

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH COURT III



I.A. No. 1161/2022

In

CP No. 4359/2019

Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016.

Asset Reconstruction Company (India) Limited

Having registered Office at:

The Ruby, 10th Floor, 29, Senapati Bapat Marg, Dadar (West), Mumbai – 400 028

... Applicant

In the matter of

Mrs. Bhanu Navin Nisar

... Financial Creditor

Vs

M/s. Vijay Group Realty LLP

... Corporate Debtor

Order pronounced on: 04.07.2025

Coram:

Ms. Lakshmi Gurung, Member (*Judicial*)

Sh. Hariharan Neelakanta Iyer, Member (*Technical*)

Appearances:

For the Applicant : Adv. Jehangir J. a/w Aparna Wagle i/b Alliance Law

For the Respondent : Adv. Nausher Kohli a/w Adv. Harish Khan i/b



Adv. Ajinkya Khurdukar

Per: Ms. Lakshmi Gurung, Member (Judicial)

1. The Interlocutory Application (IA) bearing no. 1161/2022 has been filed by Asset Reconstruction Company (India) Limited (**Applicant**) under section 60(5) of the Insolvency and Bankruptcy Code, 2016 (**Code**) read with Rule 11 of the National Company Law Tribunal Rules, 2016 (**NCLT Rules**) seeking directions which as follows:

- a. *Applicant be permitted to intervene in the present Company Petition No. 4359 of 2019 filed before this Tribunal.*
- b. *To pass necessary order to exclude the shares held by Vijay Group Realty LLP (Corporate Debtor) in Vijay Group Housing Private Limited (Borrower) and pledged as security for loans if the Applicant vide Pledge Agreement dated 11.07.2017 (Exhibit A) from being considered as an asset to be transferred under Resolution Plan to a successful Resolution Applicant under the CIRP of the Corporate Debtor.*
- c. *To pass necessary order to the Committee of Creditors (CoC) and RP of the Corporate Debtor to exclude the pledged shares of the borrower from the Resolution Plan to be being considered and approved by the RP and the CoC; and*
- d. *To grant an exemption to the Applicant from the moratorium order passed on August 04, 2021 and permit it to deal with the shares pledged by the Corporate Debtor in accordance with the terms of the Share Pledge Agreement dated July 11, 2017 and applicable law during the pendency of CIRP of the Corporate Debtor;*
- e. *Direct the CoC and RP of the Corporate Debtor not to undertake any action or accept or approve any Resolution Plan which may involve the equity or assets of the Borrower as any such action or resolution Plan shall adversely impact the Applicant's rights in relation to the Loans granted by it to the Borrower Vijay Group Housing Private Limited.*
- f. *Any other and further reliefs as this Tribunal may deem fit in the interest of justice, equity and good conscience.*
- g. *No order as to costs.*



2. **Brief relevant Facts:**

- 2.1 L&T Housing Finance Limited and the L&T Finance Limited (together referred to as '**Lenders**') granted financial assistance of Rs. 115 Crore and Rs. 185 Crore respectively, to Vijay Group Housing Private Limited hereinafter referred to as the (**Borrower**).
- 2.2 M/s Vijay Group Realty LLP (**Corporate Debtor**) holds 95% of the equity shares in the Borrower. In addition to other securities, the Corporate Debtor had pledged its entire 95% shareholding held in the Borrower in favour of Vistra ITCL (India) Limited (**Vistra**) which is the Security Trustee. The Share Pledge Agreement dated 11.07.2017 is annexed to the Application.
- 2.3 Subsequently, the Lenders assigned the above-mentioned two financial assistances to the Applicant vide Assignment Agreements, both dated 16.03.2020. It is stated that by virtue of the assignment agreements, the Applicant has been subrogated in place of the Lenders.
- 2.4 The Borrower committed default in repayment of the aforesaid loans, therefore, the Applicant declared the account of the Borrower as Non-Performing Asset (**NPA**) on 15.04.2020. Further, a Recall Notice dated 26.06.2020 was sent to the Borrower and the Guarantors calling upon them to pay the outstanding dues. Upon failure on part of the Borrower and Guarantor, the Applicant issued Notice dated 12.08.2020 under section 13(2) of the SARFAESI Act, 2002.
- 2.5 In the meantime, the Corporate Debtor was admitted into CIRP vide order dated 04.08.2021 and moratorium was imposed.



3. **Submissions by Applicant:**

- 3.1 The Applicant submits that in view of the moratorium imposed under section 14 of the Code, the Applicant is unable to enforce the pledge created by the Corporate Debtor as the pledged shares being part of the assets of the Corporate Debtor are covered under the moratorium.
- 3.2 The Applicant further submitted that the pledged shares are assets of the Corporate Debtor and could be disclosed in the Information Memorandum or the Resolution Plan, but, the same should be subject to the security interest of the Applicant and that the pledged shares cannot be acquired by a Resolution Applicant free from any encumbrances without first satisfying the claim of the Applicant.
- 3.3 It is submitted that the pledged shares are a valuable security created by the Corporate Debtor and that the Applicant is entitled to sell/dispose of the pledged shares and to appropriate the sale proceeds thereof towards the repayment of the loans which has been assigned by the Lenders in favour of the Applicant. Reference is made to Clause 16.2 of the Share Pledge Agreement which states that the obligation of the Pledgor and the Borrower will not be affected by any acts, omissions, matters or things as specified therein including the winding up, bankruptcy, change in constitution or official management or reorganisation, rationalisation or acquisition of any persons or any change in the status, function, control or ownership.
- 3.4 It is further submitted that the said pledge is exclusively for the benefit of the Applicants and other lenders of the Corporate Debtor have no right, title or interest in the pledged shares.

4. **Submissions by the Resolution Professional**

- 4.1 It is submitted that under Section 176 of the Indian Contract Act, 1872, a pledgee is entitled to either bring a suit against the pledgor



and retain the pledged security or sell the pledged security. However, the Applicant has not invoked the Pledge.

- 4.2 It is further submitted that the beneficial ownership of the said shares continues to lie with the Corporate debtor since the same has not been transferred to the Applicant. Thus, the shares are required to be included in the Information Memorandum as well as the Resolution Plan and the Applicant does not have any locus to seek exclusion of the shares from the pool of assets of the Corporate Debtor.
- 4.3 The RP submits that the Borrower is also undergoing CIRP by an order dated 30.09.2022 passed in CP/862/2019 and the Applicant has the remedy to file its claim with the RP of the Borrower.
- 4.4 It is submitted that the shares are already included in the Resolution Plan which was submitted on 24.09.2022 by a PRA named Vira Realspace LLP and in view thereof, the present application has become infructuous. Without prejudice, it is further submitted that the Information Memorandum also comprises of the said shares with details of litigation filed by the Applicant.

Analysis and Findings

5. Heard Ld. Counsel for the Applicant and the Resolution Professional and perused the record.
6. Asset Reconstruction Company (India) Limited (**Applicant**), through the present application, has sought various reliefs in respect of the Shares of M/s Vijay Group Realty LLP (**Corporate Debtor**) which have been pledged in favour of the Applicant (herein after referred to as “**Pledged Shares**”) for the financial assistance given by the Applicant to M/s Vijay Group



Housing Private Limited (**Borrower**) which is a subsidiary of the Corporate Debtor.

7. Ld. Counsel for the Applicant submitted that since the Applicant has not advanced any kind of financial assistance/loans to the Corporate Debtor and also since the Applicant has not filed any claim before the RP, the Applicant is not a creditor of the Corporate Debtor. However, he submits that as pledgee, the Applicant is entitled to take all the necessary steps to protect the Pledged Shares as security for its loans and RP is bound by the undertakings given by the Corporate Debtor under the Share Pledge Agreement.
8. Ld. Counsel for the RP, on the other side, submitted that the remedy available to the Applicant is to file a claim before the RP of the Borrower Company which is also at present undergoing CIRP by virtue of the admission order dated 30.09.2022 passed in CP/862/2019 and that any claim of the Applicant cannot be entertained against the Corporate Debtor.
9. At this stage we would like to refer to the case of ***Vistra ITCL (India) Limited & Ors. Vs. Mr. Dinkar Venkatasubramanian and Anr. [Civil Appeal No. 3606/2020]*** wherein in similar circumstances after referring to the judgments in the matter of ***Anuj Jain, IRP for Jaypee Infratech Limited vs. Axis Bank Limited [Civil Appeal Nos. 8512-8527 of 2019]*** and ***Phoenix ARC Pvt. Ltd. Vs. Ketulbhai Ramubhai Patel [Civil Appeal No. 5146/2019]*** detailed observations on Pledge and rights of Pledgee have been made. The relevant extract is reproduced below:

“8.4 the Appellant No. 1 - Vistra submits that the resolution plan in question does not meet the requirements of the Code, as it extinguishes and vaporises the pledge created in favour of the Appellant No. 1 – Vistra, and thereby, Appellant No. 1 – Vistra, a secured creditor, viz, the pledged shares, is left remediless and worse off than the dissenting financial creditors, or even the operational creditors.



- 8.5 *The difficulty which arises in the present case is that, in terms of the decision of this Court in **Anuj Jain (supra)** and **Phoenix ARC (supra)**, Appellant No. 1 - Vistra is to be treated as a secured creditor, but would not fall under the category of financial creditors or operational creditors. Therefore, they would be denied the benefit of the amendments to Section 30(2) of the Code made vide Act No. 26 of 2019, or for that matter Act No. 26 of 2018. Consequently, a very odd and a peculiar situation is created where a secured creditor is denied the benefit of the secured interest i.e., the right to exercise the sale of the secured interest, yet not be treated as either a financial creditor or an operational creditor. In terms of Section 52 of the Code, a secured creditor in liquidation proceedings has the right to relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified under Section 53 of the Code. The second option given to the secured creditor is to realise the security interest in the manner specified in aforesaid Section. Rule 21-A of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 deals with the presumption of security interest, which we need not elaborate for the present decision. If the secured creditor relinquishes the security interest, it is then entitled to priority in payment under clause (b) to sub-section (1) to Section 53 of the Code. The debts owed to the secured creditor in such event, rank *pari passu* with the workmen's dues for the period 24 months preceding the liquidation commencement date. As per Section 52(9) of the Code, where the proceeds on realisation of secured assets are not adequate to repay the debts due to the secured creditors who have exercised the option to realise the security interest, the unpaid dues of such secured creditors are to be paid by the liquidator in terms of clause (e) of sub-section (1) of Section 53 of the Code.*
9. *Thus, we are presented with a difficult situation, wherein, Appellant No.1 – Vistra, a secured creditor, is being denied the rights under Section 52 as well as Section 53 of the Code in respect of the pledged shares, whereas, the intent of the amended Section 30(2) read with Section 31 of the Code is too contrary, as it recognises and protects the interests of other creditors who are outside the purview of the CoC.”*



10. The Hon'ble Supreme Court in series of its judgments has authoritatively held that a pledgee is a secured creditor under section 52 and 53 of the Code in respect of the pledged shares though not a financial creditor or operational creditor as envisaged under section 30 of the Code. Therefore, the submission of the Applicant that it is not a creditor of the Corporate Debtor is not legally tenable.
11. It is the case of the RP that the Applicant has no entitlement over the pledged shares since the pledge was never invoked. Reference is made to section 176 of the Indian Contract Act which is reproduced below:

“176. Pawnee's right where pawnor makes default.—

If the pawnor makes default in payment of the debt, or performance; at the stipulated time or the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale. If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.”

12. It is an admitted fact the Applicant has not exercised its right as stipulated under Section 176 of the Indian Contract Act, 1872 based on which Ld. Counsel for the RP has argued that the Applicant is not entitled to the pledged shares.
13. Per Contra, Ld. Counsel for the Applicant submits that it is not a pre-requisite under the Code or any other law that before taking steps to protect its security by way of pledge of shares, the Applicant must have either filed suit against Corporate Debtor (as Pledgor) upon the debt/promise or sold the pledged shares.
14. We have already held that the Applicant is a secured creditor of the Corporate Debtor by virtue of the Share Pledge Agreement dated



11.07.2017. In **China Development Bank vs. Doha Bank Q.P.S.C. & Ors. [Civil Appeal No. 7298/2022]**, the Hon'ble Supreme Court has held that for the purpose of submission of claim, there is no requirement for invocation of the pledge. We refer to wherein the Hon'ble Supreme Court held as follows:

*“65. Another argument was canvassed based on the definition of ‘claim’ under Section 3(6) of the IBC. If the right to payment exists or if a breach of contract gives rise to a right to payment, the definition of ‘claim’ is attracted. **Even if that right cannot be enforced by reason of the applicability of the moratorium, the claim will still exist. Therefore, whether the cause of action for invoking the guarantee has arisen or not is not relevant for considering the definition of ‘claim’.**”*

15. Thus, the contention of the RP that no claim by the Applicant can be made against the Corporate Debtor is also rejected.
16. In view of the above discussions, the Applicant continues to hold security interest over the pledged shares. We direct the Applicant to file its claim before the RP in the prescribed form and the RP to examine and verify the same in accordance with the law as laid down by the Hon'ble Supreme Court. With above directions, prayer 'a' seeking intervention in the captioned company petition is **disposed of**.
17. Prayers 'b' and 'c' relate to exclusion of the pledged shares from being considered under the resolution plan. Prayer 'd' is for seeking exemption from moratorium to allow the Applicant to invoke the pledge and enforce the security.
18. We note from the submissions of the Applicant that the Applicant is not able to enforce its security due to the moratorium imposed under section 14 of the Code. Therefore, the Applicant seeks exclusion of the Pledged Shares from the assets of the Corporate Debtor as well as exemption from



the moratorium imposed under section 14 of the Code to allow the Applicant to invoke the pledge and realise its security interest.

19. The argument on behalf of the Applicant that the said pledged shares should be kept outside the resolution plan exclusively for the benefit of the Applicant. Reliance is placed on **Vistra ITCL** (supra) judgment to contend that the Applicant is entitled to retain the security interest in the Pledged shares. It is submitted that therefore, the Applicant should be permitted to retain its rights on the pledged shares as also to retain the sale proceeds thereof, either by remaining outside the insolvency proceedings or by becoming a party to the ongoing CIRP of the Corporate Debtor. We have already produced the relevant extract of the said judgment in Paragraph 12 above.
20. It is undisputed that the Applicant has not invoked the pledge before commencement of the CIRP and the corporate debtor continues to be the owner of the pledged share over which the Applicant has security interest. By virtue of section 18(1)(f)(v) of the Code, the RP is obligated to take custody of the assets including the shares held in any of the subsidiary company of the Corporate Debtor. Thus, the pledged shares being shares held by the Corporate debtor in its subsidiary (Borrower), is an asset of the Corporate Debtor and has been rightly included by the RP in the Information Memorandum of the Corporate Debtor.
21. Section 14(1)(c) of the Code on moratorium prohibits any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property. Thus, as a consequence of the moratorium declared by this Tribunal vide order dated 04.08.2021, the Applicant is prohibited under section 14(1)(c) of the Code from enforcing/invoking its pledge. Therefore, prayer 'd' is contrary to section 14 of the Code and cannot be granted and is rejected.



22. One of the arguments put forth on behalf of the Applicant is that by virtue of Clause 16.2 of the Share Pledge Agreement, the obligations of the Corporate Debtor thereunder are not affected due to the present insolvency proceedings. Clause 16.2 of the Share Pledge Agreement is reproduced below:

“16.2 Protective Clauses

The obligations of the Pledgor and the Borrower under this Agreement will not be affected by any act, omission, matter or thing (including whether or not known to the Pledgor and the Borrower) or any act or omission of the Security Trustee which would reduce, release or prejudice any of its obligations under this Agreement or prejudice or diminish those obligations in whole or in part including:

(a) Any waiver, exercise, omission, compromise, arrangement or settlement with or the granting of any time, concession, consent or indulgence to, the Pledgor under the Transaction Documents;

...

(g) any incapacity or lack of powers, authority or legal personality of or dissolution or change in the constitution or status of another person;

...

(i) the winding-up, bankruptcy, change in constitution or official management or re-organisation, nationalisation or acquisition of any other person or any change in its status, function, control or ownership.”

23. In this regard, we refer to section 238 of the Code which confers overriding effect to the Code:

“238. Provisions of this Code to override other laws.—*The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”*

24. A perusal of the above section clearly shows that the Code has the power to override all other law including an instrument in case of inconsistency. The term ‘Instrument’ includes an ‘Agreement’ and as such any Agreement



that is inconsistent with the provisions of the Code will be overridden to the extent of the inconsistency. In **Gujarat Urja Vikas Nigam Limited vs. Mr. Amit Gupta & ors. [Civil Appeal No. 9241/2019]**:

“78. It has been urged on behalf of the appellant that Section 238 does not apply to a bilateral commercial contract between a Corporate Debtor and a third party and only applies to statutory contracts or instruments entered into by operation of law. The basis of this submission is that the word “instrument” should be given a meaning ejusdem generis to the provision “contained in any other law”. We do not find force in this argument. Section 238 does not state that the “instrument” must be entered into by operation of law; rather it states that the instrument has effect by virtue of any such law. In other words, the instrument need not be a creation of a statute; it becomes enforceable by virtue of a law. Therefore, we are inclined to agree with the view taken by the NCLT. Section 238 is prefaced by a non-obstante clause. NCLT’s jurisdiction could be invoked in the present case because the termination of the PPA was sought solely on the ground that the Corporate Debtor had become subject to an insolvency resolution process under the IBC.”

25. In view of the above, the Share Pledge Agreement dated 11.07.2017, from which the rights of the Applicant emerge, is an ‘Instrument’ covered under section 238 of the Code. Considering the same, we hold that due to the inconsistency between clause 16.2 of the Share Pledge Agreement and section 14 of the Code, the provisions under section 14 would prevail over those under clause 16.2 of the Share Pledge Agreement by virtue of section 238 of the Code.
26. At this juncture, we refer to the observations of Hon’ble Supreme Court in **India Resurgence ARC Private Limited v. Amit Metaliks Limited & Anr (Civil Appeal No. 1700/2021)**:

“15. The limitation on the extent of the amount receivable by a dissenting financial creditor is innate in Section 30(2)(b) of the Code and has been further expounded in the decisions aforesaid. It has not been the intent of the legislature that a security interest



available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above other financial creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors.

16. It needs hardly any emphasis that if the propositions suggested on behalf of the appellant were to be accepted, the result would be that rather than insolvency resolution and maximisation of the value of assets of the corporate debtor, the processes would lead to more liquidations, with every secured financial creditor opting to stand on dissent. Such a result would be defeating the very purpose envisaged by the Code; and cannot be countenanced.”

27. The reliance placed by the Applicant in **Vistra ITCL** (supra) is distinguishable as Hon’ble Supreme Court came to a conclusion to permit Vistra to retain the security proceeds on the sale of the pledged shares under section 52 of the Code based on the peculiar facts and circumstances of that case.
28. The Hon’ble NCLAT in **Edelweiss ARC vs. Anuj Jain, RP of Ballarpur Industries [CA(AT)(Ins) No. 517-518 of 2023]** has clearly held that the judgment of **Vistra ICTL** (supra) being passed by Hon’ble Supreme Court under Article 142 of the Indian Constitution, cannot be read as laying law under Article 141 of the Indian Constitution. Hon’ble NCLAT further held that a third party security interest holder is entitled to retain security proceeds of its security interest under section 52 of the Code, however, sections 52 and 53 of the Code are applicable only in liquidation proceedings.
29. Thus, based on the discussions made above, the prayers to exclude the pledged shares from the assets of the Corporate Debtor and to exempt the Applicant from the moratorium imposed under section 14 of the Code, cannot be granted. Consequently, prayers ‘b’, ‘c’ and ‘d’ are **rejected**.



30. However, for sake of clarity, we reiterate that the Applicant shall file its claim, in the prescribed form, before the RP and the RP to examine and verify the same in accordance with law, without taking the plea of delay, if any, in submission of the claim. Pursuant to compliance of the above direction, all consequential actions shall follow in accordance with the Code and/or applicable Regulations. The relief sought in prayer 'e' is redundant at this stage and is accordingly, **rejected**.
31. With above observations and directions, IA/1161/2022 stands **disposed of**. No order as to costs.

Sd/-

Hariharan Neelakanta Iyer
Member (Technical)

Uma, LRA

Sd/-

Lakshmi Gurung
Member (Judicial)