

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal(AT) (Insolvency) No. 830 of 2019

IN THE MATTER OF:

Indiabulls Housing Finance Ltd.

M-62 & 63, First Floor,
Connaught Place,
New Delhi-110 001

...Appellant

Vs

1. **Mr. Samir Kumar Bhattacharya**

Resolution Professional
Network Industries Ltd.
104, S.P. Mukherjee Road
Kolkata -700 026

....Respondents

2. **Gloster Ltd.**

21, Strand Road
Kolkata-700 001

Present:

For Appellant: Mr. Sumesh Dhawan, Ms. Vatsala Kak, Advocates

For Respondents: Mr. Kanwal Chaudhary, Advocate for Respondent No. 1.

Mr. Anil Agarwalla, Ms. Neha Sharma and Mr. Mahesh agarwalla, Advocates for Respondent No. 2.

ORDER

18.12.2019 Heard learned Counsel for the Appellant as well as for the Respondents.

2. It is stated that Corporate Insolvency Resolution Process (in short CIRP) was initiated against Network Industries Ltd situated at Kolkata in which Resolution Plan was submitted by the Respondent No. 2- Gloster Ltd which came up for approval before the Adjudicating Authority (National Company Law Tribunal) Kolkata Bench, Kolkata and it was approved by Impugned Order dated

04.07.2019. The present appeal has been filed by the Appellant against the acceptance of the Resolution Plan.

3. It is the case of the Appellant that the Appellant was treated as Unsecured Financial Creditor in the Resolution Plan although according to the Appellant, the Appellant should have been treated as a Secured Financial Creditor. Learned Counsel for the Appellant has argued that the Appellant had given loan to the Corporate Debtor sometime in 2012 and against the loan provided, Title Deed of Anuj Chambers belonging to the Corporate Debtor were handed over to the Appellant and thus it is stated that the equitable mortgage had been created. Learned Counsel states that when CIRP started, the Appellant filed the claim before the Resolution Professional-Respondent No. 1 but the Resolution Professional treated the Appellant as Unsecured Claimant on the basis that the Charge was not created under Section 77 of the Companies Act, 2013. Learned Counsel referred to the Minutes of Third Meeting of the Committee of Creditors (in short CoC) (Annexure-A4 page-55) to submit that although the Resolution Professional placed the matter before the CoC and the claim was discussed the Appellant was accepted as a Financial Creditor, but, only on the basis that the Charge was not registered, CoC did not accept the Appellant as a Secured Financial Creditor. Reference is also made to the 9th Meeting of the CoC (Annexure-A7, page-81) which was dated 29.05.2019 to state that even in that meeting where the Resolution Plan came to be approved, the Appellant had raised the same objection that it should be treated as Secured Financial Creditor but the CoC did not accept the demand of the Appellant and the Appellant was treated as Unsecured Financial Creditor. Learned Counsel for the Appellant

submits that as per Section 77 of the Companies Act, 2013, it was the responsibility of the Corporate Debtor to get the Charge registered and thus the Appellant could not be made to suffer. It is argued that in spite of this, the Appellant applied to ROC on 05.12.2018 for registering its charge and when ROC pointed out that Delay Condonation Application was required, the same was filed on 19.07.2019 and the Charge has now been registered on 03.10.2019. Submission of the learned Counsel for the Appellant is that the Appellant should be treated as Secured Financial Creditor.

4. Learned Counsel for the Resolution Professional states that the deliberation as noted in the above two meetings of CoC show that the CoC consciously considered the claim which was being made by the Appellant but going by the provisions it was not found that the Charge was registered and so the Appellant was not treated as Secured Financial Creditor and was treated as Unsecured Financial Creditor and this should not be distributed. It is stated that the Resolution Plan was approved by the Adjudicating Authority on 04.07.2019 and not only it has been approved but it has also been implemented. The learned Counsel submits that the Appellant participated in the 3rd Meeting as well as in the 9th Meeting of the CoC and in spite of that did not move the Adjudicating Authority. If the Appellant had a grievance, even when the Resolution Plan was under consideration of the Adjudicating Authority, even at that time, the Appellant did not file any Application or raise any grievance that the Appellant should be treated as a Secured Financial Creditor. Learned Counsel states that the Appeal has been filed directly in this Tribunal without getting adjudication on the subject from the Adjudicating Authority. Learned Counsel states that the

Resolution Plan has already been executed and any interference at this stage would create difficulties in the process and the resolution which has already been implemented.

5. Learned Counsel for the Respondent No. 2 referred to Sections 77 and 78 of the Companies Act, 2013 to submit that when a Charge is created, the Company creating Charge and Charge holder both are required to get the Charge registered and if the concerned Company fails to register the Charge within given period of 30 days from the date of creation of Charge, (referring Section 78 of Companies Act, 2013) there is an option even for the Charge Holder to move ROC and get the Charge registered. It is the submission that no such steps had been taken till CIRP started. The benefit cannot be taken by such Creditor. Learned Counsel refers to the Judgment in the matter of “**Oil and Natural Gas Corporation Ltd. Vs. Official Liquidator of Ambica Mills Co. Ltd. and Ors.**” -MANU/SC/0319/2014. She referred to paragraph-20 of the Judgment where the Hon’ble Supreme Court referred to its judgment in the matter of “**Indian Bank Vs. Official Liquidator, Chemmeens Exports(P) ltd. and Ors.**” It is argued that Hon’ble Supreme Court referred to Section 125 of the Old Companies Act which was discussed in the judgment of “**Indian Bank Vs. Official Liquidator, Chemmeens Exports(P) ltd. and Ors.**” and paragraph-7 of that judgment was reproduced by the Hon’ble Supreme Court which reads as under:

....

“7. On a plain reading of Sub-section (1) it becomes clear that if a company creates a charge of the nature enumerated in sub-section (4), after 1-4-1914 on its properties, and fails

to have the charge together with instrument, if any, by which the charge is created, registered with the Registrar of the Companies within thirty days, it shall be void against the liquidator and any creditor of the company. This, however, is subject to the provisions of Part V of the Act. The proviso enables the Registrar to relax the period of limitation of thirty days on payment of specified additional fees, on being satisfied that there has been sufficient cause for not filing the particulars and instrument or a copy thereof within the specified period. Sub-sections (2) and (3) deal with repayment of money secured by the charge. Sub-section (2) provides that the provision of Sub-section (1) shall not prejudice the contract or obligation for repayment of money secured by the charge and Sub-section (3) says that when a charge becomes void under that section, the money secured shall become payable immediately. Though as a consequence of no-registration of charge under Part V of the Act, a creditor may not be able to enforce the charge against the properties of the company as a secured creditor in the event of liquidation of the company as the charge becomes void against the liquidator and the creditor, yet he will be entitled to recover the debt due by the company on a par with other unsecured creditors. It is also evident that Section 125 applies to every charge created by the company on or after 1-4-1914. But where the charge is by operation

*of law or is created by an order or decree of the court,
Section 125 has no application.”*

...

6. On the basis of this, learned Counsel submits that if under the general law the Creditor could not take benefit then under the IBC, it could not be taken.

7. Having heard learned Counsel from both the sides, who made submissions as above, it would be appropriate to reproduce the discussion which took place in CoC in the 3rd Meeting (Annexure-A4 Agenda-5- page-61) which portions are as under:

...

“The RP updated the COC members that none of the factories of CD are running as on date and CD had initially not disclosed their office property at Anuj Chambers to RP and his team. It was only when India Bulls filed their claim of Loan against property of Anuj Chambers, that RP was able to identify Anuj chambers as property of CD. CD had not mentioned the loan from India bulls neither their asset at Anuj Chambers in their books of account. However, India Bulls finance Ltd has not yet created any charge on the assets funded by them and a charge needs to be created by India Bulls as per process.”

...

“RP asked India bulls representative why they have not created charge on funding of CD against their property to which India Bulls representative replied that they have a

separate team at their head office and they are looking into the matter. RP and his team said that as per law, RP is supposed to take cognizance of only those assets which are included in the financial statements, but this was only with investigative process followed by RP, that the existence of this asset as financed by India Bulls came into cognizance of RP. RP said that basis the recasting of financials of CD, the acknowledged claims and assets are being taken into consideration, however, until and unless the creditors come up with their claims with the stipulated timeframe, taking cognizance of unknown claims remains a challenge.

RP and his team also read to the COC the provisions of section 71 of IBC pertaining to fines on CD for falsifying the books of the corporate debtor to which the COC members said that similar provision is there u/s 65 of IBC for concealment of property to which RP and his team said that the same can be challenged at NCLT and NCLAT if so required.”

...

8. Reference also needs to be made to the portion of the discussion which was placed in the 9th Meeting (Annexure-A7-Agenda-4, page-81) which reads as under:

.....

“ AGENDA-4

....

India Bulls Housing Finance Ltd representative queried why their claim was being considered as unsecured, though they have equitable mortgage on the assets (Office at Part Street-Anuj Chambers) of the Corporate Debtor (CD) and was thus a secured creditor, to which RP replied that their charge was not registered with ROC (Registrar of Companies), and this was well communicated to India Bulls representatives in the -3rd CoC meeting dated 03.01.2019, that the claim of India Bulls Housing Finance will be considered as Unsecured, until and unless they get their charge registered with ROC. RP read out the extracts of the minutes of 03rd CoC meeting highlighting Agenda -5 of the 03rd CoC minutes, wherein the reasons of considering the exposure of India bulls Housing Finance on CD as unsecured was clearly mentioned highlighting the fact that “India Bulls Housing Finance had not created any charge on the assets of CD founded by them, and a charge needs to be created by India Bulls as per process. Moreover, CD had not mentioned the loan from India Bulls neither their asset at Park Street (Anuj Chambers), in their Books of accounts. It was also mentioned in the 03rd CoC meeting minutes dated 03.01.2019, that as per law, RP is supposed to take cognizance of only those assets which are included financial statements of the CD, and it was only with the investigative process followed by RP, that the existence of

the office of CD (Anuj Chambers) as financed by India Bulls came into Cognizance of RP”. India Bulls representative conveyed that since they have an equitable mortgage on the assets of the CD, registering their charge with ROC is not required for consideration as Secured Creditor as per IBC. SIDBI representative conveyed that as CD had not mentioned the assets as founded by India Bulls in their Balance sheet, and also since the debt of India Bulls was not appearing in the Balance sheet of the CD and India bulls also had not registered their charge with ROC despite given such a long period since 3rd CoC meeting to regularize the creation of charge, the liability thereby itself is not acknowledge as per companies Act.”

...

9. It is thus clear that the CoC had made it clear that in absence of Charge being registered, the Appellant could not be treated as Secured Financial Creditor. Although the transaction is stated to be of 2012, it is clear that the Charge was not got registered either by the Corporate Debtor or the Appellant till now on 03.10.2019 which is after the Resolution Plan was approved on 04.07.2019. Section 77 of the Companies Act, 2013 required the Charge to be registered and the Appellant had an option to resort to even Section 78 of Companies Act, 2013, if there were any grievances. Not having done so, when CIRP started trying to rely on the equitable mortgage without a charge created, we do not find there was any error in the CoC meetings which in its wisdom did not recognize creation of security. The transaction did not even reflect in the

Books of Account of the Corporate Debtor. Appellant should be happy that it has been at least treated as Financial Creditor. Appellant took no actions since 2012 and till late stage of CIRP. Charge registered after Resolution Plan is approved cannot be considered.

10. We do not find any reason to interfere now in the Appeal directly filed before us without subject having been taken up with the Adjudicating Authority at any earlier time nor when the Resolution Plan was being discussed. In the circumstances, we do not find any substance in the appeal. The appeal is dismissed. No costs.

[Justice A.I.S. Cheema]
Member (Judicial)

(Kanthi Narahari)
Member(Technical)

Akc/Md.