

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

APPELLATE JURISDICTION

CHENNAI BENCH

Company Appeal (AT) (CH) (Ins) No. 277/2023

and

(IA No.851/2023)

**(Arising out of Order dated 14.06.2023 passed in
IA(IBC)/887(CHE)/2022 in CP(IB)/785(CHE)/2019)**

In the matter of :

**Canara Bank
Asset Recovery Management Branch
1st Floor, Spencer Tower Building,
Chennai – 600002
Represented by its Chief Manager**

... Appellant

Vs.

**Mr. S. Rajendran,
Regn. No.IBBI/IPA-002/IP-N00098/2017-2018/10241
Liquidator of
M/s. Cape Engineers Pvt. Ltd.
2nd Floor, Hari Krupa,
No. 71/1, Mc. Nicholas Road,
(Off. Poonamalle High Road),
Chetpet,
Chennai – 600 031.**

... Respondent

Present:

For Appellant : Mr. ML Ganesh, Advocate

For Respondent : Ms. Elamathi, Advocate

J U D G M E N T

Justice M. Venugopal, Member (Judicial):

Preamble:

The Appellant has filed the instant Company Appeal (AT) (CH) (Ins) No. 277/2023, being 'aggrieved', in respect of the 'Order' dated 14.06.2023, in IA(IBC)/887(CHE)/2022 in CP(IB)/785(CHE)/2019, passed by the 'Adjudicating Authority' / 'National Company Law Tribunal', Division Bench II, Chennai.

2. The 'Adjudicating Authority'/'NCLT', Division Bench II, Chennai, while passing the 'Impugned Order' in IA(IBC)/887(CHE)/2022 in CP(IB)/785(CHE)/2019 (filed under Section 60(5) of the I & B Code, 2016, r/w Rule 11 of NCLT Rules, 2016) at paragraph Nos. 17 and 18, had observed the following: -

"17. In short, the effect of non-registration would not vitiate the recovery of the debt, however by the language of Section 77(3) of the Companies Act, 2013 as amended post the introduction of the Code read with Section 52 of the Code and Regulation 21 of the IBBI (Liquidation Process) Regulations, 2016, the security interest created becomes void against the Liquidator.

18. The decision of case ICICI Bank Ltd. Vs. SIDCO Leathers Limited & Others [MANU/SC/2337/2006] relied upon by the Applicant does not

support its contention as the issue dealt by the said decision only deals with the right of the first charge holder over the right of the second charge holder, whereas the issue under consideration before this Tribunal is restricted to determine the legality of the communications of the Liquidator under the factual circumstances of the case.”

and dismissed the ‘Application’, without costs.

Appellant’s Submissions:

3. The Learned Counsel for the Appellant submits that M/s. Sree Ganesh EPC P. Ltd. had availed the credit facilities from the Appellant to an extent of Rs. 23 crores for which the ‘Corporate Guarantor’ M/s. Cape Engineers Pvt. Ltd. had offered its immovable property as collateral security besides executing ‘Corporate Guarantee Agreement’. The said ‘Corporate Guarantor’, along with Borrower Company M/s. Sree Ganesh EPC P. Ltd. had duly executed MOD on 07.07.2015, regd. as document No. 747/2015/SRO Thovalai.

4. According to the Appellant, the borrower Company went into ‘CIRP’ pursuant to an order made in CP(IB)/786(CHE)/2019 in an application filed u/s 10 of the I&B Code, 2016. Also, the ‘Corporate Guarantor’, had preferred an ‘Application’ in CP(IB)/785(CHE)/2019 (under Section 10 of the I&B Code) and by an order dated 06.09.2019, this ‘Tribunal’, was pleased to appoint Mr. J. Manivannan as ‘Interim Resolution Professional’, and later, he was replaced by another ‘Resolution Professional’, by name Mr. S.Rajendran.

5. It is represented on behalf of the Appellant that the Respondent had determined 95.76% voting share to the Appellant herein, based on the loan security documents, executed by the 'Corporate Guarantor', Company. In fact, in IA 1342/IB/2021 an application was filed as per Section 33(2) of the I&B Code by the Respondent and on 25.04.2022 'an order', was passed by this Tribunal to appoint the Respondent as 'Liquidator', for the 'Corporate Guarantor', Company.

6. It is the version of the Appellant that pursuant to the public announcement form D was filed by it on 20.05.2022 to the Respondent and in the 'Liquidation Proceedings', the Appellant, has desired to stand outside the 'Liquidation Proceedings', in terms of Section 52 of the Code, due to huge difference in valuation of the 'Secured Interest'.

7. The Learned Counsel for the Appellant points out that the Respondent had sent an email on 27.05.2022 informing the 'Appellant' to provide the documents as per Regulation 21 of the IBBI (Liquidation process) Regulations, 2016. The Appellant had sent MODTD on 06.06.2022 to the Respondent and also that subsequently, through an email communication dated 01.07.2022 the Respondent informed that since the 'charge', was not registered before the 'Registrar of Companies', the 'Appellant', will be treated as an 'Unsecured Financial Creditor', and the 'mortgaged property', will form part of the 'Liquidation Estate', thereby negating the legal document viz. MODTD which was registered on 07.07.2015, in terms of Section 58(f) of the 'Transfer of Property Act', 1882.

8. The Appellant contends that the Respondent cannot brush aside the aforesaid document, by citing Section 77(3) of the Companies Act, 2013 and there should not be any conflict between two 'Central Act'. Moreover, the 'Transfer of Property Act', 1882 confers absolute rights on the 'Mortgagee', in regard to the 'Mortgage' and the Respondent, cannot reject the Appellant's mortgage rights, based on the reasons that the charge was not registered before the Registrar of Companies. Later, the Appellant had registered the charged on 05.06.2022 before 'CERSAI' although 'CERSAI Registration', was made compulsory from 14.02.2020.

9. The grievance of the Appellant is that it is having 95.76% voting share, ought not to have treated the Appellant, as an 'Unsecured Financial Creditor'. The Appellant had informed the Respondent, through a letter dated 28.06.2022 that they are continuing 'SARFAESI Act', action against the mortgaged asset, in terms of Regulation 37 (7) of the IBBI (Liquidation process) Regulations, 2016.

10. According to the Appellant, Regulation 37(7) of the IBBI (Liquidation process) Regulations, 2016 specifically mention that the 'SARFAESI Act', or the 'Recovery of Debts and Bankruptcy Act', shall prevail over the Regulation. While so, the Respondent cannot prevent the 'Secured Creditor', from enforcing its mortgage, under the SARFAESI Act.

11. It is projected on the side of the Appellant that upon the receipt of Respondent's email on 01.07.2022, the Appellant had filed an IA No. 887 / 2022, before the 'Adjudicating Authority / NCLT Bench – II, Chennai, contesting the stand of the Respondent that MOD cannot be considered as

`Security Interest', and the same was dismissed on 14.06.2023, on the grounds that, if the `Charge', is not registered, as per Section 77 of the Companies Act, 2013, before the `Registrar of Companies', the `Lender', cannot be classified as `Financial Creditor' and the `Appellant', has not furnished any record available in `Information Utility'.

12. The Learned Counsel for the Appellant takes a plea that the Adjudicating Authority/Tribunal should have given preference to Section 58(f) of the `Transfer of Property Act', 1882, which is much before the advent of the I&B Code, 2016. To put it differently, the MOD, was registered before the advent of the I & B Code, 2016.

13. The Learned Counsel for the Appellant brings to the notice of this Tribunal that the I&B Code, 2016 in its operation is prospective in nature and shall not have any retrospective or retroactive effect or derogation to the ingredients of Section 58(f) of the `Transfer of Property Act', 1882. Moreover, the Appellant had advanced huge credit facilities based on the collateral security offered by the `Corporate Guarantor' (in Liquidation) and acquired an unfettered and indefeasible right, in regard to the mortgaged asset, as per Section 58(f) of the `Transfer of Property Act', 1882. Besides this, MOD cannot be brushed aside because security was not registered u/s 77 of the Companies Act, 2013, being mandatory as per the I&B Code, 2016.

14. The Learned Counsel for the Appellant relies on the decision in **ICICI Bank V. SIDCO Leathers Ltd. & Ors. reported in MANU/SC/2337/2006** wherein it is observed that while enacting a statute, the parliament cannot be

presumed to have taken away a right on property. Right to Property, is a constitutional right. Right to recover money lent by enforcing a mortgage would be a right to enforce an interest in the 'Property'. Also that as per Section 48 of the 'Transfer of Property Act', 1882 claim of the 'First Charge Holder' shall prevail over the claim of the 'Second Charge Holder' and that 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.

15. Such a valuable right having regard to the legal position as obtaining in common law and as also under the provisions of the 'Transfer of Property Act', 1882 must be deemed to have been known to the Parliament. Thus, *“while enacting the Companies Act, the Parliament cannot be held to have intended to deprive the first charge holder of the said right. Such a valuation right, therefore, must be held to have been kept preserved”*.

16. According to the Appellant, since Regulation 21 of IBBI (Liquidation process) Regulations, 2016 came into force only in the year 2016, the Respondent ought to have given credence to the 'MOD', executed in favour of the Appellant the pre-existing rights conferred in favour of mortgagee by virtue of the 'Transfer of Property Act', and 'SARFAESI Act', will not get diluted by virtue of Regulation 21 of IBBI (Liquidation process) Regulations, 2016 which admittedly came into force only in the year 2016. In fact, the 'Registration of CERSAI', has become mandatory in February, 2020 only and the same cannot be applied retrospectively. In any case, the Appellant had registered the

`Security Interest', in `CERSAI', on 05.06.2022, before the Respondent / Liquidator, gave his decision vide communication dated 01.07.2022.

17. According to the Appellant, had not the I&B Code, 2016 not to come into force the Appellant can very well enforce the security interest based on Section 58(f) of the 'Transfer of Property Act', 1882 and Rule 8 of 'Security Interest' (enforcement) Rules, 2002.

18. According to the Appellant, the Section 35 of the 'SARFAESI Act', 2002 for adjudication of the above case, which is perimetria with section 238 of the I&B Code and the same is as follows: -

"The provisions of this Act 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."

19. According to the Appellant, the Respondent has relied upon the decision in M/s. Volkswagen Finance Ltd. Vs. Shree Balaji Printpack Pvt. Ltd. rendered by this Tribunal which deals with 'Non-Registration of Charge', with regard to moveable property (hypothecation of car). It is relevant to distinguish between the term 'Charge and Mortgage'.

'MORTGAGE is a transfer of an interest in immovable property as a security for the loan. In other words, transfer of ownership interest in a particular immovable asset. Mortgage is the result of the act of parties. It must be registered under TP Act, 1882'.

'CHARGE is not a transfer though it is nonetheless a security for the payment of an amount. Charge refers to the security for securing the

debt, by way of pledge, hypothecation and mortgage. Charge is created either by the operation of law or by the act of the parties concerned’.

20. The Learned Counsel for the Appellant/Bank refers to the decision in **SICOM Limited V. Sundaresh Bhat, the Liquidator of ABG Shipyard Ltd.** (vide **Comp. App. (AT) (Ins.) 470 / 2021 dated 06.01.2022, reported in MANU/NL/0017/2022**, whereby and whereunder at paragraph 31 and 32, it is observed as under:-

‘31. Hon’ble Supreme Court in Sesh Nath Singh v. Baidyabati Sheoraphull Co-operative Bank Ltd. had occasion to consider the nature of proceeding under the SARFAESI Act, 2002. The Hon’ble Supreme Court in the said case held that proceedings under SARFAESI Act, 2002 are civil proceedings in a Court.

32. The judgement of the Hon’ble Supreme Court in Indian Bank (supra), thus, fully support the submissions of the learned Counsel for the Appellant. There being adjudicatory order of the Debt Recovery Tribunal in favour of the Appellant, the mortgage and hypothecation was created in favour of the Appellant by the Corporate Debtor, hence, non-registration of Mortgage and hypothecation under Section 77 of the Companies Act, cannot be a ground to hold that the Appellant was not a ‘secured creditor’. Under the order of the Debt Recovery Tribunal, the Corporate Debtor having not deposited the amount within 30 days time period’, the Appellant was at liberty to realise the amount from mortgaged and hypothecated assets. The security interest was created

by virtue of the judgement of Debt Recovery Tribunal dated 26th April, 2017.”

21. The Learned Counsel for the Appellant/Bank submits that the Adjudicating Authority/Tribunal should have recognised the Appellant's rights, which is holding valid mortgaged rights over the 'Secured Assets' and, therefore, prays for setting aside the impugned order dated 14.06.2023 passed in IA(IBC)/887(CHE)/2022 in CP(IB)/785(CHE)/2019 by the Adjudicating Authority/NCLT, Division Bench II, Chennai.

Respondent's Contentions:

22. According the Respondent / Liquidator the Appellant had submitted their claim against the Corporate Debtor, for the 'Corporate Guarantee', and collaterals given by the 'Corporate Debtor', for the 'Loan Sum', availed by M/s. Sree Ganesh EPC P. Ltd. from the Bank for an amount of Rs. 23 crores. In fact, the property belonging to the 'Corporate Debtor', bearing door No. 7/IB2 located at 534/1B of Kumarapuram village, Thovalai Taluk, Kanyakumari, was provided as collateral to the Appellant bank for the loan sanctioned in favour of M/s. Sree Ganesh EPC P. Ltd.

23. It is represented on behalf of the Respondent that on 27.05.2022 Liquidator sought for documents to establish the existence of security interest as per Regulation 21 of the IBBI (Liquidation process) Regulations, 2016, to classify the Appellant as 'Secured Financial Creditor', but the Appellant / Bank had not submitted the documents. Further, the Appellant had not

registered charge for any of the alleged collaterals with the Registrar of Companies (ROC) as required under the Companies Act, 2013 and Regulation 21 of the IBBI (Liquidation process), Regulations, 2016.

24. It is the stand of the Respondent that Section 77 (3) of the Companies Act, 2013 reads as under: -

‘Notwithstanding anything contained in any other law for the time being in force, no charge created by a company shall be taken into account by the liquidator appointed under this Act or the Insolvency and Bankruptcy Code, 2016, as the case may be, or any other creditor unless it is duly registered under sub-section (1) and a certificate of registration of such charge is given by the Registrar under sub-section (2).’

25. The Learned Counsel for the ‘Liquidator’ points out that a detailed claim determination note was emailed dated 03.06.2022 to the Appellant by the ‘Liquidator’, mentioning that their whole claim of Rs. 34,78,78,231/- was admitted as an ‘Unsecured Financial Creditor’, after having gone through the records and information made available to the ‘Liquidator’. In fact, the Appellant’s claim is not satisfying any of the requirements under Regulation 21 of IBBI (Liquidation process) Regulation, 2016 for establishing the existence of security interest as the Appellant had failed to furnish the documents, requested by the ‘Liquidator’, as per Regulation.

26. It is represented on behalf of the Respondent that since no documents were furnished to prove the existence of security interest, under Regulation 21 of IBBI (Liquidation process) Regulations, 2016 the Assets of the Corporate

Debtor will form part of the 'Liquidation Estate'. Also, that there is a 'Fixed Deposit' (A/c No. 140025439149) in the name of M/s. Sree Ganesh EPC P. Ltd. of Rs. 16,94,453/- lying with the Appellant/Bank. The said amount is a mutual credit between the Appellant and the 'Corporate Debtor', and this was not adjusted in the claim sum.

27. It is the stand of the Respondent that the Appellant in paragraph 8 of the Appeal had admitted that they had subsequently registered the charge with 'CERSAI', on 05.06.2022 although 'CERSAI Registration', was made compulsory since 2020 itself and this is quite evident that it was an after thought to register the charge before 'CERSAI'.

28. The Learned Counsel for the Respondent refers to the order dated 19.10.2020 of this Tribunal, in **M/s. Volkswagen Finance Ltd. Vs. Shree Balaji Printpack Pvt. Ltd. vide Comp. App. (AT) (Ins.) 02/2020**, wherein at paragraph 29, it is observed as under: -

"29. From the documentary evidence on record it is clear that no 'Charge' has been registered under the provisions of Section 77(1) of the Companies Act 2013, in relation to the Subject Property. The Liquidator has rightly referred to Regulation 21 of IBBI (Liquidation Process) Regulation, 2016 and observed that the Appellants 'Claim' was not supported by any evidence as prescribed under the said Regulation. It is also an admitted fact that the 'Charge' was not registered under Central Registry of Securitization Asset Reconstruction

*and Security Interest of India. We are keeping the ratio of the
aforenoted Judgements of the Hon'ble Supreme Court and
Section 52(3) of the Code read with Regulation 21(c) of the
(Liquidation Process), Regulations, 2016, in view. We are of
the considered opinion that the contentions of the Learned
Counsel appearing for the Appellant that Registration with
Motor Vehicle Authority under Section 51 of the Motor
Vehicles Act, 1988 would suffice, cannot be sustained.
Section 51(1) of the MV Act, 1988 only provides for "entry" in
the Certificate of Registration regarding the agreement. The
Section provides how to deal with the entry. To reiterate, in
the instant case, as the 'Security Interest' was neither
registered with the 'Information Utility'; nor under Section
125 of the Companies Act, 1956/Section 77 of the
Companies Act, 2013; no Application was preferred under
Section 87 of the Companies Act, 2013; 'Charge' was not
registered in the Securitisation Asset Reconstruction and
Security Interest of India, we are of the opinion that Section
52(3)(b) of the Code and Regulation 21(b) of the (Liquidation
Process), Regulation, 2016 are not complied with and the
ratio laid down by the Hon'ble Apex Court in Kerala State
Financial Enterprises Ltd. (Supra) and this Tribunal in India
Bulls Finance Ltd. (Supra) is squarely applicable to the facts
of this case. Hence, we hold that when in present matter*

‘Charge’ was not registered as per the provisions of Section 77 (1) of the Companies Act 2013 and as envisaged under the Code, the Creditor cannot be treated as a ‘Secured Creditor’.

29. The Learned Counsel for the Respondent refers to the order dated 29.03.2022 in **UCO Bank Vs. G. Ramachandran, Liquidator of M/s. Sai Regency Power Corporation Pvt. Ltd. (IA/778(CHE)/2021) and IA/777(CHE)/2021 in IBA/92/2019**), wherein the security interest created by a ‘Creditor’, was upheld after submission of claim form with ‘Liquidator’, will be considered as ‘Unsecured Financial Creditor’. Further, the ‘Liquidator’, already had intimated the Appellant about the UCO Bank’s order passed by the Adjudicating Authority/Tribunal, Chennai in the ‘Claim Determination Note’, share to the Appellant on 04.06.2022.

30. The Learned Counsel for the Respondent refers to Section 52(3) of the I&B Code, 2016 that before any security interest is realised by the ‘Secured Creditor’, the ‘Liquidator’, shall verify such ‘Security Interest’, and permit the ‘Secured Creditor’, to realise only such ‘Security Interest’, the existence of which may be proved either-

- a. by the record of such ‘Security Interest’ maintained by an information utility; or
- b. by such other means as may be specified by the Board.

31. According to the Respondent, Regulation 21 of IBBI (Liquidation process) Regulations, 2016 specifies the other means to establish the existence of security interests:

(i) The records available in an information utility, if any;

(ii) Certificate of registration of charge issued by the Registrar of

Companies or;

(iii) Proof of registration of charge with a Central Registry of Securitisation Asset Reconstruction and Security Interest of India.

32. Further, according to the Respondent the Appellant has failed to fulfil the requirements as per Section 52 of the Code r/w Regulation 21 of the 'Liquidation Process Regulations'. Also, that the Appellant is an 'Unsecured Financial Creditor', of the 'Corporate Debtor', and the aspect of the applicability of the 'Transfer of Property Act', 1882 does not arise.

33. The Learned Counsel for the Respondent points out that in regard to the letter sent by the Appellant on 28.06.2022 initiating action on the 'Corporate Debtor's Asset' under the 'SARFAESI Act', it is to be noted that Section 33(5) of the Code prohibits initiation of suit or other legal proceedings, when a 'Liquidation Order', is passed against the 'Corporate Debtor'. Considering the fact, that the Appellant has failed to establish the security interest, as per I&B Code, 2016 and Regulations therein, the Appellant does not have the right to initiate the action under 'SARFAESI Act', on an Asset which forms part of the 'Liquidation Estate'.

34. In regard to the Appellant/Bank issuing a notice on 28.06.2022 to the 'Corporate Debtor', under the 'SARFAESI Act', to proceed against the mortgaged Assets, the 'Liquidator', had sent an email on 01.07.2022 wherein it was reiterated that since the charge created on the property of the 'Corporate Debtor', was not registered, the Appellant is an 'Unsecured Financial Creditor', and in the same email, the 'Liquidator', had informed that the Appellant 'shall not continue the proceedings' under the 'SARFAESI Act', while the Company is undergoing the 'Liquidation Process', under I & B Code, 2016.

35. The Learned Counsel for the Respondent refers to the decision of the **Hon'ble Supreme Court in ICICI Bank Ltd. Vs. SIDCO Leathers Ltd. & Ors. (vide MANU/SC/2337/2006)** and points out that this decision does not support the Appellant's contentions as the issue dealt with by the said decision only with regard to 'First Charge Holder' over the right of the 'Second Charge Holder'. However, the issue before this Tribunal is restricted to decide the legality of the communication of the 'Liquidator' under the factual circumstances of the case, to classify the Appellant's claim as an 'Unsecured Financial Creditor'.

36. The Learned Counsel for the Respondent while summing up prays for dismissal of the instant Appeal along with connected applications.

Secured Creditor's Rights:

37. A Secured Creditor is not obligated to resort to its security. In fact, he may also rely upon his security and proceed to realise his 'debt', in ordinary law and may stand entirely outside the winding up the proceedings as per

decision in Gujarat State Financial Corporation V. Official Liquidator (1996), 87 Company cases pg. 658 (Guj-DB).

38. A Secured Creditor has a right to prefer a winding up petition after securing a 'Decree' from the Debt Recovery Tribunal and a Recovery Certificate based thereon as per decision in Swaraj Infrastructure Pvt. Ltd. V. Kotak Mahindra Bank Ltd., 2019 3 SCC at pg. 620. If a Creditor who had selected a method of having its 'Claim' adjudicated upon ought not then to be in a position to select another method of adjudication as per decision in Craven V. Blackpool Ghreyhound, Racing Ltd. (1936) 3 ALL ER 513.

39. It is to be remembered that prior to the assailing of the Assets of the 'Corporate Debtor', to the 'Liquidator', it is the duty of the 'Adjudicating Authority', to consider the right of a 'Secured Creditor', to realise the 'Security Interest', and sit out of Liquidation, as per Section 52 of the Code and any order in violation of the same is liable to be set aside, as per decision in Bank of Baroda V. Mrs. Deep Venkat Ramani (2020) 158 SCL 320 (NCLAT), New Delhi.

40. A cumulative reading of Section 52 and 53 of the I&B Code, 2016 shows that the Legislature in their wisdom thought it fit to give an option to the Secured Creditor armed with a security interest to choose out of the two options (i) either enforce security interest against the Asset out of Liquidation Estate being the subject of security interest or relinquish the same and claim as Secured Creditor in the manner mentioned in Section 53(1)(b) and further ranking equal to other Secured Creditors.

41. A 'First Charge Holder', will have priority in realising its security interest if it elects to realise its security interest and does not relinquish the same. In the event of the Secured Creditor opting to relinquish its interest, the distribution of Assets will be governed by Section 53(1)(b)(ii) whereby all the Secured Creditors having relinquished security interest rank equally.

42. Before winding up, each Creditor is free to pursue whatever enforcement measures are open to him in the absence of an Insolvency Proceeding, the Rule is that the 'Race' goes to the swiftest and the 'Creditor' initiating the early execution will have the first bite. In fact, the 'Initiation of Insolvency' puts an end to the race and requires that all the Creditors of the same class participate in the common pool, in proportion to the size of their admitted claims.

43. The *pari passu* Principle of ratable distribution envisages that the distribution of proceeds in respect of a class of recipients that rank equally will have to be paid in equal proportion where the debts cannot be paid in full. As a matter of fact, clubbing of debts where the charges might be different does not give a right to an assignee, to seek substitution, in place of the 'First Charge Holder' assignor Bank as per decision in Laxmi Fibres Ltd. V. Andhra Pradesh Industrial Development Corporation Ltd., reported in AIR 2015 SC 3289.

44. The Secured Creditors who have opted out of the Insolvency Process are not in competition for the liquidation proceeds except to the extent of any balance remaining to them after realising their security. The competition

among Secured Creditors, assuming that all their interests have been duly perfected will lie outside the Insolvency Law.

45. The *pari passu* Principle has different manifestation, which is beyond the contractual provisions. In fact, it provides the under pinning for other Insolvency Rules pertaining to proof of 'Debt'. The general Rule is that the 'claims' are to be valued as on the date of commencement of winding up, is designed to ensure that one is comparing like with like so that the Assets are distributed *pari passu*.

Ambit of Section 52 of the Code:

46. Section 52 of the I&B Code, 2016 provides that in a liquidation proceeding, the Secured Creditor may choose to relinquish its security interest and take part in the distribution of Assets or realise its security interest outside the 'Liquidation Proceeding'. If a Secured Creditor determines to realise its security, the sum of IRP costs payable by the Secured Creditor shall be deducted from the realised proceeds. If there is a surplus realised from the enforcement of a Security Interest, the Secured Creditor has to account for the same to the Liquidator.

47. In respect of the proceeds of the realisation of the Secured Assets, are not enough to repay the debts owed to the Secured Creditor, he may file a claim in accordance with priority of payments as per Section 53 of the I&B Code, 2016 for such an unpaid portion.

48. A Liquidator is not to ask the Secured Creditor to relinquish the Secured Interest over the assets of the Corporate Debtor. The Liquidator is not to prefer an 'Application', praying for directions to the Secured Creditor, to respond to his request for relinquishment of Security Interest over the Assets of the Corporate Debtor to the Liquidation Estate. On receipt of such notification the Liquidator is to verify the same and permit those 'Secured Creditors', to exercise their right, under 52 of the I & B Code, 2016 if they find that they had 'Security Interest', over such 'Assets'. To put it precisely, since the I&B Code, 2016 overrides the 'SARFAESI Act', 2002, the Liquidator ought not to prefer a petition, based on the 'SARFAESI Act', 2002.

49. As far as the present case is concerned, the Appellant/Bank before the Adjudicating Authority/NCLT Bench II, Chennai in IA 887/2022 in CP(IB)/785(CHE)/2019 (filed u/s 60(5)(c) I&B Code, 2016 r/w Rule 11 of NCLT Rule, 2016) has sought the relief of quashing the communication dated 01.07.2022 and 04.06.2022 caused by the Liquidator as non est in Law.

50. In fact, the Liquidator on 01.07.2022 had sent a mail to the Appellant / Petitioner wherein it was informed that the Appellant shall not continue the action under SARFEASI Act, 2002, which gives a 'cause of action', to approach the 'Adjudicating Authority/Tribunal', for securing appropriate Orders, besides treating the Appellant/Petitioner, as an 'Unsecured Financial Creditor'.

51. On behalf of Respondent, a plea is taken that Appellant is to be treated as an Unsecured Financial Creditor and that he will be paid from the 'Liquidation Proceeds', as per Section 53(1) of the I & B Code, 2016.

52. Be that as it may, on a careful consideration of respective contentions, this Tribunal, keeping in mind of the prime fact that 'Right to recover' the money, lent by enforcing a mortgage is a 'Right to enforce', an interest in the property and that the claim of the 'First Charge Holder', shall prevail over the claim of the 'Second Charge Holder', and the 'Appellant / Petitioner', can very well enforce the 'Security Interest', resting on Section 58(f) of the 'Transfer of Property Act', 1882 and 'Rule 8 of the Security Interest (Enforcement) Rules, 2002', comes to a resultant conclusion that 'mortgage', is the result of the 'Act of Parties', where the 'Transfer of Ownership Interest', in a particular 'Immoveable Asset' is created, and that the conclusion arrived at by the 'Adjudicating Authority / Tribunal', in upholding the decision of the 'Liquidator', in classifying the 'Appellant / Petitioner / Bank', as an 'Unsecured Financial Creditor', is an illegal and an invalid one, in the eye of 'Law' and in the 'Liquidation Proceedings', the Appellant / Bank, is to be treated as 'Secured Creditor', as held by this 'Tribunal'.

53. In addition, the 'non-registration of the Mortgage', as per Section 77 of the Companies Act, 2013, is not a sufficient / enough ground, to come to an 'opinion', that the 'Appellant', is not a 'Secured Creditor'. In reality, the 'rights' of a 'Mortgagee', under the 'Transfer of Property Act', 1882 and the 'SARFAESI

Act', are not to be diluted, in terms of Regulation 21 of IBBI (Liquidation process) Regulations, 2016.

54. It cannot be lost sight of the fact that 'CERSAI Registration', became 'mandatory', only in February, 2020, much after the 'Mortgage', was created in the instant case. Further, the fact remains that the 'Mortgage', was registered in the Office of S.R.O., Thovalai, Kanyakumari District, Tamil Nadu, which is again a Public Office, providing 'information', on the 'Mortgages', registered in it. Suffice it for this 'Tribunal', to unhesitatingly, to hold, that the Appellant's rights, in holding a 'Valid Mortgage Right', over the 'Secured Assets', is to be protected, by any means whatsoever. Looking at from any angle, this 'Tribunal', holds that the 'Impugned Order', dated 14.06.2023, in IA(IBC)/887(CHE)/2022 in CP(IB)/785(CHE)/2019, passed by the 'Adjudicating Authority / NCLT', Division Bench-II, Chennai, in upholding the decision of the 'Liquidator', in classifying the 'Appellant/Petitioner', as an 'Unsecured Financial Creditor', is an 'invalid' and 'illegal' one and the same is set aside, by this 'Tribunal', to secure the ends of Justice. Accordingly, the 'Appeal' succeeds.

Disposition:

In fine, the instant Comp. App (AT) (CH) (Ins) No. 277 / 2023 is 'allowed'. No costs. The 'Impugned Order', dated 14.06.2023, in IA(IBC)/887(CHE)/2022 in CP(IB)/785(CHE)/2019, passed by the 'Adjudicating Authority / NCLT', Division Bench-II, Chennai, is set aside by

this `Tribunal', for the reasons ascribed in this `Appeal'. The IA(IBC)/887(CHE)/2022 in CP(IB)/785(CHE)/2019, filed by the `Appellant/Petitioner/Bank' is allowed. The connected pending IAs, if any, are closed.

[Justice M. Venugopal]
Member (Judicial)

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

07.03.2024

SS / TM