

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH - II, CHENNAI**

IA(IBC)/887(CHE)/2022

IN

CP(IB)/785(CHE)/2019

*(Application under Section 60(5) of the Insolvency Bankruptcy Code, 2016 read with Rule
11 of the National Company Law Tribunal Rules, 2016)*

In the matter of M/s. CAPE ENGINEERS PRIVATE LIMITED

CANARA BANK
ASSET RECOVERY MANAGEMENT BRANCH
Through its Assistant General Manager
1st Floor, Spencer Tower Building,
Chennai – 600 002.

... Applicant

-Vs-

MR .S. RAJENDRAN
[IBBI/IPA/002/IP-N00098/2017-18/10241]
Liquidator of
M/s. CAPE ENGINEERS PRIVATE LIMITED
2nd Floor, Hari Krupa,
No. 71/1, Mc.Nicholas Road,
(Off. Ponamallee High Road), Chetpet,
Chennai – 600 031.

... Respondent

Order Pronounced on 14th June, 2023

CORAM

SANJIV JAIN, MEMBER (JUDICIAL)

SAMEER KAKAR, MEMBER (TECHNICAL)

Present:

For Applicant : M.L. Ganesh, Advocate

For Respondent : M.S. Elamathi, Advocate



ORDER

(Hearing conducted through VC)

Per: SANJIV JAIN, MEMBER (JUDICIAL)

This application has been filed by Canara Bank (hereinafter referred to as the 'Applicant') under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'Code') read with Rule 11 of the National Company Law Tribunal Rules, 2016 against the Liquidator of Cape Engineers Private Limited (hereinafter referred to as the 'Corporate Debtor'). Being aggrieved by the decision of the Liquidator as to the categorization of the Applicant as an 'Unsecured Financial Creditor' vide the communication dated 01.07.2022 and 04.06.2022 by the Liquidator. The prayers under the Application are extracted below:

- a) *This Tribunal may be pleased to quash the communication dated 01.07.2022 and 04.06.2022 cause by the liquidator as non-est in law and thus render justice;*
- b) *To pass such further or other orders may deem fit and proper and thus render justice.*

2. It is stated that the Applicant had extended credit facility to the tune of Rs. 23 Crores in favour of one M/s. Sree Ganesh EPC Private Limited (hereinafter referred to as 'Principal Borrower'). The Corporate Debtor herein had furnished the Corporate Guarantee for the said facility. In this regard, the Corporate Debtor along with Principal Borrower had executed



and registered the instrument titled 'Memorandum of Deposit of Title Deeds' (hereinafter referred to as 'MODT') dated 07.07.2015 with the Registration Authority.

3. It is stated that this Tribunal vide order dated 06.09.2019 allowed the Application (CP/1BA/785/2019) filed under Section 10 of the Code and admitted the Corporate Debtor into Corporate Resolution Process envisaged under the Code. Subsequently, the Respondent herein was appointed as the Resolution Professional. It is stated that during the CIR Process, the Applicant's voting share was 95.76% in the Corporate Debtor.

4. It is stated that the Respondent herein had filed an Application (IA/1342/IB/2021) before this Tribunal under Section 33(2) of the Code seeking Liquidation of the Corporate Debtor and this Tribunal vide order dated 26.04.2022 passed an order of Liquidation of the Corporate Debtor and appointed the Respondent herein as the Liquidator of the Corporate Debtor.

5. It is stated that pursuant to the Public Announcement made by the Respondent Liquidator, the Applicant had filed its claim in 'Form - D' to the Liquidator. It is also stated that owing to huge difference in the valuation of the asset on which security interest was created in favour of the Applicant,



the Applicant desired to stand outside the Liquidation process in terms of Section 52 of the Code.

6. It is stated that in terms of Regulation 21 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (hereinafter referred to as the 'Regulations'), the Respondent Liquidator vide email dated 27.07.2022 sought for documents proving security interest held by the Applicant. Upon submission of the MODT executed in favour of the Applicant, the Liquidator vide email dated 04.06.2022 (Annexure - 8) had informed that the Applicant will be treated as an 'Unsecured Financial Creditor' for the reason that no charge was registered with the Registrar of Companies (hereinafter referred to as the 'ROC') in terms of Section 77 of the Companies Act, 2013. It is also stated that the Liquidator vide email dated 01.07.2022 (Annexure - 7) had requested the Applicant not to take any action under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'SARFAESI') The above two email communications are impugned by way of the present Application.

7. It is stated that the Liquidator cannot brush aside the MODT by citing Section 77(3) of the Companies Act, 2013. The decision of the Hon'ble



Supreme Court in the case *ICICI Bank Limited Vs. SIDCO Leathers Limited and others* [MANU/SC/2337/2006] is relied upon by the Applicant.

8. In response to the present Application, the Liquidator has filed his reply vide SR No. 5957 dated 09.11.2022 before this Tribunal. The Liquidator has not disputed on the facts of the present case, however, it stated that on 05.06.2022, the Applicant has registered the charge with CERSAI.

9. It is contended that as per Section 52(2) of the Code read with Regulation 21 of the Liquidation Regulations, he is vested with the duty to verify the existence of security interest with respect to the Corporate Debtor. It is stated that a secured creditor can prove its security interest by providing either the (i) *certificate of registration of charge by the ROC*, or (ii) *proof of registration of charge in the Central Registry of Securitisation Asset Reconstruction and Security Interest of India* (hereinafter referred to as 'CERSAI') or (iii) *any record available in any Information Utility* (hereinafter referred to as 'IU'). In absence of any of the above, the Liquidator cannot permit the Applicant to realise any security interest.

10. In support of the above proposition, the Liquidator has relied upon an order passed by this Bench in the case *UCO Bank Vs. G. Ramachandran* [(2020) *ibclaw.in* 580 NCLT] and the judgement of the Hon'ble NCLAT in the



case *Volkswagen Finance Private Limited Vs. Shree Balaji Printopack Pvt. Ltd* [(2020) *ibclaw.in* 302 NCLAT] .

11. We have heard the submissions of the Learned Counsel for the Applicant and the Respondent, and perused the documents placed on record.

12. The admitted position of the parties is that the Applicant Financial Creditor had filed its claim pursuant to the public announcement and the Liquidator is in receipt of the instrument creating security interest i.e. the MODT executed in favour of the Applicant. It is also clear that the Applicant has chosen to exercise its statutory right under Section 52 of the Code, i.e., to proceed against the asset over which the Corporate Debtor has created security interest. Since the Liquidator has treated the Applicant as 'Unsecured Financial Creditor', the Applicant has challenged the impugned communication.


13. Section 52 of the Code provides:

52. Secured creditor in liquidation proceedings. —

(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.

(4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.

(5) If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing of the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.

(6) The Adjudicating Authority, on the receipt of an application from a secured creditor under sub-section (5) may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force.

(7) Where the enforcement of the security interest under sub-section (4) yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall—

(a) account to the liquidator for such surplus; and

(b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.

(8) The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

(9) Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in clause (e) of sub-section (1) of section 53.



Perusal of the above provision makes it amply clear that the Liquidator, before permitting any Financial Creditor to proceed against the asset of the Corporate Debtor, shall verify such security interest.

14. It is seen that the Insolvency and Bankrupt Board of India is vested with the power to specify other means of proving a security interest, thus, Regulation 21 of the IBBI (Liquidation Process) Regulations, 2016 prescribes the manner in which security interest may be proved. The said regulation is reproduced below:

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.

Perusal of the above makes it clear that a security interest created may be proved by any of the three modes specified therein.

15. In the present case, the Applicant has neither furnished any record available in IU nor furnished any certificate of charge registered in terms of Section 77 of the Companies Act, 2013. It is also noted that the charge

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registered with CERSAI is an after-thought since the claim was made on an earlier date.

16. At this juncture, the decision of the Hon'ble NCLAT in the case *Volkswagen Finance Private Limited Vs. Shree Balaji Printopack Pvt. Ltd [(2020) ibclaw.in 302 NCLAT]* relied by the Liquidator is squarely applicable.

Section 77 of the Companies Act, 2013 is reproduced below:

77. Duty to register charges, etc

(1) It shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation:

[Provided that the Registrar may, on an application by the company, allow such registration to be made--

(a) in case of charges created before the commencement of the Companies (Amendment) Act, 2019, within a period of three hundred days of such creation; or


(b) in case of charges created on or after the commencement of the Companies (Amendment) Act, 2019, within a period of sixty days of such creation, on payment of such additional fees as may be prescribed:

Provided further that if the registration is not made within the period specified--

(a) in clause (a) to the first proviso, the registration of the charges shall be made within six months from the date of commencement of the Companies (Amendment) Act, 2019, on payment of such additional fees as may be prescribed and different fees may be prescribed for different classes of companies;

(b) in clause (b) to the first proviso, the Registrar may, on an application, allow such registration to be made within a further period of sixty days after payment of such ad valorem fees as may be prescribed.]

Provided also that any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered:



[Provided also that this section shall not apply to such charges as may be prescribed in consultation with the Reserve Bank of India.]

(2) Where a charge is registered with the Registrar under sub-section (1), he shall issue a certificate of registration of such charge in such form and in such manner as may be prescribed to the company and, as the case may be, to the person in whose favour the charge is created.

(3) 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 (31 of 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).

(4) Nothing in sub-section (3) shall prejudice any contract or obligation for the repayment of the money secured by a charge.

Perusal of the provision above would make it clear that sub-section 3 enables the Liquidator to disregard any charge created by the Corporate Debtor in absence of an entry made in the records of ROC.

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 Limited Vs. SIDCO Leathers Limited and others [MANU/SC/2337/2006]* relied upon 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.

19. Thus, for the reasons recorded as above, this Tribunal upholds the decision of the Liquidator in classifying the Applicant as an 'Unsecured Financial Creditor' is correct and warrants no interference.

20. The Application IA(IBC)/887(CHE)/2022 is accordingly dismissed with no orders as to cost.



- Sd -

SAMEER KAKAR
MEMBER (TECHNICAL)



- Sd -

SANJIV JAIN
MEMBER (JUDICIAL)

V.Shreekumar