

IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT II, MUMBAI BENCH

MISCELLANEOUS APPLICATION NO. 1847 OF 2019

IN

COMPANY PETITION (IB) NO. 1514 (MB)/2017

*Application u/s 60(5) of the Insolvency and
Bankruptcy Code, 2016*

In the matter of:

Rakesh J. Shah & 04 Others

...Applicants

Versus

Mr. Sanjay Kumar Agarwal

The Resolution Professional of
Biator Industries Ltd.

...Respondent

In the matter between

Allahabad Bank

...Financial Creditor

v/s.

Biator Industries Ltd.

...Corporate Debtor

Order pronounced on 18.01.2024.

Coram:

Shri. Kuldip Kumar Kareer : Member Judicial.

Shri. Anil Raj Chellan : Member Technical.

Appearances (Hearing in physical mode)

For the Applicant: Adv. K.P. Anil Kumar.

For the Respondent: Adv. Yahya Batatawala.

ORDER

Per: Coram

1. This application is an appeal filed by the Applicants under Section 42 of the Insolvency and Bankruptcy Code, 2016 (**'Code'**) against the Respondent, who is the Resolution Professional ('RP')/Liquidator of the Corporate Debtor, impugning the rejection of the claim filed by them in their capacity as Authorised Representative of 271 workmen and seeking necessary directions from the Adjudicating Authority to the Respondent to admit the claims of the workmen which inter-alia includes salary, provident fund and gratuity.
2. The Facts of the case leading to the filing of this application are briefly stated as under:
 - i. The Corporate Debtor has ceased doing business since June, 2010.
 - ii. Liquidation commencement date of the Corporate Debtor is 31.12.2018.
 - iii. The Applicants in their capacity as authorised representative of 271 workmen and staff submitted their claims to the Respondent in Form F by RPAD and E-mail dated 07.02.2019. Thereafter, the Liquidator has asked the Applicants vide e-mail dated 11.02.2019 to rectify the defect such as mentioning the correct liquidation commencement date (i.e. 31-12-2018) in Form 'F' instead of 30-01-2019 being wrongly written while submitting the Form 'F'. The Liquidator had also replied to the

Applicants vide e-mail dated 25.02.2019 Therefore, the Liquidator requested the Applicants to submit the proof of employment in the company in the period of two years preceding the liquidation commencement date in order to admit their claims.

- iv. The Respondent vide his e-mail dated 02.03.2019 rejected the claim of the Applicants stating as follows:

“Therefore, with regards to the dues of workmen and employees, the IBC allows only for dues upto a period of two year/one year prior to the liquidation commencement date to be distributed from the proceeds of sale of assets of the corporate debtor.

In the present case, we have been given to understand that while the Corporate Debtor has ceased business operations since June 2010, certain employees and workmen have claimed dues till December 31, 2018.

However, in view of the above section, the workmen and the employees of the Corporate Debtor may not be able to claim from the proceeds of the sale of assets and the same may not be admitted.

*Considering the above facts of law, the your claim in M/s Biotor Industries Ltd has been **rejected**.” (Emphasis Supplied)*

- v. Being aggrieved by the aforesaid rejected, the Applicants have preferred the above-captioned application impugning the rejection of their claims by the Respondent.

3. Submissions of the Applicant (in brief):

- i. The factories are still not closed in the eyes of law. The closure of factory comes indeed only by complying with Section 25(c) of the Industrial Dispute Act, 1947. Writing a letter to the factory authorities and to the Electricity Board do not mean there is a closure in the eyes of law. This

is more so since the workmen and the employees herein have been reporting to work till date.

- ii. The Applicants submit that Section 53 speaks about Liquidation Assets and it also speaks about workmen's dues, wages and unpaid dues of employees. The word 'Workmen dues' is defined u/s 326 of the Companies Act, 2013. Under this section, the workmen are entitled to receive wages up till 2018 as they have been working and the Company was not closed.
- iii. Section 36(iv)(a) specifically excludes all sum due to the workmen from the Liquidation Estate Assets. Therefore, section 53 is not applicable to the claims of the present Applicants regarding gratuity, bonus, provident fund and pension and other dues. Thus, the waterfall mechanism contemplated u/s 53 of the Code does not cover the dues of the workmen.
- iv. Under section 25(o)(7) of the Industrial Dispute Act, 1947 permission of the State Government is required for closing down a factory/company employing more than 100 workmen. In the instant case, admittedly more than 100 employees are employed and no permission is granted by the State Government to close down the Corporate Debtor. Section 25(o)(7) further states that if the permission is refused, then the workmen shall be entitled to all the benefits under the law. Thus, the Applicants submit that as long as there is no compliance of Section 25(o) of the Industrial Disputes Act, 1947 there is no closure in the eyes of law and the employees who were ready and willing to work, the workmen are entitled to wages as if they are working. In the present case, since there is no closure in the eyes of the law and all the workmen have been reporting for work, they are to be treated as working till date and consequently, all the workers are entitled to wages.

4. Reply and Contentions of the Respondent

The Respondent has filed his Affidavit-in-Reply dated 17th June, 2019. The reply of the Respondent is briefly summarized below:

- i. The Application of the Applicants is devoid of any merit and is completely unsubstantiated with no relevant documents annexed therewith. The reliefs sought by the Applicants is illegal and contrary to law.
- ii. The Code allows dues of workmen and employees only for a period upto two years and one year, respectively, prior to the liquidation commencement date to be distributed from the proceeds of sale of assets of the Corporate Debtor. In the present case, the factories (where the Applicants and other workmen/employee were purportedly employed) have been shut and closed since April 2010. The Respondent has relied upon the letters addressed by the Corporate Debtor to Statutory Authorities informing them that the factories have been closed since April 2010. Considering that the claims towards workmen dues/wages can be allowed only upto a period of either one year or two years, as the case may be and that the factories of the Corporate Debtor were closed and non-operational since 2010, thereby having no employees/workmen employed; the Respondent rejected the claims made by the Applicants and other workmen/employees vide E-mail dated March 02, 2019. In fact, by an email dated 25.02.2019, the Respondent had requested the Applicants to provide him with the proof of employment with the Corporate Debtor in two years preceding the liquidation commencement date. However, no such proof was provided to the Liquidator/Respondent and no such proof has been provided by the Applicants in the present application.

- iii. The Respondent denies that the claim of the workmen regarding provident fund, gratuity and pension shall have priority over the waterfall mechanism u/s 53 of the Code. The Respondent says that the claims for provident fund, pension, gratuity and statutory benefits, if any, would also be restricted to the time period mentioned in section 53 of the Code and considering that the Corporate Debtor was not operational since June 2010 and the factories were closed since April 2010, no claim for any statutory benefits would arise in the present case. The Respondent submits that he has not included any sums due to any workmen or employee from the provident fund, pension fund and the gratuity fund in the liquidation estate and the same shall not be used for recovery in the liquidation.

FINDINGS

5. We have heard the learned Counsels for the Applicant and the Respondent and we have carefully gone through the pleadings and the documents and materials placed on record.
6. This application is in the nature of an appeal u/s 42 of the Code preferred by the Applicants against the rejection of their claims by the Liquidator on March 02, 2019. The Applicants herein had lodged the claims and have filed this appeal as authorised representatives of 271 workers employed in the factory of the Corporate Debtor.
7. Under Section 42 of the Code, a creditor may appeal to the Adjudicating Authority against the decision of the liquidator accepting or rejecting the claims

within fourteen days of the receipt of such decision. In the present case, the rejection of claims has been admittedly communicated by the Respondent vide e-mail dated March 02, 2019; whereas the instant application has been filed 09th April, 2019 which is after a period of 14 days of the receipt of decision. Thus, we find that there is an unexplained delay of 25 days in filing the present appeal/application. The Application of the Applicants is totally silent on the aspect of delay in filing this appeal and does not offer any explanation on such delay. Undoubtedly, the delay in preferring an appeal u/s 42 of the Code can be condoned u/s 5 of the Limitation Act, 1963 if sufficient cause for not preferring the appeal within the prescribed period is shown to the satisfaction of the Court/Tribunal. However, in the present matter, the Applicants have neither admitted the delay nor shown any sufficient cause for the delay in filing the present appeal.

8. Counsel for the Applicant has submitted that the workmen have been continuously working up till April, 2012 and they have been denied entry inside the factory by the security guards, though the workers were reporting every day. Therefore, even according to the Applicants, the workmen have been working up till April, 2012 and there is nothing on record to show that the workmen have agitated or asserted their labour rights by exercising the remedies available to them under the labour welfare legislations such as the Factories Act, 1948, the Industrial Disputes Act, 1947, etc. Hence, it seems that the workers/employees have slept over their rights for years together and have woken up all of a sudden out of their slumber only when the Corporate Debtor went into CIRP and eventually into liquidation. 'Vigilantibus non dormientibus jura subveniunt' is a well settled proposition of law which means that the law comes to the aid of those who are vigilant and not the indolent, who sleep over their rights. This

legal doctrine underscores the importance of asserting one's rights in a timely manner rather than belatedly seeking recourse.

9. Under Regulation 19(3) of the IBBI (Liquidation Process) Regulations, 2016, the existence of dues to workmen or employees may be proved by them, individually or collectively, on the basis of (a) records available in the information utility, if any; or (b) other relevant documents which adequately establish their dues including any or all of the following- (i) a proof of employment such as contract of employment for the period for which such workman or employee is claiming dues; (ii) evidence of notice payment of unpaid amount and any document or other proof that payment has not been made; and (iii) an order of a Court or Tribunal that has adjudicated upon the non-payment of dues, if any. However, in the present matter, there is no satisfactory evidence on record to show the existence of dues. The Applicants have relied upon I-Card and Pay-Slips of 2010 while submitting their claims in Form 'F' before the Respondent, which, in our considered view, do not adequately establish the dues to the workman for the period stipulated therein.
10. The Applicants while filing the claim in Form 'F' had relied upon the I-Cards and Pay Slip of some month in the year 2010. The Applicants while submitting Form 'F' have claimed the dues of workmen from November, 2010 onwards. This implies that the workmen have not been paid since November 2010. However, it is very hard to believe that the Applicants and the workmen whom they purportedly represent, worked unpaid at the factories of the Corporate Debtor from November, 2010 until April, 2012 and even thereafter, without raising any industrial dispute or agitating for their rights or asserting the same before the Labour courts/Industrial Tribunal or any other competent legal

forum. There is also no document on record to show that the workmen/employees or the Applicants herein had served any notice upon the Corporate Debtor demanding the payment of unpaid wages/salaries. There is further not an iota of evidence to show that at any point of time subsequent to 2010 or 2012, the Applicants approached the Labour Court/Industrial Tribunal to seek redressal of their grievances that their dues from the year 2010 onwards were not being paid or that they were wrongfully and illegally being prevented from entering the factory premises despite the fact that the factory was never legally closed as per the relevant laws. In the absence of any such evidence, it would be quite arduous to believe and hold that the Applicants have been working throughout from 2010/2012 onwards without being paid.

11. The Liquidator has to verify the claims submitted to him based on the information supplied by the Creditor as well as the records of the Corporate Debtor. In the present case, the Liquidator had given the opportunity to the Applicants to substantiate the claim by furnishing contract of employment or salary slips for the claim period or any other document to establish the dues of the workmen for the claim period (i.e. November 2010 to Insolvency Commencement Date). However, as the claims of the Applicants remained unsubstantiated from the information and evidence furnished by the Applicants as well as from the records of the Corporate Debtor, the Liquidator, in our considered view, was fully justified in rejecting the claims of the Applicants and the same needs no interference from the Adjudicating Authority.
12. In view of the above discussion, we are of the considered view that the Applicants have failed to prove that their claims have been wrongly or illegally rejected by the Liquidator. Therefore, the present appeal/application filed by

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the Applicants is without any merit and is hereby **dismissed** with no orders as to costs.

Sd/-

**ANIL RAJ CHELLAN
(MEMBER TECHNICAL)**

Sd/-

**KULDIP KUMAR KAREER
(MEMBER JUDICIAL)**