NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 555 of 2024

(Arising out of the Order dated 19.12.2023 passed by the National Company Law Tribunal, Mumbai Bench, in Interlocutory Application / 699 (MB) 2021 in CP (IB) 2295/NCLT/MB/2018.)

IN THE MATTER OF:

Avil Menezes
Liquidator of Sunil Hitech and Engineers Limited
Having office at:
106, 1st Floor, Kanakia Atrium 2, Cross Road A,
Behind Courtyard Marriott, Chakala, Andheri East,
Mumbai City, Maharashtra - 400093 **…Appellant**

Versus

Hinduja Leyland Finance Limited
Having office at: 1, Sardar Patel Road Guindy,
Chennai – 600032 **…Respondent**

Present

For Appellants: **Mr. J. Rajesh, Dhrupad Vaghani, Jaitegan Khurana, Md. A. Ahmed, Adv.**

For Respondents: **Mr. Prakash Shinde & Ruchita Jain, Adv.**

J U D G E M E N T

(21.01.2025)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present appeal has been filed by the Appellant Avil Menezes who is Liquidator of Sunil Hitech and Engineers Limited ('**Corporate Debtor**') against the Impugned Order dated 19.12.2023 under Section 61 of the Insolvency and Bankruptcy Code, 2016 ('**Code**') passed by the National Company Law Tribunal,

Mumbai Bench-I ('**Adjudicating Authority**') in I.A. No. 699 of 2021 in CP (IB) 2295/NCLT/MB/2018.

2. M/s Hinduja Leyland Finance Limited is the Respondent herein.

3. The Adjudicating Authority vide its order dated 10.09.2018 initiated Corporate Insolvency Resolution Process ('CIRP') against the Corporate Debtor and subsequently based on the Resolution Professional's application, the Adjudicating Authority passed an order for liquidation of the Corporate Debtor under Section 33 of the Code vide order dated 25.06.2019.

4. The Appellant issued a public announcement as per Regulation 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("**Liquidation Regulations**") in several newspapers and received claim of Rs. 30,89,42,646/- from the Respondent on 26.11.2019. It has been brought out that Corporate Debtor has availed certain credit facilities from Tata Capital Financial Service Limited ("**TCFSL**") against the movable assets which were exclusively charged in favour of the TCFSL. The Appellant submitted that the credit facilities were duly paid by the Corporate Debtor and TCFSL by way of closure letter dated 24.03.2017 confirmed that the financial facilities stood repaid in the books of TCFSL.

5. The Appellant submitted that the Corporate Debtor has availed financial assistance from a consortium led by UCO Bank Consortium comprising of various banks and financial institutions amounting to Rs. 1970 Crores and entered into an Original Working Capital Consortium Agreement ("Consortium

Agreement") dated 05.12. 2006. Similarly, the Corporate Debtor in UCO Bank consortium had entered into Original Joint Deed of Hypothecation ("Hypothecation Agreement") dated 04.12.2006 (as amended from time to time), whereby the Corporate Debtor had created charge on the movable assets in favour of the UCO Bank consortium.

6. It is the case of the Appellant that UCO Bank consortium had charge on all the movable assets of the Corporate Debtor subsequent to release of charge by TCFSL on 24.03.2017,

7. The Appellant submitted refinancing facilities were availed by the Corporate Debtor from the Respondent and the charge over the movable assets was created by the Corporate Debtor in favour of the Respondent on 30.11.2017 for which charge was already crystalized in favour of the UCO Bank consortium much earlier.

8. The Respondent vide an email dated 31.12.2019 sent to the Appellant about his intent to realise the movable assets of the Corporate Debtor and in opinion of the Appellant, the assets mentioned by the Respondent were originally financed by TCFSL and on satisfaction of loan of TCFSL, the charge on movable assets of the Corporate Debtor were crystalised in favour of the UCO Bank consortium based financial facilities from UCO Bank Consortium and way of various loan and hypothecation deeds.

9. The Appellant submitted that the Respondent and the Corporate Debtor had entered into several loan agreements between 01.09.2016 to 30.11.2017 by way

of refinancing against the movable assets of the Corporate Debtor. The Appellant clarified that the movable assets which has been claimed by the Respondent as charge in favour of the Respondent remained unidentified and as the Respondent did not provide any details of such assets at the time of submission of the claims.

10. The Appellant brought out that the Respondent, after four months of the liquidation commencement, communicated to the Appellant vide letter dated 28.11.2019 about his decision to realise his security interest on the movable assets in accordance with Section 52 of the Code. The Appellant submitted that he vide an e-mail dated 18.12.2019 requested the Respondent to furnish a no objection certificate from UCO Bank consortium which Respondent failed to furnish and therefore, the Appellant vide an email dated 31.12.2019 rejected the claim of the Respondent to realise the movable assets.

11. The Appellant stated that the Respondent, aggrieved by the decision of the Appellant in rejecting the respondent's claim, filed an Interlocutory Application bearing IA No. 699 of 2021 under Section 42 r/w 16(5) of the Code before the Adjudicating Authority and the Adjudicating Authority vide Impugned Order dated 19.12.2023 allowed the IA No. 699 of 2021 of the Respondent and hence the present appeal before us has been filed by the Appellant.

12. The Appellant explained that one of the pre conditions for availing the financial facilities from the UCO Bank consortium was that the Corporate Debtor will create security interest by way of Hypothecation in favour of UCO Bank consortium. The Corporate Debtor executed various hypothecation agreement

with the UCO Bank consortium creating the *first pari-pasu charge* overall the assets including the movable assets of the Corporate Debtor. Accordingly, both the parties entered into Joint Deed of Hypothecation on 04.12.2006 (as amended from time to time), whereby the Corporate Debtor created charge on assets of the Corporate Debtor in favour of the UCO Bank consortium. The Appellant amplified that UCO Bank consortium charge had all the movable assets of the Corporate Debtor present and further which happened subsequent to discharge of the charge of the Corporate Debtor under common agreement with TCFSL.

13. The Appellant submitted that the Respondent communicated decision to realise its security interest and after going through all the relevant documents provided by the Respondent, the Appellant came to the conclusion that assets mentioned by the Respondent were originally financed by the TCFSL and on satisfaction of loan of TCFSL the charge of movable assets were crystalised in favour of the UCO Bank consortium and thus, the Respondent could not have valid charge on these movable assets.

14. The Appellant submits that as per Section 48 of the Transfer of Property Act, 1882 ("**TP Act**") in case for same assets, different charges are created then earlier created charge will be binding, in absence of any contra special contract. The Appellant conceded that although Section 48 of the TP Act is w.r.t., immovable assets, the wordings of Section 48 of the TP Act makes it apparent that the principle of priority expressed in Section 48 of the TP Act is equally applicable to immovable assets. The Appellant stated that when two or more

instruments are created over the same immovable property, then the rights created by the subsequent instrument shall be subject to the rights created by the prior instrument unless such is excluded by a reservation in the prior instrument as a result of a special contract.

15. The Appellant stated that the Adjudicating Authority has erred in observing that there has been consistent understanding between the Corporate Debtor and the UCO Bank Consortium that the assets financed including refinanced by the lenders remained outside the Consortium lenders shall be charged in favour of such financer and the UCO Bank Consortium shall have only second charge over such assets.

16. The Appellant submits that the said clause in relevant agreement and 8th Supplemental Deed of Working Capital Consortium Agreement dated 12.06.2016 does not entitle the re-financers to have 1st charge over the assets which was already existing with the Corporate Debtor at the time of further loan availed by the Corporate Debtor from the Respondent. The Appellant submitted that the second charge of the UCO Bank Consortium will only be limited to the new assets purchased by the Corporate Debtor through a fresh credit facility. However, this relevant clause does not refer to the existing assets which are re-financed by a financer as these existing assets are already part of the estate of the Corporate Debtor and these assets are not being introduced to the estate of the Corporate Debtor because of such refinancing. The Appellant stated that the Adjudicating

Authority wrongly interpreted the said clause in allowing the claims of the Respondent.

17. The Appellant submitted that at the time of creating exclusive charge over the Movable Assets, the Respondent was duty bound to obtain no-objection certificate from the UCO Bank Consortium, however, the Respondent failed to provide no-objection certificate from the UCO Bank Consortium.

18. The Appellant submitted that in absence of a no-objection certificate for creating an exclusive charge, the charge of the Respondent became a subservient charge holder and in view of the decision of the UCO Bank Consortium to relinquish their rights in favour of the liquidation estate, the Movable Assets formed part of the liquidation estate of the Corporate Debtor. The Appellant cited judgment of this Appellate Tribunal in the matter of ***J.M. Financial Solution Private Limited and Ors.,*** passed in *Company Appeal (AT) (Insolvency) No. 593 of 2019*, where it was held that the right to realise security under Section 52 of the Code is restricted to a creditor that has an 'exclusive charge' or 'sole first charge' like UCO Bank Consortium in present case.

19. The Appellant submitted that in absence of the NOC from the UCO Bank Consortium, the Respondent does not have any exclusive or sole first charge over the Movable Assets of the Corporate Debtor, therefore, the Respondent is not entitled to realize the Movable Assets under Section 52 of the Code.

20. The Appellant further stated that the Adjudicating Authority, while directing the Appellant to handover the movable assets to the Respondent, failed

to observe that the Respondent could not even identify the assets charged in favour of the Respondent. The Appellant submits that in order to resolve the situation and identify the movable assets, the Respondent had visited the office premises of the liquidator of the company on 12.12.2019 whereby the Respondent requested for the entire list of traceable/available assets of the Corporate Debtor. The Appellant accordingly provided the entire list of traceable/available assets of the Corporate Debtor and consequently, the Respondent vide an email dated 17.12.2019 stated he was able to identify 14 assets out of the total 291 purported movable assets allegedly charged to the Respondent.

21. The Appellant stated that several assets of the Corporate Debtor have model numbers which are synonymous with that of the movable assets provided by the Respondent and hence it was absolute necessary for the Respondent to provide details pertaining to machine number or chassis number or registration number etc as required under Section 52 of the Code. However, the Loan Documents provided by the Respondent did not have the complete set of information with respect to the movable assets that were charged to it, in fact the column for the description of the movable assets was not filled by the Respondent and the same was left blank.

22. Concluding his arguments, the Appellant urged this Appellate Tribunal to dismiss the Impugned Order and allow his appeal.

23. Per contra, the Respondent denied all the averments made by the Appellant in the present appeal.

24. The Respondent submitted that between 19.03.2015 to 30.11.2017, the Respondent provided financial assistance and refinanced the movable assets of the Corporate Debtor aggregating Rs. 38,96,50,000/- against the specific movable assets under the said refinance scheme and the assets against which the loan was availed were exclusively charged to the Applicant.

25. The Respondent further submitted that the UCO Bank Consortium never had charge on the said movable assets. The Respondent elaborated that the said movable assets of the Corporate Debtor were originally financed by TCFSL and refinanced by the Respondent. TCFSL, and now Respondent has exclusive charge over the said movable assets of Schedule 'K' of his agreement. The Respondent submitted that the said movable assets which were financed by TCFSL were mortgaged/Charged by the Corporate Debtor exclusively in favour of TCFSL, in favour of the Respondent.

26. Explaining the background of his financial assistance to the Corporate Debtor, the Respondent stated that the Corporate Debtor was in need of additional funds and to get better terms on existing charge, therefore the Corporate Debtor approached the Respondent for financial assistance by way of re-finance on the said movable assets which were prior financed by TCFSL.

27. The Respondent explained that while refinancing the loan, the Respondent had also obtained NOC dated 24.03.2017 from TCFSL and

thereafter created charge over the existing unencumbered specific assets. The exclusive charge was created in favour of the Respondent and necessary charge has been registered with the Registrar of Companies ('**RoC**').

28. The Respondent emphatically submitted that TCFSL and now Respondent has exclusive charge over the said movable assets and the UCO Bank Consortium has no charge on the said movable assets as alleged by the Appellant, thus, the question of obtaining NOC from UCO Bank Consortium does not arise.

29. The Respondent submitted that the Appellant had issued public announcement on 01.07.2019 inviting the claims from Creditors and the Respondent filed his Claim on 26.07.2019. The Appellant vide email dated 24.09.2019 requested for computation of claim and KYC of authorised officer of the Respondent which were furnished by the Respondent to the Appellant. The Respondent vide letter dated 28.11.2019, informed the Appellant that the Respondent desires to realise his security interest i.e. movable assets.

30. The Respondent submitted that Claims of the Respondent were admitted by the Appellant on 29.11.2019 vide email dated December 2019 and requested the Respondent for Inspection report, NOC obtained at the time of refinancing . The Respondent vide email dated 20.12.2019, provided the NOC obtained from earlier lender and requested details, however, vide email dated 31.12.2019, the Appellant has raised the alleged contention that

charge got crystallized in favour of UCO Bank Consortium i.e. after around 6 months from the commencement of the CIRP of the Corporate Debtor.

31. The Respondent submitted that the 8th Supplemental Deed of working capital consortium agreement dated 13.06.2016, executed between the UCO Dank Consortium and Corporate Debtor does not affect the rights of the Respondent as first charge holder on movable assets of the Corporate Debtor.

32. The Respondent submitted that the UCO Bank Consortium did not possess any charge over the said movable assets, which were financed by TCFSL, and refinanced by the Respondent and thus there is no question of UCO Bank Consortium's holding pari passu charge over the said movable assets getting crystallized, as alleged by Appellant. This Respondent stated that the Respondent has exclusive charge over the said movable assets.

33. Concluding his arguments, the Respondent submitted that the Appeal is liable to be dismissed with costs.

Findings

34. We note that from 17.06.2014 to 30.06.2014, the Corporate Debtor availed financial facilities from TCFSL and financed certain movable assets (around Rs. 20 Crores) which were exclusively charged in favour of TCFSL. The Corporate Debtor repaid the said loan, after which TCFSL issued a closure letter dated 24.03.2017 confirming that the facilities were repaid.

35. We take into consideration the fact that on 05.12.2006, the corporate debtor entered into an Original Working Capital Consortium Agreement with UCO Bank as the lead bank along with 13 other banks (the "***UCO Bank Consortium***"). The working capital limit was gradually enhanced to Rs. 1970 Crores. The UCO Bank Consortium's security included hypothecation of the corporate debtor's present and future assets, both movable and immovable assets.

36. We note that on 10.09.2018, CIRP was initiated against the Corporate Debtor and subsequently on 25.06.2019, the Liquidation Order was passed. The Respondent filed their claims for Rs. 30,89,42,626/- on 26.07.2019 and the Appellant vide an email dated 13.09.2019 acknowledged the claims and sought further details. The Respondent on 28.11.2019 wrote to the Appellant seeking to realise the security as per Section 52(1)(b) of the Code. In the email dated 12.12.2019, the Appellant gave the asset list for reconciliation, however, vide an email dated 17.12.2019, the Respondent could identify only 14 assets out of 291 movable assets and sought more time to identify remaining assets. The Appellant, *vide* email dated 18.12.2019, informed the Respondent that the loan agreements provided by the Respondent did not specify the Serial No./Chassis No./Machine No, therefore, the Appellant could not map the said assets loan-wise. The Appellant also requested the Respondent to furnish Inspection Report at the time of loan sanction, NOC at the time of refinancing and Invoices against the sanction letter.

37. We observe that on 31.12.2019, the Appellant sent an email stating that TCFSL initially financed the movable assets and thereafter on 24.03.2017, the loan was repaid by the Corporate Debtor and a closure letter was issued to the Corporate Debtor by TCFSL, hence, the charge stood crystallised in favour of the UCO Bank Consortium based on hypothecation deed of UCO Bank Consortium with the Corporate Debtor as amended from time to time. The Appellant asked the Respondent to submit the NOC obtained from the UCO Bank Consortium. On 07.10.2020, the Respondent, instead of providing NOC of UCO Bank Consortium and identifying all charged assets, issued a letter stating that there was no requirement to obtain NOC from UCO Consortium Bank. The Appellant vide letter dated 15.10.2020 informed the Respondent that while the Respondent's claims as a creditor have been admitted, the Respondent's charge is subservient to the First Pari-Passu charge of UCO Bank Consortium, especially in the absence of the NOC taken from UCO Bank Consortium while refinancing the movable assets. On 22.02.2021, the Respondent filed I.A. 699 of 2021 before the Adjudicating Authority to realise the assets purportedly charged in favour of the Respondent under Section 52 of the Code.

38. It is the case of the Appellant that the Respondent could not identify the assets and also that the Respondent is a subservient charge holder to the UCO Bank Consortium and cannot realise its security interest under Section 52 of the Code. The Adjudicating Authority while passing the Impugned Order dated 19.12.2023, despite noting that no NOC was taken from the UCO Bank

Consortium, concluded that the assets re-financed by Respondent were outside the UCO Bank Consortium lenders charged assets and the UCO Bank Consortium gad only second charge as collateral security.

39. We will like to go into details of the relevant clause of the Agreement of UCO Bank Consortium, which reads as under :-

> ***Clauses 1, 2 3 AND 4 – 3rd Schedule of 8th Supplemental Deed of Working Capital Consortium Agreement on 12.06.2016*** **:-**
>
> *1) First Pari-pasu Charge on entire Fixed assets of the Borrower including Plant and Machinary, etc. (Movable and Plant And Machinery) machinery spares, tools and accessories, non-trade receivables and other movables,* ***both present and future, whether in possession*** *or under the control of the borrower or not, whether installed or not and whether now lying loose or in cases or which are now lying or stored in or about or shall hereafter from time to time during the continuance of these presents be brought into or upon or be stored or be in or about all the Borrower's factories, premises and godowns or wherever else the same may be or be held by any party to the order or disposition of the borrower or in the course of transit or on high seas or on order or deliver, excluding assets financed by availing Term Loan outside the consortium and other bankers having exclusive charge on fixed assets of the borrower in addition to the property which is mentioned in the Mortgage Deed to cover entire facilities.*

2) First Paripasu charge by way of hypothecation on the entire current assets present as well as Future of the Borrower such as stocks, all kinds of raw materials, stocks in process, finished and unfinished goods, (without prejudice to the generality of the foregoing words) and all allied and incidental products, machinery packing materials spare parts and stores of the Borrower and Loose tools (now stored or being stored in or which may hereafter from time to time be brought into or stored or be in or on any premises, warehouse, godowns, showrooms, offices, sales offices and/or any other place of steerage whatsoever at factory premises or wherever else the same may tie including any of the stocks and goods which may be in the course oil transit, otherwise or awaiting transit or otherwise, whether now belonging to or that may at any time during the continuance of this security belong to the Borrower or may be held by any party anywhere to the order or disposition of the Borrower and all the present and future book-debt, outstanding, moneys, receivables, claims and bills which are now due and owing or which may at any time hereafter during the continuance of this security becomes due or owing to the Borrower in the course \ of its business from any person, firm, company, body corporate or by any Government of India or any; and all any other charge over the movable and immovable properties of the Borrower remained to be mentioned here shall be treated as Member Banks are having first PariPassu Charge over the same.

3) First Paripassu charge being Primary Security by way of Hypothecation on the entire stocks of the inventory,

receivables, bills, and proceeds arising from / in connection with above securities, and all rights, title, interest, benefits, claims and demands whatsoever of the Borrower in, to or in respect of all the aforesaid assets, including but not limited to the Borrower's cash-in-hand, of the Borrower (Both present and Future).

4) First Charge by way of Collateral Security in the entire fixed assets excluding assets financed by availing Term Loan outside the consortium and other bankers having exclusive charge on fixed assets of the Borrower and further Pari-passu 2nd charge over the fixed assets created by availing Term Loan outside the Consortium and other banks having exclusive charge on the fixed assets of the Borrower."

(Emphasis Supplied)

40. It is significant to note that the UCO Bank Consortium had the first Pari-passu charge over the movable assets based on third schedule of 8th Supplemental Deed of Working Capital Consortium Agreement after the loan stood repaid to TCFSL by the Corporate Debtor. We note that subsequently after 8 months on 30.11.2017, the Respondent refinanced the movable assets of the Corporate Debtor aggregating to Rs 38,96,50,000/-.

41. We have noted that 3rd Schedule of 8th Supplemental Deed of Working Capital Consortium Agreement has four (4) clauses, each creating the first charge in favour of the UCO Bank Consortium. However, paragraph 4.1 of the Impugned Order only reproduces Clauses 1 and 4, i.e., regarding the first pari-passu charge on the fixed assets and by collateral security. It is significant to note that Clause

2 directly creates the **first pari-passu charge** through **hypothecation** on the movable assets "*present as well as the future*" assets of the Corporate Debtor. Clause 2 does not contain any exclusions in respect of assets financed by loans from other banks and also encompasses "... ***all any other charge over the movable and immovable properties of the borrower remained to be mentioned here shall be treated as Member Banks are having first Pari-passu charge over the same***."

42. We further note that Clause 3 of 8th Supplemental Deed of Working Capital Consortium Agreement also creates the first pari-passu charge as primary security through **hypothecation** and states that the UCO Bank Consortium would have first pari-passu charge by way of primary security over the proceeds arising in connection with the other securities. Clause 3 create a first right over the proceeds from the sale of movable properties, which are the subject matter of the present appeal.

43. Thus, it become clear that Clauses 1 and 4, which contain the exclusion clause for assets purchased fixed by financing term loans outside the UCO Bank Consortium of the 8th Supplemental Deed of Working Capital Consortium Agreement can create the first charge over the fixed assets in exclusion to UCO Bank Consortium. In other words the assets need to be new as well as fixed assets to fall under Clause 1 or even Clause 4 of the 8th Supplemental Deed of Working Capital Consortium Agreement. Therefore, it is quite logical to come to conclusion that if existing assets especially, movable assets are re-financed, by

any subsequent financer/ lender as against financed for new additional fixed assets for Corporate Debtor, then the re-financer will not have any first charge over existing movable assets which are already stood charged (as first charge) in favour of the UCO Bank Consortium. Therefore, it appears that the Adjudicating Authority ignored Clauses 2 and 3, which creates the first charge by hypothecation in respect of present and future assets, without any exclusions. Thus, we unable to see adequate reasons in the Impugned Order holding that " *We find that it has been consistent understanding with the lenders that the assets financed by lenders outside the Consortium lenders shall be charged in favor of such financier and the Consortium shall have only second charge as collateral security".*

44. We have carefully noted that it is the case of the Respondent's that the first pari-passu charge in terms of Clauses 1 and 4 has a carve-out, i.e., "... *excluding assets financed by availing Term Loan outside the consortium and other bankers having exclusive charge on fixed assets of the Borrower in addition to the Property which is mentioned in the Mortgage Deed to cover entire Facilities*." At this stage, we recall the pleading that the Respondent could not clarify about the Respondent's purported charge by way of hypothecation and therefore, the corresponding clauses in the agreement with UCO Bank Consortium, expressly create charge by hypothecation, i.e., Clauses 2 and 3 instead of Clauses 1 and 4.

45. We observe that Clauses 1 and 4 provide that in case a bank outside the consortium finances the purchase of new assets to the corporate debtor and creates

an exclusive charge over those assets then the first charge of the UCO Bank Consortium would be excluded. We consciously take into consideration that the Respondent did not finance the purchase of the assets to the Corporate Debtor at initial level/ original purchase. It was TCSFL, which had initially financed the purchase of the movable assets on 17.06.2014 and 30.06.2014, which the Corporate Debtor repaid to TCSFL on 24.03.2017 and therefore upon repayment, i.e., after 24.03.2017 – the exclusion in respect of UCO Bank Consortium no longer remained applicable. It implies that the UCO Bank Consortium had the first pari-passu charge over the movable assets.

46. On the issue of handing over the movable assets to the Respondent, we note that the Respondent had, on 17.12.2019, *vide* email, requested the Appellant herein to take possession of fourteen (14) movable assets. Immediately on the next day, 18.12.2019, the Appellant informed the Respondent that the Loan Agreements with the corporate debtor did not contain the chassis number/serial number/machine number. Therefore, the Appellant couldn't map the assets for which the Respondent purported to have charge. The Respondent could not correlate the loan agreements with the assets for the fourteen (14) assets. Therefore, the Appellant could not verify the charge concerning the movable assets by mapping the assets.

47. As regard, the controversy in relation to NoC to be taken by the Respondent i.e., from TCFSL or from UCO Bank Consortium, we have already

noted the fact that the Respondent on 30.11.2017, more than 8 months later, on 30.11.2017, refinanced the movable assets aggregating to Rs 38,96,50,000/-. It is the case of the Appellant that at this stage, a NOC needed to be sought from the existing charge holder, i.e., the UCO Bank Consortium, primarily because these assets were not being financed for the first time and because UCO Bank Consortium had the first charge over such movable assets. The first charge got crystallised upon repayment of the loan by the Corporate Debtor to TCSFL. Even otherwise, the first charge by hypothecation in terms of Clauses 2 and 3 existed without any such exclusion in favour of the UCO Bank Consortium. Neither does Clauses 1 to 4 allow for assets over which they already have first charge to be charged to other bankers upon refinancing. Therefore, in no circumstances could any charge have been created in favour of third parties, such as the Respondent herein, without the consent or NOC of the UCO Bank Consortium.

48. We have taken note from the pleadings that while conducting due diligence as required under Section 52(3) of the Code and Regulation 21 of the Liquidation Regulations, 2016, the Appellant vide an email dated 18.12.2019 and 31.12.2019 categorically requested the Respondent to prove their charges by furnishing the NoC obtained from the UCO Bank Consortium. The impugned order also records this fact in paragraph 4.3 by stating that it is an admitted fact that no NOC was taken from the UCO Bank Consortium. In the absence of an NOC, the charge purported by the Respondent was not proved in terms of Section 52(3) of the Code read with Regulation 21 of the Liquidation Regulations, 2016.

49. The main bone of contention and which is central point of the present appeal is regarding as to who has first/ primary charge over movable assets and who has second/secondary charge over the said movable assets. Thus, we will also need to look into the issue brought before us i.e., whether the Respondent's registration of a charge under Section 77 of the Companies Act, 2013, or UCO Bank Consortium's non-registration of the charge with the ROC can become the basis for disregarding UCO Bank Consortium first charge based on 8th Supplemental Deed of Working Capital Consortium Agreement.

50. We take into consideration Section 48 of TP Act, which reads as under-

> *"Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created."*
>
> *(Emphasis supplied)*

51. Section 48 of TP Act stipulate Doctrine of Priority which is based on the Principles of Natural Justice, asserting that when rights are granted to two individuals at different times, the one who possesses the earlier right will also have the legal advantage. This principle is applicable only in situations where the competing interests of the parties are otherwise equal. This doctrine is derived from the legal maxim *qui prior est tempore potior est jure*, which translates to "he who is first in time is stronger in law." Section 48 of the TP Act establishes a

fundamental principle that no individual can transfer a title greater than what he possess. This means that if a transferor conveys the same property to multiple transferees, each transferee will hold rights equivalent to those of the previous transferee. The doctrine dictates that once a transfer is initiated, the transferor cannot disregard prior grants or engage with the property without acknowledging existing rights.

52. In the case of ***ICICI Bank v. SIDCO Leather*** passed in *Civil Appeal No. 2332 of 2006*, the Hon'ble Supreme Court of India held that-

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

53. Thus, Section 48 of the TP Act, clearly protect the right of first charge holder. Although, Section 48 strictly speaking is w.r.t. immovable properties, in the present case there is common 8th Supplemental Deed of Working Capital

Consortium Agreement, where charges were created both on movable and immovable assets of the Corporate Debtor in favour of the UCO Bank Consortium , therefore, interpretation of Section 48 of the TP Act will help the cause of the Appellant for ensuring the charges in favour of UCO Bank Consortium as first charge holder.

54. We note that in paragraph 4.3 of the impugned order, the Adjudicating Authority did not consider the requirement of the NOC from the UCO Bank Consortium solely on the ground that the charge of the Respondent was registered with ROC. On this issue, the Appellant strongly argued that registration of the charge does not improve or play a role when it comes to the question of the priorities of the charge. Registration is only a form of proof under Liquidation Regulation 21. It cannot take away or improve/substantiate a charge created, such as hypothecation or a mortgage, under the TP Act.

55. We note that this Appellate Tribunal in its earlier order in ***Canara Bank v. Mr S Rajendran Liquidator of Cape Engineers*** passed in Company Appeal *(AT) (CH) (Ins) No. 277 of 2023*, passed on 07.03.2024, held that :-

> "*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."

(Emphasis Supplied)

56. This Appellate Tribunal in the matter of ***Unit Small Finance Bank Ltd. v. SripathamVenkatasubramaniam Ramkumar*** passed in *Company Appeal (AT) (Ins) No. 601 of 2024*, passed on 16.04.2024 held that Section 77 of the Companies Act, 2013 cannot be the basis for treating a creditor as unsecured as long as the security was created in terms of Section 3(31) of the Code.

57. This Appellate Tribunal in the matter of ***J.M. Financial Asset Reconstruction Company Ltd v Finquest Financial Solutions Pvt. Ltd.*** passed in *Company Appeal (AT) (Ins) 593 of 2019* held that after enforcement of right under Section 52 of the Code by one of the secured creditors, no other secured creditor can enforce his right subsequently. Thus, only one secured creditor can enforce his right to realise its debt out of secured assets under Section 52 of the Code. The Hon'ble Supreme Court of India has in various judgments including in the matter of ***DBS Bank v. Ruchi Soya [(2024) 3 SCC 752]*** that Sections 52 and 53 of the Code must be read together, and also Section 53(2) expressly states that contractual arrangement inter-se creditors must be disregarded. Only if the asset is charged exclusively to a particular creditor then Section 52 can be given effect.

58. Thus, the arguments of the Respondent w.r.t. his holding first charge on movable assets of Corporate Debtor due to charge registered with RoC are not

attractive. For same reason, we do not find the Impugned Order on this issue convincing and therefore we do not support the same.

59. In view of above detailed analysis we find merits in the arguments of the Appellant. The appeal succeeds and the Impugned Order is set aside. No costs. I.A. if any are closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

Sim