

NATIONAL COMPANY LAW APPELLATE TRIBUNAL CHENNAI BENCH**Company Appeal (AT) (CH) (Ins) No. 412 of 2023****(IA No. 1257 of 2023)****IN THE MATTER OF:****V O Chidambaranar Port Authority****...Appellant****Versus****Shri Rajesh Chillale,****RP of IndBharath Power Gencom Ltd.****...Respondents****Present****For Appellant :** Mr. P. Ulaganathan, Adv.**J U D G M E N T****Per: Justice Rakesh Kumar Jain:**

This appeal is directed against the order dated 12.10.2023 by which an application filed under Section 42 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') by the Appellant for setting aside the email dated 21.06.2023 sent by the Liquidator and further to direct the liquidator to treat the Appellant as a secured creditor for the purpose of distribution of liquidation assets as per Section 53 of the Code has been dismissed as misconceived.

2. The Appellant is a Port. It is submitted that a claim of Rs. 27,39,87,903/- was made to the liquidator and requested vide letter dated 14.03.2023 to treat their claim as that of a secured creditor for distribution of the liquidation assets under Section 53 of the Code but the liquidator vide its email dated 23.03.2023 categorized the Appellant as an Operational Creditor instead of secured creditor.

3. It is alleged that vide email dated 01.06.2023, the Appellant clarified that as per Section 171 of Indian Contract Act, 1872 (in short 'Act') the Appellant is entitled to be considered as secured creditor whereas the liquidator vide its email dated 21.06.2023 responded that the Corporate Debtor has been sold as going concern and the sale proceeds have been distributed to the stakeholders in accordance with the provisions of Section 53 of the Code and further stated that he has filed an application before the Adjudicating Authority for closure of the liquidation process, therefore, it is not possible at this stage to reverse the process which has already been completed.

4. The claim set up by the Appellant is on account of short charging of the freight charges of the coal imported by the CD. The Adjudicating Authority after a detailed discussion on Section 171 of the Act found that the Appellant is not in possession of the asset on which the right is being claimed, that the CD have been sold as going concern and the sale proceeds have been distributed to the stakeholders in terms of Section 53 of the Code.

5. The main plank of argument of the Appellant is Section 171 of the Act on the basis of which it is claimed that the Appellant should have been declared as a secured creditor and should have been included in the list of stakeholders for the purpose of distribution in terms of Section 53 of the Code. Counsel for the Appellant has vehemently argued that the Adjudicating Authority erred in its appreciation of the facts, however, on our pointed question as to how Section 171 would apply especially when there is no lien of the Appellant on the goods as a bailee because the possession of

the goods (assets) was already with the liquidator, he could not refer to any other provisions in the act or any direct precedent in his favour.

6. Section 3(30) of the Code defines secured creditor which means a creditor in favour of whom security interest is created. Section 3(31) deals with security interest which 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. Section 3(4) deals with 'charge' means an interest or lien created on the property or asset of any person or any of its undertakings or both as the case may be as security and includes a mortgage. In the present case, the Appellant has relied upon Section 171 of the Act with is reproduced as under: -

“171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers.—Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.¹ — Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect”

7. A careful reading of the aforesaid provision would show that wharfingers as the Appellant claiming itself to be a security for a general balance of account any goods bailed to them whereas in the present case, the goods are not in possession of the Appellant which is also admitted by the Appellant during the course of hearing and thus there was no actual lien to invoke Section 171 of the Act.

8. In such circumstances, we do not find any error committed by the Adjudicating Authority in passing the impugned order and as such the present appeal is found without merit and the same is hereby dismissed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[ShreeshMerla]
Member (Technical)

21st December, 2023

Sheetal