

**IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
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**CA No. 118/CTB/2019
Connected with
TP No. 44/CTB/2019
Arising out of
CP (IB) No. 373/KB/2017**

**CORAM: 1. Ms. Sucharitha R. (J)
2. Shri Satya Ranjan Prasad (T)**

**In the matter of:
INSOLVENCY AND BANKRUPTCY CODE, 2016.**

-And-

**In the matter of:
An application under Section 60(5) of the Insolvency and Bankruptcy Code,
2016.**

-And-

**In the Matter of:
State Bank of India, having its office at State Bank Bhawan, Corporate Centre,
Madam Cama Road, Mumbai 400021, Maharashtra also at Corporate Account
Group Branch, Reliance House, 2nd Floor, 34, Jawaharlal Nehru Road, Kolkata-
700071.**

... .. Financial Creditor

-VERSUS-

**Adhunik Metaliks Ltd. having its registered office Lansdowne Towers, 2/1A,
Sarat Bose Road, Kolkata-700020, West Bengal and having its factory premises
at Chadri Hariharpur, P.O. Kuarmunda, District-Sundergarh, Odisha- 770039.**

... .. Corporate Debtor

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-And-

In the Matter of:

Sumit Binani, representing Adhunik Metaliks Ltd. as its Liquidator (IBBI/PA-001/IP-N00005/2016-17/10025), Son of Sushil Kumar Binani, by occupation-Practising Chartered Accountant presently residing at 105/1, Ultadanga Main Road, Suncity Complex, Kolkata- 700067, and having office at 4th Floor, Room No. 6, Commerce House, 2A, Ganesh Chandra Avenue, Kolkata- 700013.

... .. **Applicant**

Present:

1. Mr. Sumit Binani - Liquidator] For the Applicant

Date of pronouncement of Order: 10th day of January 2020.

ORDER

Per: Shri Satya Ranjan Prasad, Member (T)

1. This application has been filed under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 ('IBC' in short) read with other applicable provisions of IBC, the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and Rule 11 of the NCLT Rules 2016.

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2. The applicant herein, is the Liquidator of the Corporate Debtor Company and was so appointed when the liquidation order was passed on 8th of July 2019 by this Bench. Vide the aforesaid application, the applicant has sought clarity about the treatment of claims received on and from the period between 18th July 2018 till 7th July 2019 when the company was supposed to be revived under the resolution plan approved on 17th July, 2018.
3. At the instance of State Bank of India/Financial Creditor, Corporate Insolvency Resolution Process (CIRP) of Adhunik Metaliks Limited/Corporate Debtor was initiated by an order dated 03.08.2017 as passed by the concerned Adjudicating Authority, Kolkata Bench. Pursuant thereto, in accordance with the Code, the Resolution Plan of the successful Resolution Applicant was approved by the Committee of Creditors (CoC) and the same was approved by the Kolkata Bench of the Tribunal vide Order dated 17th July 2018. Liberty House Group Pte Ltd., therein was the Successful Resolution Applicant. Subsequently, a Monitoring Committee was formed and constituted in accordance with the Resolution Plan as approved under Section 31 of IBC.
4. The Applicant submits that, Liberty House Group Pte Ltd., the Successful Resolution Applicant, herein had failed to implement the

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Resolution Plan and a period of almost one year had elapsed from the date of approval of the resolution plan and that there are various costs which have accrued during the aforesaid period when the Monitoring Committee was in charge of the Corporate Debtor, which includes costs incurred and accrued for salary of workmen/employee, admin costs, unpaid costs to security personnel and other professional fees of auditors etc. although the plant and business operations was shut from May 2018.

5. Applicant further submits that such costs were accrued in view of the hope of the revival of the Corporate Debtor as a going concern but the successful resolution applicant allegedly failed to implement the resolution plan which was binding on it and other stakeholders for almost a year after which the Liquidation of the Corporate Debtor has commenced.

6. Accordingly, by order dated 8th July 2019 of this Adjudicating Authority, the Company was sent to liquidation and thereafter the present applicant was appointed as the Liquidator. The liquidation order dated 8th July 2019 was challenged and an interim order of stay of the operation of the said order was passed on 17th July 2019 which was eventually set aside on 28th August 2019. On and from that date, the liquidation process is being carried out.

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7. The applicant states that several claims as on the liquidation commencement date have been received by the applicant which includes amount accrued and under for the period between 18th July 2018 till 7th July 2019 (hereinafter referred to as “the non-implementation period”).
8. As per the averments, while submitting their claims for the aforesaid period, there have been verbal enquiries to the applicant specially from workmen and employees as to the treatment of their dues accrued during the aforesaid non implementation period in the distribution pattern laid down under Section 53 of IBC and whether the same should be treated as priority over other dues.
9. The applicant states that for the period between 18th July 2018 till 7th July 2019 i.e. the period after the lapse of Corporate Insolvency Resolution Process and before the commencement of liquidation, the Monitoring Committee was in charge and has incurred costs. Details of such costs have also been provided as Annexure-A to the application.
10. The present application is for clarification in regard to treatment of aforesaid claims of work men and employees and such other claims which have accrued during the non-implementation period and that whether the same should have priority over other dues.

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11. In this regard, it has been noted that the distribution pattern of the assets and the order of priority have been specified under Section 53 of IBC. Further, the “insolvency resolution process costs” and “liquidation costs” have been defined in the following manner:

“Under sub-section 13 of Section 5 of IBC, insolvency resolution process costs mean-

- (a) The amount of any interim finance and the costs incurred in raising such finance;
- (b) The fees payable to any person acting as a resolution professional;
- (c) Any costs incurred by the resolution professional as running the business of the corporate debtor as a going concern;
- (d) Any costs incurred at the expense of the Government to facilitate the insolvency resolution process;
- (e) Any other costs as maybe specified by the Board.”

“Under subsection 16 of Section 5 of IBC - Liquidation cost means any cost incurred by the Liquidator during the period of liquidation subject to such regulations, as may be specified by the Board.”

12. In furtherance to the aforesaid provisions, Regulation 2(1) (ea) and regulation 7(1) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, state as under:

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2(1){(ea) “ liquidation cost” under sub-section (16) of Section 5 means- (i) fee payable to the liquidator under regulation 4; (ii) remuneration payable by the liquidator under sub-regulation (1) of regulation 7; (iii) costs incurred by the liquidator under sub-regulation (2) of 24; (iv) costs incurred by the liquidator for preserving and protecting the assets, properties, effects and actionable claims, including secured assets, of the corporate debtor; (v) costs incurred by the liquidator in carrying on the business of the corporate debtor as a going concern; (vi) interest on interim finance for a period of twelve months or for the period from the liquidation commencement date till repayment of interim finance, whichever is lower; (vii) the amount repayable to contributories under sub-regulation (3) of regulation 2A; (viii) any other cost incurred by the liquidator which is essential for completing the liquidation process: Provided that the cost, if any, incurred by the liquidator in relation to compromise or arrangement under Section 230 of the Companies Act, 2014 (18 of 2013), if any, shall not form part of liquidation cost.]

Further, regulation 7 (1) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 states that – “A liquidator may appoint professionals to assist him in the discharge of his duties, obligations and functions for a reasonable remuneration and such remuneration shall form part of the liquidation cost.”

13. In view of the above proposition, the claims received during the period between 18th July 2018 till 7th July 2019 can neither be treated as a part of “insolvency resolution process costs” nor do they fall within the ambit of “liquidation cost” and hence, cannot be accorded priority over other dues in terms of the provisions of the law

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14. However, in respect of the aforesaid claims received during the period between 18th July 2018 till 7th July 2019 applicant may rely on the statutory treatment of claims as laid down in Section 53 of IBC, which reads as follows:

(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 and in such manner 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;

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- (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 interests;
- (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 recipient under sub-Section (1) with equal ranking, if disrupting the order of priority under the 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

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

Explanation- For the purpose of this Section-

- (a) 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.
- (b) The term “workmen’s dues” shall have same meaning as assigned to it in Section 326 of the Companies Act, 2013.

15. Accordingly, CA No. 118/CTB /2019 is disposed of.


Shri Satya Ranjan Prasad
Member (T)


Ms. Sucharitha R.
Member (J)

Signed on this, the 10th day of January, 2020.

Ravijeet _P.S.