NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 544 of 2021

(Arising out of the Order dated 28th May, 2021 passed by National Company Law Tribunal, Kolkata Bench, in I.A. No. 1014/KB/2020 in C.P. (IB) No.-543/KB/2017)

IN THE MATTER OF:

Varrsana Employee Welfare Association,
A registered employees' union registered under Public Trust with Deputy Charity Commissioner under the Bombay Public Trust Act, 1950.

Having its office at: Plot No. 71, Survey No. 182,
Balaji Residency, Behind Jalaram Temple,
Meghpar Borichi, Anrjar,
Gujarat – 370110. **…Appellant**

Versus

Anil Goel,
The Liquidator appointed in respect of Varrsana Ispat Limited,

Having his Office at: E-10A,
Kailash Colony, Greater Kailash-I,
New Delhi – 110048. **…Respondent**

Present

For Appellant:	**Mr. Rishav Banerjee, Mr. Akshat Singh, Mr. Bhanu Gupta & Ms. Dacchita Shahi, Advocates.**
For Respondent:	**Mr. Gaurav Mitra, Mr. Amar Vivek, Mr. Dhananjaya Sud, Mr. Aditya Gauri, Ms. Damini Srestha & Ms. Shriya Roychoudhari, Advocates for Respondent.**

(J U D G E M E N T)

[Per; Shreesha Merla, Member (T)]

1. Challenge in this Appeal is to the Impugned Order dated 28.05.2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Kolkata Bench), in I.A. No. 1014/KB/2020 in C.P. (IB) No.- 543/KB/2017. By the Impugned Order, the Learned Adjudicating Authority has given the following directions:

> *"10. Orders*
>
> *10.1 In sum, -*
>
> *(a) On prayer (a): The prayer for refund of the Liquidator's fee of Rs.1.5 crore has become infructuous since the refund has already taken place vide cheque dated 03.11.2020, though under compelling circumstances (para9.2 and 9.3 supra).*
>
> *(b) On prayer (b): The prayer for inclusion of a representative of the workmen and employees on the SCC is not acceded to, since the workers at this point of time do not have a subsisting claim, and we have held that there is a symbiotic relationship between regulations 31 and 31A of the Liquidation Regulations. The claim for inclusion in the SCC will subsist only if there is inclusion in the list of stakeholders and not de hors it (para 9.6 , 9.10 and 9.11 supra).*
>
> *(c) On prayer (c): The prayer for direction to the Liquidator to take steps to recover the sum of Rs.26 crore paid to the financial creditors cannot be acceded to at this stage, since the very order whose implementation is sought, i.e., the order dated 26.06.2020 passed by this Adjudicating Authority, is under challenge before the Hon'ble NCLAT. However, the financial creditors are hereby directed to file affidavits within fifteen days from the date of*

pronouncement of this order, regarding keeping the amounts distributed to them, in an interest-bearing account (para 9.20 supra).

(d) On prayer (d): This was not argued by both sides.

(e) On prayer (e), (h) and (i): These are related to the main prayer (b). Since that prayer is not being granted, these prayers do not survive.

(f) On prayer (f) and (g): These were not argued by both sides.

(g) On locus: We hold that the Applicant has locus to file the present application, since - (i) the provisions of section 50 of the Maharashtra Public Trust Act, 1950 will apply only to "suits" and not to the present proceedings; (ii) section50 ibid will apply only to the administration of the trust itself and not to proceedings of this nature; (iii) the present petition is the latest in a series of applications filed by the applicant herein to compel the Liquidator to comply with the Code and the Regulations made thereunder; (iv) the objections regarding locus have not been taken in the reply filed by the Liquidator, but seems to be an afterthought (paras 9.28 and9.29 supra).

(h) On conflict of interest: At least a part of the reliefs sought seems to indicate that the interests of the Liquidator and of the Central Bank of India are not in complete alignment as far as the present application is concerned. Therefore, there may potentially be a case of conflict of interest (para 9.24 supra).

(i) On proper constitution of the SCC: The Liquidator shall take steps immediately to reconstitute the SCC in accordance with regulation 31A read with regulation 31 of the Liquidation Regulations, since the SCC constituted with all nine financial creditors is violative of regulation 31A(2) of the Regulations ibid (para9.16 supra).”

2. Aggrieved by those directions, the Appellant/'Varrsana Employee Welfare Association' preferred this Appeal mainly on the ground, apart from other issues raised, that the Liquidator mandatorily had to include one of the representatives of the Workmen/Employees of the 'Corporate Debtor' in the Stakeholders Consultation Committee ('SCC') of the 'Corporate Debtor' irrespective of the fact that these Employees have a subsisting 'Claim' or not.

3. I.A. No. 1014/KB/2020 was preferred by the Appellant herein before the Adjudicating Authority seeking the following reliefs:

> *"(a) An order directing the Liquidator to immediately refund the fees of 11.5 crore (approx) taken by the Liquidator for or on account of illegal distribution of funds among the creditors of the corporate debtor to the bank account of the corporate debtor along with interest;*
>
> *(b) Direction upon the Liquidator to immediately include a representative of the Applicant in the Stakeholders' Consultation Committee (SCC) of the Corporate Debtor and the Liquidator be directed not to take any decision without including the representative of the Applicant in the SCC of the Corporate Debtor;*
>
> *(c) Necessary orders directing the Liquidator to immediately take steps and direct the financial creditors to immediately depositT26 crore (approx) in an interest-bearing account of the corporate Debtor in accordance with the order dated 26.06.2010 (sic 26.06.2020) passed by NCLT Kolkata Bench;*
>
> *(d) An appropriate order directing the Liquidator to immediately recover the sum of money illegally recovered by the Banks/Lenders/Financial Creditors in violation of the moratorium order and in violation of section 14 of IBC, 2016 as more particularly held in the order dated 12.07.2018 passed by this Adjudicating Authority in CA (IB) No.563/KB /2078;*

> *(e) Injunction restraining the Liquidator from convening any meeting of the SCC without giving prior reasonable notice to the applicant;*
>
> *(f) Injunction restraining the Liquidator from distributing margin money among the Creditors;*
>
> *(g) Injunction restraining the creditors/Banks from receiving margin Money from the corporate Debtor before sale of assets of the Corporate Debtor;*
>
> *(h) Order be passed directing the Liquidator to forthwith issue notices of meetings of the SCC of the corporate debtor to the applicant and to permit representation and participation of the applicant at all meetings of the SCC; and*
>
> *(i) Any SCC meetings/decision taken at the SCC meetings till date be adjudged null and void."*

4. <u>Submissions of the Learned Counsel appearing on behalf of the Appellant:</u>

- Learned Counsel submitted that the Adjudicating Authority has erroneously refused the Prayer of the Appellant to include a representative of the Workmen and Employees on the SCC irrespective of Regulation 31-A(2) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. It is submitted that the Appellant is aggrieved by paragraph 10.1(b) in which the Adjudicating Authority has held that there was no subsisting Claim and rejected their Prayer of inclusion in the SCC. It is submitted that the Workers and Employees duly filed their Claims before the Respondent/Liquidator towards the Notice Period but the Liquidator illegally and unlawfully rejected the Claim for Notice Period on the ground that the Employees/Workmen were discharged by virtue of

Liquidation Order dated 06.08.2019 on account of which they are not entitled to make any Claims for the Notice Period.

- It is submitted that the decision of the Liquidator stating that the Workers are discharged by the Liquidation Order case against Section 33(7) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'The Code') when the business of the 'Corporate Debtor' is continued during the Liquidation Process, the Order for Liquidation shall not amount to Notice of discharge to the Employees and Workmen of the 'Corporate Debtor'. The Appellant as a Claim in respect of the 'Corporate Debtor' and is therefore entitled to a seat in the SCC of the 'Corporate Debtor'.
- The Liquidator has wrongfully included six 'Financial Creditors' in the SCC, as per Regulation 31-A of the Regulations, the Liquidator can at maximum allow only four 'Financial Creditors'. This itself shows that the Liquidator was biased towards the 'Financial Creditor'.
- Regulation 19(4) of the Liquidation Process, Regulations, 2016 states that the Liquidator may admit the Claim of a Workman or an Employee on the basis of the Books of Account of the 'Corporate Debtor', if such Workman or Employee has not made a Claim. Therefore, even if the Workers hadn't file a Claim on the basis of a Books of Account, the same can be incorporated by the Liquidator. There are more than 600 permanent Employees and since the 'Corporate Debtor' is 'a Going Concern', the Employees will have gratuity Claims.

- Regulation 28 of the Liquidation Process, Regulations, 2016 explains the ‘debt’ payable in future time and one such ‘debt’ is gratuity and therefore the Employees will have a Claim as regards to gratuity in the future whenever they retire and it is because of this reason, for the chart/table in Regulation 31-A(2) of Liquidation Process, Regulations, 2016, expressly states that one representative from the Workmen and Employees is to be included in the SCC.
- The decision of the Adjudicating Authority that there should be a Claim to be included in the SCC is against the provision of the Code.
- The Liquidator in the past has deducted the salaries of the Workmen and in Civil Appeal No. 1533/2022, the Hon’ble Supreme Court while disposing of the Appeal preferred by the Appellant has recorded the submissions of the Liquidator that the ‘Corporate Debtor’ is being conducted as ‘a Going Concern’ and no action would be taken to the detriment of its status as ‘a Going Concern’.
- The discussion paper on Corporate Liquidation Process along with the Draft Regulations of the IBBI dated 27.04.2019 emphasize inclusion of one representative of the Employees and Workers in the SCC irrespective of whether they have a Claim or not. It is also submitted that the IBBI has passed the Interim Order dated 29.10.2020 on a complaint preferred against the Liquidator and found that he had violated Order of the Adjudicating Authority from time to time.

5. <u>Submissions of the Learned Counsel appearing on behalf of the Respondent:</u>

- It is submitted that the Liquidator, subsequent to the verification of Claims, filed a list of Stakeholders in accordance with Regulation 31 of the Liquidation Process, Regulations 2016. In compliance of Regulation 5(1)(a) & 5(1)(b) read with Regulation 13, a Report was filed along with the list of Stakeholders before the Adjudicating Authority. The first Meeting was conducted on 05.10.2019 based on the list of Stakeholders. A Claim was received from the Appellant through the Authorised Representative representing 16 Employees claiming their Leave Encashment and one month salary for the Notice Period; that 'Claim' was received on 21.10.2019 and after verifying the 'Claim', the Liquidator intimated about no 'Claim' existing to the Appeal vide email dated 30.01.2020. The Appellant never challenged this decision of the Liquidator as provided for under Section 42 of the Code.
- The Appellant have written an email to the Liquidator on 01.09.2020, which was replied on 15.09.2020 and this decision was not challenged.
- The Learned Counsel drew our attention to the relevant portion of the email dated 15.09.2020 which is extracted as follows:

> *"iii. Representation of VEWA in the Stakeholders' Consultation Committee ('SCC') of the Corporate Debtor.*
>
> *This is to bring into your notice that as per regulation 31A "Constitution of SCC".*

> *(1) The liquidator shall constitute a consultation committee within sixty days from the liquidation commencement date, based on the list of stakeholders prepared under regulation 31, to advise him on the matters relating to sale under regulation 32.*
>
> *(2) ….*
> *The Liquidator duly filed the list of stakeholders along with asset memorandum and Preliminary Report before the Hon'ble NCLT Kolkata Bench. Since there is no existence of any claim from the side of Varrsana Employee Welfare Association hence you cannot be a part of SCC as per Regulation 31A of Liquidator Regulations."*

- The basic ground for rejecting the plea of the Appellant was only because there was no unpaid Claim of the Appellant with the Liquidator and the Company is 'a Going Concern'. Employee can receive gratuity payment after 5 years of service of superannuation on retirement or resignation or in the case of death and accident or occurrence of any such event. However, in the instant case, the 'Corporate Debtor' is being operated as 'a Going Concern' and the gratuity of the said Employee would be paid as a priority subject to verification of the document, if the event arises.
- It is submitted that there is a symbiotic relationship between the Regulations 31 & 31-A of the Liquidation Regulations, 2016 and inclusion of any Member under SCC is subject to existence of Claim under Regulation 31 as per provisions of law.

<u>Assessment:</u>

6. At the outset, it is significant to mention that the Appellant/'Varrsana Employee Welfare Association' challenged the decision of the Liquidator disbursing an amount of Rs.26Crs./- to five Nationalised Public Sector Banks. A coordinate Bench of this Tribunal in ***'UP Awas Evam Vikas Parishad (UP Housing and Development Board)' Vs. 'JNC Construction Pvt. Ltd. & Ors.'***[1]**,** has observed that there is no subsisting Claims of the Employees and all the Employees are getting their salaries on a regular basis. Based on the submissions of the Liquidator it is also recorded that the gratuity claim of the Employee is also not existing and has partially allowed the Appeal. The same was challenged in Civil Appeal No. 1533/2022 by the Appellant/'Varrsana Employee Welfare Association' and the Hon'ble Supreme Court has observed as follows:

> *"1. The National Company Law Appellate Tribunal has made a specific observation that the payments which were disbursed by the Liquidator were to five nationalized public sector banks, namely;*
>
> *(i) Central Bank of India;*
>
> *(ii) Corporation Bank of India;*
>
> *(iii) UCO Bank;*
>
> *(iv) United Bank of India; and*
>
> *(v) Indian Overseas Bank.*
>
> *2. An undertaking has been taken by the Liquidator that the banks would return the money if they are not entitled, in accordance with Regulation 43 of the IBBI (Liquidation Process) Regulations 2016.*
>
> *3. Mr. Ritin Rai, senior counsel appearing on behalf of the Liquidator, <u>states that the corporate debtor is being conducted as a going concern and no action which would be to the detriment of its status as a going concern would be adopted.</u>*

[1] Comp. App. (AT) (Ins.) No. 855/2020

> *4. Both in view of the findings which have been arrived at by the NCLAT, as noticed above, and the assurance which has been given to the Court by the Liquidator, it is not necessary to entertain the Appeal. The Appeal is accordingly dismissed.*
>
> *5. Pending application, if any, stands disposed of."*
>
> *(Emphasis Supplied)*

From the aforenoted Order, it is clear that the 'Corporate Debtor' is being conducted as 'a Going Concern' and that the Banks would return the money if they are not entitled in accordance with Regulation 43 of the IBBI (Liquidation Process) Regulations, 2016.

7. Now we address to the main contention of the Learned Counsel for the Appellant that they ought to have been included as a representative in the SCC **(a)** whether they have a Claim or not; and **(b)** in the present case, it is submitted that they have a subsisting Claim as they had raised a Claim for the 'Notice Period'. It is an admitted fact that the Liquidator constituted the SCC on 05.10.2019 based on the list of SCC filed before the Adjudicating Authority, detailed as hereunder:

	Name of Stakeholder	***Amount of Claims Provisionally Admitted***
A	*1. Indian Oversea Bank* *2. UCO Bank* *3. Central Bank of India* *4. Corporation Bank*	*1. 2,60,37,90,616* *2. 2,28,58,26,031* *3. 1,21,83,03,577* *4. 1,03,59,21,745*
B	*Mahavir Tie Up Pvt. Ltd.*	*22,02,09,036/-*
C	*No Claims received from Worker or Employee*	-
D	*Central GST Commissioner, Kutch-Gandhidham*	*11,70,34,132/-*

E	*RCC Limited*	*1,34,55,482/-*
F	*REI Agro Ltd.*	*Shareholding of 47% in Corporate Debtor*

8. It is the case of the Appellant that a 'Claim' was filed representing 16 Employees claiming their 'Leave Encashment' and 'one month salary for the Notice Period'. After verification of the Claim, the Liquidator decided to distribute the Claim amount to the Employees with respect to the Leave Encashment as the same forms part of the CIRP Cost and should be distributed in priority as per Section 53 of the Code. The Liquidator sought additional KYC Documents to release the payments, however, during the course of verification, the Liquidator received Additional Claims relating to gratuity and the same was rejected vide email dated 30.01.2020.

9. It is pertinent to mention that as per Section 42 of the Code, the Appellant could have approached the Adjudicating Authority to seek redressal against the decision of the Liquidator regarding non-inclusion of the Appellant in the SCC. However, no Appeal was preferred by the Appellant against the rejection of the Claim to the extent of the Notice Period. Section 42 of the Code reads as follows:

> *"42. Appeal against the decision of liquidator- A creditor may appeal to the Adjudicating Authority against the decision of the liquidator 1 [accepting or] rejecting the claims within fourteen days of the receipt of such decision."*

10. Regulation 31 of the Liquidation Regulations, 2016 requires the Liquidator to prepare the list of Stakeholders, 'category' wise based on their 'Claims' submitted. Regulation 12(3) specifies the manner in which the Liquidator would make a Public Announcement within 45 days from the last date of receipt of Claims.

11. At this juncture, we find it relevant to refer to Regulations 31 & 31-A necessary for adjudicating this matter:

> ***"31. List of stakeholders.***
>
> *(1) <u>The liquidator shall prepare a list of stakeholders, category-wise, on the basis of proofs of claims submitted and accepted under these Regulations, with-</u>*
>
> *(a) the amounts of claim admitted, if applicable,*
>
> *(b) the extent to which the debts or dues are secured or unsecured, if applicable,*
>
> *(c) the details of the stakeholders, and*
>
> *(d) the proofs admitted or rejected in part, and the proofs wholly rejected.*
>
> *(2) The liquidator shall file the list of stakeholders with the Adjudicating Authority within forty-five days from the last date for receipt of the claims.]*
>
> *(3) The liquidator may apply to the Adjudicating Authority to modify an entry in the list of stakeholders filed with the Adjudicating Authority, when he comes across additional information warranting such modification, and shall modify the entry in the manner directed by the Adjudicating Authority.*
>
> *(4) The liquidator shall modify an entry in the list of stakeholders filed with the Adjudicating Authority, in the manner directed by the Adjudicating Authority while disposing off an appeal preferred under section 42.*
>
> *(5) The list of stakeholders, as modified from time to time, shall be-*

(a) available for inspection by the persons who submitted proofs of claim;

(b) available for inspection by members, partners, directors and guarantors of the corporate debtor;

(c) displayed on the website, if any, of the corporate debtor.

(d) filed on the electronic platform of the Board for dissemination on its website:

Provided that this clause shall apply to every liquidation process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2021.]

[31A. Stakeholders' consultation committee.

(1) <u>The liquidator shall constitute a consultation committee within sixty days from the liquidation commencement date, based on the list of stakeholders prepared under regulation 31, to advise him on the matters relating to sale under regulation 32.</u>

(2) The composition of the consultation committee under sub-regulation (1) shall be as shown in the Table below:

Class of Stakeholders	*Description*	*Number of Representatives*
(1)	*(2)*	*(3)*
Secured financial creditors, who have relinquished their security interests under section 52	*Where claims of such creditors admitted during the liquidation process is less than 50% of liquidation value*	*Number of creditors in the category, subject to a maximum of 2*
	Where claims of such creditors admitted during the liquidation process is at least 50% of liquidation value	*Number of creditors in the category, subject to a maximum of 4*
Unsecured financial creditors	*Where claims of such creditors admitted during the liquidation process is less than 25% of liquidation value*	*Number of creditors in the category, subject to a maximum of 1*

	Where claims of such creditors admitted during the liquidation process is at least 25% of liquidation value	*Number of creditors in the category, subject to a maximum of 2*
Workmen and employees	*1*	*1*
Governments	*1*	*1*
Operational creditors other than Workmen, employees and Governments	*Where claims of such creditors admitted during the liquidation process is less than 25% of liquidation value*	*Number of creditors in the category, subject to a maximum of 1*
	Where claims of such creditors admitted during the liquidation process is at least 25% of liquidation value	*Number of creditors in the category, subject to a maximum of 2*
Shareholders or partners, if any		*1*

(3) The liquidator may facilitate the stakeholders of each class to nominate their representatives for inclusion in the consultation committee.

(4) If the stakeholders of any class fail to nominate their representatives, the required number of stakeholders with the highest claim amount in that class shall be included in the consultation committee.

(5) Subject to the provisions of the Code and these regulations, representatives in the consultation committee shall have access to all relevant records and information as may be required to provide advice to the liquidator under sub-regulation (1).

(6) The liquidator shall convene a meeting of the consultation committee when he considers it necessary and shall convene a meeting of the consultation committee when a request is received from at least fifty-one percent of representatives in the consultation committee.

(7) The liquidator shall chair the meetings of consultation committee and record deliberations of the meeting.

(8) The liquidator shall place the recommendation of committee of creditors made under sub regulation (1) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, before the consultation committee for its information.

(9) The consultation committee shall advise the liquidator, by a vote of not less than sixty-six percent of the representatives of the consultation committee, present and voting.

(10) The advice of the consultation committee shall not be binding on the liquidator:

Provided that where the liquidator takes a decision different from the advice given by the consultation committee, he shall record the reasons for the same in writing."

(Emphasis Supplied)

12. Regulation 31 clearly specifies that ***'the Liquidator shall prepare a list of Stakeholders, category wise, on the basis of proves of Claims submitted and accepted under these Regulations'.*** In the instant case, the Claims made by the 16 Employees with respect to the one-month Notice Period was rejected and the same was not challenged vide an Appeal. Regulation 31-A(2), speaks of one representative of Workmen and Employees. Regulation 31-A flows from 31 and has to be read together and interpreted in its truest sense keeping the objective of the Code. Read congruously, Regulations 31 & 31-A specify that when the Employees have no subsisting Claim, they cannot be included in the list of Stakeholders, thereby meaning that if the Workers are not specifically includes in the list of Stakeholders, under Regulation 31, they cannot be made a part of the SCC under Regulation 31-A(1). Therefore, the contention of the Learned Counsel for the Appellant that one representative to be included whether the Claim is subsisting or not, is untenable.

13. We also find force in the submission of the Respondent Counsel that Claim of Gratuity is payable only at a future date in the happening of any event like retirement, resignation, termination, death, etc., and therefore, it cannot be construed as a ‘Claim subsisting’ to be included in the list of Stakeholders and consequently seeking a place in the SCC.

14. Keeping in view that the ‘Corporate Debtor’ is ‘a Going Concern’ and an assurance as has been given by the Respondent that their Claims of gratuity as and when they arise would be paid as per the provisions of the Code, we do not find any illegality or infirmity in the Order of the Adjudicating Authority and hence, this Appeal fails and is accordingly dismissed.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

Principal Bench,
New Delhi
25th November, 2022

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