

MA/221/KOB/2020 and MA/222/KOB/2020
IN
IBA/258/CB/2019

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOCHI BENCH, KERALA

MA/221/KOB/2020

&

MA/222/KOB/2020

in

**IBA/258/2019(Chennai Bench)
(Under Section 42 of IBC 2016)**

Order delivered on: 18.11.2021

Coram:

**Hon'ble Mr. Rajesh Sharma
Member (Technical)**

**Hon'ble Mr. Ashok Kumar Borah
Member (Judicial)**

Applicants

1. MA/221/KOB/2021

Sabu K.V.,
Kuttichira,
Avalookunnu P.O.,
Alappuzha 688 006.

2. MA/222/KOB/2020

Sunil Kumar O.N.,
Kochukandathil House,
Pathirappally P.O.,
Alappuzha 688 521.

Versus

Respondent in all the above cases

Shri. Ravindra Chaturvedi
Liquidator of Excel Glasses Limited,
BKC Centre, 31-E, Lakshmi Industrial Estate,

MA/221/KOB/2020 and MA/222/KOB/2020
IN
IBA/258/CB/2019
New Link Road, Andheri (w), Mumbai-400 053

Parties/Counsel Present (through Video Conferencing):

For Appellants : Shri Jayesh S. Pillai (Advocate)

For Respondent : Shri. Joseph Kodianthara, (Senior Advocate)

ORDER

1. These appeals have been filed by the Petitioners/Appellants who were workmen/ employees of Excel Glasses Limited under Section 42 of Insolvency & Bankruptcy Code, 2016 (hereinafter referred as Code), aggrieved by the decision of the liquidator in the Claims of Workmen/ Employees in the matter of Excel Glasses Limited.

The brief facts are: -

2. An application has been filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against the Corporate Debtor (Excel Glasses Limited) before the National Company Law Tribunal, Chennai Bench, by Boon Investment and Trading Company Private Limited. The said application was admitted by the National Company Law Tribunal, Chennai Bench, vide its Order dated March 26, 2019 and accordingly, the Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") was initiated. Since no resolution plan was received during CIRP period, the order for Liquidation of the Corporate Debtor was passed vide Order dated October 21, 2019 by this Bench and the Respondent herein, Mr. Ravindra Chaturvedi, was appointed as the Liquidator of the Corporate Debtor.

3. Pursuant to the order of liquidation, the Liquidator, (respondent herein) had issued Public Announcement on 21.10.2019 intimating liquidation of the subject company and calling upon the stakeholders of the subject company to submit proof of their claims on or before 20.11.2019 to the respondent. The said public announcement were published on 24.10.2019 in two newspapers.

MA/221/KOB/2020 and MA/222/KOB/2020

IN

IBA/258/CB/2019

Subsequently the Appellants submitted their claim in Form E before the respondent. Thereafter nothing was heard from the respondent and on 09.03.2020, the appellants herein came to know that their total claim being rejected by admitting only part of the claim amount. On 10.08.2020, an order was passed by this Tribunal in MA/78/KOB/2020 under Section 33(1)(n) of the Insolvency and Bankruptcy Code, 2016, for modification of the list of stakeholders.

4. The claim amounts which included gratuity etc. were never paid to them till 21.10.2019, the date on which order directing liquidation of the subject Company was passed by this Tribunal. On 24.08.2020 an impugned communication has been issued by the Liquidator under Section 40(2) of the IBC wherein the Liquidator has partly rejected the claims made by the Appellants. Therefore, the Appeals were filed by the Appellants.

Brief description of claim of the appellants:

MA/221/KOB/2021

The appellant **Sabu K. V.** stated that he was an **Ex-employee** of the Corporate Debtor since **14.09.1996** and was in continuous service till 21.10.2019. He had submitted his claim in Form E on 20.11.2019 to the respondent claiming amounts on various counts such as salary arrears, bonus, lay off compensation, closure/ retrenchment compensation, and notice pay and gratuity. His total claim amount is Rs **18,00,000/-**.

However, from the communication issued by the Respondent dated 24.08.2020, the appellant came to know that an amount of Rs. **1,36,686/-** has only been admitted by the respondent.

Aggrieved by the decision of the respondent rejecting the claim of the appellant, he filed this application under Section 42 of the Code.

MA/222/KOB/2021

The appellant **Sunil Kumar O.N.** stated that he was an **Ex-employee** of the Corporate Debtor from **04.04.1997** and was in continuous service till

MA/221/KOB/2020 and MA/222/KOB/2020

IN

IBA/258/CB/2019

21.10.2019. He had submitted his claim in Form E on 20.11.2019 to the respondent claiming amounts on various counts such as salary arrears, bonus, lay off compensation, closure/ retrenchment compensation, and notice pay and gratuity. His total claim amount is Rs **17,24,372/-**.

However, from the communication issued by the Respondent dated 24.08.2020, the appellant came to know that an amount to the tune of Rs. **1,36,885/-** has only been admitted by the respondent.

Aggrieved by the decision of the respondent rejecting the claim of the appellant, he filed this application under Section 42 of the Code.

5. The respondent -Liquidator, filed counter in each case, inter alia, stating as under: -

- I. Appellants claims are already partially admitted to the extent of gratuity as per records of Corporate Debtor and as per report of Actuarial Valuer with all requisite supporting to substantiate the same. The Appellants claims has been partially admitted by the Respondent after careful perusal of documents and with abundant caution.
- II. The claims of Gratuity made by the Appellants has been admitted on the basis of audited books/record and actuarial valuer's report with detailed reasoning for rejection of other claims have been communicated as per Section 40(2) through mail. The Respondent has followed the principles and provisions of the Code by the book and has partially admitted the claim of the Appellants based on the said provisions and documents submitted by the Appellants considering the audited books of accounts and all the data available to the Respondent.
- III. The Appellants are not entitled to any interest on gratuity, since they did not provide the Respondent with any order from controlling authority under the Payment of Gratuity Act which directs the Respondent to pay specific interest on gratuity even after repeated requests by the Respondent to furnish the said documents. The only claims admissible

MA/221/KOB/2020 and MA/222/KOB/2020

IN

IBA/258/CB/2019

were of gratuity up to the date of liquidation or date of retirement whichever earlier which are admitted.

Findings:

6. We have gone through the case records and the arguments advanced by the learned counsel for the appellants as well as the learned Senior Counsel for the respondent – Liquidator as gone through the extant provisions of the Code and Rules made thereunder. After hearing the arguments made by both parties through video conferencing and on verification of records it is found that the submission of the Respondent that he has not been provided with any order from the appropriate authority in connection with payment of gratuity etc. Since the Appellants have not produced any order of the Labour Court or such authorities the Liquidator on his own cannot decide on disputed liability of them. He can only act on the strength of crystalized claims.
7. We have also gone through the Settlement Agreement dated 02.12.2015 which was arrived at between the Management of Excel Glasses and the Trade Unions, in which it was stated that the lock-out was valid and legally done by the company.
8. This Tribunal suggested modification in the list of stakeholders vide order dated 10.08.2020 in IA 78/KOB/2020 filed under Section 35(1)(n) of the Code and that the Respondent had duly complied with that order. It is the settled position of law that the provident fund, the pension fund and the gratuity fund, do not come within the purview of 'liquidation estate' for the purpose of distribution of assets under Section 53 of the Code. Based on this, the only inference which can be drawn is that Pension Fund, Gratuity Fund and Provident Fund can't be utilised, attached or distributed by the liquidator, to satisfy the claims. Section 36(2) of the I&B Code 2016 provides that the Liquidator shall hold the Liquidation Estate in fiduciary for the benefit of all the Creditors. The Liquidator has no domain to deal with any property of the Corporate Debtor, which is not the part of the Liquidation Estate. It is clear that in terms of sub-Section (4)(a)(iii) of Section 36 all sums due to any

MA/221/KOB/2020 and MA/222/KOB/2020

IN

IBA/258/CB/2019

workman or employees from the Provident Fund, Pension Fund and the Gratuity Fund, do not form part of the liquidation estate/liquidation assets of the 'Corporate Debtor. To get further clarity on this issue, we have gone through Section 36(4)(a)(iii) of the IBC, 2013 which reads as under:

Section 36: Liquidation estate

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

(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;

9. The above Section leads us to go through Section 53 of the Act which is as under: -

Section 53: Distribution of assets.

53. (1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely: —

(a) (a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following: —

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

MA/221/KOB/2020 and MA/222/KOB/2020
IN
IBA/258/CB/2019

10. Moreover, some of the Appellants failed to provide any proof of having been appointed in service of employment of the Corporate Debtor and that the benefit accruing to the Appellants shall be subject to documents available on record with the Respondent unless otherwise proven with sufficient evidence that the Appellants were in employment of Corporate Debtor and that the Appellants without properly responding to the communication addressed to them, have now come with the above appeals. This cannot be accepted. In the light of the above findings, we came to the conclusion that the claim of wages cannot be sanctioned unless the statutorily constituted forums either under the Industrial Dispute Act, Payment of Wages Act and Bonus Act have rendered its decision. However, no such decision or award is available in favour of the workmen entitling them to claim these amounts. It is also seen that the Respondent admitted the claim amount on the basis of the financial records of the Corporate Debtor and the value ascertained by the Registered Actuarial Valuer vide his Report dated 10.02.2020 for Gratuity liability outstanding as on 21.10.2019. Hence we do not find any merit in any of the appeals. Appeals MA/221/KOB/2020 and MA/222/KOB/2020 are dismissed.

Dated this the 18th day of November, 2021

Sd/-
(Rajesh Sharma)
Member (Technical)

Sd/-
(Ashok Kumar Borah)
Member (Judicial)

Rajasree