

**IN THE NATIONAL COMPANY LAW TRIBUNAL
AT MUMBAI BENCH, C-IV**

**Appeal No.03/MB/2024
In
CP (IB) No. 1056/MB/2020**

An application is filed under section 42 a/w Section 60(5) of the Insolvency Bankruptcy Code, 2016 read with rule 11 of the National Company Law Tribunal Rules, 2016.

Kolkata Municipal Corporation

...Applicant

Versus

Gajesh Labhchand Jain

Liquidator of Talwalkars Better Value Fitness Limited

...Liquidator

IN THE MATTER OF

Axis Bank Limited

...Financial Creditor

Versus

Talwalkars Better Value Fitness Limited

... Corporate Debtor

Order delivered on: 19.07.2024

IN THE NATIONAL COMPANY LAW TRIBUNAL
AT MUMBAI BENCH, C-IV

Appeal No.03/MB/2024
In
CP (IB) No. 1056/MB/2020

Coram:

Ms. Anu Jagmohan Singh
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Applicant : Ms. Kritika Sethi i/b Aquilaw,
Ld. Counsel.

For the Liquidator : Mr. Prakshal Jain a/w Mr.
Pushkar Deo i/b Trilegal, Ld
Counsel.

1. This was filed by the ***Kolkata Minicipal Corporation*** in the matter of ***Talwalkars Better Value Fitness Limited*** (“*Corporate Debtor*”) under section 42 a/w Section 60(5) of the Insolvency Bankruptcy Code, 2016 read with rule 11 of the National Company Law Tribunal Rules, 2016, seeking an order of this tribunal to set aside the decision of the ***Liquidator***.
2. The reliefs/prayers sought by the applicant are as follows:
 - a) *set aside the decision of the Liquidator dated 21 July 2023 rejecting partial claims of the Applicant;*
 - b) *Issue directions to the Liquidator to admit the entire claim of Rs 34,23,403/- (Rupees Thirty-Four Lakhs Twenty Three Thousand Four Hundred and Three*

only) of the Applicant filed with the Liquidator, after adjustment from the Suspense Account;

- c) Declare that Kolkata Municipal Corporation is a secured creditor in the liquidation of Talwalkars Better ValueFitness Limited in light of its first charge on the Property situated at First Floor, Unit 1, No. 13/1/1A Soorah East Road, Ward No. 33, Kolkata Municipal Corporation, Police Station Beliaghata, Sealdah, District-North 24 Paragans, Kolkata under the Kolkata Municipal Corporation Act, 1980;*
- d) Direct the Liquidator to cancel the auction of the Property being First Floor, Unit 1, No. 13/1/1A Soorah East Road, Ward No. 33, Kolkata Municipal Corporation, Police Station Beliaghata, Sealdah, District North 24 Paragans, Kolkata, as mentioned in the notice dated 18 July 2023 issued by the Liquidator;*
- e) In alternative to prayer (d) above, in case the Property is auctioned and/or sold in furtherance of the notice dated 18 July 2023, the Hon'ble Adjudicating Authority may be pleased to set aside the auction of the Property being First Floor, Unit I, No. 13/1/1A Soorah East Road, Ward No. 33, Kolkata Municipal Corporation, Police Station Beliaghata, Sealdah, District North 24 Paragans, Kolkata;*
- f) In alternative to prayer (d) above, in case the Property is auctioned and/or sold in furtherance of the notice dated 18 July 2023, the Hon'ble Adjudicating Authority may be pleased to direct the Liquidator to make payments to the Applicant against its dues from the sale proceeds of the auction of the said Property*

before distributing the same under Section 53 of Insolvency and Bankruptcy Code, 2016:

- g) Injunct the Liquidator from distributing the sale proceeds from the auction of the Property and to keep the same in a separate interest-bearing account until the dues of the Applicant are paid;*
- h) Stay the auction of the Property during the pendency of this Application;*
- i) Stay the Liquidation proceedings of the Corporate Debtor during the pendency of this Application;*
- j) Grant ad-interim reliefs in respect of prayers-above;*
- k) Condone the delay of three days in filing this application in the interest of justice;*

Brief Facts

- i. An application was filed under Section 7 of the Code by Axis Bank Limited, this Tribunal vide its order dated 11.01.2021 read with corrigendum order dated **18.01.2021** initiated **Corporate Insolvency Resolution Process (CIRP)** of the Corporate Debtor and appointed **Mr. Saurabh Kumar Tikmani** as the Interim Resolution Professional (IRP). The IRP was Subsequently confirmed as the Resolution Professional (RP) of the Corporate Debtor.
- ii. Thereafter, on account of not having received any resolution plans in the CIRP of the Corporate Debtor, the members of the Committee of Creditors (CoC) in the 11th Meeting of the CoC held on 22.12.2021 resolved to initiate liquidation

proceedings of the Corporate Debtor and directed the RP to file an appropriate application with this Tribunal. This tribunal vide order dated 28.04.2022 passed an Liquidation Order.

- iii. Thereafter, the Liquidator issued a public announcement in all India publication of the Financial Express inviting claims from the creditors of the Corporate Debtor on 30.06.2022.
- iv. It is stated that by the applicant that, the property tax for an amount of INR 47,77,358/- (Indian Rupees Forty Seven Lakhs Seventy Seven Thousand Three Hundred and Fifty Eight Only) in respect of the property situated at First Floor, Unit 1, No. 13/1/1A Soorah East Road, Ward No. 33, Kolkata Municipal Corporation, Police Station Beliaghata, Sealdah, District North 24 Paragans, Kolkata ("Property") was due on 22 March 2022 by the Corporate Debtor to the Applicant. The Corporate Debtor had made total payment of INR 17,49,125/- (Indian Rupees Seventeen Lakh Forty-Nine Thousand One Hundred and Twenty-Five Only) to the suspense account of the Applicant on 7 March 2018 and 3 May 2018. However, the balance outstanding of INR 30,28,233.91/- (Indian Rupees Thirty Lakhs Twenty-Eight Thousand Two Hundred and Thirty Three Only) remained unpaid, and thus the warrant of distress was issued to the Corporate Debtor.
- v. Since the Corporate Debtor failed to pay the property tax, the Property was sealed on 24.09.2022. As on the Liquidation Commencement Date, property tax of an amount of INR 51,72,528 (Indian Rupees Fifty-One Lakhs Seventy-Two Thousand Five Hundred and Twenty-Eight Only) is outstanding. Upon adjustment from the suspense account, a sum of INR 34,23,403 (Indian Rupees

Thirty-Four Lakhs Twenty Three Thousand Four Hundred and Three Only) is outstanding as on the Liquidation Commencement Date.

- vi. The Liquidator filed an application being IA No. 137 of 2023 before this Tribunal inter alla seeking directions to the Applicant to vacate, de-seal and handover peaceful possession of the Premises to the Liquidator. Vide an order dated 02.05.2023, IA No. 137 of 2023 was disposed of by this Tribunal directing the Applicant to de-seal and de-attach the Premises with immediate effect and to file a claim before the Liquidator.
- vii. Thereafter, the Applicant issued a letter dated 12.05.2023 to refrain the Liquidator from auctioning the Premises, claiming to have a first charge over the Premises in accordance with Section 232 of the Kolkata Municipal Corporation Act, 1980 (KMC Act) and further informing the Liquidator that it was taking steps to file its claim with the Liquidator.
- viii. The Applicant filed a Form C on 12.05.2023 for a total amount of INR 51,72,528/- as outstanding property tax in respect of the Premises. The Applicant's claim was divided into three components- (a) the principal amount; (b) interest; and (c) penalty for delayed payment. The Applicant also admitted that the Corporate Debtor had made a payment of INR 17,49,125/- (Indian Rupees Seventeen Lakh Forty-Nine Thousand One Hundred and Twenty-Five Only) to the suspense account of the Applicant on 7.03.2018 and 3.05.2018.
- ix. Thereafter, various communications ensued between the Applicant and the Liquidator , where the Liquidator, at various times, requested the Applicant to

substantiate its claim, along with its alleged status as a secured creditor of the Corporate Debtor.

- x. It is submitted that the security interest is created in favor of the Applicant by operation of law under the KMC Act. Therefore, it is submitted that in accordance with Section 52 of the IBC, the said security interest can be realized in accordance with the procedure provided under the KMC Act. In the form submitted by the Applicant to the Liquidator, it is stated that the security interest in the Property was not relinquished by the Applicant. Therefore, it is stated that the auction of the Property without realizing of the security interest by the Applicant is in violation of the IBC and precedents cited above. Accordingly, a letter dated 12.05.2023 was written by the Applicant to the Liquidator requesting them to cancel the said auction of the Property and issue a clarification in this regard.
- xi. It is submitted that the Liquidator by letter dated 26.05.2023 had acknowledged the claims filed by the Applicant and also sought an explanation from the Applicant regarding the creation of security on the Property by the Applicant.
- xii. It is stated that by e-mail dated 03.06.2023, the Applicant responded to the Liquidator's letter dated 26.05.2023 wherein it has stated that KMC has created the first charge as per section 232 of the KMC Act and has a security interest over the property as per regulation 21 Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("Liquidation Regulations") and should be treated as a secured creditor as per Section 52 of the IBC read with Regulation 32 of the Liquidation Regulations. Further, the Applicant by e-mail

dated 07.06.2023 explained the calculation of the claim ascertained by the Applicant in its Form C.

- xiii. It is submitted by the applicant that, by e-mail dated 21.07.2023, the Liquidator partially rejected the claim of the Applicant and categorized the Applicant as unsecured operational creditor. In this regard, it is denied that the claims filed by the Applicant are vague or not precise. It is submitted that the claims filed by the Applicant constitute of the following:

Sr. No.	Particulars	Amount (In INR)
1	Principal Amount	27,26,202.98
2	Interest	20,38,273.6
3	Penalty	4,08,051.42
Total		51,72,528

- xiv. It is stated that the Applicant has charged principal amount, interest and penalty in accordance with the provisions of the KMC Act and has been computed precisely to the exact amount.
- xv. Further, by a notice dated 18.07.2023, the Liquidator has issued a notice for auction of properties owned by the Corporate Debtor, i.e. TBVFL. The list of properties put up for auction includes the concerned Property in Kolkata which was sealed and attached by the Applicant.
- xvi. The Applicant had relied upon the judgment of *State Tax officer (1) v/s. Rainbow Papers Limited 2022 live law (SC) 743/CA 1661 of 2020*.

xvii. It is stated that there is a delay of three days in filing this application under Section 42 of the IBC. It is stated that it took time for the Applicant to seek necessary approvals from the different departments of the Applicant and to gather full information in relation to this subject matter. The Applicant states that the delay is not intentional and the same is bonafide. It is prayed in the interest of justice that the delay of three days in filing this application be condoned

Submissions of the Respondent/Liquidator

3. The Counsel for the Liquidator/Respondent submits that , various communications ensued between the Applicant and the Respondent where the Respondent, at various times, requested the Applicant to substantiate its claim, along with its alleged status as a secured creditor of the Corporate Debtor. The Applicant failed to provide satisfactory explanation regarding its claim amount and its alleged status as a secured creditor of the Corporate Debtor.
4. The Applicant also failed to provide clarity on its outstanding amounts including the applicable interest rate and adjustment of part payments made by the Corporate Debtor in the year 2018.
5. In view thereof, and, in accordance with Regulation 25 of the Liquidation Regulations, the Liquidator made a best estimate of the amount of the claim based on the information available with him and vide email dated 21.07.2023 admitted an amount of INR 9,77,078/- (Indian Rupees Nine Lakhs Seventy-Seven Thousand Seventy-Eight Only) in the liquidation proceedings of the Corporate Debtor. Further, since the creation of security interest over the Premises could not be ascertained, the Applicant was categorized as an unsecured operational creditor.

Findings

6. Heard the learned Counsel.
7. We find that the Applicant contends that its claim ought to be admitted in the category of Secured Creditor relying upon decision in the case of Rainbow Papers Pvt Ltd (Supra). In furtherance of the said proposition the applicant has relied on section 232 of the KMC Act, which bestows 1st Charge on the premises.
8. Before we delve into the aforesaid contention of the Applicant it would be pertinent to mention that the the Hon'ble High Court while deciding Writ Petition filed by Kolkata Municipal Corporation challenging an order passed by the National Company Law Tribunal in *Kolkata Municipal Corporation and another Vs. Union of India and others WPA No.977 of 2020* held that

49. The proposition laid down in Commissioner of Income Tax vs. Monnet Ispat of Energy Ltd. [Special Leave to Appeal (C) No. (S) 6483 of 2018], that income tax dues, being in the nature of crown debts do not take precedence even over secured creditors, holds true in the present case as well. The claim of the KMC, being in the nature of crown debts, cannot gain precedence over other secured creditors, as contemplated in the IBC.

9. In view of the aforesaid decision laid down by Hon'ble Calcutta High Court clarifying the interplay between the provisions of KMC Act and IBC. It can be

inferred that the provisions of KMC Act will not prevail over the provisions of IBC.

10. The applicant has contended that its claim be admitted in category of Secured Creditor relying upon the decision in the case of *Rainbow Papers Pvt. Ltd.* However, this decision has been distinguished later on by the Hon'ble Supreme Court expressly in the case of *Paschimanchal Vidyut Vitran Nigam Ltd (PVVNL) v. Raman Ispat Private Limited* | CIVIL APPEAL NOS. 7976 OF 2019) wherein it was held that:

“ dues payable or requiring to be credited to the Treasury, such as tax. tariffs, etc. which broadly fall within the ambit of Article 25 of the Constitution will be covered by Section 53(1)(e) of the Code. Since the Applicant's claim against the Corporate Debtor is for outstanding property tax, it would clearly fall within the ambit of Government dues”.

11. In view of the said judgement , the Applicants reliance upon the provisions of the KMC Act for its claim as a Secured Creditor of the Corporate Debtor is misplaced and devoid of merits. Hence, cannot be taken into consideration. The Applicants prayers to be treated as Secured Creditor is hence **Rejected**.

12. We are of the considered view, that the claim of KMC being in the nature of crown debt, would be categorised as Government Dues and accordingly be placed in the waterfall mechanism u/s 53 of the Insolvency and Bankruptcy Code, 2016.

13. Vide prayer clause “*b*” the applicant has sought directions to the liquidator to admit the entire claim of Rs. 34,23,403/-. Therefore this bench directs the liquidator to verify the claim of the Kolkata Municipal Corporation and take decision as prescribed under the law.

14. With the above observations in *para* 11 and *para* 12 above, this tribunal is of the considered opinion that the above *Appeal No. 03/2024* in *CP No. 1056/2020*, is *Partly allowed (subject to) clause ‘b’*.

Sd/-
ANU JAGMOHAN SINGH
MEMBER (TECHNICAL)
19.07.2024.

Sd/-
KISHORE VEMULAPALLI
MEMBER (JUDICIAL)