

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 470 of 2021

(Arising out of Order dated 28.04.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Court 2, in IA/33(AHM)2021 in CP(IB) 53 of 2017)

IN THE MATTER OF:

SICOM Limited,
Solitaire Corporate Park,
Building No.4,
Guru Hargovindji Road,
Andheri – Ghatkopar Link Road,
Chakala, Andheri (East), Mumbai – 400 093. Appellant

Vs

Mr. Sundaresh Bhat,
The Liquidator of ABG Shipyard Limited,
BDO Restructuring Advisory LLP,
The Ruby, Level 9, North West Wing,
Senapati Bapat Marg, Dadar (W)
Mumbai – 400 028. ... Respondent

Present:

For Appellant: **Mr. Arun Kathpalia, Sr. Advocate,
Pranaya Goyal, Mr. Dharav Shah,
Ms. Diksha Gupta, Advocates**

For Respondent: **Mr. Nakul Dewan, Sr. Advocate with
Mr. Abhishek Sharma, Ashly Cherian,
Mr. Kamendra Singh, Advocates**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'IB Code') has been filed against the order dated 28th April, 2021 passed by the National Company Law Tribunal, Ahmedabad Bench rejecting the I.A. No.33 of 2021 filed by the Appellant.

2. The brief facts of the case and sequence of events necessary to be noted for deciding this Appeal are:

- (i) The ABG Shipyard Limited – Corporate Debtor had obtained financial assistance from the Appellant vide sanction letter dated 28th March, 2013. A Medium Term Loan of Rs.90,00,00,000 (Rupees Ninety Crores Only) was sanctioned by the Appellant to the Corporate Debtor. The Loan Agreement was entered between the Corporate Debtor and the Appellant. Security was provided by the Corporate Debtor for the loan by mortgage and hypothecation. The Loan Agreement was executed on 30th March, 2013. Clause 3 of Sanction Letter as modified on April 5, 2013 provided as follows:

“(3) Hypothecation of receivables:

An exclusive charge of entire Receivables of subsidy under the Shipbuilding Subsidy Scheme to be received from the Ministry of Shipping Government of India to be hypothecated in a separate ‘No Lien Escrow Account’ bearing no.00600350093444 with HDFC Bank (the escrow agent), in favour of SICOM Ltd.”

- (ii) The Deed of Hypothecation was also executed on 11th April, 2013, creating first exclusive charge for the entire receivables under Shipbuilding Subsidy Scheme.
- (iii) On 31st October, 2013, the account of Corporate Debtor was classified as Non-Performing Asset (NPA). The Appellant

issued notices and reminders to pay outstanding money and ultimately filed an O.A. No.274 of 2016 before the Debt Recovery Tribunal, (DRT) Ahmedabad seeking recovery of Rs.144,46,95,879/- together with interest. The DRT Ahmedabad vide its judgment dated 26th April, 2017 allowed the O.A. and directed the defendants to jointly and severally deposit Rs.144,46,95,879/- within 30 days, failing which due was to recover from their mortgaged and hypothecated properties.

- (iv) The ICICI Bank Limited – Financial Creditor of the Corporate Debtor filed an Application under Section 7 of the IB Code, which was admitted vide order dated 1st August, 2017.
- (v) The Appellant filed its proof of claim before the Interim Resolution Professional (IRP) in requisite Form-C for an amount of Rs.190,70,93,566/-.
- (vi) On 30th November, 2018, the Resolution Professional circulated the list of Financial Creditors wherein the claim of the Appellant was categorized as ‘Secured Financial Creditor’. An order dated 25th April, 2019 was passed directing for liquidation by the Adjudicating Authority. Liquidator issued public announcement on 3rd May, 2019, in response to which, the Appellant filed its proof of claim of Rs.259,97,90,186/-
- (vii) The Liquidator on 24th May, 2019 wrote an email to the Appellant seeking relinquishment of security interest in the

assets of Corporate Debtor. On 6th June, 2019, the Appellant gave its consent regarding relinquishment of security interest in accordance with Section 52(1)(a) of the IB code. List of stakeholders and Financial Creditors was prepared by the Liquidator, in which the claim of the Appellant was put under the head of “amount unsecured”. The Appellant protested the categorization.

(viii) The Appellant filed an I.A. No.33 of 2021 under Section 60 sub-section (5) of the IB Code praying that Respondent be directed to rectify the classification of the claim of the Appellant. The Respondent filed a reply to the I.A. Written submissions were filed before the Adjudicating Authority.

(ix) The Adjudicating Authority vide order dated 28th April, 2021, rejected the application on two grounds – firstly, the I.A. was belatedly filed and it was barred by time as per Section 42 of the IB Code; and secondly, the Appellant failed to furnish any document pertaining to ROC charge/ registration certificate in support of its security interest as required by Section 77 of Companies Act, 2013.

3. We have heard Shri Arun Kathpalia, learned Senior Counsel for the Appellant and Shri Nakul Dewan, learned Senior Counsel for the Respondent (Liquidator).

4. Shri Kathpalia submitted that the Adjudicating Authority committed error in rejecting the Application of the Appellant filed under Section 60

sub-section (5) of the IB Code and not under Section 42, hence limitation provided for filing an Appeal was not applicable. The Appellant was aggrieved with regard to its categorization as 'unsecured creditor', which was fully covered by Section 60 sub-section (5), relating to question of priorities. It is further submitted that Section 77 of the Companies Act, 2013 was not applicable in the present case in view of the fact that there was a Decree in favour of the Appellant by Debt Recovery Tribunal. The claim of the Appellant over shipping subsidies arises and accrues from the DRT judgment. The definition of 'security interest' under Section 3(31) of the Code is wide enough to include the claim of the Appellant. Section 77 sub-section (3) of the Companies Act, 2013 is applicable only to the charge created by a 'company' and not on the encumbrance created over an asset of a company pursuant to DRT judgment. It is further submitted that the Liquidator, who was Resolution Professional earlier had categorized the claim of the Appellant as 'secured creditor' and the Liquidator after the initiation of liquidation proceedings has changed the categorization from 'secured creditor' to 'unsecured creditor' relying on a legal opinion, which was misplaced.

5. Shri Nakul Dewan, learned Senior Counsel for the Respondent refuting the submissions of the Appellant contends that verification of security interest is mandatory during the liquidation process. In view of the fact that charge of the Appellant was not registered under Section 77 sub-section (3) of the Companies Act, 2013, the same was not binding on the Liquidator. The Appellant failed to prove his security interest as per

Regulation 21 of the Liquidation Regulations. The Application filed by the Appellant before the Adjudicating Authority was time barred in terms of Section 42 of the IB Code on account of having been filed after delay of 551 days. The recovery certificate issued by the Debt Recovery Tribunal is not a Decree. Section 77 sub-section (3) of the Companies Act was fully attracted in the present case and charge of Appellant having not been registered, no illegality has been committed by the Adjudicating Authority in rejecting the claim of the Appellant as 'secured creditor'.

6. Learned Counsel for both the parties have placed reliance on various judgments of Hon'ble Supreme Court and this Tribunal, which we shall be referring to while considering the submission of the parties.

7. Section 3, sub-section (31) defines 'security interest' in following words:

*“(31) “security interest” means right, title or interest or a 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”*

8. Section 52 deals with 'Secured creditors and liquidation proceedings'. Section 52 sub-section (1) is to the following effect:

“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.”*

9. Regulation 21 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 provides for ‘Proving security interest’ in following words:

“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.”*

10. Another provision which needs to be noticed for deciding this Appeal is Section 77 of the Companies Act, 2013, which is contained in the Chapter VI, “Registration of Charges”. Section 77, sub-section (1), (3) and (4) read as:

“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:

(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 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.”

11. The Adjudicating Authority has rejected the I.A. No.33 of 2021 filed by the Appellant substantially on following two grounds:

- (i) The Application was barred by time since as per Section 42 of the IB Code, a creditor may appeal before the Adjudicating Authority against the decision of Liquidator within 14 days on receipt of such decision, whereas the Application was filed after 551 days.
- (ii) The charge being not duly registered under Section 77 sub-section (3) of the Companies Act, 2013, the Liquidator did not

commit any error in not taking into consideration and classifying the Appellant as ‘unsecured creditor’.

12. We may first take up the first ground of rejection of the Application, that is, Application being barred by time.

13. Copy of I.A. No.33 of 2021 has been brought on record as Exhibit-B, memo of which Application indicate that Application was filed under Section 60 sub-section (5) of the IB Code. The Appellant was aggrieved by the classification of the Appellant as ‘unsecured creditor’. As noted above, in the CIRP, the Appellant was referred to as ‘secured creditor’, but the Liquidator after obtaining the legal opinion had categorized Appellant as ‘unsecured creditor’. We have also noticed above that the Liquidator has asked for consent regarding relinquishment of security interest in the assets of the Corporate Debtor, which consent was given by the Appellant. The Appellant at different stages of the liquidation has kept on repeating his claim as ‘secured creditor’ and has also referred to the Recovery Certificate issued by the DRT. On 28th December, 2020, when Liquidator addressed an email to all the stakeholders of the Corporate Debtor informing them about the distribution of amounts realized out of proceeds of the sale of assets of the Corporate Debtor, an Application was filed by the Appellant.

14. Section 42 of the IB Code, provides for an Appeal against the decision of the Liquidator, which is to the following effect:

“42. Appeal against the decision of liquidator. - A creditor may appeal to the Adjudicating Authority

against the decision of the liquidator accepting or rejecting the claims within fourteen days of the receipt of such decision.”

15. The present was not a case where the claim of the Appellant of dues was rejected by the Liquidator altogether. The claim of the Appellant claiming an amount was accepted, but the Appellant was classified as ‘unsecured creditor’. Section 60 sub-section (5) empowers the Adjudicating Authority to entertain or dispose of any Application by or against the corporate debtor or corporate person; any claim made by or against the corporate debtor or corporate person; and any question of proprieties in relation to liquidation proceedings. Section 60 sub-section (5) is as follows:

“60(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of –

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.”

16. It is not the finding of the Adjudicating Authority that I.A. No.33 of 2021 filed by the Appellant was not entertainable under Section 60 sub-

section (5). When the Application being I.A. No.33 of 2021 was maintainable and entertainable under Section 60 sub-section (5), there is no occasion to treat the Application as an Appeal under Section 42 of the IB Code and reject the Application on the ground that it is not filed within 14 days as is provided by Section 42 of the IB Code.

17. Section 42 provides for an Appeal against the decision of Liquidator accepting or rejecting the claim. The present is not a case where the Appellant's claim was altogether rejected. The amount as claimed by the Appellant was accepted and it was only that classification with regard to which the Appellant was aggrieved. The Application filed by the Appellant under Section 60 sub-section (5), thus, clearly maintainable and there is no occasion to reject the Application applying the limitation of an Appeal. Right to Appeal under Section 42 and right to Application under Section 60 sub-section (5) are two different remedies provided by the statute. A person is entitled to elect for a remedy and pursue the remedy as provided by the statute. The period of limitation provided for an Appeal under Section 42 cannot be applied in an Application filed under Section 60 sub-section (5).

18. We are thus of the considered opinion that the Application filed by the Appellant under Section 60 sub-section (5) was fully entertainable and it could not have been rejected on the ground that it has not been filed within 14 days as provided under Section 42. Section 42 was clearly inapplicable, since no Appeal was filed by the Appellant. The Adjudicating

Authority thus, committed error in rejecting the Application as barred by time.

19. Now we come to the second reason given by the Adjudicating Authority in rejecting the Application, that is, non-registration of charge under Section 77 of the Companies Act, 2013.

20. The Companies Act, 1913, the Companies Act, 1956 and the Companies Act, 2013, all contain provisions pertaining to registration of charge. Sub-section (3) of Section 77 of Companies Act, 2013 begins with non-obstante clause providing that no charge created by a company shall be taken into account by the Liquidator unless it is duly registered under sub-section (1) of Section 77 and certificate of registration of such charge is given by the Registrar under sub-section (2). The scheme as contained in sub-section (3) of Section 77 was also present in earlier Companies Act and similar provision came for consideration before different High Courts as well as Hon'ble Supreme Court, which we shall notice hereinafter.

21. Section 109 of the Companies Act, 1913 came for consideration before **Oudh High Court in AIR 1927 Oudh 55 in Hukmichand v. Pioneer Mills Ltd.**, the High Court held that Section 109 was not applicable when charge is created by operation of law and not by a contract. The following observation was made at page 59:

“As regards the argument advanced on the side of the defendants-respondents and based on the provisions of s. 109 of the Indian Companies Act, 1913, much need not be said. Those provisions are only applicable to a “mortgage or charge created.....by a Company.” The charge arising in favour of the plaintiffs in the

circumstances of this case is a charge by operation of law and not by a contract.

22. We may notice the judgment of the Calcutta High Court reported in **1982 SCC OnLine Cal 290 – Praga Tools Ltd. Vs. Official Liquidator of Bengal Engineering CO. (P) Ltd.** The provisions of Section 125 of the Companies Act, 1956 came for consideration in the aforesaid case before the Calcutta High Court. An Application was filed before the Company Judge, seeking leave to execute the Decree against the monies lying with the official liquidator. The Appellant had a Decree against Company of Rs.90,343.37/-. The decretal amount dues remained unpaid, an application for winding up was filed before the High Court. The High Court passed an order providing for furnishing of security by the Company to the extent of Rs.50,000/-, subject to which the stay was granted on publication of advertisement. The security of Rs.50,000/- was furnished by the Company. The application was opposed by the Official Liquidator. It was contended by the Liquidator that in absence of registration of the charge in favour of the Applicant and in accordance with the Section 125 of the Companies Act, the Appellant cannot claim to be secured creditor to the extent of Rs.50,000/-. The submission was refuted. It was contended on behalf of the Applicant that security or charge, which is created in favour of the Applicant by an order of the Court, does not require registration under Section 125 of the Companies Act. The Calcutta High Court held that when security was furnished in pursuant of order of the High Court, which cannot be said to be a charge created by the Company, hence Section

125 of the Companies Act was not applicable. In paragraph 19, following was held:

“19. The fallacy in the argument of Mr. Mookherjee, in my view, is that after the passing of the order of S.K. Roy Chowdhury J. (as his Lordship then was), dated August 1, 1978, the position with regard to the security assumed a completely different complexion. By that order, as I have already indicated, the claim of the petitioning-creditor was settled at a certain amount. A mode for payment of that money was indicated. Then there is a default clause. That default clause contained a twin option either of initiating a fresh winding up proceeding or of executing the balance as a decree of court. It is only in the event of an option being exercised in favour of the last contingency, viz., in the event of the execution as a decree of court, that the security which was furnished pursuant to the order of R.M. Dutta J. would be a security for the applicant company for the satisfaction of the decree and would be the security for the decree until the decretal dues were paid. Thus, the benefit of the security in so far as the applicant company is concerned is entirely the creature of the order of Roy Chowdhury J. dated August 1, 1978. This can, in my view, by no stretch of imagination, be called a charge created “by a company” within the meaning of s. 125 of the Companies Act, 1956, requiring registration under the above section.”

23. Learned Senior Counsel for the Appellant placed reliance on judgment of the Hon’ble Supreme Court in **(1998) 5 SCC 401, Indian Bank v. official Liquidator, Chemmeens Exports (P) Ltd. & Ors.** In

the above case, the provision of Section 125 of the Companies Act, 1956 came for consideration. The Indian Bank had advanced certain amount to M/s Chemmeens Exports Pvt. Ltd., which was secured by an equitable mortgage by deposit of title deeds of the debtor-Company. Winding up proceedings were initiated by the Bank. The Bank sought leave of the Company Court to file a suit for recovery, which was granted. In the suit, Official Liquidator filed written statement taking the plea that the properties of the Company not having been registered under Section 125 of the Act, the charge was void. A preliminary decree was passed against the Official Liquidator, which is quoted in paragraph 13 of the judgment, which reads as follows:

“13. The question, however, remains what is the effect of the preliminary decree passed by the Court against the Official Liquidator on 28-5-1982. It will be useful to read here the material portion of the preliminary decree:

“It is ordered and decreed that a preliminary decree is passed and that the plaintiff is entitled to realise from the defendants a sum of Rs 29,50,605.59 with interest at 14% from the date of suit till the realization and that the plaintiff is entitled to the cost of the suit also and that Defendants 1 to 3 will deposit in court on or before 28-8-1982 the abovesaid amount and cost of the suit and on payment of the amount the equitable mortgage will stand discharged and the documents of title deposited with the plaintiff by the defendants and which are produced by the plaintiff in court will be delivered to the defendants and that in default of payment as aforesaid, the plaintiff may apply to the court for passing a final decree for the

sale of the plaint schedule property and that the money realised by such sale shall be applied in payment of the amount due under the decree, and the balance if any, shall be paid to the 1st defendant and that if the money realised by the sale of the plaint schedule property is insufficient for payment of the decree debt in full, the plaintiff shall be at liberty to apply for a personal decree against Defendants 2 to 5 for the balance and that the defendants will suffer cost hitherto incurred.””

After noticing the contents of the Decree, Hon'ble Supreme Court observed that right of the Company to deposit the decree amount was available till 28th August, 1982 and thereafter the matter had passed from the domain of the contract to that of judgment. In paragraph 16, following has been laid down:

16. From the above discussion, it follows that the right of the respondents including the Company represented by the Official Liquidator to deposit the decree amount was available till 28-8-1982. In other words, the right to recover the amounts pursuant to the contract-creating charge, even under the terms of the decree was available till the said date and thereafter “the matter had passed from the domain of the contract to that of judgment”.

The Hon'ble Supreme Court also approved the judgment of Bombay High Court in **Suryakant natvarlal Surati v. kamani Bros. Ltd. (1985)**

58 Comp Cas 121, where Section 125 of the Companies Act was held to be inapplicable. In paragraph 18-19, following was laid down:

“18. In Suryakant Natvarlal Surati v. Kamani Bros. Ltd. [(1985) 58 Comp Cas 121 (Bom)] the Company created a charge under a mortgage in favour of the trustees of the Employees' Gratuity Fund. The creditors, by a preliminary decree of 3-12-1977 were entitled to receive the amount secured on the property of the Company; the Court fixed 8-12-1988 as the date for redemption and ordered that in default of payment of the sum due by that date, the property was to be sold by public auction. On an application made on 16-2-1978, the Company was ordered to be wound up by an order dated 3-8-1979. As default in payment of the decreed amount was committed, the mortgagees applied for leave of the Court under Section 446 to execute the decree against the Official Liquidator by application dated 10-7-1981. Three contributories sought injunction against taking any further action on the ground that the charge created by the Company was not registered under Section 125 of the Companies Act, therefore, the mortgagees should be treated only as unsecured creditors. Their application was dismissed by a learned Single Judge. On appeal, speaking for the Division Bench of the Bombay High Court Justice Bharucha (as he then was) laid down, inter alia, the principle that the question of applicability of Section 125 had to be decided on the terms of the decree — whether the unregistered charge created by the mortgagor was kept alive or extinguished or replaced by an order of sale created by the decree; if upon a construction of the decree, the Court found that the unregistered charge was kept alive, the provisions of

Section 125 would apply and if, on the other hand, the decree extinguished the unregistered charge, the section would not apply. We are in respectful agreement with that principle. We hold that a judgment-creditor will be entitled to relief from the Company Court accordingly.

19. Reverting to the facts of this case, on the construction of the decree we have already held that the charge was kept alive till 28-8-1982 and thereafter in default of payment of decree amount the sale order would take effect. In this case, admittedly the decree amount was not paid before 28-8-1982, as such the matter had passed from the domain of contract to the realm of the judgment. The Official Liquidator filed application on 21-3-1983 seeking to declare the decree as void. By that date, what was operative in the decree was not a mere unregistered charge but an order for sale of mortgaged property for realisation of decree amount. The preliminary decree cannot therefore be said to be void and inoperative.”

The ratio of the above judgments of the Hon’ble Apex Court is that when charge though unregistered forms part of a decree, in executing the Decree, the plea of charge not being registered does not hold any water.

24. We may also refer to another judgment of the Hon’ble Supreme Court, that is, **(2006) 10 SCC 709 – Kerala State Financial Enterprises Ltd. vs. Official Liquidator, High Court of Kerala**, where the Hon’ble Supreme Court referring to the judgment of Indian Bank (supra) held that Section 125 of the Companies Act may not be applicable in a case where decree has already been passed.

25. The present is a case where Debt Recovery Tribunal has allowed the O.A. No.274 of 2016 filed by the Appellant under the provisions of Section 19(1) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The Debt Recovery Tribunal passed the following order on 26th April, 2017

“O R D E R

- 1) *I hereby allow this O.A. of the Applicant and direct the defendants to pay jointly and severally to the applicant within 30 days from today, a sum of Rs.144,46,95,879/- (Rs. One Hundred Forty Four Crore Forty Six Lac Ninety Five Thousand Eight Hundred and Seventy Nine Only) along with interest @ 12% p.a. from the date of filing of this O.A. till the date of realization of dues with costs and expenses.*
- 2) *In case of failure to deposit the said amount, the same shall be recovered from the sale of mortgaged and hypothecated properties as detailed in Schedule – I and Schedule – II, annexed with IA.”*

26. The order passed by the Debt Recovery Tribunal dated 26th April, 2017 is an order adjudicating the dispute between the Appellant and the Corporate Debtor and after adjudication, the order passed by the Tribunal is akin to a Decree. The order dated 26th April, 2017 indicates that 30 days’ time was allowed to the defendants (one of which was Corporate Debtor) to make the payment, failing which the amount was to be recovered from the sale of mortgaged and hypothecated properties. When the sale of

mortgaged and hypothecated was directed as per judgment of the Debt Recovery Tribunal, the mortgage and hypothecation no longer remained the matter of contract, rather it was the part of the judgment of the Tribunal and the non-registration of charge as required by Section 77 of Companies Act, 2013 does not in any manner affect enforceability of the order dated 26th April, 2017.

27. We may also now notice the judgments relied by learned Senior Counsel for the Respondent in support of his submissions. Learned Senior Counsel for the Respondent has placed reliance on judgment of this Tribunal in **Volkswagen Finance Ltd. vs. Shree Bala Printopack Pvt. Ltd. & Ors. – (2020) SCC OnLine NCLAT 729**. In the above judgment, the claim of the Appellant was rejected by the Liquidator relying on Section 77 (3) of the Companies Act, 2013. This Tribunal held that the charge being not registered, the Liquidator rightly rejected the claim. In paragraph 29, following was laid down:

“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 aforementioned 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’.”

28. The Volkswagen case (supra) was not a case where there was any Decree or judgment in favour of the Appellant so as to get over the requirement of registration as mandated by Section 77 sub-section (3). The

present is a case where the Appellant is relying on judgment and order of the Debt Recovery Tribunal dated 26th April, 2017, where on account of default in depositing the money as directed by the DRT, the default clause permitting sale of mortgage and hypothecation of asset became operative. Thus, the judgment in Volkswagen case does not help the Appellant in the present case.

29. The learned Senior Counsel for the Respondent tried to distinguish the judgment of Hon'ble Supreme Court in Indian Bank's case (supra) on the ground that in the case before the Hon'ble Supreme Court in Indian Bank, there was a decree of Civil Court, whereas in the present case there was a judgment by Debt Recovery Tribunal, which cannot be said to be Decree akin to Civil Court. The judgment of Debt Recovery Tribunal dated 26th April, 2017 admittedly was not challenged by the Respondent in any higher Forum. The said judgment has become final between the parties and its enforceability cannot be objected by the Respondent on the spacious ground that it is not a Decree of the Civil Court. Recovery Certificate was issued by the Debt Recovery Tribunal, execution of which was pending consideration when Application under Section 7 was filed.

30. We may refer to a judgment of the Bombay High Court in **(2016) SCC OnLine Bom 7005 – Fine Platinum (India) Ltd. & Anr. vs. Indusland Bank Ltd. & Ors.**, wherein Bombay High Court had occasion to consider the provisions of Recovery of Debt Due to Banks and Financial Institutions, 1993 and held that recovery certificate issued under the 1993 Act is a

formal expression of the adjudication. In paragraph 30, following has been laid down:

“30.Considering the scheme of the RDDBI Act, more precisely the provisions of Section 19 and Rule 12(5) of the Rules of 1993, we are of the view that recovery certificate is akin to decree in a suit.....”

31. Hon’ble Supreme Court in **Sesh Nath Singh v. Baidyabati Sheoraphull Co-operative Bank Ltd. (2021) SCC OnLine SC 244** 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 judgment 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 held that 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 judgment of Debt Recovery Tribunal dated 26th April, 2017.

33. We thus, are of the view that Adjudicating Authority committed error in rejecting the claim of the Appellant to be of 'secured creditor'. By virtue of judgment and order of the Debt Recovery Tribunal, the Appellants were entitled to recover their dues from the secured assets and they having relinquished the security interest according to Section 52 of the IB Code, as was requested by the Liquidator, in the liquidation proceedings, they have to be treated as 'secured creditor'. In result, we allow the appeal and set aside the order dated 28th April, 2021 of the Adjudicating Authority and allow the Application being I.A. No.33 of 2021 filed by the Appellant and direct the Respondent/ Liquidator to correct the classification of claim of the Appellant as 'secured'. No order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

NEW DELHI

6th January, 2022

Ash/NN