

**THE NATIONAL COMPANY LAW TRIBUNAL
COURT NO. IV
AT NEW DELHI**

**IA No. 412/2020
IN
Company Petition No. (IB)-1265(ND)/2019**

IN THE MATTER OF:

AUTONIX LIGHTING INDUSTRIES PRIVATE LIMITED

...OPERATIONAL CREDITOR

VERSUS

MOSER BAER ELECTRONICS LIMITED

...CORPORATE DEBTOR

AND IN THE MATTER OF:

**MR. SANDEEP TYAGI
(Authorized representative)
Ex- Employees of MoserBaer Electronics Limited)**

....APPLICANT

VERSUS

HEMANT SHARMA

...RESPONDENT/RESOLUTION PROFESSIONAL

Order delivered on: 19.11.2020

Coram:

**DR. DEEPTI MUKESH
HON'BLE MEMBER (JUDICIAL)
SMT. SUMITA PURKAYASTHA
HON'BLE MEMBER (TECHNICAL)**

For Resolution Professional: Mr. Milan Singh
For Applicant : Mr. Swarnedu Chatterjee, Adv

Memo of Parties

AUTONIX LIGHTING INDUSTRIES PRIVATE LIMITED

...OPERATIONAL CREDITOR

VERSUS

MOSER BAER ELECTRONICS LIMITED

....CORPORATE DEBTOR

AND IN THE MATTER OF:

**MR. SANDEEP TYAGI
(AUTHORIZED REPRESENTATIVE)
EX- EMPLOYEES OF MOSERBAER ELECTRONICS LIMITED)**

....APPLICANT

VERSUS

**HEMANT SHARMA
RESOLUTION PROFESSIONAL
MOSER BAER ELECTRONICS LTD.
R/O D-54, 1ST FLOOR, DEFENCE COLONY
NEW DELHI-110024**

...RESPONDENT/RESOLUTION PROFESSIONAL

ORDER

AS PER SUMITA PURKAYASTHA (TECHNICAL)

1. This Application has been filed by Mr. Sandeep Tyagi, Authorized representative on behalf of 52 (fifty-two) Ex- Employees of MOSER BAER ELECTRONICS LTD. seeking directions to release the lawful dues of the ex-employees who had submitted their resignation prior to the initiation of the CIRP process. The application has been filed by seeking the following prayers:-

- a) Admit and Allow this Application. Issue necessary directions to the RP to release the DUES of the ex-employees as per the commitment.
 - b) Issue necessary directions to the RP to deposit the Provident Fund with EPFO and release Gratuity dues with the forthwith.
 - c) Issue necessary directions to the erstwhile management of the Corporate Debtor to remit the requisite funds to the RP for disbursal of dues of the present applicant.
 - d) Pass any further or suitable orders as may be necessary and expedient in the facts of this case.
2. The facts of the case in brief are that the Corporate Debtor is a wholly owned subsidiary of MOSERBAER INDIA LIMITED. As per the averments made in the application it is stated that all the Employees were forced to resign by the ex-management by March 2019. Their dues (salary and leave encashment), Provident Fund Gratuity and bonus is yet to be paid. The dues were not settled by the ex-management of the Corporate Debtor citing financial instability.
3. An application for Corporate Insolvency Resolution Process was preferred by Autonix Lightning Private Limited, herein the Operational Creditor in the matter of Moser Baer Electronic Limited, herein the Corporate Debtor, under Section 9 of the IBC on account of default. The Adjudicating Authority vide order dated 17.09.2019 admitted the said application and appointed Mr. Hemant Sharma as the Interim Resolution Professional of the Corporate Debtor.

4. As per the Public announcement made by the IRP, all the Creditors were called to submit their claims via electronic mode and every ex-employee of the Corporate Debtor had submitted Form D with the Resolution Professional which included the pre- CIRP dues of the Ex-Employees from the date of non-payment of salaries till their dates of resignation/relieving respectively. It also includes the Provident Fund from FY 2018-2019 till the respective dates of resignation. The Resolution Professional admitted the amounts, but deducted Leave Encashment and bonus.
5. As per the averments made in the application it has been stated that nine employees (applicants) were made to resign from MOSERBAER INDIA LIMITED post its CIRP and were re-employed under contractual post in MOSER BAER ELECTRONICS LTD. that all the nine people have been paid gratuity as and when they had resigned from their services in MOSERBAER INDIA LIMITED.
6. The Applicant states that the Corporate debtor did not deposit Provident Fund till their dates of resignation respectively. The salary slips of the ex-employees show that Provident Fund was deducted every month but admittedly it was not deposited with the EPSO.
7. The applicant has relied on the Judgement dated 19.03.2019 of the Hon`ble Principal Bench in CA(PB) No. 19.(PB)/2019 filed by the Moser Baer Karamchari Union of the MOSERBAER INDIA LIMITED (Holding Company) against the Resolution Professional in CP. NO.(IB)

378(PB)/2017 **Alchemist Asset Reconstruction Co. Ltd. Vs. Moser Baer India Limited** for release of their dues. The Adjudicating Authority has observed in Para 3 that *“There is a basic flaw in the reasoning adopted by the liquidator. Under Section 36(41 (a) (m), the expression 'liquidation estate' has been defined and it is clarified that all sums due to any workman or employee from the provident fund, pension fund and gratuity fund, were not to constitute and included in the expression 'liquidation estate assets". Once the sum due to any workman or employee from the provident fund, pension fund and gratuity fund are not constitute a part of the liquidation estate. we fail to understand as to how Section 53 could be invoked along with its explanation. According to Section 53, the proceeds from the sale of the liquidation assets are to be distributed in the manner specified therein. Therefore, the aforesaid amount of the workmen dues cannot be a part of liquidation estate assets.”*

Para 4 *“The provident fund dues, pension funds dues and gratuity fund dues are not treated as a part of the liquidation estate and would not, therefore, be recovered by Section 53 of the Code which provides for waterfall mechanism. The liquidator has taken a perverse view by unnecessarily referring to explanation n of Section 53 and Section 326 of the Companies Act, 2013.”*

8. It has been observed that the order dated 19.03.2019 of the Adjudicating Authority had been challenged before the Hon`ble Appellate Authority. The Hon`ble Appellate Authority vide its order dated 19.08.2019 upheld the order of the Adjudicating Authority and

stated that “ Para 24- *Once the liquidation estate/asset 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.*

Para 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.”

9. We would like to fall in line with the ratio laid down by the Hon`ble Principal Bench wherein it is clearly held that any shortfall in gratuity has to be made over by the Resolution Professional and payments of the dues has to be paid outside the waterfall mechanism. The said finding is also upheld by the Hon1ble NCLAT, therefore we hereby allow this IA No. 12/2020 in Company Petition No. (IB)-1265(ND)/2019. It is directed to the Resolution Professional to release the dues of the ex-employees and deposit the Provident Fund with EPFO and release Gratuity dues with the forthwith.

10. Copy of this order be sent to the parties.

Sd/-

Sumita Purkayastha

Member (T)

Sd/-

Dr. Deepti Mukesh

Member (J)