



**IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI**  
**COURT-V**  
**(Part Heard Bench)**

**Item No.-205**  
(IB)-373(PB)/2018  
IA/984/2022

**IN THE MATTER OF:**

Indian Overseas Bank

**Vs.**

M/s. JMD Oils Pvt. Ltd.

**....Applicant**

**.....Respondent**

**SECTION**

U/s 7 of (IBC) in Liq.

**Order delivered on 04.08.2023**

**CORAM:**

**SHRI P.S.N PRASAD,**  
**HON'BLE MEMBER (JUDICIAL)**

**DR. BINOD KUMAR SINHA,**  
**HON'BLE MEMBER (TECHNICAL)**

**PRESENT:**

For the Applicant :

For the Respondent :

**ORDER**

Order pronounced in open court vide separate sheets. IA/984/2022 in (IB)-373(PB)/2018 is **dismissed**

**Sd/-**  
**(DR. BINOD KUMAR SINHA)**  
**MEMBER (T)**

**Sd/-**  
**(P.S.N PRASAD)**  
**MEMBER (J)**



**THE NATIONAL COMPANY LAW TRIBUNAL**  
**COURT V, NEW DELHI**  
**I.A. 984/2022**  
**IN**  
**COMPANY PETITION No. (IB)-373/PB/2018**

APPLICATION UNDER SECTION 60(5) OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 R/W RULE 11 OF NCLT RULES, 2016 READ WITH SECTION 53 AND 42 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

In the matter of:

**SH. SHAKEEL AHMED KHAN**

S/o Sh. Abdul Jabbar Khan,

Address: Plot No. 135,

Survey No. 94, Siddeshwar

Park, Meghpar Khumbardi,

Kutch- 370205

...Applicant

**Versus**

**MS SHALU KHANNA**

Liquidator For M/s JMD Oil Pvt. Ltd.

Luthra & Luthra Restructuring

And Insolvency Advisors LLP.

Address: LGF, A-16/9, Vasant Vihar,



New Delhi-

110057

...Respondent/Liquidator

**AND**

In the matter of:

**INDIAN OVERSEAS BANK**

Address: Rachna Buiding,  
4<sup>th</sup> floor, 2, Rajendra Place,  
Pusa Road, New Delhi-

110008

... Financial Creditor

**Versus**

**M/S JMD OILS PRIVATE LIMITED**

5/24, Ramesh Nagar,

New Delhi- 110015

...Corporate Debtor

**CORAM:**

**SHRI P.S.N PRASAD, HON'BLE MEMBER (JUDICIAL)**

**DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)**

**APPEARANCE:**

For the Applicant

: Adv. Mr. Avishek Das

For the Respondent

: Adv. Mr. Gautam Singhal



**Order Pronounced on: 04.08.2023**

**ORDER**

**SHRI P.S.N PRASAD, HON'BLE MEMBER (JUDICIAL), AND  
DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)**

1. The present Application has been filed by Sh. Shakeel Ahmed Khan, the Employee of JMD Oils Pvt Ltd. (hereinafter referred as 'Applicant) under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as IBC/Code) r/w Rule 11 of National Company Law Tribunal, Rule 2016 "NCLT" read with section 53 and 42 of the IBC, praying for the following reliefs:
  - a) Allow the instant Application and declare the Applicant's Priority as set forth by the Respondent herein in terms of Section 53 of IBC, 2016 is bad in Law;
  - b) Direct the Liquidator to forthwith disburse the funds to the Applicant against the admitted claim in terms of Section 53(1)(b) of IBC, 2016,
  - c) Pass any other further order(s) as this Hon'ble Tribunal deems fit and proper in the facts and circumstances.

**Averment by the Applicant**

2. Briefly stated the facts of the present case as averred by the applicant are that the Applicant was an Assistant Manager-Commercial i.e an employee of M/s JMD Oils Pvt. Ltd. (hereinafter referred to as the 'Corporate Debtor). It is submitted that the Corporate Debtor was admitted in the Corporate Insolvency Resolution Process "CIRP" vide order dated 11.12.2018 on the application of the Indian Overseas Bank under section 7 of the IBC in CP (IB) No. 373 of 2018. Thereafter, The



Corporate Debtor has undergone liquidation proceedings in terms of the order dated 03/02/2021 as passed by this Adjudicating Authority.

3. Further the Applicant submitted that, this Adjudicating Authority while admitting CIRP against the Corporate Debtor vide Order dated 11.12.2018 declared moratorium pursuant to Section 13 of the IBC and appointed Mr. Sandeep Kumar Gupta as the Interim Resolution Professional of the Corporate Debtor and subsequently, Mr. Sandeep Kumar Gupta appointed as Resolution Professional (hereinafter referred to as 'RP') of the Corporate Debtor with 100% voting in Committee of Creditor "CoC" meeting held on dated 07.01.2019 . Pursuant to regulation 6(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 the RP published a Public announcement and thereby the applicant submitted his proof of claim with respect to his outstanding salaries and statutory dues in Form D on 08.02.2019 before the Resolution professional for an amount of Rs. 6,07,7791/- and the Resolution professional upon scrutinizing the documents provided by the applicant, admitted the claim of the Applicant to the tune of Rs. 3,04,745/-.
  
4. It is submitted that, after the failure of several attempts to approve the Resolution Plan, the CoC vide meeting dated 02.12.2020 approved the initiation of the Liquidation process of the Corporate debtor with 100% majority under Section 33 of the IBC, 2016. Thereafter, the Respondent herein Ms. Shalu Khanna was appointed as liquidator of the corporate debtor which was later confirmed by this Hon'ble Tribunal vide its order dated 03.02.2021. In pursuant to Regulation 12 of IBBI (Liquidation Process) Regulations, 2016 (hereinafter referred to as the 'said Regulations') Liquidator through public announcement invited all the classes of creditors to submit their claim against the Corporate Debtor.



In pursuant to that the applicant submitted his proof of claim with respect to his outstanding salaries and statutory dues before the Liquidator herein for an amount of Rs.17,10,575/-. Applicant further submitted that vide E-mail dated 09.04.2021 the Applicant came to know that the Liquidator has admitted the claim of the Applicant to the tune of Rs. 7,37,3881/- in terms of Section 53(1)(c) of IBC, 2016 and Rs. 6,79,3121/- in terms of Section 53(1)(f) of IBC, 2016 . Furthermore, it is found that out of total 15 employees working with the Corporate Debtor under same category including the Applicant, the Respondent kept four worker under section 53(1)(b) of IBC and kept rest of the employees under the category of Section 53(1)(c) of IBC for the reasons best known to Liquidator only.

5. It is further alleged that the Liquidator unreasonably started disbursing the funds to employees kept under the category of Section 53(1)(b) of IBC and refused to disburse anything to the employees kept under the category of Section 53(1)(c) of IBC. Applicant submitted that after consistent follow up for about nine months after admission of claim, the Respondent vide E-Mail dated 23.12.2021 denied to release any fund towards statutory dues as classified under section 53(1)(c) of IBC, 2016 due to non - availability of funds under liquidation. Furthermore, the Applicant come to know that the Liquidation proceeds of Corporate Debtor were distributed in term of section 53(1)(a) and 53(1)(b) in installment basis, however, the Applicant neither heard anything nor was any funds released towards his outstanding admitted claim. The Applicant submitted that, it is an established law that the dues of the employees and workmen are not a part of liquidation estate and must be paid on priority, Applicant had placed reliance on case titled as State Bank of India Vs. Moser Baer Karmachari Union [Comp. application (AT) (Ins.) 396 of 2019.



6. Therefore, the Applicant has prayed for the following interim relief:
  - a) Pending the final hearing and disposal of the instant Application, this Hon'ble Tribunal be pleased to not consider and/ or approve any distribution of assets to any category of claimants; and
  - b) Direct the Liquidator to call the records for distribution of assets, in the manner as prescribed under section 53 of the Insolvency and Bankruptcy Code, 2016.

**Reply of the Respondent /Liquidator:**

7. Per contra, the respondent through his reply submitted that all averments, statements, submissions, grounds, contentions or allegations made by the Applicant are baseless, misconceived and false, and hence, are denied in entirety.
8. It is submitted by the Learned Counsel for the Liquidator that the Present Application is not maintainable because it is filed beyond the prescribed period of filing the appeal under Section 42 of IBC. Also, the Applicant has failed to bring out any error in law or fact which warrants the indulgence of this Adjudicating Authority because the Respondent has duly complied all the provisions of the Insolvency and Bankruptcy Code, 2016 and 'IBBI (Liquidation Process) Regulations, 2016.
9. Further the Respondent submitted that after completing of all the formalities such as the public announcement in Form B of Schedule 11 pursuant to Regulation 12 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016 in the concerned areas newspaper, Receiving the claim from all the claimants including the applicant under Form E (i.e Proof of claim by a



workman or employee), Successfully conducting E-Auction of the Corporate Debtor assets, scrutinized and verified the documents submitted along with the respective claimants the Respondent duly filed all the progress reports before this adjudicating authority. Subsequently, the Respondent made the distribution sheet and proceeds with the waterfall mechanism as prescribed under section 53 of the IBC.

10. The Respondent submitted that the during the liquidation of Corporate Debtor, Liquidator realized that the amount would not be sufficient to pay the claims of the stakeholders as mention under 2<sup>nd</sup> priority under section 53 of IBC, and there would not be any funds available to distribute to the stakeholders whose claims are classified from 3<sup>rd</sup> priority and below.
11. The Respondent further submitted that the Applicant herein in the Application admittedly mention himself as an Assistant –Manager (Commercial) in the Corporate Debtor Company. It is submitted that the word “employee” is not defined under the IBC, however the term ‘workman’ is defined in section 3(36) of IBC and has the same meaning as in Industrial Disputes Act, 1947. The Respondent placed reliance of a case of Delta Jute & Industries Ltd. Staff Association and Ors. v. State of West Bengal and Ors (Calcutta High Court), where it was held that a person working in purely managerial and/or supervisory capacity does not fall within the definition of workman under Industrial Disputes Act, 1947. Therefore, the Respondent classified the Applicant as “employees” and admitted his claim as per section 53(1)(c) and remaining amount as per 54(1)(f) of the IBC 2016 as the applicant does not fall under the category of "workmen".



12. Further, it is submitted that the Corporate Debtor had not created fund for gratuity even prior to the commencement of its CIRP and hence the Respondent is not under any obligation to provide for the same. The Respondent submitted that in regard to Provident Fund the Respondent has paid the same to all the 'workmen' as per the provision of the section 53(1)(b) of the IBC.
13. The Applicant through its rejoinder submitted that the Respondent at the one point admitted the entire claim of Applicant and on the other hand the Liquidator is alleging that the applicant did not work for the period as desired from the employee.
14. The Applicant further submitted that the statutory dues of the Applicant and employees do not form part of the assets of Corporate Debtor but are the property of the Applicant and employees which is lying with the corporate debtor and therefore is bound to be released to the employees. The Applicant denied the Respondents allegation and submitted that the fund for gratuity and leave encashment for salary and Provident Fund was already created by the corporate debtor and the same is duly evident from filed balance sheet of the corporate debtor for the financial year 2014-15 before Registrar of Companies as attached in its Rejoinder as Annexure-1
15. It is submitted that, as per the provisions of the Code, 2016, the ex-employees/workmen of the corporate debtor are entitled to all the outstanding dues including salaries, gratuity, pension, leave encashment, provident fund and alike dues and above of all the right of the employees over their retirement benefits from the corporate debtor are related to right to life because these amounts are the savings made



by the employees out of their hard earned money for life after retirement therefore it cannot be put at par with other creditors.

### **Analysis and Findings**

16. We have heard the parties and, carefully perused the case records, averments made in the application and reply/rejoinder filed by the parties. The relevant documents annexed with the respective submissions have also been examined. The main issue before this Adjudicating Authority herein is that, whether the Applicant is to be classified as a Workmen 'or' an Employee under CIRP and Liquidation Process as treatment of these two categories of Operational Creditors is differentiated under the IBC for the purpose of distribution of proceeds of liquidation under section 53 of the IBC? According to the waterfall mechanism of section 53, in the event of liquidation, the dues owed to the various stakeholders are to be paid off in the following order of priority:

- a) insolvency resolution process costs and the liquidation costs;
- b) workmen's dues for the period of 24 months preceding the liquidation commencement date and debts owed to a secured creditor in the event such secured creditor has relinquished security;
- c) wages and any unpaid dues owed to employees other than workmen for the period of 12 months preceding the liquidation commencement date;
- d) financial debts owed to unsecured creditors;
- e) any amount due to the central government and the state government and debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
- f) any remaining debts and dues;
- g) preference shareholders; and
- h) equity shareholders or partners.



17. From the above, it is immediately discernible that according to Section 53 of the IBC, the claims filed by the 'workmen' and 'employees' are to be differentiated in terms of distribution of proceeds in the liquidation process as hereunder :

- a) The dues of "workmen" for the period of 24 months preceding the liquidation commencement date rank equally with debt owed to such secured creditors, who relinquish their security interest in favour of liquidation estate,
- b) The wages and any unpaid dues owed to "employees" other than the workman for the period of 12 months preceding the liquidation commencement date rank below the secured creditors and workman dues.

18. It is pertinent to note here that the definition of the word 'employee' is not defined in the IBC, however, the term 'workman' is defined under the provisions of Section 3(36) of the IBC as having the same meaning as assigned to it in section 2(s) of the Industrial Disputes Act, 1947.

19. From the definition of 'workman', any person "who is employed mainly in a managerial or administrative capacity or" any person "who, being employed in a supervisory capacity, draws wages exceeding ten thousand rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature" are excluded.

20. The Applicant herein, has claimed that he was employed by the Corporate Debtor in the capacity of 'Assistant Manager-Commercial', which, in our view, was a purely managerial function, and therefore would squarely fall outside the definition of workman. Therefore, we conclude that the Applicant herein is not covered under the definition of 'workman' under section 3(36) of the IBC read with section 2(s) of the Industrial Disputes Act, 1947.



21. In the matter of Delta Jute & Industries Ltd. Staff Association and Ors. v. State of West Bengal and Ors. (Calcutta High Court) in W.P No. 20574 (w) of 2013, it was held that a person working in purely managerial and/or supervisory capacity does not fall within the definition of workman under Industrial Disputes Act. However, when a person performs multifarious functions, the nature of the main function performed by the person has to be considered to determine if the person is a “workman.” The designation of a person is not a conclusive factor in determining the nature of work. Even if a person is designated as supervisor, the employer has to prove that his work and his duties were in nature of a supervisor. However, in the instant case, the applicant has not brought any evidence on record to establish that his duties were not managerial.

22. It is observed that, there are various acts wherein the term “employee” has been defined such as under Section 2(f) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, Section 2 of the Payment of Wages Act, 1936 etc. Since the definition of ‘employee’ is not incorporated in the IBC 2016, and the definition of ‘workmen’ only is incorporated, one could infer from this, that the intention of legislature was that in case if the employed person doesn’t fall under the ambit of the ‘workmen’, then he/she can be considered as an ‘employee’. Therefore, we observe that as per the waterfall mechanism prescribed under section 53 of the IBC, the applicant in regard to his claim, would fall under section 53(1)(c) of the IBC (i.e 3<sup>rd</sup> priority under section 53 of IBC). Consequently, the claim of Applicant has to be considered by the Liquidator only after distribution of liquidation proceeds to the ‘workmen’ and Secured Creditors. The Liquidator has stated that he could not release any sum to the Applicant because the liquidator has no funds available to distribute to the stakeholders whose claims are classified from 3<sup>rd</sup> priority or below. We find no



reason to find fault with the Liquidator's action. Therefore, both prayers (a) and (b) are dismissed.

23. Accordingly, the present Application i.e., I.A./984/2022 in (IB)-373(PB)/2018 filed by, Sh. Shakeel Ahmed Khan, under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal, Rule 2016 read with section 53 and 42 of the IBC, stands dismissed, without cost.

Let a copy of order be served to parties.

Sd/-

**(DR. BINOD KUMAR SINHA)**  
**MEMBER (TECHNICAL)**

Sd/-

**(SHRI P.S.N. PRADAD)**  
**MEMBER (JUDICIAL)**