Crore Only)                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| Prime Security                                                                        | Registered mortgage of Non agriculture land situated at Village Dewanmn, Taluka Vasai in the Registration sub-district of vasai, Dist. Thane admeasuring 1,33,550.00 sq. mtrs. Standing in the name of Mr. Rakesh Kumar Wadhawan having market value of Rs.1100,00,00,000/- (Rupees Eleven Hundred crores only) as per valuation report of M/s Yardi Prabhu Consultants & valuers pvt. Limited Dated 27/08/2012 (Details of Property at Taluka, Vasai is as per annexure attached. |
| Rate on Interest                                                                      | 16.00% p.a. (Floating Rate)                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Repayment                                                                             | **On Demand/ to be repaid in 84 months                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| Moratorium Period                                                                     | Nil                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| **The Mortgage O/d of Rs.10.00 Crore will be reduced by Rs.35,71,500/- every quarter. |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| Insurance                                                                             | Comprehensive insurance of immovable property will be done in Bank's name A/c Borrower.                                                                                                                                                                                                                                                                                                                                                                                            |
| Inspection                                                                            | Yearly                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| Sureties                                                                              | 1. Shri Rakesh Kumar Wadhawan                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|                                                                                       | 2. Shri Sarang Rakesh Kumar Wadhawan                                                                                                                                                                                                                                                                                                                                                                                                                                               |

SUBJECT TO COMPLIANCE OF FOLLOWING TERMS & CONDITIONS:-

1. All Terms and Conditions to be observed and documents to be submitted by you.
2. Conditions for Registered Mortgage of Property:
  - a. All our usual terms and conditions of registered mortgage of above-mentioned property should be complied with.
  - b. Registered Mortgage of the said property to be done in Bank's favour.
  - c. Deed of Mortgage duly stamped will be obtained from owners of the property.
  - d. All Original Title deeds pertaining to the said property should be submitted such as Chain of agreements, duly transferred in name of Owners' name, registration and stamp duty paid \*\*\* etc.
  - e. Property owner should give an undertaking to our bank that during the pendency of the limit they will not deal with, dispose off, or part with or create any third party interest or induct any third party in the said property until an intimation is given by the Bank to that effect. Further Company should incorporate the clause for crediting the \*\*\*\*\* (not readable) \*\*\*
3. Stamp & document charges as per State Stamp Act will have to be borne by you.
4. The rate of interest applicable for the sanctioned mortgage overdraft limit is 16.00% p.a. Floating rate (Monthly rest) or as per RBI directives from time to time.
5. Incidental & Service charges of Rs.1,00,000/- + service tax & Educ cess @ 12.30% should be borne by borrower;

\*\*\*\*\*

\*\*\*\*\* Valuation charges and any other related charges in respect of the said properties.

- b. That the funds will not be utilized for speculative purposes.
- c. That cheque will not be utilized for speculative purposes.
- d. That the account will be operated within the sanctioned limit.

Acknowledgement:

Please return to us the duplicate copy of this letter duly signed by the Director in \*\*\* the accep \*\* herein above.

Yours faithfully,

I/We accept the above  
Terms and conditions  
M/s. Privilege Industries Ltd.

Sd/-

Sd/-

- c. Deed of Mortgage duly stamped will be obtained from owners of the property.
  - d. All Original Title deeds pertaining to the said property should be submitted such as Chain of agreements, duly transferred in name of Owners' name, registration and stamp duty paid receipts, etc.
  - e. Property owner should give an undertaking to our bank that during the pendency of the limit they will not deal with , dispose off, or part with or create any third party interest or induct any third party in the said property until an intimation is given by the Bank to that effect. Further Company should incorporate the clause for crediting the sale proceeds to overdraft limit account in the agreement for sale which the mortgagor will be entering into with the prospective buyers.
3. Stamp & document charges as per State Stamp Act will have to be borne by you.

4. The rate of interest applicable for the sanctioned mortgage overdraft limit is 16.00% p.a. Floating rate (Monthly rest) or as per RBI directives from time to time.
5. Incidental & Service charges of Rs.1,00,000/- + service tax & Educ cess @ 12.30% should be borne by Borrower.

Firm should undertake the following:

- a. To authorize the Bank to deduct all the documentation, share membership fees, valuation charges and my other related charges in respect of the said properties.
- b. That the funds will not be utilized for speculative purposes.
- c. That cheque will not be returned in the account for want of funds.
- d. That the account will be operated within the sanctioned limit.

Acknowledgement

Please return to us the duplicate copy of this letter duly signed by the Director in Token of the acceptance of the terms and conditions stipulated herein above.

Assuring you of our best services.

Yours faithfully,  
Sd/-  
Authorised Signatory

I/We accept the above  
Terms and conditions  
M/s. Privilege Industries Ltd.

Sd/-  
Director”

10. The above Sanction Letter does not even contemplate creation of any other security apart from the security as mentioned in the Sanction Letter, which were security by Guarantors and not by Corporate Debtor.

11. The learned Counsel for the Appellant, during his submissions has referred to a letter given by Corporate Debtor dated 04.11.2011, which is claimed to be letter of Lien and Set-off. According to the Appellant, by the

said letter, security shall be created on the debt of the Corporate Debtor.

The letter is also part of the record, which is as follows:

To,

The Manager,  
Punjab & Maharashtra Co-op Bank Ltd.  
(Multi –State Scheduled Bank)

\_\_\_ Branch

Dear Sir,

In consideration of your from time to time making advance to me/us and/or giving me/us banking accommodation and facilities by way of loan/overdraft/ cash credit, I/We agree with you as follows:

1. That you may hold all securities to me/us (which may now be in your possession or which may any time thereafter come into your possession) and the proceeds thereof respectively not only for the specific advance made thereon but also as collateral security for any others monies now due or which may at any time be due from me/us to you, whether singly or jointly with another or others.
2. That in addition to any general lien similar right to which you as bankers may be entitled by law, you may at any time and without notice to me/us combine or consolidate all or any of my/our accounts with and liabilities to you and set off or transfer any sum or sums standing to the credit of any one or more of such accounts in or towards satisfaction of any of my/our liabilities to you on any other account or in any other respect, whether such liabilities be actual or contingent, primary or collateral and several or joint. 5
3. That any balance of the sale proceeds shall remain in the hands of the Bank after the sale of the securities, the Bank may at its sole discretion apply the balance, if any towards any sum or sums of money that may be owing by me/us to

the Bank upon any other account or any other transaction or transactions separate or distinct from the security, and you will pay to me/us any surplus which may remain after settlement of all claims of your Bank against me/us.

Dated this Mumbai Day of 4<sup>th</sup> November 2011.

Sd/-

Yours faithfully,  
For PRIVILEGE INDUSTRIES LTD.  
Sd/-  
Director/ Authorised Signatory”

12. The above letter in no manner can be read to be a letter creating any securities on the assets of the Corporate Debtor. The contents of the letter are self-explanatory.

13. The submission, which has been pressed by the learned Counsel for the Appellant is that RP has committed error in relying on Section 77 of the Companies Act, 2013. In support of his submission, the learned Counsel has placed reliance on the judgment of Hon’ble Supreme Court in ***Paschimanchal Vidyut Vitran Nigam Ltd. vs. Raman Ispat Pvt. Ltd. – Civil Appeal No.7976 of 2019 – (2023) 10 SCC 60*** and ***State Tax Officer vs. Rainbow Papers Limited – (2023) 9 SCC 545***.

14. Section 77 of the Companies Act, 2013 is as follows:

**“77. Duty to register charges, etc.—**(1) It shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation:

Provided that the Registrar may, on an application by the company, allow such registration to be made within a period of three hundred days of such creation on payment of such additional fees as may be prescribed:

Provided further that if registration is not made within a period of three hundred days of such creation, the company shall seek extension of time in accordance with section 87:

Provided also that any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered.

(2) Where a charge is registered with the Registrar under sub-section (1), he shall issue a certificate of registration of such charge in such form and in such manner as may be prescribed to the company and, as the case may be, to the person in whose favour the charge is created.

(3) 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 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).

(4) Nothing in sub-section (3) shall prejudice any contract or obligation for the repayment of the money secured by a charge.”

15. The learned Counsel for the Appellant submits that definition of ‘secured creditor’ as contained in Section 3(3) and definition of ‘security interest’ in Section 3(31), do not contemplate registration of security interest under Section 77. Section 3(3) and 3(31) are as follows:

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

**(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;”

16. It is true that Section 3(31) does not refer to any registration of charge under Section 77. We may notice the judgment of the Hon’ble Supreme Court in ***Paschimanchal Vidyut Vitran Nigam Ltd. vs. Raman Ispat Pvt. Ltd. - (2023) 10 SCC 60***, which has been relied by learned Counsel for the Appellant. The above was a case where a claim was filed under IBC for government dues. The assets of the Corporate Debtor were attached and in the above context issue arose as to whether Electricity Department is ‘secured creditor’ or not and further in the above context Section 77 of the Companies Act was looked into. In paragraph 43 of the judgment Hon’ble Supreme Court has noted the statutory provisions, wherein it was noted that outstanding dues will be first charge on the assets of the company. Paragraph 43 of the judgment is as follows:

“**43.** By virtue of Section 181(2)(x) of the 2003 Act, State Commissions are empowered to frame regulations. Section 50 empowers the State Commissions to frame the “Electricity Supply Code” to provide for recovery of electricity charges, intervals for billing of electricity charges, disconnection of supply of electricity for non-payment, etc. These provisions in the 2003 Act and the respective Codes form the legal framework for recovery of dues by various kinds of licensees under the 2003 Act. In the present case,

the Uttar Pradesh State Commission had framed the 2005 Supply Code. Clause 4.3(f)(iv) of the 2005 Code is relevant, which inter alia provides as follows:

“4.3. (f)(iv) The outstanding dues will be first charge on the assets of the company, and the licensee shall ensure that this is entered in an agreement with new applicant.””

17. In paragraphs 45 and 46 notes the creation of charge over the assets, which are as follows:

**“45.** As previously stated above, the corporate debtor entered into an agreement with PvnI for supply of electricity on 11-2-2010 which provided that outstanding electricity dues would constitute a “charge” on its assets. [ Clause 5 of the agreement, extracted at para 2.] This was in accordance with Clause 4.3(f)(iv) of the 2005 Code. Clause 8 of the agreement [ Clause 8 of the agreement read as follows: “This agreement shall be governed by the Electricity Act, 2003 with all its amendments, various other laws of India for the time being in force, but not limited to various regulations of UPERC, as applicable to the State of U.P. and shall be subject to the jurisdiction of the Court subordinate to the High Court of Judicature at Allahabad.”] also mentioned that the parties would be governed by the 2003 Act.

**46.** A recent ruling of this Court in K.C. Ninan v. Kerala SEB [K.C. Ninan v. Kerala SEB, (2023) 14 SCC 431 : 2023 SCC OnLine SC 663] examined the circumstances in which such a “charge” could be constituted in law, and held as follows : (SCC para 107)

“107. Consequently, in general law, a transferee of the premises cannot be made liable for the outstanding dues of the previous owner since electricity arrears do not automatically become a charge over the premises. Such an action is permissible only where the statutory conditions of supply authorise the recovery of outstanding electricity dues from a subsequent purchaser claiming fresh connection of

electricity, or if there is an express provision of law providing for creation of a statutory charge upon the transferee.”

This Court held that the creation of a charge need not necessarily be based on an express provision of the 2003 Act or plenary legislation, but could be created by properly framed regulations authorised under the parent statute. In these circumstances, the argument of Pvvnl that by virtue of Clause 4.3(f)(iv) of the Supply Code, read with the stipulations in the agreement between the parties, a charge was created on the assets of the corporate debtor, is merited. A careful reading of the impugned order [Raman Ispat (P) Ltd. v. Paschimanchal Vidyut Vitran Nigam Ltd., 2018 SCC OnLine NCLT 25732] of the NCLT also reveals that this position was accepted. This is evident from the order of Nclat which clarified that Pvvnl also came under the definition of “secured operational creditor” as per law. This finding was not disturbed, but rather affirmed by the impugned order [Paschimanchal Vidyut Vitran Nigam Ltd. v. Raman Ispat (P) Ltd., 2019 SCC OnLine NCLAT 883] . In these circumstances, the conclusion that Pvvnl is a secured creditor cannot be disputed.”

18. The learned Counsel for the Appellant in the above judgment has specifically relied on paragraphs 59, 60 and 61, which are as follows:

“**59.** Lastly, the liquidator had urged that without registration of charge, the same was unenforceable under liquidation proceedings. Section 77 of the Companies Act, 2013 reads as follows:

“77. Duty to register charges, etc.—(1) It shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in such form, on payment of such fees

and in such manner as may be prescribed, with the Registrar within thirty days of its creation:

Provided that the Registrar may, on an application by the company, allow such registration to be made within a period of three hundred days of such creation on payment of such additional fees as may be prescribed:

Provided further that if registration is not made within a period of three hundred days of such creation, the company shall seek extension of time in accordance with Section 87:

Provided also that any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered.

(2) Where a charge is registered with the Registrar under sub-section (1), he shall issue a certificate of registration of such charge in such form and in such manner as may be prescribed to the company and, as the case may be, to the person in whose favour the charge is created.

(3) 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 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).

(4) Nothing in sub-section (3) shall prejudice any contract or obligation for the repayment of the money secured by a charge.”

**60.** Section 78 enacts, that when a company whose property is subject to charge, fails to register it, the charge-holder (or the person entitled to the charge over the company's assets) can seek its registration. Section 3(31) IBC defines “security interest” in the widest terms. In this Court's opinion, the liquidator cannot urge this aspect at this stage, because of the concurrent findings of the NCLT and NCLAT that Pvnvl is a secured creditor.

**61.** The record further shows that after the NCLT passed its order, the appellant preferred its claim on 10-4-2018. Based on that application, the liquidator had filed an application before the NCLT for modification of its order dated 21-8-2018 [Raman Ispat (P) Ltd. v. Paschimanchal Vidyut Vitran Nigam Ltd., 2018 SCC OnLine NCLT 25732] , and contended that Pvvnl also came under the definition of “secured operational creditor” in realisation of its dues in the liquidation proceedings as per law. The application sought amendment of the list of stakeholders. The application was allowed. In view of these factual developments, this Court does not consider it appropriate to rule on the submissions of the liquidator vis-à-vis the fact of non-registration of charges under Section 77 of the Companies Act, 2013.”

19. When we look into paragraph 61, it is clear that Hon’ble Supreme Court did not consider it appropriate to rule on the submissions of the Liquidator, vis-à-vis the fact of non-registration of charges under Section 77 of the Companies Act. The question was thus left open.

20. We in the facts of the present case, proceed to examine the submission of the Appellant as to whether there are any material on record to declare the Appellant as ‘secured creditor’ despite the charge being not registered under Section 77 of the Companies Act. As noted above, the Appellant has not filed any documents proving to create charge on the assets of the Corporate Debtor, except for Sanction letters as noted above as well as letter dated 04.11.2011 referred to as letter of Lien and Set-off. When we look into the definition of Section 3(31), it is clear that 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*

*any obligation and includes mortgage, charge, hypothecation, assignment and encumbrances or any other agreement or arrangement securing payment or performance of any obligation of any person”, no transaction has been placed on record, under which a security interest is created in favour of the Corporate Debtor with regard to assets of the Corporate Debtor. As noted above, mortgages of immovable property and non-agricultural land were mortgages, which were referred in Sanction Letter, were mortgages by Guarantors and no assets of the Corporate Debtor was mortgaged to the Appellant. The Sanction Letter cannot be said to be a transaction, which secures payment or performance of an obligation.*

21. The learned Counsel for the Appellant has also referred the judgment of the Hon’ble Supreme Court in ***State Tax Officer vs. Rainbow Papers Limited – (2023) 9 SCC 545***. In the above case, Hon’ble Supreme Court was considering Section 48 of the Gujarat Value Added Tax Act, 2003, which has been quoted in paragraph 2 of the judgment, which is as follows:

“2. The short question raised by the appellant in this appeal is, whether the provisions of IBC and, in particular, Section 53 thereof, overrides Section 48 of the GVAT Act which is set out hereinbelow for convenience:

**“48. Tax to be first charge on property.**—Notwithstanding anything to the contrary contained in any law for the time being in force, any amount payable by a dealer or any other person on account of tax, interest or penalty for which he is liable to pay to the Government shall be a first charge on the property of such dealer, or as the case may be, such person.”

22. The Hon'ble Supreme Court relying on the aforesaid provision held the State as 'secured creditor'. In paragraph-57, following was held:

“**57.** As observed above, the State is a secured creditor under the GVAT Act. Section 3(30) IBC defines “secured creditor” to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of “secured creditor” in IBC does not exclude any Government or Governmental Authority.”

23. The judgment in the **State Tax Officer**, does not come to any aid to the Appellant.

24. The learned Counsel for the Appellant has also referred to a recent judgment of the Hon'ble Supreme Court in **Greater Noida Industrial Development Authority vs. Prabhjit Singh Soni and Anr. – (2024) SCC OnLine SC 122**. The Hon'ble Supreme Court in **Greater Noida's** case was considering Section 13A of the Uttar Pradesh Industrial Area Development Act, 1976 and on the basis of Section 13, an observation was made that Greater Noida Industrial Development Authority was a operational/secured creditor. The above judgment also does not render any help to the Appellant in the facts of the present case. We, thus, are satisfied that RP did not commit any error in declaring the Appellant as unsecured Financial Creditor. There was no document on the basis of which Appellant could have been declared as secured Financial Creditor of the Corporate Debtor.

25. The next submission of the Appellant is that CIRP period has come to an end, hence, the approval of Resolution Plan subsequently, is without jurisdiction. It is to be noted that 180 days period came to an end on

13.08.2023. In the 7<sup>th</sup> CoC Meeting a decision was taken to file an Application for exclusion for 23 days, which Application was filed by the RP on 11.08.2023. The Adjudicating Authority in the impugned order has noted Form-H, where at Item No.15, the RP has stated following:

| <b>Sl. No.</b> | <b>Particulars</b>                                                    | <b>Description</b>                                                                                                                                                                      |
|----------------|-----------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1              | Name of CD                                                            | Privilege Industries Limited                                                                                                                                                            |
| 2              | Date of Initiation of CIRP                                            | February 15, 2023                                                                                                                                                                       |
| 3              | Date of Appointment of IRP                                            | February 15, 2023<br>(order received on February 20, 2023)                                                                                                                              |
| 4              | Date of Publication of Public Announcement                            | February 22, 2023                                                                                                                                                                       |
| 5              | Date of Constitution of CoC                                           | March 14, 2023                                                                                                                                                                          |
| 6              | Date of First Meeting of CoC                                          | March 20, 2023                                                                                                                                                                          |
| 7              | Date of Appointment of RP                                             | March 31, 2023 (order received on April 18, 2023)                                                                                                                                       |
| 8              | Date of Appointment of Registered Valuers                             | April 28, 2023                                                                                                                                                                          |
| 9              | Date of Issue of Invitation for EoI                                   | May 6, 2023                                                                                                                                                                             |
| 10             | Date of Final List of Eligible Prospective Resolution Applicants      | May 29, 2023                                                                                                                                                                            |
| 11             | Date of Invitation of Resolution Plan                                 | May 6, 2023; May 25, 2023; June 28, 2023; July 5, 2023                                                                                                                                  |
| 12             | Last Date of Submission of Resolution Plan                            | July 21, 2023                                                                                                                                                                           |
| 13             | Date of Approval of Resolution Plan by CoC                            | August 23, 2023                                                                                                                                                                         |
| 14             | Date of Filing of Resolution Professional with Adjudicating Authority | August 30, 2023                                                                                                                                                                         |
| 15             | Date of Expiry of 180 days of CIRP                                    | September 4, 2023<br>(considering 23 days exclusion of timelines sought per application filed with Hon'ble NCLT, Mumbai Bench on August 11, 2023 with efilings number 2709138069142023) |

|    |                                            |                                                                                                                                                                                                                                                                                                                                     |
|----|--------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 16 | Date of Order extending the period of CIRP | Not applicable                                                                                                                                                                                                                                                                                                                      |
| 17 | Date of Expiry of Extended Period of CIRP  | Not applicable                                                                                                                                                                                                                                                                                                                      |
| 18 | Fair Value                                 | RV1 – INR 272 crores<br>RV2 – INR 294 crores<br>Average – INR 283 crores                                                                                                                                                                                                                                                            |
| 19 | Liquidation value                          | RV1 – INR 205 crores<br>RV2 – INR 220 crores<br>Average – INR 213 crores                                                                                                                                                                                                                                                            |
| 20 | Number of Meetings of CoC held             | 7 CoC meetings held on the following dates<br>1 <sup>st</sup> CoC – March 20, 2023;<br>2 <sup>nd</sup> CoC – May 5, 2023;<br>3 <sup>rd</sup> CoC – May 30, 2023;<br>4 <sup>th</sup> CoC – June 26, 2023<br>5 <sup>th</sup> CoC – July 27, 2023;<br>6 <sup>th</sup> CoC – August 7, 2023;<br>7 <sup>th</sup> CoC – August 22, 2023;” |

26. The Adjudicating Authority, thus, was very well aware that Application has been filed for extension on 11.08.2023 and the Plan was approved on 23.08.2023. The mere fact that no formal orders were passed on that Application are not sufficient to set aside the impugned order on this ground. It is to be noted that 13.08.2023 was a date when 180 days was expiring. Present is not a case that there was any other extension claimed for. The Adjudicating Authority after noticing the aforesaid fact, approved the Resolution Plan, which makes it clear that Adjudicating Authority did not find any infirmity in approval of the Resolution Plan on 23.08.2023. In any view of the matter, exclusion having been prayed for and no order having been passed by the Adjudicating Authority on the said extension, no infirmity can be found on that ground and we are of the clear view that exclusion as prayed for was fully admissible and is required to be granted.

27. We, thus, do not find any error in order of the Adjudicating Authority approving the Resolution Plan and allowing IA No.4004 of 2023 filed by the RP. There is no merit in the Appeal. The Appeal is dismissed. No order as to costs.

**[Justice Ashok Bhushan]**  
**Chairperson**

**[Barun Mitra]**  
**Member (Technical)**

**NEW DELHI**

**16<sup>th</sup> April, 2024**

Ashwani