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**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI**

IA(IBC)/1322(CHE)2023 IN IBA/624/2019

(filed under Section 60(5) of Insolvency & Bankruptcy Code, 2016)

In the matter of COASTAL ENERGY PRIVATE LIMITED

V.O. Chidambaranar Port Authority,
Represented by its Transport Manager,
Ministry of Ports, Shipping and Waterways,
Government of India,
Tuticorin-628 004

...Applicant

-Vs-

Ramakrishnan Sadasivan,
Liquidator of Coastal Energy Private Limited,
New No.28, Old No.22, Menod Street,
Purasawalkam,
Chennai-600 007

...Respondent

Order Pronounced on 12th December 2023

CORAM:

SANJIV JAIN, MEMBER (JUDICIAL)

VENKATARAMAN SUBRAMANIAM MEMBER (TECHNICAL)

For Applicant : Mr. P. Ulaganathan, Advocate

For Respondent : Mr. B.Dhanaraj, Advocate

ORDER

This application has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("IBC") by the Applicant, V.O. Chidambaranar

Port Authority Ministry of Ports, Shipping and Waterways, Government of India seeking following relief:

*To declare under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 that the Applicant Port is a **secured creditor** of the Corporate Debtor and further direct the Respondent/Liquidator to recall his decision conveyed to the applicant vide his email dated 20.06.2023 and to treat the Applicant Port Authority as a **secured creditor for the purpose of distribution of the Liquidation assets under Section 53 of the IBC Code, 2016.***

2. It is stated that the Applicant is a 'port' coming within the meaning Major Port as defined in the Major Ports Act, 1963. It is stated that the claim submitted by the Applicant, though initially retained at the notional value of Rs.1/- was eventually admitted at Rs.5,62,61,565/- and accepted by the Liquidator as Operational Creditor-Statutory Dues. It is stated that the application in IA/643(CHE)/2022 for a direction to the Liquidator to admit the entire claim was eventually dismissed vide order dated 18.08.2022 as infructuous due to the said act of the Liquidator admitting the entire claim of the applicant.

3. It is stated that the applicant requested the Liquidator vide letter dated 15.03.2023 to treat the claim of the Port as that of a Secured Creditor for distribution of the Liquidation Assets under Section 53 of the Code at par with

other secured creditors in the light of the judgment of the Hon'ble Supreme Court of India dated 06.09.2022 in State Tax Officer vs Rainbow Papers Limited in Civil Appeal No.1661 of 2020.

4. It is stated that the Liquidator had sought clarification vide his email dated 18.03.2023, as to under which provisions akin to Section 48 of the GVAT Act, 2003 the claimant is making the claim.

5. It is stated that the applicant clarified vide email dated 01.06.2023 that *Section 171 of Indian Contract Act* provides for retention as a security for such balance, goods bailed to them, unless there is an express contract to that effect. The Applicant further drew attention to the right of the Port Authority under *Section 61 of the Major Port Trust Act, 1963 or Section 28 of the Major Port Authorities Act, 2021*. The Supreme Court Judgment in ***Board Trustees of Bombay Port vs Shriyanesh Knitters dated 30.07.1999*** was also quoted to point out that Port has an authority to retain a general lien over the assets in its possession for unpaid dues from the importer.

6. It is stated that the Liquidator rejected the claim of the applicant port by email dated 22.06.2023 (communicating the attached letter dt. 20.06.2023) by making an artificial differentiation between right of lien and creating an actual lien stating that retention of goods on the date of commencement of

CIRP/Liquidation is necessary to entitle a creditor to claim himself as "Secured Creditor", Since the Port is no longer in possession of the goods, the Port cannot be termed as Secured Creditor according to the Liquidator.

7. It is stated that the present appeal under Section 42 of the Act has been filed against the order passed by the Liquidator communicated vide his email dated 20.06.2023 rejecting the request of the applicant to treat the applicant port in respect of the outstanding dues payable by the Corporate Debtor as a secured creditor in the light of the Hon'ble Supreme Court judgment dated 06.09.2022 in State Tax Officer vs Rainbow Papers Limited in Civil Appeal No.1661 of 2020.

COUNTER FILED BY THE RESPONDENT/LIQUIDATOR:

8. It is stated that the Applicant had relied to the Judgment of *State Tax Officer (1) vs Rainbow Papers Limited* by Hon'ble Supreme Court of India to treat them as Secured Creditor of the Corporate Debtor. In a subsequent judgment of *Paschimanchal Vidyut Vitran Nigam Ltd., vs. Raman Ispat Private Limited & Ors.*, the Supreme Court has categorically held that Rainbow Judgment confines to the facts of that case alone. Further, in the Rainbow case, the Sales Tax Officer was treated as Secured Creditor only on the fact that they had attached the property of the Respondent and further Section 48 of the GVAT, 2003 provides for a first charge on the property.

9. It is stated that in the present case, the Applicant neither attached any property of the Corporate Debtor nor has any first charge over the assets of the Corporate Debtor and even more, the Applicant had not created any security interest in favour of the Applicant.

10. It is stated that reliance of the Section 171 of the Indian Contract Act, 1872 by the Applicant is not sustainable as the above section categorically stipulates that any goods bailed can be retained as a security for a general balance of account. In the present case, the Applicant did not retain any goods of the Corporate Debtor as security and the claims pertained to the period of 2008-09 and 2014-15.

11. It is stated that in the Form-C submitted by the Applicant as Operational Creditor, the Column No. 8 & 9, the details with respect to retention of goods or properties and any other securities are shown as 'NIL'. Further, the Applicant did not claim themselves as the Secured Creditor of the Corporate Debtor.

12. It is further stated that the reliance of the Applicant to the provisions of Indian Major Ports Act and Indian Major Ports Authority Act is not sustainable in law in view of well settled proposition of law that the I&B Code, 2016 overrides all laws including the Crown debts.

ANALYSIS:

13. We observe that the applicant had filed the revised claim before the Liquidator on 15.03.2023 to treat him as Secured Creditor based on the Judgment of the Hon'ble Supreme Court in the matter of *State Tax Officer (1) Vs Rainbow Papers Limited*. It is stated that security interest could be created by operation of law and also as per definition of 'Secured Creditor' under IBC, 2016, it does not exclude any dues of Government or Governmental Authority. Hence the Applicant sought reclassification of his dues as 'Secured' Operational Creditor in view of the Judgment of **Rainbow Papers Limited** (*supra*).

14. In support of its arguments, the applicant has quoted various provisions of law like Section 61 of Major Port Trusts Act 1963, Section 28 of Major Port Authorities Act 2021, Section 171 of Indian Contract Act and Section 100 of Transfer of Property Act, etc.

15. The provisions are encapsulated below for better understanding:

- i) **Section 61 of Major Port Trusts Act 1963** has been reproduced below:

Section 61 in The Major Port Trusts Act, 1963

61. Sale of goods after two months if rates or rent are not paid or lien for freight is not discharged.—

(1) A Board may, after the expiry of two months from the time when any goods have passed into its custody, or in the case of animals and perishable or hazardous goods after the expiry of such shorter period not being less than twenty-four hours after the landing of the animals or goods as the Board may think fit, sell by public auction [or in such cases as the Board considers it necessary so to do, for reasons to be recorded in writing, sell by tender, private agreement or in any other manner] such goods or so much thereof as, in the opinion of the Board, may be necessary—(1) A Board may, after the expiry of two months from the time when any goods have passed into its custody, or in the case of animals and perishable or hazardous goods after the expiry of such shorter period not being less than twenty-four hours after the landing of the animals or goods as the Board may think fit, sell by public auction [or in such cases as the Board considers it necessary so to do, for reasons to be recorded in writing, sell by tender, private agreement or in any other manner] such goods or so much thereof as, in the opinion of the Board, may be necessary—"

(a) if any rates payable to the Board in respect of such goods have not been paid, or

(b) if any rent payable to the Board in respect of any place on or in which such goods have been stored has not been paid, or

(c) if any lien of any ship-owner for freight or other charges of which notice has been given has not been discharged and if the person claiming such lien for freight or other charge has made to the Board an application for such sale.

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ii) Section 28 of Major Port Authorities Act 2021 reproduced below:

Section 28. Board's lien for rates.

(1) The Board for the amount of all rates leviable under this Act in respect of any goods and for the rent due to such Board for any buildings, plinths stacking areas, or other premises on or in which any goods may have been placed, it shall have a lien on such goods, and may seize and detain the same until such rates and rents are fully paid.

(2) The right of lien referred to in sub-section (1) shall have priority over all other liens and claims, except for general average and for ship owner's lien upon the said goods for freight and other charges where such lien exists and has been preserved in the manner provided in sub-section (1) of section 29, and for monies payable to the Central Government under any law for the time being in force relating to customs, other than by way of penalty or fine.

(3) The right of lien referred to in sub-section (1) shall also vest with any concessionaire appointed by the Board with whom a concession contract under a Public Private Partnership project for operating any berth or terminal within the port limits has been executed by the said Board.

- iii) **Section 171 of Indian Contract Act** talking about **General lien** of Bankers, Factors, Wharfingers, attorneys and policy- brokers, page 12 of typeset.

Section 171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers.

Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect¹.

- iv) Charge enshrined in **Section 100 of Transfer of Property Act** reads as follows: *where immovable property of one person is by an act of parties or by operation of law made security for the payment of money to another...*
- v) As per **Doctrine of relation back**, the applicant while making the revised demand from CD from out of which claim emanated, is entitled to all rights as if the demand was raised at the initial point of time.

16. Before proceeding further, let us recapitulate the relevant provisions in **IBC about Secured Creditor, security interest, Charge** as under:

- i) **Section 3 (30) of IBC defines 'Secured Creditor'** means a creditor in favour of whom Security Interest is created .
- ii) **Section 3 (31) of IBC defines 'Security Interest'** means right, title, interest or claim to property, created in favour of or provided for a secured creditor **by a transaction** which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person. Provided that security interest shall not include a performance guarantee.
- iii) As per **Section 3(4) of IBC**, Charge means an interest or lien created on the property or assets of any person or any of its undertakings or both, as the case may be , as security and includes a mortgage.
- iv) Security interest has to be proved by the claimant to the liquidator by any of the following means as under as per Regulation 21 of IBBI **Liquidation Regulations 2016**

21. Proving security interest.

The existence of a security interest may be proved by a secured creditor on the basis of-

- (a) the records available in an information utility, if any;
- (b) certificate of registration of charge issued by the Registrar of Companies; or
- (c) proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India.

- v) **As per Section 52 of IBC**, Secured Creditor has option to relinquish his security interest to liquidation asset or stand outside and realise the assets. The relevant provisions are as under:

Section 52: Secured creditor in liquidation proceedings.

52. (1) A secured creditor in the liquidation proceedings may—

(a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in [section 53](#); or

(b) realise its security interest in the manner specified in this section.

(2) Where the secured creditor realises security interest under clause (b) of sub-section (1), he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.

(3) Before any security interest is realised by the secured creditor under this section, 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 records of such security interest maintained by an information utility; or

(b) by such other means as may be specified by the Board.

CONCLUSION:

17. We have gone through the averments and written submissions of both applicant and respondent. Based on the facts and legal submissions, it can be inferred that:

a) The applicant had not provided any of the proof for security interest as required by Regulation 21 of IBBI Liquidation Regulations 2016.

b) The applicant had not opted for relinquishment of his right under Section 52 of IBC. On exercise of the option only, he can be treated as Secured Creditor under Section 53 waterfall mechanism.

c) When definition of Charge is available in Section 3(4) IBC, the provision of Section 100 of Transfer of Property Act will not apply.

d) **Section 238 of IBC** provides that rules and regulations outlined within the IBC will take precedence over any conflicting provisions in other existing laws or legal instruments.

e) Section 61 of Major Port Trusts Act 1963, Section 28 of Major Port Authorities Act 2021 and Section 171 of Indian Contract Act talk about *general lien* of the Port for retaining goods in its possession for payment of its charges. *Lien is the right of an individual to retain goods and securities in his possession that belongs to another until certain legal debts due to the person retaining the goods are satisfied.* Lien is a floating charge and will be converted as charge only on crystallization. It is found that the claims of the applicant relate to the period before 2015 and the applicant had not retained any goods by way of lien to create charge over it. Thus, **it had not created any charge on the assets of the Corporate Debtor.**

f) The Judgment of **Rainbow Papers Limited** (*supra*) does not give any blanket permission to treat all Government and Government department as Secured Creditor. The judgement was applicable to the circumstances of that specific case. The applicant has not given any proof either by operation of law or by way of any transaction that he could be treated as Secured Creditor.

18. In view of the above, IA(IBC)/1322(CHE)2023 is dismissed. No costs.



VENKATARAMAN SUBRAMANIAM
MEMBER (TECHNICAL)



SANJIV JAIN
MEMBER (JUDICIAL)