

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 396 of 2019

(Arising out of Order dated 19th March, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench in C.A. No. 19 (PB) of 2019 in C.P. No. (IB) 378(PB)/ 2017))

IN THE MATTER OF:

State Bank of India

...Appellant

Vs.

Moser Baer Karamchari Union & Anr.

...Respondents

Present: For Appellant: - Mr. Ramji Srinivasan, Senior Advocate with Mr. Ankur Mittal, Mr. Abhay Gupta, Ms. Sylona Mohapatra, Mr. Nikhil Ramdev, Advocates.

For Respondents:- Mr. Swarnendu Chatterjee and Ms. Shriya Maini, Advocates for R-1.

Mr. Abhishek Anand and Mr. Tushar Tyagi, Advocates for R-2.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

On 14th November, 2017, pursuant to an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short), the 'Corporate Insolvency Resolution Process' was initiated against the 'Corporate Debtor', wherein finally on 20th September, 2018, the order of liquidation was passed by the Adjudicating Authority

(National Company Law Tribunal), Principal Bench, New Delhi, and the workmen stood discharged under Section 33(7) of the 'I&B Code'.

2. According to the Liquidator, by e-mail dated 5th December, 2018, he categorically denied the payment of the gratuity fund, the provident fund and the pension fund preferentially and included the same for the payments under the waterfall mechanism under Section 53 of the 'I&B Code'.

3. In January 2019, the 'Moser Baer Karamchari Union' filed CA No. 19(PB)/ 2019 with prayer that the directions be issued to the Liquidator to exclude the amount due to them towards 'Provident Fund', 'Pension Fund' and 'Gratuity Trust Fund' from the waterfall mechanism envisaged under Section 53 of the 'I&B Code' and pay them the 'Provident Fund Dues', 'Pension Fund Dues' and 'Gratuity Fund Dues' as these will not constitute part of the liquidation estate.

4. The Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, by impugned order dated 19th March, 2019, allowed the CA No. 19(PB)/ 2019 and held that the 'Provident Fund Dues', 'Pension Fund Dues' and 'Gratuity Fund Dues' cannot be part of Section 53 of the 'I&B Code'. The 'State Bank of India', a 'Secured Creditor', has challenged the order in this appeal.

5. Learned counsel appearing on behalf of the Appellant- 'State Bank of India' submitted that for the purpose of distribution of assets of the 'Corporate Debtor' under Section 53 of the 'I&B Code', dues of employees as mentioned in sub-clause (c) of sub-section (1) therein includes the contribution of 'Provident Fund'.

6. It placed reliance on *Explanation* below Section 53 to suggest that the 'workmen's dues' shall have the same meaning as assigned to it in Section 326 of the Companies Act, 2013.

7. Reliance has been placed on *Explanation* (iv) below Section 326 of the Companies Act, 2013, which relates to '*Overriding Preferential Payments*' and *Explanation* (iv) below Section 326, it is mentioned that all sums due to any workman from the provident fund, the pension fund, the gratuity fund or any other fund for the welfare of the workmen, maintained by the Company is covered by term "workmen's dues".

8. Learned counsel for the Appellant- 'State Bank of India' also relied on Section 327 of the Companies Act, 2013 which related to '*Preferential Payments*' and submitted that the sums due to the workman from the provident fund or any other fund for the welfare of the workmen, maintained by the Company, be treated as 'workmen dues'.

9. Learned counsel appearing on behalf of the 'Resolution Professional' submitted that Section 36 (3) of the 'I&B Code' defines the

components of the liquidation estate and also lays down what forms the liquidation estate. Sub-section (3) therein is subject to sub-section (4). Sub-section (4) (a) (iii) specifically excludes from the liquidation estate or all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund.

10. Therefore, it is submitted that the workmen have the first charge on the aforesaid funds.

11. The question arises for consideration in this appeal is whether the provident fund, pension fund and gratuity fund come within the meaning of assets of the 'Corporate Debtor' for distribution under Section 53 of the 'I&B Code'.

12. Section 36 of the 'I&B Code' deals with '*Liquidation Estate*' for the purpose of liquidation. As per sub-section (1) of Section 36, for the purpose of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the 'Corporate Debtor' and reads as follows:

“36. Liquidation estate.— (1) For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor.

(2) The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

(3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following: -

(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;

(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;

(c) tangible assets, whether movable or immovable;

(d) intangible assets including but not limited to intellectual property, securities

(including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;

(e) assets subject to the determination of ownership by the court or authority;

(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;

(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;

(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and

(i) all proceeds of liquidation as and when they are realised.

(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation: -

(a) assets owned by a third party which are in possession of the corporate debtor, including -

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case

may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.”

13. From sub-section (4) (a) (iii) of Section 36, it is clear that all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund, shall not be included in the liquidation estate assets and cannot be used for recovery in the liquidation.

14. Section 53 relates to ‘*Distribution of assets*’, as mentioned hereunder:

“53. Distribution of assets.—*(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in*

the following order of priority and within such period as may be specified, namely: -

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following:

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following: -

(i) any amount due to the Central Government and the State

Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-

section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation. – For the purpose of this section-

- (i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and*
- (ii) the term “workmen’s dues” shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 (18 of 2013).”*

15. From sub-section (1) of Section 53, it is clear that the proceeds from the sale of the liquidation assets of the ‘Corporate Debtor’, the distribution is to be made in order of priority and within such period and in such manner as provided thereunder.

16. In terms of sub-section (4) (a) (iii) of Section 36, as all sums due to any workman or employees from the provident fund, the pension fund

and the gratuity fund, do not form part of the liquidation estate/ liquidation assets of the 'Corporate Debtor', the question of distribution of the provident fund or the pension fund or the gratuity fund in order of priority and within such period as prescribed under Section 53(1), does not arise.

17. The 'workmen's dues' is mentioned in clause (b) (i) of Section 53(1), which are the dues for the period of twenty-four months preceding the liquidation commencement date.

18. In view of the aforesaid specific provisions, the *Explanation* (iii) below Section 53, for the purpose of meaning of 'workmen's dues', the Appellant cannot derive the meaning as assigned to it in Section 326 of the Companies Act, 2013, including the *Explanation* below it.

19. Section 326 of the Companies Act, 2013, since its amendment w.e.f. 1st December, 2016 provides 'overriding preferential payments', relevant of which reads as follows:

“326. Overriding Preferential Payments. (1) In the winding up of a company under this Act, the following debts shall be paid in priority to all other debts:—

(a) workmen's dues; and

(b) where a secured creditor has realised a secured asset, so much of the debts due to such secured creditor as could not be realised by him or the amount of the workmen's portion in his security (if payable under the law), whichever is less, pari passu with the workmen's dues:

Provided that in case of the winding up of a company, the sums referred to in sub-clauses (i) and (ii) of clause (b) of the Explanation, which are payable for a period of two years preceding the winding up order or such other period as may be prescribed, shall be paid in priority to all other debts (including debts due to secured creditors), within a period of thirty days of sale of assets and shall be subject to such charge over the security of secured creditors as may be prescribed.

(2) The debts payable under the proviso to subsection (1) shall be paid in full before any payment is made to secured creditors and thereafter debts payable under that subsection shall be paid in full, unless the assets

are insufficient to meet them, in which case they shall abate in equal proportions.

Explanation.—For the purposes of this section, and section 327—

(a) "workmen", in relation to a company, means the employees of the company, being workmen within the meaning of clause (s) of section 2 of the Industrial Disputes Act, 1947 (14 of 1947);

(b) "workmen's dues", in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely:—

(i) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman in respect of services rendered to the company and any compensation payable to any workman under any of the

provisions of the Industrial Disputes Act, 1947 (14 of 1947);

(ii) all accrued holiday remuneration becoming payable to any workman or, in the case of his death, to any other person in his right on the termination of his employment before or by the effect of the winding up order or resolution;

(iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or amalgamation with another company or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (19 of 1923), rights capable of being transferred to and vested in the workmen, all amount due in respect of any compensation or

liability for compensation under the said Act in respect of the death or disablement of any workman of the company;

(iv) all sums due to any workman from the provident fund, the pension fund, the gratuity fund or any other fund for the welfare of the workmen, maintained by the company;

(c) "workmen's portion", in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of the amount of workmen's dues and the amount of the debts due to the secured creditors."

20. There is a difference between the distribution of assets and preference/ priority of workmen's dues as mentioned under Section 53(1) (b) of the 'I&B Code' and Section 326(1) (a) of the Companies Act, 2013. It has also been noticed that Section 53(1) (b) (i) which relates to

distribution of assets, workmen's dues is confined to a period of twenty-four months preceding the liquidation commencement date.

21. While applying Section 53 of the 'I&B Code', Section 326 of the Companies Act, 2013 is relevant for the limited purpose of understanding 'workmen's dues' which can be more than provident fund, pension fund and the gratuity fund kept aside and protected under Section 36(4) (iii).

22. On the other hand, the workmen's dues as mentioned in Section 326(1) (a) is not confined to a period like twenty-four months preceding the liquidation commencement date and, therefore, the Appellant for the purpose of determining the workmen's dues as mentioned in Section 53(1) (b), cannot derive any advantage of *Explanation (iv)* of Section 326 of the Companies Act, 2013.

23. This apart, as the provisions of the 'I&B Code' have overriding effect in case of consistency in any other law for the time being enforced, we hold that Section 53(1) (b) read with Section 36(4) will have overriding effect on Section 326(1) (a), including the *Explanation (iv)* mentioned below Section 326 of the Companies Act, 2013.

24. Once the liquidation estate/ assets of the 'Corporate Debtor' under Section 36(1) read with Section 36 (3), do not include all sum due to any workman and employees from the provident fund, the pension fund and the gratuity fund, for the purpose of distribution of assets under Section

53, the provident fund, the pension fund and the gratuity fund cannot be included.

25. The Adjudicating Authority having come to such finding that the aforesaid funds i.e., the provident fund, the pension fund and the gratuity fund do not come within the meaning of 'liquidation estate' for the purpose of distribution of assets under Section 53, we find no ground to interfere with the impugned order dated 19th March, 2019.

The appeal is accordingly, dismissed. No costs.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice A.I.S. Cheema)
Member(Judicial)

(Kanthi Narahari)
Member(Technical)

NEW DELHI
19th August, 2019

AR