

**THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-I**

**I.A. 2364 OF 2022**

Under Section 60(5) of Insolvency &  
Bankruptcy Code, 2016

**Union Bank of India & Others**

...Applicants

Vs.

**Mr. Divyesh Desai**

Liquidator of Nicomet Industries

...Respondents

In

**I.A. 4119 OF 2019**

**I.A. 1893 OF 2020**

**In**

In the matter of

C.P.(IB) No. 619/MB/2018

Nico Extrusion Limited

**...Operational Creditor**

Vs.

Nicomet Industries Limited

**...Corporate Debtor**

*Order delivered on: 02.01.2024*

*Coram:*

**Shri Prabhat Kumar**  
Hon'ble Member (Technical)

**Justice Shri V.G. Bisht**  
Hon'ble Member (Judicial)

*Appearances*

For the Applicant : Mr. Yudhishtir Sharma, Advocate  
For the RP : Ms. Aakansha Nehra, Advocate

**ORDER**

***Per: Prabhat Kumar, Member (Technical)***

1. This Application IA 2364/2022 is filed by M/s Union Bank of India and M/s JM Financial Assets Reconstruction Company Limited ("Applicants"), the Financial Creditors of Nicomet Industries Limited ("Corporate Debtor"). The Applicants collectively are the members of Committee of Creditors forming 100% share at the stage of Corporate Insolvency Resolution Process ("CIRP") of Corporate Debtor. The Applicants has sought following reliefs and directions to the Respondent Sh. Divyesh Desai, the Liquidator of the Corporate Debtor in the liquidation process.
  - a. necessary order and directions to the Liquidator for re calculation of the dues;
  - b. Direction to the Respondent to remit a professional fees to the Committee of Creditors paid to the Respondent till date towards allowances/professional Fees.
2. This Tribunal appointed the Respondent as the Liquidator of the Corporate Debtor vide Order dated December 16, 2020 in I.A. No.

713 of 2020 in C.P. No. 619 of 2018, thereby initiating liquidation process of the Corporate Debtor as per the provisions of the Insolvency and Bankruptcy Code, 2016 ("Code") and the rules and regulations made thereunder. Prior to the liquidation commencement, Mr. Devang Sampat ("Resolution Professional") appointed by this Hon'ble Tribunal vide Order dated December 14, 2018 was carrying out the Corporate Insolvency Resolution Process ("CIRP") of the Corporate Debtor.

2.1. Pursuant to the liquidation of the Corporate Debtor, the Liquidator made public announcement on December 24, 2020, within 2 days of receipt of the liquidation order dated December 16, 2020 i.e., on December 22, 2020, thereby calling upon the stakeholders of the Corporate Debtor to submit or update their claims (as the case may be) with this deponent, latest by/before January 15, 2021. Subsequently, the Liquidator prepared and filed the list of stakeholders before this Tribunal. However, since all the claims could not be finalized prior to filing of the original list of stakeholders, on account of certain reasons beyond the control of this deponent, the Liquidator subsequently filed an application bearing number viz. I.A. No. 2789 of 2021 (e-filed on November 26, 2021) thereby seeking modification in the list of stakeholders in terms of Regulation 31(3) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("Liquidation Regulations"), which is since disposed of by this Tribunal. In addition to that, the property of the company was sold and sale proceeds were realized by sale of such assets. The liquidator is currently in the process of distributing the sale proceeds. However, the proposed distribution by the Liquidator is against the established law and is in surplus to what is actually to be admitted as per the Code and the established Principle of Law.

- 2.2. It is the case of the Applicants that the liquidator must distribute the sale proceeds in accordance with section 53 and without assigning any priority to the workers dues, distribute the proceeds between the workers and secured creditor on pari passu as contemplated under Section 53 of IBC, 2016.
- 2.3. Further, the liquidator must not accord any priority to the Provident Fund dues and accordingly not earmark the amounts for the Provident Fund dues or pay any Provident Fund dues in priority to the dues as contemplated under Section 53. The Liquidator must also take the benefit of the OTS Scheme offered by Goa Electricity Department.
- 2.4. Therefore, the Liquidator is required to re calculate the distribution list of payment as per Order and Judgment dated 19 April 2022 passed by Hon'ble Justice Mr. M.R. Shah and Mr. Justice Aniruddha Bose of Supreme Court of India in the Civil Appeal No. 5910 of 2019 in the matter of Sunil Kumar Jain and others Versus Sundaresh Bhatt and others.
- 2.5. The Applicants who are secured creditors are already forced to take substantial cut out of the outstanding dues for receiving their shares from sale proceeds will be left out of sale proceeds for secured creditors in case of the distribution proposed by the Liquidator is implemented in totality,
3. The Respondent has filed the reply stating that the Corporate Debtor was involved in manufacturing of precious and non-ferrous metals and had a functional unit and operating as a going concern when the CIRP commenced vide Order dated December 14, 2018 passed by this Tribunal. The Corporate Debtor had employed approximately 175 workmen/employees/staffs at that point in time and the employees (workmen and staffs) remained on the rolls

of the Corporate Debtor throughout the CIRP period and were discharged with effect from December 16, 2020 in light of the liquidation commencement order dated December 16, 2020.

3.1. On April 19, 2022, the Hon'ble Supreme Court of India pronounced judgment in the matter of Sunil Kumar Jain (Supra) holding dues towards the wages/salaries of only those workmen/employees who actually worked during the CIRP period are to be included in the costs.

3.2. Accordingly, in view of the Sunil Kumar Jain Judgment, the Liquidator is stated to have addressed an email dated April 26, 2022 to the Resolution Professional, seeking following clarification from the Resolution Professional.

- a. Period during which Nicomet's unit was operational during CIRP period;*
- b. Names of Workmen and staff members who assisted the RP during CIRP period when the unit was operational i.e., as covered in point I above. If only few of the employees have assisted, please specify nature of assistance provided by them;*
- c. Date from which the unit was completely shut down and remained so till commencement of Liquidation;*
- d. Names of Workmen and staff members who assisted the RP during CIRP period, if at all, after the unit was completely shut down and nature of assistance provided by them;*
- e. Date from which Head Office ("HO") was completely shut down and remained so till commencement of Liquidation;*
- f. Names of staff members in HO who assisted the RP during CIRP period when the HO was operational. If only few of the employees have assisted, the nature of assistance provided by them;*

*g. Names of staff members in HO who assisted the RP during CIRP period, if at all, after the HO was shut down completely and the nature assistance provided by them.*

3.3. The Resolution Professional addressed an email of even date, thereby stating as "*We have provided all information that we had*". In view of the above, the Liquidator addressed an email dated June 1, 2022 to the Resolution Professional, thereby once again requesting him to provide the requisite information. In response thereto, vide email dated June 6, 2022, the Resolution Professional provided response to the information sought by this deponent. Among other things, the Resolution Professional informed that the unit of the Corporate Debtor was operational until around the middle of July, 2019.

3.4. The Liquidator is stated to have addressed an email dated September 12, 2022 to the representative of the Workers' Union of the Corporate Debtor as well as addressed separate emails to each employee of the Corporate Debtor, whose claim amount is likely to undergo change, from September 12, 2022 to September 24, 2022 informing about the Sunil Kumar Jain Judgment and re-adjudication of their respective claims.

3.5. Thereafter, during the course of the 9th meeting of the Stakeholders' Consultation Committee "SCC") held on August 29, 2022, the Liquidator is stated to have informed the SCC members about the Sunil Kumar Jain Judgment and also briefly explained as to how the claims of the workmen and employees would undergo change in light of the Sunil Kumar Jain Judgment.

3.6. Thereafter, in continuation of previous email communications between this deponent and the solution Professional dated April 26, 2022, May 11, 2022, June 1, 2022 and June 6, 2022, s deponent addressed an email dated September 30, 2022 thereby informing that based on the feedback received from the Resolution Professional, this deponent had re- calculated claim amounts of all employees of the Corporate Debtor. It was further stated that some of the employees of the Corporate Debtor had informed this deponent that they had assisted the Resolution Professional even after the unit was shut down. Additionally, this deponent also enlisted the name of such employees in the aforesaid email. Further, vide email dated October 3, 2022 to the Resolution Professional, this deponent provided details of one more such employee namely Mr. Rajendra Hegde. Upon receiving no response, this deponent addressed a reminder email dated October 19, 2022, thereby requesting the erstwhile Resolution Professional to revert on the previous emails in the interests of those employees. However, till date, this deponent has not received any response from the Resolution Professional. A copy of email communications between this deponent and the Resolution Professional dated April 26, 2022, May 11, 2022, June 1, 2022, June 6, 2022, September 30, 2022 and October 3, 2022 and October 19, 2022 is annexed hereto and marked as Exhibit "A (Colly)".

3.7. Application numbers 4119 of 2019 and 1893 of 2020 filed by the Applicants, during the course of the CIRP period against the Resolution Professional, are still pending adjudication before this Tribunal. The nature of allegations made in the above-mentioned applications are against the conduct of the

Resolution Professional and therefore, the same has to be contested by the Resolution Professional and not by the Respondent in this Applicant. Without prejudice and notwithstanding the aforesaid, the Liquidator has prayed that Application numbers 4119 of 2019 and 1893 of 2020 as well as similar other applications which may be acting as an impediment in finalization of the claims of all the stakeholders, may be collectively disposed by this Tribunal.

3.8. The Liquidator has further stated that he has not distributed any amounts towards claims which are likely to undergo change in light of the Sunil Jumar Jain Judgment and the Applicants being Secured Financial Creditors are well aware of the aforesaid, since the details pertaining to distribution of sale proceeds is presented to them in the SCC meetings. However, the Liquidator has denied the proposed distribution of sale proceeds by the liquidator is against the established law or that is in surplus to what is actually to be admitted as per the Code

3.9. The Applicants have sought a direction from this Tribunal to remit a professional fees to the Committee of Creditors paid to the Respondent till the date towards allowances/professional fees", though, there arises no question of the liquidator remitting any professional fees to the Committee of Creditors.

3.10. Furthermore, the Liquidator has stated that there exist certain interlocutory applications filed by or against the Liquidator, seeking appropriate directions from this Tribunal, with respect to adjudication/admission of claims of various creditors/stakeholders of the Corporate Debtor. A list of all such applications is annexed hereto and marked as Exhibit

"C". Further, in particular, the Liquidator has prayed that an application viz. I.A. No. 751 of 2022 in I.A. No. 53 of 2022 in the captioned Company Petition, for seeking appropriate reliefs against the attachment of the assets of the Corporate Debtor by the Employees Provident Fund Organization be listed and disposed of along with the other pending applications on the issue at hand.

3.11. The Liquidator has filed an affidavit to update the developments during the pendency of the present application submitting that the Hon'ble Supreme Court has decided the issue of payment of Provident Fund ("PF") and Gratuity dues in the matter of Lanco Infra tech Limited and Moser Baer holding that such dues would fall outside the Liquidation Estate.

4. We have heard learned Counsel and perused the material available on record.

4.1. We find that the issue for consideration in the present application is in relation to priority of dues amongst the same class as well as treatment of PF and Gratuity dues. The Liquidator has also placed on record revised distribution as proposed by him, which reads as follows –

Particulars	Accepted Claim Amount	Funds Available for distribution
Realisation from sale of assets		39,15,89,000/-
Less : Claims outside Liquidation estate		

EPFO Dues	10,08,90,444/-	
Gratuity Dues	2,87,33,872/-	12,96,24,316/-
Amount Available for distribution under section 53(1)		26,19,64,684/-
Less : CIRP and Liquidation Expenses		11,42,95,377/-
Funds Available for Distribution under Section 53(1)(b)		14,76,69,307/-

4.2. As regards PF and Gratuity dues are concerned, this Bench has taken consistent views that dues in nature of Employee and Employer contribution to the Provident Fund, to the extent they are identifiable with the employees of the Corporate Debtor, shall stand outside the Liquidation Estate, hence shall have priority over other dues. The remaining dues claimed by the EPFO shall be treated as Operational Debt due to statutory authorities and has to be dealt accordingly in terms of Section 53 of the Code. As regards Gratuity dues, the principal gratuity shall be outside the Liquidation Estate and the interest, if any claimed thereon, shall be treated as Operational Debt due to Statutory Authorities. The distribution shall be modified accordingly.

4.3. As regards distribution of claims of class of creditors falling under section 53(1)(b) of the Code, we hold that the distribution shall take place inter-se pro-rata as no priority within the class is contemplated in the provisions. Had it been so, the

legislature would have carved out additional class to give priority to workmen/salary dues falling u/s 53(1)(b) of the Code.

- 4.4. As regards prayer for the remittance of the professional fees to the Committee of Creditors, which was paid to the Respondent till date towards allowances/professional Fees, we find that that the Liquidator has pleaded that this ground pertains to then Resolution Professional, against whom the Applicants have made certain allegations in this Application. We find that Applications i.e. IA 4119 of 2019 and IA 1893 of 2020 against the conduct of the then Resolution Professional are pending adjudication before this Tribunal and the said Resolution Professional is not a party to the present application. Accordingly, the refund of fees charged by the then Resolution Professional can be decided in those applications only. Needless to say, if this Tribunal finds it appropriate to direct refund of fees, the same shall come to the Corporate Debtor's account and shall be dealt with in accordance with Section 53 of the Code.
- 4.5. As regards other applications stated to be pending in relation to the claims of other creditors and attachment of account by EPFO, we are of considered view that those applications involve independent issues and this application can be adjudicated de hors adjudication in those application. However, this Tribunal takes notice of this fact and shall expedite the adjudication in those applications also.
5. In view of the foregoing, the IA 2364/2022 is partly allowed and disposed of accordingly.

**Sd/-**

**Prabhat Kumar**  
Member (Technical)

**Sd/-**

**Justice V.G. Bisht**  
Member (Judicial)