



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
DIVISION BENCH-(Court-I)  
KOLKATA**

**I.A. (I.B.C) No. 424/KB/2020  
IN  
C.A.(I.B.) No. 788/KB/2019  
IN  
C.P.(I.B.) No. 03/KB/2017**

In the matter of:

**Nicco And Associated Companies Senior Management Superannuation  
Fund**

*...Applicant*

*Versus*

**Vinod Kumar Kothari, Liquidator of Nicco Corporation Limited**

*...Respondent*

**Date of Hearing: 23/08/2024**

**Date of pronouncing the order: 18/12/2024**

**Appearances (through hybrid mode):**

For the Applicant : Mr. Jishnu Choudhary, Advocate  
: Ms. Urmila Chakraborty, Advocate  
: Mr. Rahul Auddy, Advocate  
: Mr. Aditya Gooptu, Advocate

For the Liquidator : Mr. Joy Saha, Senior Advocate  
: Ms. Barsha Dikshit, PCS  
: Ms. Neha Malu, PCS

**Coram:**

**Bidisha Banerjee** : **Member (Judicial)**  
**Balraj Joshi** : **Member (Technical)**



**ORDER**

**Per: Balraj Joshi, Member (Technical)**

1. The present application has been filed by Nicco and Associated Companies Senior Management Superannuation Fund (**Applicant**) under Section 60(5) of the Insolvency and Bankruptcy Code 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 seeking the following reliefs:

- (a) *That directions be served upon the Respondent Liquidator appointed by this Hon'ble Tribunal to pay a sum of INR.50,99,000/- to the applicant trust;*
- (b) *That directions be served upon the Respondent Liquidator to pay a sum of INR. 5,00,000/- to the Applicant Trust towards legal cost incurred;*
- (c) *Ad-interim orders in terms of the prayers above;*
- (d) *Such or other order or orders be made and/or directions be given as to this Hon'ble Tribunal may deem fit and proper.*

***Facts of the case:***

2. An application being C.A. (I.B) No. 788/KB/2019 was moved on 02.07.2019 which after being heard by this Adjudicating Authority was disposed of vide order dated 04.10.2019<sup>1</sup>, however the order failed to record the quantum of superannuation dues. Thereafter an amendment application being C.A. (I.B) No. 1668/KB/2019 was filed in C.A. (I.B) No. 788/KB/2019 praying that the superannuation quantum being Rs. 50,99,000/- be included in the letter and spirit of the order dated 04.10.2019. After hearing the same, this

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<sup>1</sup> Annexure-B of the Application

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Adjudicating Authority disposed of the same vide order dated 10.10.2019<sup>2</sup> in which it was recorded:

*"C.A. (IB) No.1668/KB/2019 is an application filed by the workmen seeking certain clarification in the order dated 04/10/2019 passed by this bench. Being satisfied with the submissions submitted on both sides we find there is an inadvertent omission in respect of superannuation fund to the tune of Rs.50.99 Lakhs. Accordingly, the amount is to be included in the order and an amended order is to be uploaded forthwith.*

*Ld. Liquidator is directed to distribute it in accordance with the order dated 04/10/2019 and subject to the eligibility of the beneficiary for which the list of beneficiaries is to be submitted by the applicant to the Liquidator. Accordingly, this CA is disposed of."*

3. The applicant stated that the quantum deposited with the applicant trust was not directly transferred to the beneficiary but the same was transferred to Life Insurance Corporation of India (LIC) which in turn would pay the employees after considering their eligibility.
4. The Respondent i.e., the Liquidator in his draft order dated 20.01.2020<sup>3</sup> stated that the superannuation fund is not pursuant to any statutory obligation as under the EPF Act and the same cannot be said to be similar to pension funds as stipulated under EPF Act, since the arrangement is purely voluntary and solely for the benefit of certain classes of employees.
5. It is also stated that the Liquidator in case of a similar funds has accepted payment of shortfall before the waterfall mechanism which pertains to Nicco Restructuring Employees Trust Fund (NRETF), a voluntary and non-

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<sup>2</sup> Annexure- D of the Application

<sup>3</sup> Annexure- H of the Application

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statutory trust fund whose claim of Rs.34,55,000 was settled by the Liquidator. Further, the books of accounts of the Corporate Debtor as on 13.10.2017<sup>4</sup> also noted such obligation of payment of superannuation fund.

6. The Liquidator in his written submission accepted the fact that the claim of superannuation due has to be considered in the same manner in which the gratuity dues were being discharged. The Liquidator has erred in putting the trust's claim through the waterfall mechanism as envisaged under Section 53 of the Code. This act of the Liquidator of not disbursing the due amount to the applicant trust is causing undue hardship to the applicant trust and its beneficiary and such delay is causing immense financial hardship and difficulties since the beneficiary does not have any alternative source of income as their livelihood as stopped after the order dated 17.10.2017 from when they had been discharged from the services of the Corporate Debtor.

**Contents of the Reply Affidavit filed by the Respondent/Liquidator:**

7. The Respondent received a letter dated 07.03.2019 from the applicant reiterating that the claimed amount falls under Section 36(4)(a)(iii) of IBC and that there was a variation of claim from Rs.1,08,88,875/- to Rs.50,99,000/-. As per the applicant, the claim was originally filed for 3 beneficiaries out of which 2 were dealt with in accordance with share purchase agreement with Oriental Nicco and therefore the claim was reduced to Rs.50,99,000/- with respect to shortfall in the Fund, and the only beneficiary was Mr. Kartick Chatterjee who is also one of the trustees and Ex-Managing Director of the Corporate Debtor.
8. The Respondent also stated that the Applicant's reliance on the judgment of NCLT, Mumbai Bench in **Asset Reconstruction Company (India) Ltd v. Precision Fasteners Ltd (MA 576 & 572 of 2018 in CP (IB) No. 1339/MB/2017)** and judgment of **Alchemist Asset Reconstruction Co Ltd v. Moser Baer India Limited (CA-19 (PB)/2019)** wherein the Benches held

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<sup>4</sup> Annexure- J of the Application

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that pension fund dues are not treated as part of the liquidation estate and would not therefore be recovered by section 53 of IBC, 2016.

9. The Respondent had repeatedly sought for certain information/documents but the applicant preferred to file an application being CA No. 788/KB/2019 claiming superannuation dues beyond the priority of Section 53 but did not provide the Respondent with the required documents. After the orders dated 04.10.2019 and 10.10.2019 passed by this Adjudicating Authority, in order to determine the eligibility of the Applicant when the Respondent asked for some documents, the only document provided was a copy of one LIC policy. It was also not clear from the policy whether the Fund is a statutory or voluntary fund. However, on 16<sup>th</sup> January, 2020, the Respondent received a copy of the trust deed, scheme document and text of related rules from which it appeared that the fund has been constituted for making voluntary contributions from the Group Companies for the benefit of senior employees. The contributions from such companies go to the LIC and then the LIC makes payment of superannuation dues to the concerned employee.
10. The following conclusion was made out by the Liquidator upon perusal of the required documents:
- a. The Fund claimed was not pursuant to any statutory obligation as under the EPF Act. Hence the arrangement is purely voluntarily and solely for the benefit of certain classes of employees (senior management and employees) and cannot be compared with statutorily required gratuity/provident/pension funds as referred to in the Code. There was no deduction from the salary of the employee as well. As such, the superannuation fund is merely an obligation from the employer, which cannot be regarded as any different from the rest of the employers' obligations to the employee.


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- b. the members of the scheme were to be paid out of the balance lying in the Fund only, and the participation of a company could be discontinued on account of financial adversities.
- c. it cannot be contended that the obligation to make payment to the Superannuation Fund is covered by section 36(4)(a), as not being part of the liquidation estate and therefore, as per the Liquidator, the Claimant is not eligible for disbursement of funds beyond section 53 of the Code.
11. The decision mentioned above was communicated via an email dated 20.01.2020 which was disregarded by the applicant stating that the said draft decision goes against the order of this Adjudicating Authority to which the Respondent clarified his stand on the draft decision vide email dated 29.01.2020 which has been omitted by the applicant in the present application. However, as no comments were given by the applicant on the issues/points involved till 28.01.2020, the Respondent treated this as a final decision and communicated the same to the applicant vide email dated 29.01.2020.
12. The Respondent stated that it is clear that the Code, vide section 53, accords higher priority to workmen dues over employee dues. Voluntary arrangements entailing creation of trusts in favour of senior management, if taken to be beyond section 53, would go on to circumscribe the basic fabric of the Code. Therefore, it is counter-intuitive to say that when section 53 calls for payment of wages to workmen in accordance with the priority, the dues to senior management be paid off beyond the said priority any such interpretation goes against the spirit of welfare laws read with the provisions of the Code. It is submitted that the ruling in *Moser Baer* was to enhance a social security measure and not to take away the part available to workmen and redirect the same to senior employees.
13. With respect to sub-para (xviii) of para 6, the Applicant is drawing incomparable reference to NRETF, wherein the sums were deducted from

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the salaries of the employees but were not remitted to NRETF. In essence, the amount required to be remitted to NRETF was the money of the employee and not the Corporate Debtor. it is hereby clarified that the Respondent has only released the amount due to the Trust Fund based solely on the fact that, such amount was deducted by the Corporate Debtor from the salaries of the employees and the same was owed to the employees outside the liquidation estate. However, as clarified above, there is no such case of 'deduction' from employees' salaries for onward contribution to any Fund in case of superannuation dues.

14. The Respondent also stated that the contention of the applicant that the books of accounts of the Corporate Debtor also mentions about the superannuation dues due to the applicant is not correct. The balance sheet of the Corporate Debtor reflect the superannuation fund under the head 'short term provision' but nothing regarding past contribution, remaining balance and the shortfall has been provided therein which clearly gives a strong doubt on the pre- existence of the fund and in any event a mere balance sheet entry of a liability cannot be a ground to disburse the amount against the provisions of the Code.


15. The Respondent has contended that it is not true that the act of the Respondent is causing any injustice to the Trust as the Respondent cannot divert money lying in the liquidation estate towards himself and leave behind the workmen and other employees of the Corporate Debtor. Therefore, this application is liable to be dismissed.

**Contents of the Supplementary Affidavit filed by the Applicant**

16. The superannuation dues as claimed by the applicant in the application is Rs.50,99,000/- as calculated up to 17.10.2017. However, on 03.01.2017, the LIC had communicated to the Applicant that considering that since Mr. Kartick Kumar Chatterjee is entitled to monthly pension Rs. 36,800/- from

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November, 2017 itself, the 5 years arrears from October 2017 to December 2022, amounting to Rs. 23,18,400/- also needs to be contributed by the CD Liquidator to the Applicant Trust Fund and in turn to the LIC to enable LIC to start the monthly pension outflow to the said Mr. Kartick Kumar Chatterjee. Therefore, the total amount of contribution that needs to be made by the Applicant Trust to LIC for the superannuation of Mr. Kartick Kumar Chatterjee as on January 2023 was Rs. 72,85,779/-. For this, the Applicant made a supplementary affidavit filed on 15th March 2024 to bring in record the communication of LIC dated 3rd January 2024 and also prayed for modifications of the prayer in the instant IA and modification in the amount of contribution required to be done by the Liquidator to the Applicant Trust.

17. Subsequently, the Applicant Trust received a communication by LIC that the as on June 2024, the arrears from October 2017 till June 2024 amounting to Rs. 29,44,000/- needs to be contributed by the CD Liquidator to the Applicant Trust Fund and in turn to the LIC to enable LIC to start the monthly pension outflow to the said Mr. Kartick Kumar Chatterjee. Therefore, the total amount that needs to be paid is Rs. 73,98,586/- and not Rs.50,99,000/- which was due as on 17.10.2017.

18. Therefore, this supplementary Affidavit has been filed to bring on record the aforesaid facts and the modifications of the prayer of the instant application and the modification in the amount of contribution that is now required to be done by the Respondent to the Applicant Trust.

**Analysis**

19. Heard the counsels on both the sides.

20. The provision of the law governing the issue is contained in Section 36(4)(a)(iii), which reads as under:

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

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- (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 workman 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; ii)*

21. It is clear that the pension fund is exempted from being considered to be forming a part of the Liquidation estate and the genre of the Superannuation fund is similar to a Pension fund. It is not the matter as to whether the scheme is voluntary or compulsory, since the money that would have been deposited in the fund would come from the workmen or employees account only. In cases where the employees would not opt for being a part of such a superannuation scheme would naturally get the equal or equivalent amount along with their salaries to keep them at par with those who do , in whose case i.e. those who would opt for the scheme, this money would be deposited in the superannuation fund. In either case the employer's liability is established and the contribution of the employees whether directly or indirectly would not form a part of the liquidation estate. We therefore do not agree to the submission of the respondent liquidator that no parallels can be drawn with the contribution made to the NRETF, as in the instant case no money was deducted from the salary of the employee. Thus, as long as there is an existence of a fund by whatever name it is called which is for the use of the employee in future i.e. Provident fund or Superannuation fund, it is the workers'/employees' money held in trust by the employer and as such can not form a part of the liquidation estate.

22. Next, we come to the issue of the amount of money to be deposited which has been variously represented. The liquidator is hereby directed to calculate the amount in keeping the rules of the superannuation scheme/fund, up to the date of the liquidation and deposit the amount in the fund. The amount of

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pension that would result would be accordingly re-calculated by the fund manager/LIC.

23. **I.A. (I.B.C) No. 424/KB/2024** is allowed in above terms and disposed of.

24. A certified copy of this order may be issued, if applied for, upon compliance with all requisites.

**(Balraj Joshi)**  
**Member (Technical)**

**(Bidisha Banerjee)**  
**Member (Judicial)**

This order is pronounced on 18<sup>th</sup> day of December, 2024.

*FA\_LRA*