G1NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 908 of 2020

IN THE MATTER OF:

Hero Fincorp Ltd. **... Appellant**
Having its corporate office at
34, Basant Lok, Vasant Vihar,
New Delhi-110057.

Versus

Liquidator of TAG Offshore Ltd. **.... Respondent**
Having its address at
Duff & Phelps India Private Ltd.,
14th Floor, Raheja Tower
Bandra Kurla Complex,
Bandra (East), Mumbai-400051.

Present:

For Appellant: **Mr. Shantanu Singh, Advocate**

For Respondent: **Mr. Amir Arsiwala and Mr. Dhrupad Vaghani, Ms. Nidhi Shah, Ms. Naveli Reshamwalla, Mr. Ajiz M, Advocates.**

ORDER
(Date: 29.04.2022)
(Virtual Mode)

[**Per.: Dr. Alok Srivastava, Member (Technical)]**

This appeal has been filed by the Appellant, a financial creditor of the Corporate Debtor/TAG Offshore Limited, under section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called 'IBC') assailing the judgment of the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) in MA No. 3656 of 2019 filed under section 60(5) of the IBC in CP No. 54/I&BC/NCLT/MAH/2019.

2. In brief, the Appellant's case is that after order for liquidation of the Corporate Debtor dated 26.9.2019, the erstwhile resolution professional Sudeep Bhattacharya was appointed as liquidator. During the liquidation process, the liquidator vide e-mail dated 2.10.2019 intimated the Appellant/Hero Fincorp Limited (in short 'Hero Fincorp') which had charge of vessel Tag 22, that two vessels, namely Tag 6 and Tag 22, which are assets in the liquidation estate, have come close to each other and may make contact which might result in potential damage to the vessels. This email was also sent to United Bank of India, which had the charge of vessel Tag 6. The liquidator also mentioned in the email that he has reached out to a salvage company, namely K.E. Salvage for securing the two vessels for their protection and preservation and asked it to provide an estimate for the proposed job. The Appellant has further submitted that vide e-mail dated 3.10.2019 it communicated to the liquidator its willingness to contribute funds for securing the vessel Tag 22 and also requested for starting the job of securing the vessels. After completion of the securing operation, K.E. Salvage submitted tax

invoice dated 9.10.2019 amounting to Rs. 14,75,000 (Rupees Fourteen Lakhs Seventy Five Thousand only) for shifting and re-anchoring the two vessels during the period starting from 3rd to 5th October 2019. On being requested to provide details of the job undertaken, K.E. Salvage provided relevant details vide e-mail 10.12.2019.

3. The Appellant has further submitted that it issued a notice dated 9.10.2019 to the liquidator indicating its intention to exit from the liquidation process and realise its charge in Tag 22 since it had obtained the statutory remedy for enforcement of mortgage for the vessel by invoking the Admiralty Jurisdiction of the Hon'ble Bombay High Court and Hon'ble Andhra Pradesh High Court before the initiation of CIRP of the Corporate Debtor/TAG Offshore Limited. After issuing the notice and on not receiving any response from the liquidator, the Appellant preferred MA No. 3656 of 2019 in CP No. 54/I&BC/NCLT/MAH/2019 on 13.11.2019 seeking directions from the Adjudicating Authority to allow the Appellant to exit the liquidation process and keep the vessel Tag 22 out of liquidation estate and also for including the expenses incurred in securing the two vessels, Tag 22 and Tag 6, as part of the CIRP and liquidation expenses. The Appellant has stated that subsequently the Adjudicating Authority passed orders in MA No. 3656 of 2019 on

6.2.2020 holding that the expenses incurred for securing the vessel Tag 22 cannot be treated as liquidation process expenses and the Appellant should bear the entire expenses incurred by the liquidator in protecting the charge of the Appellant. In addition, the Adjudicating Authority also allowed the Appellant to keep its charge of Tag 22 out of the liquidation estate as requested under section 52 of the IBC subject to clearance of proportionate CIRP costs and payment of expenses incurred by the liquidator in securing the vessel Tag 22. On being aggrieved by the said order the Appellant has preferred this Appeal.

4. We heard the arguments submitted by the Ld. Counsels for the parties and also perused the record.

5. The Ld. Counsel for Appellant has argued that the responsibility for securing the vessel Tag 22, which was part of the liquidation estate, was the responsibility of the liquidator and, therefore, expenses for preventing any damage due to possible collision between the vessels was upon the liquidator, and hence the expenses incurred should be part of the overall liquidation process costs. He has further argued that the liquidator had issued an email dated 2.10.2019 for securing the two vessels Tag 6 and Tag 22 to the Appellant and United Bank of India and the Appellant had

requested the liquidator to undertake the securing operation since it had no technical expertise or knowledge of shipping activities and also agreed to contribute its share in the expenses so incurred. He has further argued that the Appellant indicated its intention to exit from the liquidation process vide notice dated 9.10. 2019 in view of the fact that it had obtained statutory remedy for enforcement of the mortgage for the vessel under its charge by invoking the Admiralty Jurisdiction of the Hon'ble Bombay High Court and the Hon'ble Andhra Pradesh High Court but the said notice did not elicit any response from the liquidator.

6. The Learned Counsel for Appellant has further contended that it was therefore constrained to prefer MA No. 3656 of 2019 seeking directions of the Adjudicating Authority for permission to exit from the liquidation process and keep vessel Tag 22 out of the liquidation estate, and also for including the expenses incurred in securing the two vessels for their preservation and protection in the liquidation expenses. His argument is that since the said expenses were incurred after the liquidation commencement date, it cannot form part of the CIRP expenses and therefore it should be included in the liquidation process expenses. The Learned Counsel for Appellant has also argued that when the Appellant is proceeding by not relinquishing its security in its charge of Tag 22 which is a

proceeding *in rem*, the liquidation costs cannot be imposed on the Appellant and there is no provision in the IBC to impose specific costs upon the Appellant for preserving and protecting the assets in the liquidation state which is actually the responsibility of the liquidator. He has also argued that the Adjudicating Authority has held in the last sentence of the Impugned Order that the Applicant needs to bear the whole of the expenses incurred by the liquidator for protecting its charge, which is not proper and he should be saddled with only 50% of the expenses incurred.

7. The Learned Counsel for Respondent/Appellant has also argued that the Mumbai Port Trust and K.E. Salvage have already claimed these dues as Sheriff's expenses in Admiralty proceedings going on before the Hon'ble Bombay High Court, and hence the Appellant cannot be insisted upon to pay these expenses under IBC. The Learned Counsel for Appellant has further contended that the money realized after auction/sale of its charge Tag 22 is deposited in Hon'ble Bombay High Court and any expenses to be taken out of the auction/sale proceeds can take place only after the orders of Hon'ble Bombay High Court, and in such an event it is the responsibility of the Appellant to pay these expenses that have already been incurred in its behalf.

8. The Learned Counsel for the Liquidator has argued that the Appellant did not file its claim under the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (in short Liquidation Process Regulations) wherein Regulation 16 and Regulation 18 require a financial creditor to submit its claim on or before the last date mentioned in the public announcement and the proof of the claim in Form D of Schedule II. He has referred to paragraphs 4 and 8 of the Impugned Order to argue that the Appellant is pursuing a statutory remedy available to it as a mortgagee under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 prior to commencement of CIRP of the corporate debtor, wherein vessel Tag 22 which is under its charge was 'arrested' on the order dated 18.3.2019 of the Hon'ble Bombay High Court and its auction/sale was also ordered on 23.4.2019 and, therefore, the expenses incurred for securing the specific charge Tag 22 of the Appellant have to be borne by the Appellant. The Learned Counsel for Appellant has adverted to para 8 of the Impugned Order to claim that the Appellant had, through e-mail dated 4.10.2019, agreed to reimburse 50% of the total expenses and this fact is not disputed by the Appellant and, therefore, such expenses should not form part of CIRP or liquidation process expenses.

9. The Learned Counsel for Respondent/Liquidator has urged

that, in accordance with the order given by the Adjudicating Authority in MA No. 3656 of 2019, the Appellant should not be allowed to exit from the liquidation process until it clears its proportionate CIRP costs and also pays the expenses incurred by the liquidator in securing its charge vessel Tag 22.

10. The provisions in the Liquidation Process Regulations that are relevant to this case are as follows: –

"16. Submission of claim – *(1) A person, who claims to be a stakeholder, shall submit its claim, or update its claim submitted during the corporate insolvency resolution process, including interest, if any, on or before the last date mentioned in the public announcement.*

(2) A person shall prove its claim for debt or dues to him, including interest, if any, as on the liquidation commencement date.

18. Claims by financial creditors. – *(1) a person claiming to be a financial creditor of the corporate debtor shall submit proof of claim to the liquidator in electronic means in Form D of Schedule II.*

(2) The existence of debt due to the financial creditor may be proved on the basis of –

(a) the records available in an information utility, if any; or

(b) other relevant documents which adequately establish the debt, including any or all of the following; -

(i) a financial contract supported by financial statements as evidence of the debt;
(ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;
(iii) financial statements showing that the debt has not been repaid; and

(iv) an order of a Court or tribunal that has adjudicated upon the non-payment of a debt, if any.

11. The relevant provisions of IBC are as follows: -

21-A Presumption of security interest

xx xx xx

(2) Where a secured creditor proceeds to realize its security interest, it shall pay

(a) as much towards the amount payable under clause (a) and sub-clause (i) of clause (b) of sub-section (1) of section 53, as it would have shared in case it had relinquished the security interest, to the liquidator within ninety days from the liquidation commencement date;

xx xx xx

53. Distribution of assets. -

xx xx xx

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation. – For the purpose of this section-

(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) (ii) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 (18 of 2013).

12. It is noted that the liquidator, who is responsible for preservation and protection of the assets in the liquidation estate,

exchanged email communications starting with an e-mail dated 2.10.2019 (emails attached at pp.45-48 of the appeal paperbook) to both Appellant/Hero Fincorp and United Bank of India, under whose charges the vessels Tag 22 and Tag 6 were held respectively, that the two vessels have come close to each other and may come into contact leading to potential damage, whereupon vide e-mail dated 3.10.2019 (attached at pg. 45 of the appeal paperbook) the Appellant communicated its unreserved willingness to contribute funding needed for securing Tag 22 and also requested the liquidator to undertake the securing operation. Again, vide e-mail dated 4.10.2019, the Appellant expressed its willingness to contribute 50% of the funds required for securing the two vessels Tag 22 and Tag 6. The order portion in the Impugned Order is as follows:-

> *"The application be and the same is allowed in part. The applicant may opt out of the liquidation estate u/s 52 of the Code subject to clearance of proportionate CIRP costs and payment of the expenses incurred by the liquidator in securing m.v. TAG 22 in order to prevent the collision. No costs."*

(emphasis supplied)

Thus, it is clear that proportionate CIRP cost and payment of expenses incurred by the liquidator in securing m.v. Tag-22 has been ordered by the Adjudicating Authority which has to be paid by the Appellant.

13. The Adjudicating Authority has noticed in para 4 of the Impugned Order that the Appellant filed Commercial and Admiralty Suit before the Hon'ble Bombay High Court for invoking the admiralty jurisdiction and realising its security interest. Relevant part of the Impugned Order is as follows: -

> *"4. ………. The statutory remedy available to vessel mortgagee (applicant) has already been invoked under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 prior to the commencement of CIRP of the Corporate Debtor. Commercial admiralty Suit (L) 51 of 2019 was filed before the Hon'ble Bombay High Court wherein one of the vessels i.e. m.v. TAG 22 was arrested by an order dated 18.03.2019 and its auction/ sale was ordered on 23.04.2019. The applicant has also filed Commercial Admiralty Suit 2 of 2019 before the Hon'ble High court of Andhra Pradesh and the other vessel i.e. m.v. TAG 21 was arrested by an order dated 28.03.2019. Through this letter, it was also stated that the vessels m.v. TAG 21 and m.v. Tag 22 are under exclusive charge of the applicant and appropriate statutory remedies were also adopted to redeem the charge."*

14. Thus, the Appellant had invoked Admiralty Jurisdiction under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 vide Commercial and Admiralty Suit No. (L- 51 of 2019),

whereupon an order for 'arrest' of the vessel was given by the Hon'ble Bombay High Court on 18.3.2019 and its auction/sale was ordered on 23.4.2019. The CIRP of the Corporate Debtor/Tag Offshore Limited was initiated vide order dated 24.4.2019 of the Adjudicating Authority, which was more than one month after the Appellant had invoked the Admiralty Jurisdiction of the Hon'ble Bombay High Court for securing and realizing its charge in the vessel Tag 22.

15. It is also noted by us that the actions relating to protection and preservation of two vessels Tag 22 and Tag 6 were taken by the liquidator during the period 3rd to 5th October, 2019, as is clear from the e-mails exchanged between the charge holders of two vessels, namely United Bank of India and Hero Fincorp and the liquidator (emails attached at pp. 45-48 of appeal paperbook) and also from the tax invoice submitted by K.E. Salvage (attached at pg. 49 of the appeal paperbook). Therefore, the action relating to securing the two vessels was taken much after the Appellant had obtained order from the Bombay High Court under its Admiralty Jurisdiction on 18.3.2019 and 23.4.2019 and therefore the vessel Tag 22 had become the 'asset' of the Appellant. Thus, it is clear the any action taken thereafter for securing the vessel Tag 22 was undertaken by the liquidator with the explicit consent of the Appellant/Hero Fincorp in pursuance of Hero Fincorp's interest in protecting and

preserving its asset Tag 22, and the action being taken for liquidation of the Corporate Debtor is under the provisions of the IBC. Moreover, the security interest of the Appellant in its charge vessel Tag 22 is being realised under section 52(1)(b) of the IBC. Therefore, we do not think it is relevant in this case that the liquidator's vendor K.E. Salvage should await orders of the Hon'ble Bombay High Court for payment of its claim from the sale proceeds of vessel Tag 22. We are of the clear opinion that the payment of salvaging operation should be made without awaiting the orders under the Admiralty Jurisdiction, as it is the responsibility of the Appellant, on whose request the securing operation for Tag 22 was undertaken by the liquidator.

16. Regulations 16 and 18 of the Liquidation Process Regulations enjoin upon the creditors to file their claim before the liquidator in a prescribed time period. In the present case, the financial creditor Hero Fincorp Limited did not file its claim before the liquidator ostensibly because it wanted to realise its security interest in the vessel Tag 22. Later, after it was able to secure its charge in vessel Tag 22, the Appellant sent notice on 9.10.2019 to the liquidator regarding its intention to keep its charge of Tag 22 out of the liquidation estate and process. The Appellant obtained orders for auction/sale of vessel Tag 22 on 23.4.2019, which was much before

the initiation of CIRP of the Corporate Debtor and order for its liquidation was passed by the Adjudicating Authority on 26.9.2019. Therefore, even though the Appellant gave notice for keeping its charge of the Vessel Tag 22 out of the liquidation process on a later date, it had already initiated process for statutory remedy available to it as mortgagee before Hon'ble Bombay High Court under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 in March, 2019 (vide Admiralty Suit (L) 51 of 2019).

17. It is noted that after receiving the Impugned Order on 6.2.2020, the Appellant waited for almost seven months before filing this appeal on 17.9.2020. We also note that the Appellant has already taken action in pursuance of the Impugned Order by opting out of the liquidation process and keeping vessel Tag 22 out of the liquidation assets.

18. We thus find that the liquidator took action after receiving consent from the Appellant for preservation and protection of vessel Tag 22 during 3rd – 5th October, 2019 much after the Appellant had invoked Admiralty Jurisdiction of Hon'ble Bombay High Court to realise its security charge in vessel Tag 22. Subsequently, when invoice received from K.E. Salvage Company was sent for payment to the Appellant by the liquidator, the Appellant went for litigation

against making payment of said invoice. We do not consider this action of the Appellant logical and in accordance with the actions taken by it to realise its charge in Tag 22. We, therefore, do not find any error in the Impugned Order regarding payment to be made by the Appellant, of its proportionate share in the expenses incurred in securing vessel Tag 22 alongwith securing vessel Tag 6.

19. We are also of the view that even after the salvage operation undertaken during 3rd - 5th October, 2019, the Appellant has not only refused to pay the cost of securing and protecting the vessel Tag 22 and has engaged the liquidator in protracted litigation. We note that the action taken by the liquidator in protecting and preserving Tag 22 was for the benefit of the Appellant and the litigation undertaken by the Appellant caused expenditure which has ultimately cut into the value of the liquidation estate, thereby affecting the financial interest of the creditors/stakeholders. We, therefore, order that the Appellant shall pay a cost of Rs. One Lakh as litigation expenses to the liquidator, which shall go into the liquidation estate. Both, the proportional share of the Appellant in securing the two vessels Tag 22 and Tag 6 and the litigation cost shall be paid by the Appellant within 15 days of this judgment.

20. In view of the discussion in above paragraphs, the appeal is found to be devoid of any merit and is, therefore, dismissed with the directions as above.

(Justice Ashok Bhushan)
Chairperson

(Dr. Alok Srivastava)
Member (Technical)

(Ms. Shreesha Merla)
Member (Technical

New Delhi
29th April, 2022

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