

**IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI**  
**PRINCIPAL BENCH**

**Item No. 119**  
**(IB)-378(PB)/2017**

**IN THE MATTER OF:**

Alchemist Asset Reconstruction Co. Ltd.  
V.  
Moser Baer India Limited

... Applicant/Petitioner  
... Respondent

**SECTION:**

**Under Section 7 of Insolvency & Bankruptcy Code, Liq.**

**Order delivered on 19.03.2019**

**Coram:**

**CHIEF JUSTICE (RTD.) M. M. KUMAR**  
**HON'BLE PRESIDENT**

**SH. S. K. MOHAPATRA**  
**HON'BLE MEMBER (TECHNICAL)**

**PRESENT:**

For the applicant

For the Respondent(s):-

Mr. Dinkar Singh, Adv.

Mr. Abhishek Anand, Mr. Tushar Tyagi & Ms.  
Chetna Singh, Advs. for Liquidator.

Mr. Anik Kohli, Liquidator in person.

Mr. Swarnendu Chatterjee, Ms. Itisha Gulati,

Ms. Anmol, Mr. Pankaj Agarwal, Advs.

Ms. Charu Sangwan, Adv.

**ORDER**


**CA-19(PB)/2019:-**

This is an application filed on behalf of the workmen of the company in liquidation, namely, Moser Baer India Limited. The prayer made by the workmen is that the directions be issued to the liquidator to exclude the amount due to them towards provident fund, pension fund and gratuity fund from the waterfall mechanism envisaged under Section 53 of the Insolvency and Bankruptcy Code, 2016 and pay to them the provident fund dues, pension fund dues

and gratuity fund dues as they will not constitute part of the liquidation estate. Directions have also been sought to pay the dues towards workmen to the workmen in accordance with Section 25 FFF of the Industrial Dispute Act, 1947 and pass appropriate directions to the liquidator to pay arrears due from 01.09.2017 to 20.09.2018 being less than 24 months preceding the order of liquidation without following the waterfall mechanism envisaged under Section 53 of the Code.

2. Reply to the application has been filed and the stand taken by the liquidator is that as per the provisions of Section 326 of the Companies Act, 2013 which have been referred to in Section 53 explanation II of the Code wherein the terms “workmen’s dues” shall have the same meaning as assigned to it under Section 326 of the Companies Act, 2013. Therefore, the gratuity is included as per Section 326 and could be covered by Section 53 to the extent of the balance amount.

3. We have heard learned counsels for the parties. There is a basic flaw in the reasoning adopted by the liquidator. Under Section 36(4) (a) (III), the expression ‘liquidation estate’ has been defined and it is clarified that all sums due to any workman or employee from the provident fund, pension fund and gratuity fund, were not to constitute and included in the expression “liquidation estate assets”. Once the sum due to any workman or employee from the provident



fund, pension fund and gratuity fund are not constitute a part of the liquidation estate, we fail to understand as to how Section 53 could be invoked along with its explanation. According to Section 53, the proceeds from the sale of the liquidation assets are to be distributed in the manner specified therein. Therefore, the aforesaid amount of the workmen dues cannot be a part of liquidation estate assets. A co-equal bench of NCLT Mumbai was confronted in the case of Asset Reconstruction Company (India) Ltd. v. Precision Fasteners Ltd. (MA 576 & 752 of 2018 in CP No. (IB)-1339(MB)/2017) decided on 12.09.2018 in paras 33 & 34. Hon'ble Bench has taken the following view which are reproduced *verbatim*.

“33. Now in alignment with the provisions of EPF Act, in section 36(4) (1) (3), the Code has gone ahead saying that the dues in respect of the Provident Fund/Pension Fund/Gratuity Fund shall not be treated as part of the liquidation estate, as long as such dues are not treated as part of liquidation estate, the provisions of IBC will not be applicable for realisation of such dues from the asset of the Corporate Debtor. The intriguing aspect lying in this scenario is that though it is a due payable by the Corporate Debtor, as to Provident Fund/Pension Fund/Gratuity Fund dues are considered, the Code has treated it as an asset of the workmen lying with the Corporate Debtor.

34. In view thereof, the overriding effect of section 238 of this Code will not have any bearing over the asset of the workmen lying in the possession of the Corporate Debtor because the asset is not considered as the part of the liquidation estate, moreover, to apply Section 238 over any other law for the time being in force, the other law must be inconsistent with the provisions of the Code, since section 36(4)(iii) has excluded the PF dues of the workmen from the liquidation estate assets treating it as an asset of the workmen lying with the corporate debtor, section 53 is not applicable to say that these dues fall within the ambit of liquidation estate. Therefore,



this argument of inconsistency raised by the Liquidator counsel has no merit, hence the same is rejected.”

4. A perusal of the aforesaid para shows that the provident fund dues, pension funds dues and gratuity fund dues are not treated as a part of the liquidation estate and would not, therefore, be recovered by Section 53 of the Code which provides for waterfall mechanism. The liquidator has taken a perverse view by unnecessarily referring to explanation II of Section 53 and Section 326 of the Companies Act, 2013.

5. As a sequel to the above discussion, the application is allowed. Learned counsel for the liquidator states that the claim of the workmen dues shall be considered afresh as per law propounded in the present order as well as the order passed by Mumbai Bench of NCLT. It is made clear that if there is any deficiency to the provident fund, pension fund and gratuity fund, then the liquidator shall ensure that the fund is made available in the aforesaid accounts, even if their employer has not diverted the requisite amount. The prayer made with regard to the bonus and compensation shall also be decided in the light of the observations made in accordance with law.

The application stands disposed of. The needful be done at the earliest preferably within the period of two weeks.

**CA-304(PB)/2019:-**

Learned counsel for the liquidator states that the application may be permitted to be withdrawn in view of the order passed in CA No. 19(PB)/2019 as the liquidator has to revisit the whole distribution list.



The application stands disposed of.

**CA-496(PB)/2019:-**

Notice of the application be issued to the non-applicant for 09.04.2019 and the details are as under:-

1. Hindustan EPC Company Ltd. (formerly known as Moser Baer Engineering & Construction Ltd.)
2. Babulnath Alloys Pvt. Ltd.
3. Maharashtra State Power Generation Co. Ltd.
4. Vestige Marketing Pvt. Ltd.
5. N N Moulding Pvt. Ltd.
6. Power Cube Infotech Private Ltd.

Process dasti.

List on 09.04.2019.

Sd/-

**(M.M.KUMAR)  
PRESIDENT**

Sd/-

**(S. K. MOHAPATRA)  
MEMBER (TECHNICAL)**