

**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT-V, NEW DELHI BENCH**

**IA NO. 4904/PB/2022
IN
CP IB NO. 386/PB/2018**

An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016.

IN THE MATTER OF:

UCO BANK

...Financial Creditor

VERSUS

SHREE SHYAM PULP AND BOARD MILLS LTD.

...Corporate Debtor

AND IN THE MATTER OF:

**Sh. Mahipal Singh
S/o Sh. Tejram Singh,
Akansha Marble, Moradabad Road,
Kashipur, Udham Singh Nagar**

...Applicant

VERSUS

**Mr. Rohit Sehgal
Liquidator of Shree Shyam Pulp and Board Mills Ltd.
A -604, Sujjan Vihar,
Sector-43, Gurgaon**

...Respondent

Order Delivered on: 23.07.2024

CORAM:

**SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)
DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)**

APPEARANCES:

For the Applicant : Adv. Kartavya Mishra
For the Liquidator : Mr. Dhruva Vig, Mr. Shashwat Anand, Mr. Shashwat Parihar, Advs.

ORDER

PER: MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

1. The present I.A. No. 4904 of 2022 is an application filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("**Code**") along with Rule 11 of the NCLT, Rules, 2016. The present application is preferred by Mr. Mahipal Singh, Workman of Shree Shyam Pulp and Board Mills Ltd. ("**Applicant**"), seeking appropriate directions against the Liquidator being the Respondent, to release the funds in full to the Applicant towards his statutory dues including but not limited to the outstanding salaries/wages, gratuity, provident fund, leave salary and other dues alike, for which claim was already filed by the Applicant before the Liquidator and the same was duly admitted by the Liquidator.
2. The Applicant has made the following prayers in the application:
 - a) *Allow the instant Application and declare the Applicant's priority as set forth by the Respondent herein in terms of Section 53 of IBC, 2016 is bad in law.*
 - b) *Direct the Liquidator to forthwith disburse the funds to the Applicant against the admitted claim in terms of Section 53(1)(f) of IBC, 2016.*
 - c) *Pass any other further order(s) as this Hon'ble Tribunal deems fit and proper in the facts and circumstances.*

Contentions of the Applicant

3. Briefly stated the facts of the case as mentioned in the instant application, which are just and necessary for adjudication, are as follows:

- (i) The Applicant has duly served the Corporate Debtor for a considerable period of time i.e. from 01.10.2010 till 28.06.2018 on the post of 'Security Officer' and as such he is a workman/ employee of the Corporate Debtor which is presently undergoing liquidation proceedings vide Order dated 21.01.2020 passed by this Adjudicating Authority.
- (ii) The respondent upon taking a charge as liquidator issued a letter dated 05.02.2020 whereby employees working with the Corporate Debtor were duly discharged from their duties from the date of liquidation i.e. 21.01.2020 and amongst which the applicant is also one of them.
- (iii) Pursuant to the public announcement made in terms of liquidation regulations, the applicant submitted his proof of claim with respect to his outstanding salaries and statutory dues in Form E before the Liquidator i.e. the Respondent herein for an amount of Rs. 18,91,823/- which were admitted by the Liquidator in full, however, the dues of the workman were kept under Section 53(1)(f) of the IBC, 2016 without considering the facts and evidences submitted in Form- E regarding work done by the applicant/ workman.
- (iv) The Applicant has also submitted an Experience Certificate along with the submission of Form E dated 24.02.2020, wherein, it is mentioned that the applicant had worked with the Respondent Company from 01.10.2010 till 28.06.2018.
- (v) The Applicant submits that the Applicant was working between the period 21.01.2018 and 21.01.2020, i.e., the Applicant had been working for an approximate period of 7 months (from 21.01.2018 to 28.06.2018) which comes under the purview of 24 months preceding the date of liquidation. Therefore, the claim of the Applicant was supposed to be kept under Section 53(1)(b) for allowance under the waterfall mechanism. However, the Liquidator has kept the claim of the applicant under Section 53(1)(f) to deny the employee any claim.
- (vi) The Applicant furnished copy of his bank passbook records to prove that he was paid during the period of liquidation by Mr. Amit Kumar Gupta, who is the Chief Managing Director and the son of the owner (Mr. Naresh Kumar

Gupta) of the Corporate Debtor. However, the Respondent Liquidator rejected such a contention of the Applicant and stated that such payments were received by the Applicant from Shree Shyam Coating Pvt. Ltd. which was a separate unit and as such was not part of the Shree Shyam Pulp and Board Ltd.

- (vii) The Applicant further submits that Shree Shyam Coating Pvt. Ltd. is also a branch of the Corporate Debtor which was functional at the time of liquidation. The Liquidator declared the branch to be something outside the purview, however, the account of Shree Shyam Coating Pvt. Ltd. was operated by the Corporate Debtor only since the main bank accounts of the Corporate Debtor were seized after the order for Liquidation.
- (viii) The Applicant submits that the Respondent had failed to consider the right of the employees over their retirement benefits from the Corporate Debtor which relates to their right to life.
- (ix) The Applicant submits that the Respondent has kept the creditors under the provisions of section 53(1)(b) and although the applicant conducted his duty of safeguarding the establishment of the Corporate Debtor, the applicant was kept under section 53(1)(f). Hence, the present application is filed.

Contentions of the Respondent

- 4. The Respondent Liquidator has replied to the averments made by the Applicant in the present application and the submissions are stated in brief as follows:
 - (i) The Respondent is appointed to act as the Liquidator of the Corporate Debtor vide order dated 21.01.2020 passed by this Adjudicating Authority. Pursuant to his appointment, the Liquidator issued a public announcement in Form -B on 30.01.2020 inviting claims of all types of creditors and stakeholders. The last date of submission of such claims was 28.02.2020.
 - (ii) The Liquidator has already received and admitted Claims of Secured Financial Creditors along with creditors belonging to other categories. The Claims of the Secured Financial Creditor falling under Section 53(1)(b)(ii) itself amount to a total of Rs. 15,24,24,68,375/- at the present date,

however, the total realized value from the Liquidation Estate has only been Rs. 59,79,69,000/-, which is not even sufficient to satisfy the admitted claim amounts of the Secured Financial Creditors.

- (iii) Till date, the Liquidator has received and admitted the claims of 239 ex-workmen and ex-employees of the Corporate Debtor, where the same has been admitted under the category of S.53(1)(f) since there was no employee or workmen in the employment of the Corporate Debtor in the Twenty-Four Month Period preceding the Liquidation Commencement Date. Hence, the Liquidator is duty bound to treat the claim of the Applicant at par with the other ex-workmen, who do not fall under S.53(1)(b)(ii) and the same was intimated to the Applicant and his counsel at the office of the SDM Kashipur on 20.09.2021 and thereafter, the SDM did not pursue the matter.
- (iv) The Respondent submits that even before the Corporate Debtor had undergone the Corporate Insolvency Resolution Process (CIRP) under the IBC, the Corporate Debtor was engaged in the winding-up proceedings before the Hon'ble Delhi High Court since 2014 vide Company Petition No. 81/2014.
- (v) The Respondent further submits that during the winding up proceedings, the Corporate Debtor was being managed by the Official Liquidator appointed by the Hon'ble Delhi High Court. However, Hon'ble High Court transferred the winding up proceedings under Section 434 of the Companies Act to the National Company Law Tribunal. Thus, there can be no situation where the Applicant was engaged as a workman under the management of the Corporate Debtor in the period of 24 months preceding the Liquidation commencement date.
- (vi) The Respondent submits that while the Company Petition was pending before the Hon'ble Delhi High Court, the lead bank of the Corporate Debtor i.e., UCO Bank, took action under the SARFAESI Act against the Corporate Debtor. The only unit of the Corporate Debtor at Kashipur was taken under possession of the consortium of banks led by UCO Bank in October 2015. Ever since the possession was taken over by UCO Bank, there was no production or work that happened from the Unit in Kashipur. Hence, the

Applicant cannot be said to be engaged as a workman under the management of the Corporate Debtor in the period of 24 months preceding the Liquidation commencement date.

(vii) The Applicant provided a Bank Statement to the Counsel of the Liquidator wherein it was alleged that the Applicant/Workman had received payments from the Corporate Debtor in within the period of 24 months preceding the Liquidation commencement date. However, such bank statements are disputed as these bank statements reflect entries from some other entity namely, "Shree Shyam Coating Limited" instead of the Corporate Debtor's name.

(viii) The Respondent further submits that the company was not functional since 2016 as indicated in the possession letter issued by UCO Bank dated October 12.10.2015. Therefore, the claim of the applicant that he has worked as a worker in the company within 24 months before the liquidation process began, is not correct.

Analysis & Findings

5. We have gone through documents on record filed by the applicant and the respondent and heard the arguments advanced by counsels of the Applicant as well as the counsel for the Respondent (Liquidator).
6. In the present case, it is the contention of the Applicant that the Applicant has worked as a workman on the post of Security Officer with the Corporate Debtor 24 months preceding the liquidation commencement date. Therefore, the Applicant is entitled to his total claim worth Rs. 18,91,823 in accordance with Section 53(1)(b) of the Code. However, the Liquidator has admitted the claim of the Applicant under Section 53(1)(f) of the Code.
7. Pertaining to the facts of the present case, it is observed that the CIRP against the Corporate Debtor was initiated by this Adjudicating Authority vide order date 27.03.2019. Further, the Corporate Debtor underwent Liquidation proceedings vide order dated 21.01.2020 passed by this Adjudicating Authority.

8. The issue for consideration is as to whether the claim of the Applicant falls within the parameters of Section 53(1)(b)(i) or Section 53(1)(f) of the Code. In order to place the claim of the Applicant under Section 53(1)(b)(i), the Applicant has to satisfy that he was a 'workman' and his dues is for the period of 24 months preceding the liquidation commencement date.
9. It is the contention of the Applicant that the Applicant is entitled to his claim of Rs. 18,91,823 under the category of 'workmen dues for 24 months preceding the liquidation commencement date' laid down under Section 53(1)(b) of the Code. In this regard, the Applicant has furnished bank statements to prove that the Applicant was being paid by the Corporate Debtor during the period falling under 24 months preceding liquidation commencement date. However, on the perusal of the bank entries furnished by the Applicant, it is observed that the bank entries nowhere discloses that the Applicant was being paid by the Corporate Debtor only, since the name of the Corporate Debtor does not appear on the bank statements.
10. On the perusal of the records, it is observed that the Corporate Debtor had undergone winding up proceedings before the Hon'ble Delhi High Court in 2014 by filing a Company Petition No. 81 of 2014, whereby, the Corporate Debtor was being managed by the Official Liquidator appointed by the Hon'ble Delhi High Court. Subsequently, the Hon'ble Delhi High Court vide its order dated 13.09.2018 transferred the winding up proceedings under Section 434 of the Companies Act to this Adjudicating Authority. It is observed that such initiation of winding up proceedings before the Hon'ble Delhi High Court took place in 2014, which is much before the initiation of the CIRP by this Adjudicating Authority's order dated 27.03.2019. Thus, we are of the view that since the Corporate Debtor was undergoing Liquidation proceedings since 2014, then there could be no possibility of Applicant being engaged as a workman during that period.
11. It is further observed that the only unit of the Corporate Debtor at Kashipur was taken under possession of the consortium of banks led by UCO Bank in October 2015 and since then, no production or work was carried out at the Kashipur unit

of the Corporate Debtor. Further, a Letter for Claim of Insurance dated 12.10.2015 along with Possession Notices on behalf of UCO Bank Consortium dated 09.10.2015 is placed on record before this Adjudicating Authority which proves that the UCO Bank took possession of the Kashipur Unit in 2015. Hence, it appears to us that the Corporate Debtor was not functional since 2016.

12. At this juncture, it is pertinent to refer to the decision of the Hon'ble Supreme Court in the case of **Sunil Kumar Jain & Ors. Vs. Sundaresh Bhatt & Ors. (2022) 7 SCC 540**, whereby, the Hon'ble Supreme Court has observed as under:

“19. Therefore, while considering the claims of the workmen/employees concerned towards the wages/salaries payable during CIRP, first of all it has to be established and proved that during CIRP, the corporate debtor was a going concern and that the workmen/employees concerned actually worked while the corporate debtor was a going concern during the CIRP. The wages and salaries of all other workmen/employees of the corporate debtor during the CIRP who actually have not worked and/or performed their duties when the corporate debtor was a going concern, shall not be included automatically in the CIRP costs. Only with respect to those workmen/employees who actually worked during CIRP when the corporate debtor was a going concern, their wages/salaries are to be included in the CIRP costs and they shall have the first priority over all other dues as per Section 53(1)(a) IBC. Any other dues towards wages and salaries of the employees/workmen of the corporate debtor shall have to be governed by Section 53(1)(b) and Section 53(1)(c) IBC. Any other interpretation would lead to absurd consequences and violate the scheme of Section 53 read with Section 5(13) IBC. If any other interpretation, more particularly, the interpretation canvassed on behalf of the appellants is accepted, in that case, the wages/salaries of those workmen/employees who had not worked at all during CIRP shall have to be treated and/or included in the CIRP costs, which cannot be the intention of the legislature.

21. In the present case, the RP/Liquidator has seriously disputed that during the CIRP, the corporate debtor was a going concern. It is seriously disputed that the respective appellants — workmen/employees employed at Dahej Yard and Mumbai Head Office actually worked during the CIRP. It is true that while submitting the claims towards CIRP

*costs, the RP has not submitted the claims towards the wages/salaries of the appellants, however, still **the claims submitted/to be submitted by the appellants will have to be adjudicated upon and considered by the Liquidator and the Liquidator has to adjudicate and consider, (i) whether the corporate debtor was a going concern during the CIRP; (ii) how many workmen/employees actually worked during the CIRP while the corporate debtor was a going concern.***

*22. **If on adjudication of the claims made by the respective workmen/employees, if it is established and proved that during CIRP, the corporate debtor was a going concern and the workmen/employees concerned actually worked during the CIRP when the corporate debtor was a going concern, the wages and salaries of such workmen/employees to be included in the CIRP costs as defined under Section 5(13) IBC and they will have to be paid such wages/salaries as per Section 53(1)(a) IBC as part of the CIRP costs in full before making any payment as per priorities mentioned in Section 53(1) IBC.***

Based on the decision of the Hon'ble Supreme Court in Sunil Kumar Jain (supra), it is concluded that to disburse the wages/salaries of the workmen, it must be proved that the Corporate Debtor was a going concern during the CIRP and the workmen must have actually worked during CIRP period. However, based on the fact that winding up proceedings were initiated before the Hon'ble Delhi High Court vide Company Petition No. 81 of 2014 and also on the perusal of the possession notice dated 09.10.2015 issued by the UCO Bank, it is established that the Corporate Debtor was not functional even before the CIRP was initiated against the Corporate Debtor vide order dated 27.03.2019. Therefore, it is concluded that the Corporate Debtor was not a going concern at the time the CIRP was initiated against the Corporate Debtor. Hence, the claim of the Applicant does not stand substantiated on the basis of this ground alone.

13. Further, it is observed that to file a claim under Section 53(1)(b) of the Code, it is mandatory to prove that the Applicant has worked as a 'workman', however, the Applicant has failed to file any satisfactory proof which proves that he has worked as a 'workman' during 24 months preceding the liquidation commencement date.

Mere furnishing of experience certificate by the Applicant does not sufficiently prove that the Applicant falls under the category of 'workman' as laid down under Section 53(1)(b) of the Code.

14. In view of the aforesaid discussion and judicial pronouncements, we are of the considered view that the Applicant has failed to prove that he has worked as a 'workman' during 24 months preceding the liquidation commencement date. Further, it is observed that since the Corporate Debtor was not a going concern at the time of the initiation of the CIRP, therefore, there lies no possibility as to the engagement of the Applicant or even any other person as employee or workman in the said entity. Hence, we are of the view that the claim filed by the Applicant do not hold any ground.
15. Resultantly, the present application i.e., **I.A./4904/PB/2022 in CP IB No. 386/PB/2018, being devoid of merit, stands dismissed** and accordingly, disposed of. No orders to cost.

Let a copy of the order be served to the parties.

Sd/-
(DR. SANJEEV RANJAN)
MEMBER (TECHNICAL)

Sd/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)