NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

M.A. NO. 310 OF 2020

Under Section 60(5) of IBC, 2016.

Filed by:

Mr. Ravi Shankar Devarakonda,

Liquidator of RTIL Ltd.

...Applicant

versus

Finquest Financial Solutions Private Limited

602, Boston House, Suren Road, Andheri (East), Mumbai, Maharashtra 400093

...Respondent

APPEAL NO. 733 OF 2020

Filed by:

J.M. Financial Asset Reconstruction Company Limited

7th Floor, Cnergy, Appasaheb Marathe Marg, Prabhadevi, Mumbai – 400025

...Appellant

versus

1. **Ravi Shankar Devarkonda**

   Liquidator of RTIL Limited
   Marathon Innova IT Park, B2/501 &
   C-501, 5th Floor, Off. G.K. Marg,
   Lower Parel (West), Mumbai 400013

2. **Finquest Financial Solutions Private Limited.**
   602, Boston House, Suren Road, Andheri (East), Mumbai, Maharashtra 400093

3. **Edelweiss Asset Reconstruction Company Ltd.**

   15th Floor, Edelweiss House, Off. C.S.T. Road, Kalina, Mumbai – 400098

...Respondents

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In the matter of

COMPANY PETITION NO. 382/IB/MB/2018

Edelweiss Asset Reconstruction Company Ltd.
15th Floor, Edelweiss House, Off. C.S.T. Road, Kalina, Mumbai – 400098

.....Financial Creditor

versus

RTIL Limited
Marathon Innova IT Park, B2/501 & C-501, 5th Floor, Off. G.K. Marg, Lower Parel (West), Mumbai 400013

.....Corporate Debtor

Order delivered on: 17.03.2020

Coram:

Hon'ble Shri Bhaskara Pantula Mohan, Member (Judicial)

Hon'ble Shri Shyam Babu Gautam, Member (Technical)

Appearance:

For the Applicant: Ms. Sandhya Iyer and Ms. Pratiksha Agrawal, Advocates i/b Vaish Associates

For the Respondent: Mr. Gaurav Joshi a/w Mr. Nishit Dhruva, Mr. Rohan Agrawal, Ms. Swati i/b MDP & Partners

For J.M. Financial Solutions: Mr. Rohit Gupta a/w

Per:

Hon'ble Shri Bhaskara Pantula Mohan, Member (Judicial)

Hon'ble Shri Shyam Babu Gautam, Member (Technical)

ORDER

1. This is an appeal filed by J.M. Asset Reconstruction Company Limited (hereinafter called as the "Appellant"), who is one of the secured creditors inter alia amongst others of RTIL i.e. the company

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in liquidation (hereinafter called as the "corporate debtor"). Mr. Ravi Shankar Devarakonda (hereinafter called as "Respondent No. 1) is the liquidator of this company. Finquest Financial Solutions Private Limited (hereinafter called as "Respondent No. 2") is also a secured creditor of the corporate debtor.

2. The counsel for the Appellant mentioned that a M.A. under Section 60(5) r/w Section 52 of the Insolvency and Bankruptcy Code, 2016 and Regulation 37 of the IBBI Liquidation Process Regulations, 2016 was filed seeking to allow Respondent No. 2 to sell and dispose of the secured assets situated at Mysore belonging to the corporate debtor for enabling them to realize their security intertest. This application was allowed with a direction to handover symbolic possession of fixed assets of the corporate debtor to Respondent No. 2 to enable it to proceed to sell the same. Therefore, being aggrieved by this order dated 10.05.2019, an appeal was been preferred by them before the Hon'ble National Company Law Appellate Tribunal (NCLAT) by urging that the said order was passed without appreciating the fact that the Respondent No.2 has proceeded to pursue.

3. This appeal was allowed with a direction to Respondent No.1 to act in terms of Section 52(3) and find out as to who has the first charge over the said property from the records maintained by an information utility or as may be specified by the board and pass an appropriate order. By the said order dated 11.12.2019, it was categorically directed that in the event of any dispute pending before the court of law in respect of the adjudication of an exclusive first charge, the Respondent No.1 was directed to inform the same to the parties and proceed as per provision of Section 52(3) of the Insolvency and Bankruptcy Code, 2016.

4. The following reliefs have been sought by the Appellant in this appeal:
   i. Set aside and/or quash the decision of Respondent No. 1 dated 19.02.2020
   ii. Reject the M.A. 310 of 2020 filed by Respondent No. 1 wherein a direction to handover possession, overall control and supervision of the said property to Respondent No. 2;

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iii. Pending this appeal, stay of the effect and operation of the decision dated 19.02.2020;

iv. Cost of the appeal.

5. In view of the same, the very first point raised by the Appellant was whether in view of finding of Hon'ble NCLAT in Paragraph 39 r/w Paragraph 42 of the Order, it was open to the Liquidator to pass the Impugned Order? The counsel for the Appellant argued that the issue of handing over was once decided by this Hon'ble Tribunal on 10.05.2019 by an order which was challenged by them before the National Company Law Appellant Tribunal ("NCLAT") and the same was set aside by order dated 11.12.2019 in Appeal No. 593 of 2019 wherein various findings have been given by the Hon'ble NCLAT one of which was specifically cited being crucial and important for the purpose of this Appeal, which is as follows:.

"39. As in the present case, we find that all the 'Secured Creditors' have claimed right over the same secured asset, which is 91% of the total secured asset and particularly when a suit is pending for declaration, as to which 'Secured Creditors' has the first charge, in such a case, it was not open to the Adjudicating Authority to allow the application filed by the 1st Respondent to realise the 'security interest' under Section 52.

The counsel for the Appellant argued that, upon bare perusal of this paragraph it can be clearly demonstrated that the Appellate Tribunal was of the view that in this case, all the Secured Creditor have claimed right over the same Secured Assets and a suit is pending as to which Secured Creditor has the first charge and in such a case it was not open to the Adjudicating Authority to allow the Application. Therefore, in no uncertain terms the Appellate Tribunal has held, after taking note of the fact that Suit is pending, no such permission of standing out can be granted.

The counsel also mentioned that the Appellate Tribunal had set aside the order on the ground that this Tribunal has no Jurisdiction to grant such a relief and as a consequence of this, the matter was remitted back and has limited the scope of enquiry as set out in paragraph 42 of the Order. The said paragraph is reproduced herein below:

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"42. The matter is remitted to the Liquidator to proceed in accordance with law, following Section 53 r/w Section 52 of the I&B Code. If one or more 'Secured Creditors' have not relinquished the 'security interest' and opt to realise their 'security interest' against the same very asset in terms of Section 52(1)(b) r/w Section 52(2) & (3), the Liquidator will act in terms of Section 52(3) and find out as to who has the 1st charge ('security interest') from the records as maintained by an information utility or as may be specified by the Board and pass an appropriate order. If any dispute is pending before the Court of Law, the question as to who has the exclusive 1st charge, the Liquidator may inform the same to the parties and may proceed as per Section 52(3) of the I&B Code. The Appeal is allowed with the aforesaid observations and directions. No costs.

The counsel for the appellant further mentioned that these findings clearly demonstrates that the Tribunal has held that Liquidator shall decide in accordance with Section 53 and Section 52 and has directed the Liquidator to find out who has the First Charge. Therefore, the direction of the Tribunal given in paragraphs 39 and 42 clearly indicates that if the Suit is pending, such application should not be granted. The Liquidator was to adjudicate who all have first charge. As far as, exclusive first charge is concerned and issue related to that, if pending in any court of law, the Liquidator could not have then decided on the same and in that event the Liquidator was required to inform the same to the parties as here, there are more than two creditor who has first charge the dispute as to who has exclusive first charge is pending before the court of law i.e. suit filed by Finquest.

6. The next point raised by the Appellant was regarding who can make request for standing outside liquidation proceedings and whether Finquest is a Secured Creditor or not, in view of the fact, that mortgage is created in favour of Trustee Company and not in favour of Finquest? The counsel mentioned that it is an admitted position and evident from Liquidator's MA more particularly page 52 and 53 that mortgage and charge both were created in favour of IDBI acting in capacity as Trustee. He further relied on Section 52 which allows

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"Secured Creditors to take this decision to stand in liquidation or outside liquidation" and therefore stated that in order to take such a step one has to be a Secured Creditor. The word Secured Creditor is defined in Section 3(30) which reads as follows;

> *"Section 3(30) – Secured Creditor means a creditor in favour of whom Security Interest is created".*

Accordingly, the word Security Interest is defined in Section 3(31) which reads as follows:

> *"Section 2(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 secured payment or perfrormance 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."*

In view thereof, one has to have mortgage in its favour and in this case, a mortgage is in favour of the Trustee, Finquest merely being a beneficiary and unless beneficiary decides to discharge the Trustees, he cannot be permitted to independently come and claim any such rights and take decision in this manner.

The counsel for the Appellant further stated that it would be absurd to suggest that because the debt is due to Finquest, mortgage can also be assumed to be created in favour of Finquest. This is common banking practice were mortgage is in favour of Trustees. In fact, the Trustee is permitted to take measures for enforcement under RDDB Act, 1993 as well as SARFAESI Act, 2002. The counsel stated that the Liquidator ought to analyze this basic thing that the mortgage is in favour of Trustee and no request is made by the Trustee within 30 days but has not applied his mind at all.

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7. Further the issues raised by the Appellant were whether the word Secured Creditor used under Section 52 of the Code would mean only "First Charge holder" or also "Second Charge holder"? and whether a first charge holder can only decide to stand outside liquidation proceedings or consent from other Secured Creditor having second charge is also required?

The Appellant herein, claims to be a First Charge holder which the Liquidator also admits but it is the case of Liquidator that charge in favour of ITSL/ Finquest is created before the charge of Appellant, Edelweiss and L&T. However, it is not in dispute and cannot be disputed that if not first charge there is a second charge and there is a mortgage. The issue then falls for consideration that whether only at the request of Finquest this property can be excluded from the liquidation process or even consent of other creditors is required and in order to consider this issue, the language of section 52

"52. Secured creditor in liquidation proceedings – (1) A secured creditor in the liquidation proceedings may"

The counsel mentioned that upon perusal of this provision, it is found that the legislature has used the word Secured Creditor and by doing so has not carved out any difference amongst the Secured Creditor as first charge holder or second charge holder and in fact, the provision reads as if it can be done only by one Secured Creditor having exclusive charge. Further, the language used in provision would include all Secured Creditor irrespective of their priority of charge. Priority of charge inter-se will come into consideration only at the time of distribution of sale proceeds. However, at the time of deciding the issue of standing in or out of Liquidation Proceedings or deciding application made under section 52 the Liquidator cannot decide by categorizing or taking into consideration only the first charge holder. It was submitted that whether it is first charge or second charge, there is mortgage created in favour of both the parties and both are Secured Creditors.

The counsel also cited the decision of Hon'ble Gujarat Court as well as before Hon'ble Delhi High Court which are as following:

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1. **Bokiyu Tanneries Ltd.** (2006) (89) BRJ (513) (para 16);
2. **Industrial Development Bank of India Vs OL of M/s. Rustom Mills and Industries Ltd. & 7 Ors** (CA No. 657 of 2006) (para 5,6)
3. **Textile vs OL of Arbuda Mills Ltd.** (Appeal No.110 of 2008) (para 1, 2)
4. **Gujarat Steel Tube Employee Union Vs O.L. of Gujarat Steel Ltd ors.** (Manu/GJ/0377/2012)

wherein the courts, while interpreting Section 529 and 529A of companies Act 1956 which is pari materia to Section 53 of the Code, have held that when the legislature has used the word "Secured Creditor", one cannot distinguish it to be first charge or second charge. The courts have further held that it is only on distribution of sale proceeds that the first charge holder will receive first. In view thereof unless all creditors consent, there is no question of standing outside liquidation proceedings.

8. The nest point raised was whether in view of pendency of the Suit the Liquidator could have adjudicated the issue and decided the priority and permitted Finquest to stand outside winding up proceedings?

The Appellant submitted that Suit No.84 of 2013 filed by Finquest raises issue before the court regarding the priority of charge. He submitted that UCO Bank who is assignor of Appellant herein has filed its Written Statement and disputed the exclusive charge. The issue is not yet decided. The suit is still pending. It is not withdrawn by Finquest.

He relied on paragraph 20 of the order dated 11.12.2019 of the Hon'ble NCLAT which runs as follows

"20. The Adjudicating Authority in the impugned order dated 10th May, 2019 has persuade the copy of Suit No.84 of 2013 filed in the Court of Civil Judge, Sr. Division at Nanjangud, Karnataka by IDM as a first charge mortgage for enforcement of their 'security interest'. The written statement filed therein on 19th September, 2013 by UCO Bank and case status was also noticed. Though, the aforesaid facts were noticed by the Adjudicating Authority, it has not deliberated into issue whether in such

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circumstances, while there Is a pendency of the suit, stated to be filed by 1st Respondent-Finquest Financial Solutions Private Limited (Assignee), it was proper for it to pass any order on such issue of first charge over the secured assets in question.

Therefore, the counsel for the appellant mentioned that the decision of the Liquidator finds to be an erroneous one when para 20 and 39 are read conjointly with para 42 as this issue could not have been decided and the Liquidator could not tender it's fining in this manner without appreciating the evidence in record.

9. The next three points which have been dealt by the Appellant are as follows:

i. Whether the Liquidator can travel beyond the decree /judgment passed by a Competent Court/ Tribunal and decides contrary to the said judgment?

ii. Whether in view of order passed by DRT in O.A. No. 711 of 2015 the Liquidator could have passed this order?

iii. Whether in view of order passed by DRT in O.A. No. 501 of 2014 dated 4th September 2017 the Liquidator could have pass this order

While addressing these points, the Appellant submitted that it is a Asset Reconstruction Company and along with other banks/ ARCs had applied to the Debt Recovery Tribunal (DRT) which is the competent forum having exclusive Jurisdiction to adjudicate its claims by filing suits/OA. The DRT adjudicated and decided on the mortgage created in favour of Appellant/other banks/ ARC. This is decided in OA No. 711 of 2016 and as well as OA No. 501 of 2014. The Tribunal passed an order on 04.09.2017 in O.A. No. 501 0f 2014 in which Finquest through its assignor as well as ITSL were parties. The Tribunal declared mortgage in favour of the Appellant. Similarly, Recovery Certificate was issued in O.A. No.711 of 2015. The Tribunal in that order also ordered for sale of Mysore Immovable property. The NCLAT also made following observation in respect of these orders:

"21. From the record we find that a Recovery Certificate has been issued by the Debts Recovery Tribunal in O.A. No.711/2015. wherein it has been ordered that Edelweiss

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Asset Reconstruction Company, along with other Banks are entitled to recover a sum of Rs.2495,49,98,442.20/-. It was further ordered that in case of failure to pay the said amount within 30 days, i.e., by 19th January, 2017 they are entitled to recover the same from the sale of the scheduled properties, which includes the immovable property of the 'Corporate Debtor' at Mysore."

Relying on this, the counsel for the Appellant mentioned that the Tribunal competent to adjudicate the dues and charge of the Appellant has adjudicated the same and therefore, it is binding on the Liquidator as well as Finquest. The Liquidator cannot bypass the decree passed by this competent forum having Jurisdiction to do so. The counsel allegedly mentioned that this Impugned Order travels beyond the decree passed by competent court.

10. Next points raised and dealt by the Appellant was whether there is any provision under the Code which allows or provides for handing over of possession to the Secured Creditors, if the Secured Creditor chooses to stand outside winding up proceedings?

The counsel for the Appellant stated that neither the Insolvency Code nor any other law anywhere provides that if the Creditor stands outside liquidation then the Liquidator is required to handover the possession to the Creditor. Also, Section 52 or Regulation nowhere provides for mechanism to handover possession and therefore, there is no way the Liquidator can handover possession. Even Finquest has not shown any authority under law to take possession or custody of the property. For example, a bank or ARC can take possession from Liquidator under the provisions of SARFAESI Act, 2002. However, in this case there is no such mechanism which Finquest has adopted. Therefore, the Application of Liquidator to handover possession is thoroughly misconceived and no possession is required to be handover irrespective of whether we allow or dismiss the present Appeal.

While dealing with the next point whether in view of the order of Hon'ble NCLAT the decision of Liquidator is valid or not?, the counsel for the Appellant submitted that the decision of the Liquidator is contrary to the order of the Hon'ble NCLAT in

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paragraphs 20, 21, 39 and 42 which the Liquidator has failed to comply. Para 20 states that the fact of suit being pending is required to be considered, paragraph 21 states that the order by DRT is required to be considered. Para 39 states that if suit is pending, the court should not allow application for standing out, however, the Liquidator allowed that. In paragraph 42 the Hon'ble NCLAT has said that if the suit is pending then Liquidator shall convey to the parties. But the Liquidator still allowed the request. Also, the Liquidator was required to pass an Order but has proceeded to file Misc. Application No. 310 of 2020 on 24th January 2020 and passed order only on 19.02.2020.

11. Whether the Act of Liquidator of passing judgment on 19th February 2020 i.e. after filing Misc. Application is proper and bonafide or not?.

While dealing with this issue, the counsel for the Appellant stated that the order of Liquidator should have been passed before filing the MA requesting this Tribunal to handover possession but proceeded to file the MA without deciding the matter. The order was passed on 19th February 2020 which is after commencement of submission in the MA.

The order was treated as merely a Ministerial Act, whereas that was the most important part required to be complied before filing the application. This shows not just non-compliance of order of NCLAT, but also complete negligence and high handedness on the part of Liquidator.

12. The counsel for the Appellant stated that without prejudice what is set out above, even if it is considered that Finquest is the first charge holder, in that event also the question arises as to whether the Liquidator has performed its obligations and duties as set out in Regulation 37? But the fact remains that the Liquidator though before the order dated 10.05.2019 took steps as per Regulation 37, however, after the order of Hon'ble NCLAT, has not complied with the same when the matter was remitted and has not taken any steps for inviting offers and even if made were made with conditions to sign the non-disclosure first and the parties were told to finish the process in a time period of 10-15 days only. Therefore, on this ground itself, the MA filed by the Liquidator deserves to be rejected.

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13. The last two points raised by the Appellant were as follows:

    i. Whether the Finquest can sell the properties and granting such permission to stand out will serve the purpose under the code?

    ii. Whether the offer by Finquest to buy the property through its 100% subsidiary is a bonafide offer or not?

The counsel for the Appellant has dealt with these two issues together. He mentioned that upon perusal of provision of Code as well as Regulation clearly shows whether the creditors stand in liquidation proceeding or stand outside liquidation proceedings, the property is to be sold by the Liquidator in case a creditor is standing in Liquidation proceeding, whereas when the creditor is standing outside liquidation proceedings the property is to be sold by the creditor. For a creditor to sell a property, he has to proceed in accordance with such law as applicable to the security interest which is clear from Section 52(4) which is quoted as below;

> *"Section 52(4): A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it."*

Also, it is a settled legal position that mortgage cannot be enforced without intervention of the Court unless it is registered / English mortgage where parties agrees to do so. In the present case there is none. Therefore, there is no proceeding on manner in which Finquest can sell the property and thus, this is nothing but an attempt to take physical control over the asset.

Even the offer made as per Regulation 37 is made by none other than a subsidiary of Finquest created to a textile name only for the purpose of complying with Regulation 37. It is only the Liquidator who can sell the property and not Finquest in present circumstances. Therefore, the Liquidator has completely failed to appreciate the entire mechanism and has casually allowed this request.

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14. The counsel for the Appellant also mentioned that in the course of arguments, it was sought to be canvassed that Finquest is incurring Rs.2 Crores per month for keeping the Corporate Debtor (in liquidation) as a going concern. This can never be the basis for deciding application to stand out of liquidation proceedings. Just because some creditor has contributed towards up keep of the property, will not entitle that creditor to take away the property. In any event, it is demonstrated that how sale by liquidator will prejudice Finquest. The counsel submitted that in the aforesaid facts and circumstances, the Impugned Order passed by the liquidator is contrary to the provisions of law and therefore is incorrect and bad in law and is required to be quashed and set aside and the Miscellaneous Application being MA No. 310 of 2020 is required to be rejected with orders as to compensatory cost.

15. On the other hand, Finquest as well as the Liquidator have also represented in this matter and has made submissions on their behalf. Finquest is challenging this Appeal No. 733 of 2020 and supporting the M.A. 310 of 2020 filed by the Liquidator. Both of them have commonly paid reliance on the order of Hon'ble NCLAT 11.12.2019 in Company Appeal (AT) (Insolvency) No. 593 of 2019 filed by the Appellant challenging this Bench's order dated 10.05.2019 whereby inter alia the Liquidator was directed to ascertain and determine as to who has the security interest and follow the procedure in accordance with Section 53 read with Section 52 of the Code. They stated that the Liquidator, in accordance to this, had determined that Finquest is having the first charge in respect of "right, title and interest of the Corporate Debtor in the movable fixed assets and the immovable property situated at Thandavapura Village, Hobli Chikkaianachalra, Taluka Nanjangud, Dist. Mysore, Karnataka" and therefore, Finquest is entitled to realise the said property under the provisions of Section 52 of the Code read with the relevant Regulations framed thereunder. They further stated that it is to be noted that the findings of this Tribunal in the said order dated 10.05.2019 were not set aside.

16. The Senior Counsel appearing for the Finquest also submitted that one of the methods for the Liquidator, as per the Regulation 21(b), to ascertain and for a Secured Creditor to prove its security interest us by considering certificate of registration of charge issued by the Registrar of

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Companies. He further stated that in the aforesaid background, it is relevant to note that JM has relied on the index of charges of the Corporate Debtor in the Appeal at Pages 166 and 167 therein. The said index of charges evidently demonstrates that Finquest has a charge created on the property of the Corporate Debtor on 31/07/2008 and on 17/09/2009, whereas, JM has a charge created on 24/12/2011. Hence, it is absolutely clear that Finquest has a charge on the assets of the Corporate Debtor which was registered first in time. It is also an admitted position that no NOC from Finquest was obtained by JM for its subsequent charges.

17. The Senior Counsel for Finquest quoted Section 48 of the Transfer of Property Act, 1882 and also relied on judgment of Hon'ble Supreme Court dated 28.04.2006 in the matter **of ICICI Bank Ltd. v/s SIDCO Leathers Ltd. And others** (Reported at (2006) 10 SCC 452) has inter alia held as under:

> *"39. The subject of mortgage, apart from having been dealt with under the common law, is governed by the provisions of the Transfer of Property Act. It is also governed by the terms of the contract.*
>
> *40. ...*
>
> *41. While enacting a statute, Parliament cannot be presumed to have taken away a right in property. Right to property is a constitutional right. Right to recover the money lent by enforcing a mortgage would also be a right to enforce an interest in the property. The provisions of the Transfer of Property Act provide for different types of charges. In terms of* ***Section 48 of the Transfer of Property Act claim of the first charge – holder shall prevail over the claim of the second charge – holder and in a given case where the debts due to both, the first charge – holder and the second charge – holder, are to be realised from the property belonging to the mortgagor, the first charge – holder will have to be repaid first. There is no dispute as regards the said legal position."***

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18. The senior counsel appearing on behalf of Finquest further relied on the Legal opinion/Report of Vaish Associates Advocates dated 16.01.2020 wherein it is all along stated that there is no NOC that is provided by either the Appellant or any other lender from which it becomes clear that such subsequent charge shall be subject to the previously created charge in favour of Finquest.

19. He further emphasized on the Insolvency Law Committee Report dated 26.03.2018 wherein the following observations have been made:

> "21.6...
> ***Thus, valid inter-creditor/subordination agreements would continue to govern their relationship.*** Further sub-section (2) of section 53 must also be interpreted accordingly. For instance, applying section 53(2) in the context of section 53(1)(b), any agreements between workmen and secured creditors which disrupts their pari passu rights will be disregarded by the liquidator. However, agreements inter-se secured creditors do not disturb the equal ranking sought to be provided by section 53(1)(b) and therefore do not fall within the ambit of section 53(2). ***The Committee felt that there was no requirement for an amendment to the Code required since a plain reading of section 53 was sufficient to establish that valid inter-creditor and subordination provisions are required to be respected in the liquidation waterfall under section 53 of the Code."***

20. The Senior Counsel for Finquest submitted that in terms of the directions of the Hon'ble NCLAT, the Liquidator has ascertained and concluded that Finquest has the first charge over the property. It was only somewhere in the month of March 2019 that the Appellant filed its claim with the Liquidator relating to the loan acquired from UCO Bank. But till date, this charge is the only charge which is registered, and which is reflected on the Index of Charges of the Corporate Debtor with the Registrar of Companies. He stated that it is to be noted that the charge registration in respect of this charge is subsequent and subordinate to that of Finquest. The Appellant thereafter filed a second claim belatedly in January 2020 in relation to a purported acquisition of a loan by Bank of India to S. Kumars Nationwide Ltd, which was allegedly secured by a mortgage over the assets of the Corporate Debtor. However, neither does the Deed of Assignment executed by Bank of

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India in favour of JM even mention about the said property nor does the Index of Charges / ROC data reflect the same.

21. Pursuant to the order passed by the Hon'ble NCLAT, Finquest has, in compliance with Regulation 21A of the Liquidation Process Regulations, informed the Liquidator that it wishes to realise its security interest under the provisions of Section 52 of the Code. Thereafter, Finquest vide its email dated 20.01.2020 informed the Liquidator that its earlier offer from Krihaan Texchem Private Limited was still valid and subsisting and that Finquest would like to take it forward as per the terms and conditions more particularly mentioned therein.

22. He further mentioned that it is noteworthy to point out that pursuant to their offer from Krihaan Texchem Private Limited, in compliance with Regulation 37 of the Liquidation Process Regulations, the Liquidator addressed an email dated 26.04.2019 to the creditors of the Corporate Debtor (including JM) stating that the Liquidator was in receipt of the price at which Finquest proposed to realise its security interest and that in case the creditors were aware of any prospective bidders who could better their offer, then the details may be communicated to the Liquidator. However, vide an email dated 14.05.2019, the Liquidator informed the creditors including the Appellant that he had not received any bid/offer from any other prospective bidder. It is therefore clear that the process for sale/realisation of a secured asset under Section 52 of the Code was strictly and transparently followed by Finquest and the Liquidator.

23. The Senior Counsel for Finquest mentioned that the Appellant has also referred to the pendency of a Suit filed by Finquest's predecessors before the civil court in Karnataka. The Appellant has in its Appeal stated that the Suit filed was for declaration of mortgage. This is incorrect. The Suit was filed seeking enforcement of the mortgage with Finquest. In any event, for the Liquidator to determine as to who has the first charge, he has to look at and consider the Index of Charges of the Corporate Debtor. It is submitted that this exercise has been carried out by the Liquidator and only thereafter has the Liquidator come to a conclusion that Finquest has the first charge on the property.

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24. The Senior Counsel for Finquest mentioned that till date they have contributed a sum of Rs.12.5 crores (approximately) after initiation of the Liquidation Process, only to keep the Corporate Debtor as a going concern. However, no monies have been paid by JM or any other creditor to protect the assets of the Corporate Debtor.

25. It is therefore submitted that in view of the above, it is imperative that the Liquidator be directed to forthwith handover physical possession as also transfer of title deeds of the said property in favour of Krihaan Texchem Private Limited, so as to enable Finquest to immediately and without causing any further losses to the Corporate Debtor, give effect to the sale of the said property under the provisions of Section 52 of the Code read with the relevant Regulations.

26. The counsel for the Liquidator has made submission stating that he has properly complied with the provisions of the Code and the Liquidation Regulations. The counsel stated that a proper procedure was followed by calling a meeting of the stakeholders in accordance with Section 35(2) of the Code which entitles him to consult any of the stakeholders entitled to distribution of the proceeds under Section 53 of the Code. After the meeting which was held on 18.12.2019 whereby the lenders who claimed first charge on the assets were requested to provide their comments on the Report on Charges provided by Vaish Associates dated 05.04.2019 along with additional documents on which they wished to rely on. Upon revocation of the symbolic possession of the Movable Fixed Assets and Mysore Immovable Property which was earlier transferred to Finquest on 19.12.2019, some of the creditors along with the Appellant sent some additional documents vide e-mails dated 31.12.2019, 01.01.2020 and 10.01.2020 and on perusal of these documents, a revised report of the Vaish Associates dated 16.01.2020 which was also shared with all the financial creditors on 17.01.2020. Later, on receiving the intimation from Finquest that they chose to go under Section 52(1)(b) of the Code and realise the security interest held by them, the Liquidator verified the priority charge from the records of the Registrar of Companies with the help of Vaish Associates and determined that Finquest has the first charge and thereafter passed the order dated 19.02.2020.

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27. Further, the counsel for the Liquidator also relied on Section 77(3) of the Companies Act, 2013 which provides that *"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 liquidator unless it is duly registered and a certificate for registration is given by ROC".* Therefore, the Liquidator could not and cannot reckon the security purportedly assigned by Bank of India in favour of the Appellant since there is no registration of charge in respect of security assigned by Bank of India to the Appellant.

28. Hence, the conclusion made by both the parties i.e. the Liquidator and Finquest from their arguments is that the Liquidator has acted in consonance with the provisions of the Code and Regulations and correctly decided that Finquest has the first charge in respect of the "right, title and interest of the Corporate Debtor in the movable fixed assets and the immovable property. Further, Finquest being the sole first charge – holder in respect of the aforesaid property of the Corporate Debtor is entitled to realise its secured asset under Section 52 of the IBC. Therefore, both the parties prayed for dismissal of this Appeal and approval of M.A. No. 310 of 2020.

ORDER

Heard all the parties concerned. Having gone through the pleadings put forth before this Bench and the effective arguments advanced by the Appellant i.e. J.M. Financial Asset Reconstruction Company Limited, the liquidator and the Finquest Financial Solutions Private Limited, we state our observations as under:

1. The Appeal No. 733 of 2020 is filed by the Appellant i.e. J.M. Financial Services challenging the orders dated 19.02.2020 of the liquidator Mr. Ravi Shankar Devarakonda under Section 52 r/w Section 53 of the Code wherein he had taken a decision on 17.01.2020 that Finquest Financial Solutions Private Limited held to be the first charge holder and the Mysore immovable property and movable fixed assets lying therein in the premises of RTIL Limited which was formerly known as Reid and Taylor (India) Ltd. The reasons as to why such a decision has been taken has been clearly and categorically recorded by the liquidator in its order.

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2. The application M.A. No. 310 of 2020 is filed by the liquidator himself with a prayer that the Tribunal be pleased to direct that possession, overall control and supervision of the secured assets be handed over to Finquest Financial Solutions Private Limited. Earlier to this, this Bench in M.A. No. 1392 of 2019 had passed an order dated 10.05.2019 to handover the symbolic possession of the fixed assets of the corporate debtor to the applicant i.e. Finquest Financial Solutions Private Limited and to proceed with the sale of fixed assets in terms of Section 52(1)(b) r/w Regulation 37 of the IBBI (Liquidation Process) Regulations, 2016. Though the said orders were passed on merits after hearing Edelweiss Asset Reconstruction Company and other secured creditors, the said order was challenged by the Appellant J.M. Financial Asset Reconstruction Company Limited in the Hon'ble National Company Law Appellate Tribunal in Company Appeal (A.T.) (Insolvency) No. 593 of 2019. The said appeal was heard and on 11.12.2019, the said order of this Bench in M.A. No. 1392 of 2019 was set aside and the matter was remitted back to the liquidator for taking appropriate decision in terms of Section 52(3) of the Code. The operative portion of the orders of the Hon'ble NCLAT is as under:

> *"42. The matter is remitted to the Liquidator to proceed in accordance with law, following Section 53 r/w Section 52 of the I&B Code. If one or more 'Secured Creditors' have not relinquished the 'security interest' and opt to realise their 'security interest' against the same very asset in terms of Section 52(1)(b) r/w Section 52(2) & (3), the Liquidator will act in terms of Section 52(3) and find out as to who has the 1st charge ('security interest') from the records as maintained by an information utility or as may be specified by the Board and pass an appropriate order. If any dispute is pending before the Court of Law, the question as to who has the exclusive 1st charge, the Liquidator may inform the same to the parties and may proceed as per Section 52(3) of the I&B Code. The Appeal is allowed with the aforesaid observations and directions. No costs."*

3. Subsequent to the above, the liquidator had approached a Law Firm Vaish Associates and sought their opinion on various charges held by

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the secured creditors in a sequential manner. The said Law Firm after going through the entire documents on record had opined that Finquest Financial Services Limited is the first charge holder on Mysore immovable property and movable fixed assets. Subsequently, the liquidator had given an opportunity to all the secured creditors including the Appellant and held a meeting on 18.12.2019 and to comment on Vaish Report and also to put forth their claim. The said meeting was attended by the Appellant and Finquest Financial Solutions Private Limited etc. Again on 09.01.2020, the Appellant filed a new claim and additional Form D with the liquidator and contended that they are also the first charge holders along with Finquest Financial Solutions Private Limited. Then, the liquidator had after going through all the claims put forth by the lenders had passed the impugned order on 19.02.2020.

4. Another important point to be noted that in the orders passed by this Bench dated 10.05.2019 in M.A. No. 1392 of 2019, a detailed analysis as to the entitlement of the first charge on the part of Finquest Financial Solutions Private Limited was made. Hence, there is no need to trace the flow of charges finally resulting in the decision that the Finquest Financial Solutions Private Limited would naturally emerge as the first charge holder on the strength of the documents filed. However, we cannot undermine the fresh effort made by the liquidator who came to the conclusion that Finquest Financial Solutions Private Limited is the first charge holder among all the secured creditors. The order dated 19.02.2020 itself is sufficient to the methodology adopted by the liquidator in coming to the said decision.

   Under these circumstances, the M.A. No. 310 of 2020 was filed by the liquidator with the abovesaid prayer and followed by the Appeal M.A. No. 733 of 2020 filed by J.M. Financial Solutions with a prayer to quash/set aside the decision of the liquidator and to reject the M.A. No. 310 of 2020 came to be filed.

5. In the Appeal filed by the J.M. Financial Services, we would like to discuss each issue that the appellant had raised in their appeal.
   i. Whether in view of finding of Hon'ble NCLAT in Paragraph 39 r/w Paragraph 42 of the Order, it was open to the Liquidator to pass the Impugned Order?

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ii. Who can make request for standing outside liquidation proceedings?

iii. Whether Finquest is a Secured Creditor or not, in view of the fact, that mortgage is created in favour of Trustee Company and not in favour of Finquest?

iv. Whether the word Secured Creditor used under Section 52 of the Code would mean only "First Charge holder" or also "Second Charge holder"?

v. Whether a first charge holder can only decide to stand outside liquidation proceedings or consent from other Secured Creditor having second charge is also required?

Yes. The orders of the Hon'ble NCLAT are very clear. It is not the methodology that was adopted in the orders passed by this Bench dated 10.05.2019 but the procedure adopted that came into question and accordingly, the Hon'ble NCLAT had directed the liquidator to proceed and take appropriate decision. Section 52 r/w 53 of the Code is very clear and it is the prerogative of the liquidator who is vested with the power to verify the documents of the claimants and take appropriate decision. Hence, in view of the efforts put in by the liquidator who as a measure of abundant caution and to give perfection to his effort in taking a right decision on the first charge holder, the liquidator had consulted a Law Firm and then cautiously passed the said order.

It goes without saying that the first charge holder alone can seek to opt out of the liquidation proceedings for the reason that his debt has to be satisfied first. In case the security of the first charge holder is satisfied in full, then the other charge holders or secured creditors would have a say either to opt or to join the liquidation process for the remaining assets. Apart from that there is no requirement on the part of the first charge holder to obtain consent or permission from the second or other charge holders. It is more a common-sense point that the other secured creditors would not permit the first charge holder to be satisfied in full. The contention of the Appellant that Finquest is not a secured creditor in view of the fact that mortgage is created in favour of Trustee company and not in favour of Finquest doesn't hold any water for the reason that Trustee acts only for the sake of beneficiary and by itself, it doesn't have any independent transaction. Therefore,

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Finquest has to be adjudicated as the secured creditor. And now the question whether the term "secured creditor" as mentioned in Section 52 of the Code would mean only the first charge holder? The answer has to be yes. The Finquest has a charge created on the property of the corporate debtor on 31.07.2008 and on 17.09.2009 whereas J.M. Financial Asset Reconstruction company i.e. the Appellant has a charge created on 24.12.2011. in these circumstances if it were to be interpreted that whether Section 52 would mean only the first charge holder, then it will be a very funny situation wherein all the secured creditors irrespective of their first charge or second charge would want to get themselves satisfied first as regards their debts. Therefore, on a simple analogy, it has to be stated that in case there are multiple secured creditors claiming security interest in the corporate debtor, then it is the order of sequence which is to be applied and that is date on which the first charge is created followed by next. Therefore, we are of the considered view that the term secured creditor as contained in Section 52 would, under the present context, the Finquest Financial Solutions Private Limited only who is the first charge holder and none else.

It is very interesting to note the Appellant always misdirects himself in framing a question of law as to who is the first charge holder. On one hand they argue that Finquest is not the first charge holder. When the required documents show that it is the Finquest who is the first charge holder, then they argue whether the first charge holder alone has the right. That means J.M. Financial Services blows hot and cold on the issues of who is the first charge holder. As per Section 48 of the Transfer of Property Act, 1972 which deals with the priorities of charges and categorically holds that it is the first charge holder which shall prevail over the second charge holder.

vi. Whether in view of pendency of the Suit the Liquidator could have adjudicated the issue and decided the priority and permitted Finquest to stand outside winding up proceedings?

The pendency of suit as referred by the Appellant is in fact filed by Finquest's predecessors for the enforcement of mortgage but not for declaration of mortgage as contended by J.M. Financial

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Solutions. This shall not come in the way of liquidator in taking a decision as to who the first charge holder is. It is the will of the plaintiffs whether to continue with the suit or to withdraw the same. In any event, the pendency of the suit has absolutely no relevance of whatsoever nature with the present issues on hand.

vii. Whether the Liquidator can travel beyond the decree/judgment passed by a Competent Court/ Tribunal and decides contrary to the said judgment?

viii. Whether in view of order passed by DRT in O.A. No. 711 of 2015 the Liquidator could have passed this order?

ix. Whether in view of order passed by DRT in O.A. No. 501 of 2014 dated 4th September 2017 the Liquidator could have pass this order.

As submitted by the Finquest Financial Services Limited, the Appellant is incorrect in stating that they are entitled to sent the mortgaged properties as contained in the schedule. At paragraph 8 of the order is as follows:

> *"the relief is claimed in the application only against Defendant No. 1 and 2 and other defendants are only formal parties. Out of this, the fourth defendant is claiming that a mortgage was created over the subject property by the first defendant who deposited the title deeds with the third defendant for the benefit of the 12th defendant (Finquest) and thereby claiming first charge over the property." However, these contentions according to Finquest are considered as part of this application only as it is always open to the said 4th and 12th defendants to take whatever legal recourse open to them under law. At no point of time DRT had never held in any of the OAs before them that the Appellant is the first charge holder or Finquest is not the first charge holder. For the first time it is only before this Bench that the issue as regards who the first charge holder is had come up and no where else."*

x. Whether there is any provision under the Code which allows or provides for handing over of possession to the Secured Creditors, if the Secured Creditor chooses to stand outside winding up proceedings?

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xi. Whether in view of the order of Hon'ble NCLAT the decision of Liquidator is valid or not?

xii. Whether the Act of Liquidator of passing judgment on 19th February 2020 i.e. after filing Misc. Application is proper and bonafide or not?.

xiii. Whether the Liquidator has performed its obligations and duties as set out in Regulation 37?

xiv. Whether the Finquest can sell the properties and granting such permission to stand out will serve the purpose under the code?

xv. Whether the offer by Finquest to buy the property through its 100% subsidiary is a bonafide offer or not?

Handing over of the possession to the first charge holder is a consequential step. The court need not prescribe any modes and methodology for handing over the possession. It is always the prerogative of the liquidator. If at all the secured creditor, as per law, decides to stand out side the liquidation proceedings, there is no other way left for the liquidator to hand over the possession of the assets to the first charge holder. However, at the same time it is the liquidator who monitors the entire procedure of the sale by the secured creditor who had taken the possession of the assets from the hands of the liquidator. Once it is clear that the first charge holder is completely realised of their debt, then the liquidator again steps in and monitors whether any assets are left over for the liquidator process to satisfy other stakeholders. Here is a very peculiar case the corporate debtor owes close to about Rs.900 Crores to the Finquest whereas the amount that is going to be realised even at the highest level of values attributable, the same would not satisfy even 15% of the amount due. The liquidator in the course of his argument had contended as follows:

"g. Further, Regulation 37(7) of the Liquidation Regulations provides that secured creditors relinquishing security can realise its security in one of the following 3 manners – (a) SARFAESI, (b) RDB Act, (c) Regulation 37 of the Liquidation Regulations. In the present case, Finquest is realizing security as per Regulation 37 and the pending civil proceedings filed by Finquest in Suit No. 84 of 2013 and the pending civil proceedings filed by Finquest in Suit No. 84 of 2013 filed in the Court of Civil Judge, Senior Division at Nanjangud, Karnataka is not relevant as IBC is a self contained

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code and Section 238 of the IBC provides that IBC overrides all other laws. Therefore, the decision of the Liquidator would prevail and Suit No. 84 of 2013 would be infructuous.

h. Section 36(3)(g) and 52(3) of the IBC read with Regulation 37 of the Liquidation Regulations clearly indicate that once Finquest opts not to relinquish security interest, such security interest no longer forms part of the Liquidation Estate. No funds are available with the Liquidator and the Liquidator does not wish to hold or manage and security which does not form part of the Liquidation Estate. Hence the security interest of Finquest who has opted not to relinquish security ought to be handed over to Finquest as the requirements of Section 52 and 37 of the IBC have been complied-paragraph 13(d) at page 13 and paragraph 14 at page 17, 18 and 19 of the Liquidator's Reply to the JM Appeal."

Therefore, we fully agree with the reply given by the liquidator and steps taken by him under Section 52 r/w 53 and other applicable Regulations. The orders of the liquidator dated 19.02.2020 is in full satisfaction of Regulation 37 and his decision to allow Finquest Financial Solutions to stand outside the liquidation process is absolutely valid, correct and in full satisfaction of the provisions of the Code. Another interesting issue raised by the Appellant is whether offer by Finquest to buy the property through its 100% subsidiary is bonafide or not, is a matter of discretion on the part of the first charge holder i.e. Finquest. The only requirement is that the price of the property at which the subsidiary of the Finquest is trying to buy. Here is a case, in the course of arguments an open offer was made by the Liquidator that if someone is prepared to match the price offered by Finquest, the liquidator is still ready and willing to consider the same for which even the Finquest was completely satisfied. At that point of time no secured creditor had come forward with any offer let alone a better offer.

Under these circumstances, the logical conclusion that can be deduced from all above contentions raised by the Appellant and on verification of the documents, it is only the delay tactics or cantankerous and frivolous efforts on the part of the Appellant and nothing else. In addition to the above, another superfluous argument advanced by the Appellant is that the liquidator had not followed the

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procedure as contained in the Code or in the Regulations. We completely disagree with the said contention and we hold that the procedure adopted by the liquidator is far more accurate and deserves appreciation.

2. The Appellant has relied upon the following judgments:

   i. Bokiyu Tanneries Ltd. (2006) (89) BRJ (513);

   ii. Industrial Development Bank of India Vs OL of M/s. Rustom Mills and Industries Ltd. & 7 Ors (CA No. 657 of 2006)

On a plain reading of both the above judgments, it is clear that the observations made are more pointed towards right of workman for preferential payment for their dues before any payment is made to a secured creditor. The context under which both the judgments are passed are completely different from that of the case on hand and the same are absolutely not applicable to the present case.

On the other hand, the Liquidator had relied upon the judgment of the Hon'ble Supreme Court of India in the matter of **ICICI Bank Ltd. v. SIDCO Leathers Ltd. and Others** (2006) 10 Supreme Court Cases 452,

20. The questions therefore which arise for our consideration are:

(a) Whether significance is lost in respect of inter se right of priority between two sets of secured creditors in view of Section 529-A of the Companies Act?

(b) Whether Section 48 of the Transfer of Property Act stands overridden by Section 529-A of the Companies Act?

(c) Whether the appellant can be said to have relinquished his right to claim as a secured creditor as it has not opted in terms of Section 47 of the Provisional Insolvency Act?

21. Some legal propositions, which are not in controversy, may also be noticed at this stage.

22. There are two categories of secured creditors, namely, (i) those who are desirous of going before the Company Court; and (ii) those who stand outsides the winding-up proceeding

23. Corporate Insolvency procedures serve a variety of functions which include collective execution by unsecured creditors, facilitation

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of corporate rescue and the enforcement of security which would include certain public goals, as for example, corporate morality. In an Insolvency proceeding, the fundamental questions, which go to the root of the procedure, are:

(i) which parties are involved:

(ii) which assets are to be included; and

(iii) how proceedings are to be funded.

24. Liquidation proceedings although are a collective enforcement mechanism for the benefit of unsecured creditors, the question which invariably arises is what would be the meaning of the assets of the company in the Indian context. For the said purpose, the court has to bear in mind that the liquidation is also the occasion for the termination of the company's affairs. Assets of the company would include debenture- holders' assets, freehold assets and sometimes floating assets.

25. Applying the pari passu principles, creditors' claims are to be treated alike: a single point of time at which the assets are liable to be quantified must be pinpointed, but then, subsequent events are also required to be considered.

26. For those who desire to go before the Company Court for dividend by relinquishing their security, in accordance with the Insolvency Rules, Section 529 of the Companies Act would be attracted.

27. The relevant portion of Section 47 of the Provincial Insolvency Act reads as under:

"47" Secured creditors. – (1) Where a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised.

(2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.

(3) Where a secured creditor does not either realise or relinquish his security, he shall before being entitled to have his debt entered in the Schedule, state in his proof the particulars of his security, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

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(4)-(5)

(6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend."

"28" The second class of the secured creditors are those who come under Section 529-A(1) (b) of the Companies Act i.e. those who opt to stand outside the winding up to realise their security. They also can, in certain circumstances, go before the Company Court.

29. In Allahabad Bank Jagannadha Rao, J., referring to the Tiwari Committee Report, 1981 as regards framing of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "the RDB Act") stated the law in the following terms : (SCC p. 426, para, 37)

"37. Even in regard to 'priorities' among creditors, the said Committee stated in Annexure I as follows:

'The Adjudication Officer will have such power to distribute the sale proceeds to the banks and financial institutions being secured creditors, in accordance with inter se agreement/arrangement between them and to the other persons entitled thereto in accordance with the priorities in law.'

The above recommendations as to working out 'priorities' have now been brought into the Act with greater clarity under Section 19 (19) as substituted by ordinance 1 of 2000 [inter alia, whereof]. Priorities, so far as the amounts realised under the RDB Act are concerned, are to be worked out only by the Tribunal under the RDB Act. Section 19 (9) of the RDB Act reads as follows:

19. (19) Where a certificate of recovery is issued against a company registered under the Companies Act, 1956, the Tribunal may order the sale proceeds of such company to be disturbed among its secured creditors in accordance with the provisions of Section 529-A of the Companies Act, 1956 and to pay the surplus, if any, to the company.

Section 19 (19) is clearly inconsistent with Section 446 and other provision of the Companies Act. Only Section 529-A is attracted to the proceedings before the Tribunal. Thus, on questions of adjudication, execution and working out priorities, the special

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provisions made in the RDB Act have to be applied.

(emphasis in original)

30. In that case, this Court was not called upon to decide the question as to whether having regard to the provisions contained in Section 529-A of the Companies Act those who stand outside the winding-up proceedings will have to proceed with the proceedings initiated by them. Therein, the court was concerned with the interpretation of Section 446 of the Companies Act, 1956 vis-à-vis the provisions of the RDB Act, namely, as to whether for instituting or contributing proceedings thereunder, permission of the Companies court was required to be obtained. Having regard to the finding that the RDB Act was a special statute enacted by Parliament much after the Companies Act came into force, it was opined that no permission was required since the Debts Recovery Tribunal had exclusive jurisdiction with respect to matters concerning recovery of dues by banks and financial institutions.

31. This legal position was considered by a Bench of this court in Rajasthan State Financial Corpn. V. Official Liquidator wherein one of us (Balasubramanyan, J.) was a member. It Was stated : (SCC pp. 198-99, part 14)

"14" In Allahabad Bank v. Canara Bank the question of jurisdiction of the Debts Revocery Tribunal under the Recovery of Debts Due to banks and Financial Institutions Act, 1993 vis-à-vis the Company Court arose for decision. This Court held that even where a winding-up petition is pending, or a winding-up order has been passed against the debtor company, the adjudication of liability and execution of the certificate in respect of debts payable to banks and financial institutions, are respectively within the exclusive jurisdiction of the Debts Recovery Tribunal and the Recovery Officer under that Act and in such a case, the Company Court's jurisdiction under Sections 442, 537 and 446 of the Companies Act stood outsted. Hence, no leave of the Company Court was necessary for initiating proceedings under the Recovery of Debts Act. Even the priorities among various creditors, could be decided only by the Debts Recovery Tribunal in accordance with Section 19 (19) of the Recovery of Debts Act read with Section 529-A of the Companies Act and in no other manner. The court took into account the fact that the

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Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was a legislation subsequent in point of time to the introduction of Section 529-A of the Companies Act by Act 35 of 1985 and it had and it had overriding effect. But it noticed that by virtue of Section 19(19) of the Recovery of Debts Act, the priorities among various creditors had to be decided by the Recovery Tribunal only in terms of Section 529-A of the Companies Act and Section 19 (19) did not give priority to all secured creditors. Hence, it was necessary to identify the limited class of secured creditors who have priority over all others in accordance with Section 529-A of the Companies Act. The Court also held that the occasion for a claim by a secured creditor against the realisation by other creditors of the debtor under Section 529-A read with proviso 9 (c) to Section 529(1) of the Companies Act could arise before the Debts Recovery Tribunal only if the creditors concerned had stood outside the winding up and realised amounts and if it is shown that out of the amounts privately realised by it, some portion had been rateably taken away by the Liquidator under clauses (a) and (b) of the proviso to Section 529 (1). The Court has not held that Section 529-A of the Companies Act will have no application in a case where a proceeding under the Recovery of Debts Act has been set in motion by a financial institution. The Court there was essentially dealing with the jurisdiction of the Debts Recovery Tribunal in the face of Sections 442, 537 and 466 of the Companies Act.

32. Allahabad Bank, therefore, is not an authority for the proposition that in terms of section 529-A of the Companies Act the distinction between two classes of secured creditors does no longer survive. The High Court, thus, in our considered opinion, was not correct in that behalf.

33. In fact in Allahabad Banks it was categorically held that the adjudication officer would have such powers to distribute the sale proceeds to the banks and financial institutions, being secured creditors, in accordance with inter se agreement/arrangement between them and to the other persons entitled thereto in accordance with the priority in law.

34. Section 529-A of the Companies Act no doubt contains a non obstante clause but in construing the provisions thereof, it is

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necessary to determine the purport and object for which the same was enacted.

35. In terms of Section 529- of the Companies Act, as it stood prior to its amendment, the dues to the workmen were not treated pari passu with the secured creditors as a result whereof innumerable instances came to the notice of the Court that the workers may not get anything after discharging the debts of the secured creditors. It is only with a view to bring the workmen's dues pari passu with the secured creditors, that Section 529-A was enacted.

36. The non obstante nature of a provision although may be of wide amplitude, the interpretative process thereof must be kept confined to the legislative policy. Only because the dues of the workmen and the debts dues to the secured creditors are treated pari passu with each other the same by itself, in our considered view, would not lead to the conclusion that the concept of inter se priorities amongst the secured creditors had thereby been intended to be given a total go-by.

37. A non obstante clause must be given effect to, to the extent Parliament intended and not beyond the same.

38. Section 529-A of the Companies Act does not ex-facie contain a provision (on the aspect of priority) amongst the secured creditors and, hence, it would not be proper to read thereinto things, which Parliament did not comprehend.

39. The subject of mortgage, apart from having been dealt with under the common law, is governed by the provisions of the Transfer of Property Act. It is also governed by the terms of the contract.

40. Punjab National Bank granted loan to the first respondent herein knowing fully well that, over the assets of the mortgagor, the appellant held the first charge. It in no uncertain terms stated that the charges created by reason of the loan agreement entered into by and between itself and the firs respondent was subservient to the charges of the appellant as also Respondent 3 and 4. The admission of PNB in this behalf is absolutely clear and explicit. Even in the suit filed by it for recovery of the mortgage money as against the first respondent, it not only in no uncertain terms stated that the

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appellant and respondents 3 and 4 herein were the first charge holder in respect of movable and immovable properties of the first respondent, but its prayers in regard thereto were also limited, as would appear from prayer (f) made in the suit.

41 While enacting a statute, Parliament cannot be presumed to have taken away a right in property. Right to property is a constitutional right. Right to recover the money lent by enforcing a mortgage would also be a right to enforce an interst in the property. The provisions of the Transfer of Property Act provide for different types of charges. In terms of Section 48 of the Transfer of Property Act provide for different types of charges. In terms of Section 48 of the Transfer of property Act claim of the first charge-holder shall prevail over the claim of the second charge-holder and in a given case where the debts due to both, the first charge-holder and the second charge-holder, are to be realised from the property belonging to the mortgagor, the first charge-holder will have to be repaid first. There is no dispute as regards the said legal position.

42. Such a valuable right, having regard to the legal position as obtaining in common law as also under the provisions of the Transfer of Property Act, must be deemed to have been known to Parliament. Thus, while enacting the Companies Act, Parliament cannot be held to have intended to deprive the first charge-holder of the said right. Such a valuable right, therefore, must be held to have been kept preserved. [See Workmen v. Firestone Tyre and Rubber Co. of India (P) Ltd.]

43. If Parliament while amending the provisions of the Companies Act intended to take away such a valuable right of the first charge-holder, we see no reason why it could not have stated so explicitly. Deprivation of legal right existing in favour of a person cannot be presumed in construing the statue. It is in fact the other way round and thus, a contrary presumption shall have to be raised.

44. Section 529 (1) (c) of the Companies Act speaks about the respective rights of the secured creditors which would mean the respective rights of secured creditors vis-a-vis unsecured creditors. It does not envisage respective rights amongst the secured creditors. Merely because Section 529 does not specifically provide for the

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rights of priorities over the mortgaged assets, that, in our opinion, would not mean that the provisions of Section 48 of the transfer of Property Act in relation to a company, which as undergone liquidation, shall stand obliterated.

45. If we were to accept that inter se priority of secured creditors gets obliterated by merely responding to a public notice wherein it is specifically stated that on his failure to do so, he will be excluded from the benefits of the dividends that may be distributed by the Official Liquidator, the same would lead to deprivation of the secured creditor of his right over the security and would bring him on a par with an unsecured creditor. The logical sequitur of such an inference would be that even unsecured creditors would be placed on a par with the secured creditors. This could not have been the intendment of the legislation.

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

7. Therefore, we hereby conclude that the appeal doesn't deserve any interference with the orders of the liquidator dated 19.02.2020 and hence, the Appeal M.A. No. 733 of 2020 is dismissed by upholding the orders of the Liquidator dated 19.02.2020. Further, the M.A. No. 310 of 2020 becomes infructuous and we hereby clarify that the liquidator is at liberty to hand over the possession of the Mysore property and movable fixed assets to the Finquest Financial Solutions Private Limited and to execute any sale deed or conveyance deed strictly in terms of Section 52 r/w Section 53 of the Code r/w Regulation 37 of the IBBI Regulations, 2016.

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SHYAM BABU GAUTAM
Member (Technical)

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BHASKARA PANTULA MOHAN
Member (Judicial)