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CAR FINANCER - WHETHER FINANCIAL CREDITOR UNDER IBC - VOLKSWAGEN FINANCE PVT LTD CASE

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The appeal in the present case, *Volkswagen Finance Pvt. Ltd. vs. Shree Balaji Printopack Pvt. Ltd.*, [Company Appeal (AT) (Insolvency) No. 02 of 2020] has been filed by the Car Financer (for short “Appellant”) before the National Company Law Appellate Tribunal (NCLAT) against the impugned order dated 8.11.2019 passed in CP (IB) No. 391/ND/2018 of the National Company Law Tribunal (NCLT).

1. The brief facts of the case

1.1 The Appellant and Corporate Debtor entered into a loan and hypothecation agreement for purchase of a car.

1.2 A sum against such loan/car financing agreement remained due and payable to the Appellant.

1.3 The Corporate Debtor subsequently underwent Liquidation.

1.4 The Appellant filed its claim before the Liquidator.

1.5 The claim of the Appellant was rejected.

1.6 Appellant challenged such order by way of Appeal under Section 42 of the Insolvency Code, before the adjudicating authority being the NCLT, wherein the appeal was dismissed on the following grounds:

- Claim of Appellant did not fulfil the requirement of Regulation 21 (Proof of existence of security interest) of the IBBI (Liquidation Process) Regulation, 2016 (IBBI Regulations, 2016).
- No charge created under Section 77 of the Companies Act, 2013, hence the same cannot be taken into consideration by the liquidator.
- Due to lack of compliance of requirements of the statutory laws, appellant has to be considered as unsecured creditor.

- Rule 3(1) of the Companies (Registration of Charges) Rules, 2014 (Form No. CHG-1) indicates motor vehicle in various types of charges, thus implying that it is mandatory to register a charge on a motor vehicle with the Registrar of Charges (ROC).

1.7 The order of the NCLT not allowing the claim of the Appellant was challenged in the present appeal before NCLAT. The judgment in the said appeal is being dealt with in this article.

2. Grounds of Challenge

The Appellant has challenged the impugned order on the following grounds amongst others:

2.1 Charge was duly registered by way of hypothecation in terms of Section 51 of the Motor Vehicles Act, 1988 (MVA).

2.2 Regulation 21 starts with the word “may”. Adjudicating authority failed to make a harmonious construction of the same in consonance with the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC).

2.3 Section 77 of the Companies Act, 2013 does not specify charge on what categories of items are to be registered.

2.4 Adjudicating authority also failed to interpret the provisions of the MVA in consonance with the provisions of IBC.

3. Reply of the Corporate Debtor

The Corporate Debtor sought to sustain the order of the Liquidator which rejected the claim of the Appellant on following contentions:

3.1 Charge created by Appellant was not registered with any authority mentioned under Section 52(3) of the IBC, read with Regulation 21 of the IBBI Regulations, 2016. Thus, the

appellant failed to present an “Information Utility” as mandated under such provisions.

3.2 Security interest was not registered under Section 77 of the Companies Act, 2013.

3.3 Non-registration of charge qualifies as an unsecured liability thus making the Appellant an unsecured creditor.

4. Issues

4.1 The issues which fell for adjudication before the NCLAT on the basis of the above facts are:

- Whether appellant may be termed as secured financial creditor in absence of registration of charge with the ROC under Section 77 of the Companies act, 2013.
- Whether registration of hypothecation under Section 51 of the MVA may be valid for qualifying as ‘security interest’ within the meaning of Section 52 of IBC.

5. Provisions of Law

The provisions of law being dealt with in the instant case.

5.1 Section 52 of the IBC, 2016

- Section 52 provides a right to a secured creditor to realize its security interest when the debtor is under liquidation.
- However, the existence of such security interest has to be proved by the creditor as provided under sub-section 3.
- This provision is to be read with Regulation 21 of the IBBI Regulations, 2016 which states that existence of a security interest maybe proved through records available in an information utility; certificate of registration of charge; or proof of registration with the Central Registry of Securitization Asset Reconstruction and Security Interest of India.

5.2 Section 77 of the Companies Act, 2013

- This provision imposes a duty upon a company to register a charge.
- It provides for a specified time period within which the charge must be registered with the registrar.
- It also expressly mentions that a liquidator must refuse to consider a claim if the charge being claimed against is not registered.

5.3 Section 51 of the MVA

- The registering authority, on receiving an application for registration of a motor vehicle which is held under a hypothecation agreement, must register the existence of such agreement.

- The appellant here contends that registration under such section must be read as registration of charge under Section 77 of the Companies Act, 2013

6. Finding

6.1 The Appellate Tribunal relied on the provisions of law stated above and found:

- The liquidator shall verify the existence of a security interest under section 52(3) of IBC before allowing the claim of a creditor.
- The appellant failed to produce any document stipulated under Regulation 21 of the IBBI Regulations, 2016.
- Section 125(4) of the Companies Act, 1956 provides for mandatory registration of a charge on any movable property

6.2 The Tribunal relying on *Kerala State Financial Enterprises Ltd. vs. Official Liquidator, High Court of Kerala (2006) 10 SCC 709* held that charges not registered shall be void against liquidator or creditors.

6.3 In *Oil and Natural Gas Corporation Ltd. vs. Official Liquidator of Ambica Mills Co. Ltd. (2015) 5 SCC 300* it was made clear that in absence of a registered charge, a creditor shall not be treated as a secured financial creditor. This judgment was also relied on in *India Bulls Finance Ltd. vs. Samir Kumar Bhattacharta*. [Company Appeal (AT) (Insolvency)No.830 of 2019]

6.4 The Tribunal, relying on *Prabhudas Damodar vs. Manhabala Jeram Damodar (2013) 15 SCC 358*, found that since there was no ambiguity in the language/legislative intent of the provisions relied upon, it is necessary to read into the natural and ordinary sense of the words.

7. Decision

7.1 The Tribunal found that the arguments of the appellant on the lines of the relevant provisions not being applied correctly by the liquidator or the adjudicating authority (NCLT) could not be accepted.

7.2 NCLT had applied the law on the present subject correctly.

7.3 The charge had not been registered within the meaning of Section 77 of the Companies Act, 2013 and hence the Liquidator had rightly referred to Regulation 21 in refusing the claim of the appellant.

7.4 Registration under Section 51 of the MVA shall not be considered as registration of a charge as it only provides for “entry” in the certificate of registration regarding the existence of a hypothecation agreement.

7.5 The law laid down by the Supreme Court in *Kerala State Financial Enterprises* and *India Bulls Finance* shall be applicable in this case.

7.6 Thus, the appeal was dismissed.

8. Appeal pending before the Supreme Court

An appeal has been preferred by the Appellant/Volkswagen Finance before Hon'ble Supreme Court [Civil Appeal No3858 of 2020], which is pending adjudication, as on date with no stay orders.

9. Conclusion

- 9.1 A car financier or for that matter financier may not be considered as a secured financial creditor under the Liquidation process, if the charge against such car/movable property is not registered under Section 77 of the Companies Act, 2013 or under any other statutory law applicable to the facts of the case.
- 9.2 A registration under the Motor Vehicles Act may not be sufficient for satisfying the conditions of 'secured interest' as laid down in Section 52 of IBC.
- 9.3 In absence of documents to prove the claim by a creditor, liquidator totally entitled to reject such claim or accredit the creditor as an unsecured creditor.

A copy of the judgment is annexed hereto at page 4 to 15.

2020 SCC OnLine NCLAT 729

In the National Company Law Appellate Tribunal[±]
(BEFORE A.I.S. CHEEMA, MEMBER (JUDICIAL) AND SHREESHA MERLA, MEMBER (TECHNICAL))

Volkswagen Finance Private Limited ... Appellant;

Versus

Shree Balaji Printopack Pvt. Ltd. Through its Director of Mr. Dishank Rustagi & Ms. Seema Rustagi and Another ... Corporate Debtor Respondent No. 1/Respondent No. 1 Before NCLT/Respondent No. 2 Before NCLAT.

Company Appeal (AT) (Insolvency) No. 02 of 2020[±]
Decided on October 19, 2020

Advocates who appeared in this case :

Mr. Sanjeev Sagar & Ms. Nazia Parveen, Advocates, for the Appellant;

Mr. Nazim Khan, Advocate, for the Respondents;

Mr. Nilotpal Shyam, Advocate, for the Respondent/Liquidator.

The Judgment of the Court was delivered by

SHREESHA MERLA, MEMBER (TECHNICAL):— Challenge in this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016, ('IBC' in short) is to the Order dated 08.11.2019, passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench-III), in CP (IB) No. 391/ND/2018, by which Impugned Order, the Adjudicating Authority has dismissed the Application seeking a direction to set aside the Order of the Liquidator rejecting the 'Claim' of the Appellant.

2. The facts in brief are that the Company (under Liquidation) namely Shree Balaji Printopack Pvt. Ltd. executed a Loan and Hypothecation Agreement on 25.11.2013, for an amount of Rs. 36,00,000/- payable in 84 monthly instalments of Rs. 61,964/- each from 15.12.2013 to 15.11.2020, for the purchase of an AUDI Q3 TDI 2.0 vehicle. It was stated by the Appellant that they have security of the vehicle in terms of Sections 52 and 53 of the Insolvency and Bankruptcy Code, 2016. It was averred that a demand of Rs. 21,83,819.18/- was made which was not paid and hence there was a 'default' and the amount became 'due and payable'.

3. The Learned Adjudicating Authority had appointed a Liquidator vide Order dated 03.04.2019 and Claims were invited from the Creditors as per the provisions of the Code. The Applicant namely, M/s. Volkswagen Finance Pvt. Ltd. filed its claim on 22.07.2019 with the copies of the Loan Agreement, the Hypothecation Deed, the Demand Letter and the Registration Certificate of the vehicle together with the invoices concerned for the consideration of the Liquidator. The Applicant had informed the Liquidator that the 'Charge' was duly registered by way of hypothecation registration with the Regional Transport Office (RTO) in terms of Section 51 of the Motor Vehicles Act, 1988 (M.V. Act). It is the Applicant's case that there was no requirement of registration of 'Charge' with the R.O.C and that the Liquidator, without examining the Certificate issued by the Registration Authority under the 'M.V. Act' dismissed the Claim made by the Applicant. Being aggrieved with the decision dated 26.07.2019 of the Liquidator, the Applicant approached the Adjudicating Authority seeking to set aside the Order of the Liquidator.

4. The Learned Adjudicating Authority while dismissing the Application observed as follows;

"12. The Liquidator has referred to Regulation 21 of the IBBI (Liquidation

Process) Regulation, 2016 and submitted that the claim of the Applicant is not supported by any documentary evidence as prescribed under the said Regulation and the Applicant cannot be treated as a secured creditor. Further, as per submission of the Liquidator, the Applicant is to be treated as Unsecured Financial Creditor. For the sake of convenience, Regulation 21 is extracted below:

"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;*
- (c) proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India."*

13. As per the record placed on the file, the claim of the Applicant is not fulfilling any of the requirements under Regulation 21, as noted above. Further, the Liquidator has referred to the provisions of Section 77(3) of the CA, 2013 and submitted that no charge has been registered under Section 77(1) in relation to the Subject Property. Therefore, no other charge created by the CD can be taken into account by the Liquidator. For the sake of convenience, Sub-Section (3) of Section 77 of the CA, 2013 is extracted below:

Section 77. Duty to register charges, etc:

"(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)."

14. In connection with the above, it is relevant to refer to the judgement passed by the Hon'ble High Court of Kerala in Kerala State Financial Enterprises v. Official Liquidator, reported in (2006) 133 Comp Cas 912 (Kerala), wherein it has been held that if, 'the charge had not been registered under Section 125 of the Companies Act, 1956, then, undisputedly the Appellant has to be considered as an Unsecured Creditor and has to be in que with other creditors to receive its dues as and when assets of the company are collected by the Official Liquidator for distribution in accordance with law'. The said judgement was upheld by the Hon'ble Apex Court on the Appeal filed as reported in (2006) 133 Comp Cas 915 (SC). A similar view was taken by the Hon'ble High Court of Bombay in Antifracture bearings Corporation Ltd. v. State of Maharashtra, reported in AIR 1999 Bom 37.

15. From the discussion made above, it is concluded that no charge has been registered under the provisions of Section 77(1) of the CA, 2013 in relation to the Subject Property. This is also confirmed from the format as provided under the Rule 3(1) of the Companies (Registration of charges) Rules, 2014 (Form No. CHG-1), which indicated various types of charge i.e. immovable Property, book debts, Motor Vehicle (hypothecation), goodwill etc. indicating that motor vehicle is one of the specific type of charge which is mandatory to be registered with ROC. Therefore, the Applicant cannot be treated as Secured Financial Creditor. Accordingly, the issue framed herein above is decided against the Applicant and in favour of the Liquidator. Consequently, the Subject Property i.e., AUDI Q3 TDI 2.0 bearing registration number DL1CQ4564 shall form part of the assets of the CD and the Applicant has to stand in que of the Unsecured Financial Creditor for the disbursement of the claim, if any, as provided under Section 53 of the IBC, 2016.

(Emphasis Supplied)

5. Learned Counsel appearing for the Appellant contended that the Learned Adjudicating Authority failed to take into consideration that the 'Charge' of the Appellant was duly registered by way of hypothecation under Registration Certificate

with the RTO in terms of Section 51 of the Motor Vehicles Act, 1988; that the Hypothecation Deed, Loan Agreement, CIBIL Record, Admission of the 'Debt and Default' was not considered; that Hypothecation is a method of creation of security of movable property and the goods so hypothecated continued to be in possession of the owner, i.e. the Borrower and hence it is a way of creating security without delivery of possession and as in the literal sense of term, the lender is 'hypothetically' in control of the property; that the definition of 'Hypothecation', 'Charge', 'Secured Asset', 'Financial Asset', 'Financial Creditor', 'Secured Creditor', clearly explains the position of Law on the subject more particularly Sections 3(4), 3(31), 3(37) of IBC and Sections 2(1)(b) and 2(16) of the Companies Act, 2013; that the hypothecated vehicle of the Applicant is the 'Security' as recognised under Law and, therefore, the Appellant has every right under Sections 52 and 53 read with Section 36(4)(b) of the IBC to proceed independently. The Learned Appellant Counsel strenuously contended that Hypothecation is merely an extended form of 'Pledge' which allows a lender to retain possession in trust for himself and, therefore, Hypothecation is a subset of 'Pledge'.

6. He placed reliance on the Judgement of the Hon'ble Apex Court in *Brilliant Alloys Pvt. Ltd. v. Mr. S. Rajgopal*, 2018 SCC OnLine SC 3154, in support of his submission that the Regulation 21 starts with the word 'may' and that the Regulation has to be read with the main provisions of IBC, which the Learned Adjudicating Authority had failed to do so by not making any attempt to harmonise the two provisions of the Regulations and the Code on one hand and the Motor Vehicles Act, 1988 on the other.

7. He further contended that Section 77(1), 77(2) require that 'Charge' is to be registered, but nowhere categorises on what items the 'Charge' is to be registered by a Company or a Financial Institution. Section 77(3) states that unless 'Charge' is registered, the claim would not be considered and read with Section 77(4) and Section 79, it is made clear that non-Registration of 'Charge' does not impact the original contract and 'Security' so created. He submitted that the Learned Adjudicating Authority failed to adopt a Harmonious Construction of the 'MV Act' and the IBC Code. He placed reliance on the decision of the Constitution Bench of the Hon'ble Supreme Court in *Sri Venkataramana Devaru v. The State of Mysore*, AIR 1958 SC 255, wherein the Hon'ble Apex Court has observed that, where there are, in an enactment, two provisions which cannot be reconciled with each other, they should be so interpreted that if possible, effect should be given to both. He argued that the rule of 'Beneficial construction' was not adhered to by the Learned Adjudicating Authority which took a hypothetical view by not taking into consideration that a 'Charge' registered under 'MV Act', 1988 also satisfies the requirement under Law. The status of the Appellant in terms of Section 53 being a Secured Financial Creditor could not have been degraded to an Unsecured Creditor as was done by the Liquidator under the garb of Regulation 21 read with Section 77 of the Companies Act, 2013. He, further, placed reliance on the Judgement of the Hon'ble Apex Court in *Pegasus Assets Reconstruction Pvt. Ltd. v. Haryana Concast Ltd.*, (2016) 4 SCC 47, in which the Hon'ble Supreme Court has observed that '*if the defaulter is the Company under winding up, the said Financial Corporation can at best be a Secured Creditor who may opt to remain out of winding up but nonetheless it will be subject to Orders passed in accordance with Law under the Companies Act. It is also the clear intention of the Parliament expressed in Section 13 of the SARFAESI Act, that a Secured Creditor has a right to enforce its security interest without the intervention of the Court and Tribunal*'. The Learned Counsel contended that a similar view was taken by the Hon'ble Supreme Court in *Laxmi Fibre Ltd. v. Andhra Pradesh Industrial Development Corporation Ltd.*, (2015) 16 SCC 464, in which it was held that the Liquidator has no right to ascertain the claims and rights of the Secured Creditors who chose to stand outside the (Liquidation Process) in respect of the securities.

8. It is the case of the Respondent that the Hypothecation Agreement dated

25.11.2013 was unattested; the record of the 'Charge' created by the Appellant was not registered with any Authority as mentioned in Section 52(3) of the Code read with Regulation 21 of the IBBI (Liquidation Process) Regulations, 2016; that the security interest was not registered under Section 77 of the Companies Act, 2013 and neither was any Application moved under Section 87 of the Companies Act, 2013; that the Appellant had failed to provide any proof through the records available with an 'Information Utility' as mandated under Section 52(3)(a) of the Code read with Regulation 21(a) of IBBI (Liquidation Process) Regulation, 2016 and submitted that non-Registration of 'Charge' under Section 125 of the Companies Act, 1956/Section 77 of the Companies Act, 2013 makes a Creditor an '*Unsecured Creditor*'.

9. Learned Counsel for the Respondent relied on the Judgment of the Hon'ble Supreme Court in *Kerala State Financial Enterprises Ltd. v. Official Liquidator, High Court of Kerala*, (2006) 10 SCC 709, in which the Hon'ble Apex Court, while confirming the Order of the Hon'ble High Court of Kerala observed that '*ordinarily a 'Charge' should be registered in terms of Section 125 of the Act and if the charges are not registered the same would be void against the Liquidator or Creditors*'. He also drew our attention to the Judgement of the Hon'ble Supreme Court in *Oil and Natural Gas Corporation Ltd. v. Official Liquidator of Ambica Mills Co. Ltd.*, (2015) 5 SCC 300 in which the Hon'ble Apex Court while placing reliance on *Indian Bank v. Official Liquidator, Chemmeens Exports (P) Ltd.*, (1998) 5 SCC 401 in which the Hon'ble Apex Court has observed that '*Section 125 applies to every 'Charge' created by the Company on or after 01.04.1914. But where the 'Charge is by Operation of Law or is created by order or decree of the Court, Section 125 has no Application*'.

10. The Learned Counsel, further, contended that the Liquidator had rejected the Applicant's claim as time barred in view of delay of more than 70 days from the date of the last date of submissions of claim and that the Appellant has not challenged the ground of the 'Claim' being barred by limitation and hence this Appeal ought to be dismissed at the very threshold as not maintainable.

11. The main issue which falls for consideration in this Appeal is whether the Liquidator was justified in rejecting the Application filed by the Applicant on the ground that

- the Applicant was not a 'Secured Financial Creditor' in the absence of the 'Charge' being registered with the Registrar of Companies (ROC) under Section 77 (1) of the Companies Act, 2013 with respect to the Subject Property.
- that the Appellant was not a Secured Creditor entitled to realise the security interest in accordance with Section 52(1)(b) of the Code.
- that the Registration of Hypothecation by way of 'Charge' under Section 51 of Motor Vehicles Act, 1988 would stand nullified, if the 'Charge' was not registered under the Companies Act, 1956/2013.

12. It is not in dispute that the Appellant and the Corporate Debtor executed a Loan and Hypothecation Agreement on 25.11.2013, for an amount of Rs. 36,00,000/- payable in 84 monthly instalments for purchase of AUDI Q3 TDI 2.0. It is also not in dispute that the Subject Property has been hypothecated by the Corporate Debtor and under Section 51 of the 'MV Act', 1988, entry of the agreement is made in the Certificate of Registration with the RTO. The relevant clauses in the unattested Deed of Hypothecation which refers to breach or default by the Borrower is detailed as hereunder;

"(iii) In the event of any breach of default by the Borrower in the performance of its obligations hereunder or any of the terms, covenants obligations and conditions stipulated in the Loan Terms and/or the other Transaction Documents or in the event of the charge on the Assets having become enforceable for any reason whatsoever, VWFPL or their nominees or authorized persons shall, in case such

breach or default is not remedied by the Borrower to the satisfaction of VWFPL, without any notice and without assigning any reason and at the risk and expense of the Borrower and if necessary as attorney for and in the name of the Borrower, be entitled (without prejudice to any other rights and remedies) exercise such rights and remedies, including (but not limited to) : (i) to enter into and upon the premises of the Borrower and/or other person who then has possession of the Assets, (ii) to seize, recover, collect, withdraw, receive the Assets and/or any income, profits and benefits thereof without interruption or hindrance by the Borrower and/or by any person(s), (iii) to remove, and/or sell by public auction or by private contract, dispatch or consign for realization or otherwise dispose of or deal with all or any part of the Assets and enforce, realize, settle, compromise and deal with any right or claims relating thereto without being bound to exercise any of these powers or be liable for any losses in the exercise or non-exercise thereof, (iv) to be freed and discharged and well and sufficiently saved and kept harmless and indemnified of, from and against all former and other estates, titles, claims, demands, charges and encumbrances whatsoever, or to direct the Borrower and/or other concerned person to sell, assign or otherwise liquidate, any or all of the Assets, (v) to claim the proceeds of any such sale or liquidation, (vi) to retain all amounts and/or other proceeds received or receivable by VWFPL in respect of the Assets and use them, in whole or part, towards repayment/payment of all amounts in respect of the Facilities, (vii) to direct the Borrower and/or other concerned person in writing to deliver the Assets to VWFPL on a date and time indicated by VWFPL, in which event the Borrower shall, at its own expense."

13. The clause is a regular clause noticed in cases of hypothecation of Vehicles. The question which arises is if 'Charge' was created in law binding on the Liquidator and on other Creditors. Under Part II of IBC when Application is admitted & Moratorium becomes applicable, the right to reach the Vehicle under such contract would be affected & will be subject to provisions of IBC. Under Section 18(1)(f) of the IBC Code, 2016, as soon as CIRP is initiated, the IRP is duty bound to take control and custody of assets over which the Corporate Debtor has ownership rights. The Learned Adjudicating Authority has recorded that the material on record shows evidence that the owners name displayed on the portal of the Ministry of Road Transport and Highways, confirms the ownership of the car to be that of the Corporate Debtor. This being so, reference to the above contents of the hypothecation deed would not have any relevance as the material issue is whether there is legally enforceable 'Charge' so as to claim that the Appellant is a 'Secured Creditor'.

14. For adjudicating the issue on hand, the relevant portions of Section 52 of the IBC, 2016 is reproduced for ready reference;

"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 off 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.

(Emphasis Supplied)

15. It is clear from Section 52(3)(a) of the Code that before any security interest is sought to be realised by the Secured Creditor under this Section, the Liquidator shall verify such security interest and permit the Secured Creditors to realise only such security interest, the existence of which may be proved either by the records of such security interest maintained by an 'Information Utility' or by such other means as may be specified by the Board.

16. The said mechanism is clearly specified in Regulation 21 of the IBBI (Liquidation Process), Regulations, 2016. The said Regulation is detailed as hereunder;

"21. Providing 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 or 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."

(Emphasis Supplied)

17. Section 52(3) read with the aforementioned Regulation 21 stipulates that the proof of security interest is ascertained from records available with the 'Information Utility' as per the Code; through the Certificate of Registration of 'Charge' issued by the ROC

under Section 77 of the Companies Act, 2013/Section 125 of the Companies Act, 1956, or, if there is any proof of Registration of 'Charge' with Central Registry of Securitization Asset Reconstruction and Security Interest of India.

18. At this juncture, it is also relevant to reproduce the definition of 'Information Utility' as defined under Section 3(21) of the Code which is as follows;

"(21) "information utility" means a person who is registered with the Board as an information utility under section 210:

(Emphasis Supplied)

19. The Appellant does not claim & has not shown that Security Interest claimed by the Appellant is covered under any of the above clauses of Regulation 21.

20. It is the Appellant's case that 'Charge' registered under Section 51 of the 'MV Act' 1988, was duly recognised under Section 125 of the Companies Act, 1956. For better understanding of the case, Section 125 of the Companies Act, 1956 is reproduced as hereunder;

"125. CERTAIN CHARGES TO BE VOID AGAINST LIQUIDATOR OR CREDITORS UNLESS REGISTERED

(1) Subject to the provisions of this Part, every charge created on or after the 1st day of April, 1914, by a company and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge together with the instrument, if any, by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration in the manner required by this Act within thirty days after the date of its creation:

1[Provided that the Registrar may allow the particulars and instrument or copy as aforesaid to be filed within thirty days next following the expiry of the said period of thirty days on payment of such additional fee not exceeding ten times the amount of fee specified in Schedule X as the Registrar may determine, if the company satisfies the Registrar that it had sufficient cause for not filing the particulars and instrument or copy within that period.]

(2) Nothing in sub-section (1) shall prejudice any contract or obligation for the repayment of the money secured by the charge.

(3) When a charge becomes void under this section the money secured thereby shall immediately become payable.

(4) This section applies to the following charges:

(a) a charge for the purpose of securing any issue of debentures;

(b) a charge on uncalled share capital of the company;

(c) a charge on any immovable property, wherever situate, or any interest therein;

(d) a charge or any book debts of the company;

(e) a charge, not being a pledge, on any movable property of the company;

(f) a floating charge on the undertaking or any property of the company including stock-in-trade;

(g) a charge on calls made but not paid;

(h) a charge on a ship or any share in a ship;

(i) a charge on goodwill, on a patent or a licence under a patent, on a trade mark, or on a copyright or a licence under a copyright.

(5) In the case of a charge created out of India and comprising solely property situate outside India, thirty days after the date on which the instrument

creating or evidencing the charge or a copy thereof could, in due course of post and if despatched with due diligence, have been received in India, shall be substituted for thirty days after the date of the creation of the charge, as the time within which the particulars and instrument or copy are to be filed with the Registrar.

- (6) *Where a charge is created in India but comprises property outside India, the instrument creating or purporting to create the charge under this section or a copy thereof verified in the prescribed manner, may be filed for registration, notwithstanding that further proceedings may be necessary to make the charge valid or effectual according to the law of the country in which the property is situate.*
- (7) *Where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not, for the purposes of this section, be treated as a charge on those book debts.*
- (8) *The holding of debentures entitling the holder to a charge on immovable property shall not, for the purposes of this section, be deemed to be an interest in immovable property."*

(Emphasis Supplied)

21. Even Section 125(4)(e) clearly shows that 'Charge' not being 'Pledge' on any movable property of the Company would require to be registered. Counsel for Appellant is arguing to claim that hypothecation of car is subject of Pledge in an effort to somehow get out from the requirement of Registration with Registrar. However, the distinction becomes irrelevant considering Section 77 of the Companies Act, 2013. Section 77 of the Companies Act, 2013 which came into force on 01.04.2014, changed the wordings & the Company creating 'Charge' on its property or assets 'tangible or otherwise', is required to register the same. It also provides an additional time of 300 days from the date of creation of 'Charge' to register before the ROC on payment of additional fees. Section 77 & 78 of the Companies Act, 2013 are reproduced here for ready reference;

"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 stipulated 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 within a period of three hundred days of such creation on payment of such additional fees as may be prescribed:

Provided further that if registration is not made within a period of three hundred days of such creation, the company shall seek extension of time in accordance with section 87:

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.

⁴*[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 ⁵[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 subsection (2).

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

(Emphasis Supplied)

"78. Application for registration of charge.—

Where a company fails to register the charge within the period specified in section 77, without prejudice to its liability in respect of any offence under this Chapter, the person in whose favour the charge is created may apply to the Registrar for registration of the charge along with the instrument created for the charge, within such time and in such form and manner as may be prescribed and the Registrar may, on such application, within a period of fourteen days after giving notice to the company, unless the company itself registers the charge or shows sufficient cause why such charge should not be registered, allow such registration on payment of such fees, as may be prescribed:

Provided that where registration is effected on application of the person in whose favour the charge is created, that person shall be entitled to recover from the company the amount of any fees or additional fees paid by him to the Registrar for the purpose of registration of charge."

22. The material on record does not show evidence that on failure of the Corporate Debtor under Section 77, Appellant had exercised their choice of registering the 'Charge' under Section 78. The Hon'ble Apex Court in *Kerala State Financial Enterprises Ltd. v. Official Liquidator*, High Court of Kerala, (2006) 10 SCC 709, observed as follows;

"5. Appellant is a Government company. Its dues are not Government dues. The provisions of the Kerala Revenue Recovery Act might have been made applicable, but only by reason thereof, dues of a Government company would not become the dues of the Government within the meaning of Sub-section (2) of Section 537 of the Companies Act.

Ordinarily a charge should be registered in terms of Section 125 of the Act. If the charges are not registered the same would be void against the liquidator or creditors. The question which arises for consideration is as to whether if the properties are attached by a Revenue Recovery Court, Section 125 of the Act would be applicable? An attachment itself does not create any charge in the property. By reason of attachment, no decree is passed.

15. For the reasons aforementioned, we do not think that the High Court has committed any error in refusing to exercise its discretionary jurisdiction under Section 446 of the Companies Act. The appeal is dismissed. No costs."

(Emphasis Supplied)

23. This Tribunal in *India Bulls Finance Ltd. v. Samir Kumar Bhattacharta* Company Appeal (AT) (Insolvency) No. 830 of 2019, Judgement dated 18.12.2019 referred to *Oil and Natural Gas Corporation Ltd. v. Official Liquidator of Ambica Mills Co. Ltd.*, (2015) 5 SCC 300, (to which one of us was party), the relevant portion of the Judgement is detailed as follows;

"3. It is the case of the Appellant that the Appellant was treated as Unsecured Financial Creditor in the Resolution Plan although according to the Appellant, the Appellant should have been treated as a Secured Financial Creditor. Learned

Counsel for the Appellant has argued that the Appellant had given loan to the Corporate Debtor sometime in 2012 and against the loan provided, Title Deed of Anuj Chambers belonging to the Corporate Debtor were handed over to the Appellant and thus it is stated that the equitable mortgage had been created. Learned Counsel states that when CIRP started, the Appellant filed the claim before the Resolution Professional-Respondent No. 1 but the Resolution Professional treated the Appellant as Unsecured Claimant on the basis that the Charge was not created under Section 77 of the Companies Act, 2013. It is argued that in spite of this, the Appellant applied to ROC on 05.12.2018 for registering its charge and when ROC pointed out that Delay Condonation Application was required, the same was filed on 19.07.2019 and the Charge has now been registered on 03.10.2019. Submission of the learned Counsel for the Appellant is that the Appellant should be treated as Secured Financial Creditor".

.....
"5. Learned Counsel for the Respondent No. 2 referred to Sections 77 and 78 of the Companies Act, 2013 to submit that when a Charge is created, the Company creating Charge and Charge holder both are required to get the Charge registered and if the concerned Company fails to register the Charge within given period of 30 days from the date of creation of Charge, (referring Section 78 of Companies Act, 2013) there is an option even for the Charge Holder to move ROC and get the Charge registered. It is the submission that no such steps had been taken till CIRP started. The benefit cannot be taken by such Creditor. Learned Counsel refers to the Judgement in the matter of "Oil and Natural Gas Corporation Ltd. v. Official Liquidator of Ambica Mills Co. Ltd.," (2015) 5 SCC 300. She referred to paragraph-20 of the Judgement where the Hon'ble Supreme Court referred to its judgement in the matter of "Indian Bank v. Official Liquidator, Chemmeens Exports (P) Ltd." It is argued that Hon'ble Supreme Court referred to Section 125 of the Old Companies Act which was discussed in the judgement of "Indian Bank v. Official Liquidator, Chemmeens Exports (P) Ltd." and paragraph-7 of that judgement was reproduced by the Hon'ble Supreme Court which reads as under;"

"7. On a plain reading of Sub-section (1) it becomes clear that if a company creates a charge of the nature enumerated in sub-section (4), after 1-4-1914 on its properties, and fails to have the charge together with instrument, if any, by which the charge is created, registered with the Registrar of the Companies within thirty days, it shall be void against the liquidator and any creditor of the company. This, however, is subject to the provisions of Part V of the Act. The proviso enables the Registrar to relax the period of limitation of thirty days on payment of specified additional fees, on being satisfied that there has been sufficient cause for not filing the particulars and instrument or a copy thereof within the specified period. Sub-sections (2) and (3) deal with repayment of money secured by the charge. Sub-section (2) provides that the provision of Sub-section (1) shall not prejudice the contract or obligation for repayment of money secured by the charge and Sub-section (3) says that when a charge becomes void under that section, the money secured shall become payable immediately. Though as a consequence of no-registration of charge under Part V of the Act, a creditor may not be able to enforce the charge against the properties of the company as a secured creditor in the event of liquidation of the company as the charge becomes void against the liquidator and the creditor, yet he will be entitled to recover the debt due by the company on a par with other unsecured creditors. It is also evident that Section 125 applies to every charge created by the company on or after 1-4-1914. But where the charge is by operation of law or is created by an order or decree of the court, Section 125 has no application."
It was then held by this Tribunal:

"9. It is thus clear that the CoC had made it clear that in absence of Charge being registered, the Appellant could not be treated as Secured Financial Creditor. Although the transaction is stated to be of 2012, it is clear that the Charge was not got registered either by the Corporate Debtor or the Appellant till now on 03.10.2019 which is after the Resolution Plan was approved on 04.07.2019. Section 77 of the Companies Act, 2013 required the Charge to be registered and the Appellant had an option to resort to even Section 78 of Companies Act, 2013, if there were any grievances. Not having done so, when CIRP started trying to rely on the equitable mortgage without a charge created, we do not find there was any error in the CoC meetings which in its wisdom did not recognize creation of security. The transaction did not even reflect in the Books of Account of the Corporate Debtor. Appellant should be happy that it has been at least treated as Financial Creditor. Appellant took no actions since 2012 and till late stage of CIRP. Charge registered after Resolution Plan is approved cannot be considered."

(Emphasis Supplied)

24. The Judgements relied upon by the Appellant Counsel in *Pegasus Assets Reconstruction Pvt. Ltd.* (Supra) and *Laxmi Fibre Ltd.* (Supra) are not helpful to the Appellant. Here the Appellant has failed to prove that it is a 'Secured Creditor'.

25. The Appellant's Counsel strenuously contended that the Learned Adjudicating Authority did not harmoniously construe the Regulations; the Code, 2016; Section 125 of the Companies Act, 1956 and the Motor Vehicles Act, 1988, together and placed reliance on the Judgement of the Hon'ble Supreme Court in *Venkataramana Devaru v. The State of Mysore*, AIR 1958 SC 255.

26. It is pertinent to mention that the Hon'ble Apex Court in the very same Judgement *Venkataramana Devaru* (Supra) while interpreting Article 25(2)(B) of the Constitution held as follows;

"The Language of the Article being plain and unambiguous, it is not open to us to read into it limitations which are not there, based on a priori reasoning as to the probable intention of the Legislature. Such intention can be gathered only from the words actually used in the statute; and in a Court of law, what is unexpressed has the same value as what is unintended. We must therefore hold that denominational institutions are within Article 25(2)(B).

27. Section 77 of the Companies Act, 2013, specially sub-Section 3 is very clear to us. This Section read with provisions under IBC referred have no ambiguity. The Hon'ble Apex Court in *Prabhudas Damodar v. Manhabala Jeram Damodar*, (2013) 15 SCC 358 observed as follows;

27. Golden-rule is that the words of a statute must be prima facie be given their ordinary meaning when the language or phraseology employed by the legislature is precise and plain. This, by itself proclaims the intention of the legislature in unequivocal terms, the same must be given effect to and it is unnecessary to fall upon the legislative history, statement of objects and reasons, frame work of the statute etc. Such an exercise need be carried out, only when the words are unintelligible, ambiguous or vague.

28. It is trite law that if the words of a Statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.

(Emphasis Supplied)

28. Apart from the fact that the words of the statute are themselves precise and unambiguous and not in conflict with any other provisions of the Code or any other Act, (keeping in view the facts and circumstances of the instant case) read together

with the objective of the statute and the 'Plain' and 'unambiguous words' of the relevant provisions, we are of the considered opinion that the Learned Adjudicating Authority has correctly applied the law.

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'.

30. For all the aforementioned reasons, this Appeal fails and is accordingly dismissed. No order as to costs.

† New Delhi Bench

‡ Arising out of Order dated 8th November, 2019 passed by National Company Law Tribunal, New Delhi Bench, Bench-III in Company Petition (IB) No. 391/ND/2018

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