



LexArticle

September 23, 2019 New Delhi, INDIA

EMPLOYEE AND WORKMEN DUES ARE NOT PART OF LIQUIDATION ESTATE – TO BE PAID ON

If you have questions or would like additional information on the material covered herein, please contact:

Mr. Alishan Naqvee, Partner
(anaqvee@lexcounsel.in)

Ms. Swet Shikha, Associate
(sshikha@lexcounsel.in)

LexCounsel, Law Offices C-10, Gulmohar
Park New Delhi 110 049, INDIA.
Tel.:+91.11.4166.2861
Fax:+91.11.4166.2862

Recommended by:

EMPLOYEE AND WORKMEN DUES ARE NOT PART OF LIQUIDATION ESTATE – TO BE PAID ON PRIORITY

Judgment: State Bank of India v Moser Baer Karamchari Union [Company Appeal (AT) (Insolvency) Number 396 of 2019]

Forum: National Company Law Appellate Tribunal (“NCLAT”).

Judgments delivered on: August 19, 2019.

Act/Law: The Insolvency and Bankruptcy Code, 2016 (“Code”).

Ratio: The dues of the workmen and employees towards provident fund, pension fund and gratuity fund are considered “assets of workmen/employees” lying with the Corporate Debtor. These dues are therefore to be paid to the workmen/employees on priority, without reference to or waiting for distribution of liquidation assets as per the waterfall mechanism stipulated by the Code.

Factual Matrix:

- The National Company Law Tribunal, Principal Bench (“NCLT”) on September 20, 2018 passed the order for liquidation of Moser Baer India Limited (Corporate Debtor) in accordance with the provisions of the Code.
- The liquidator vide an email communication dated December 5, 2018 denied the payment of provident fund, pension fund and gratuity fund preferentially to the workmen. The liquidator was of the view that these dues formed part of the liquidation estate and should therefore be distributed in equal proportion to the (other) secure debts of the Corporate Debtor as per the waterfall mechanism stipulated by Section 53 of the Code.



- Aggrieved by the view of the liquidator, Moser Baer Karamchari Union filed an application before the NCLT seeking directions for exclusion of the said dues to the workmen, from the ambit of Section 53 of the Code as workmen's dues are specifically excluded from the definition of the liquidation estate under Section 36 of the Code.
- The said application was allowed by the NCLT on March 19, 2019 ("Impugned order¹"), relying heavily upon the decision of the Mumbai Bench of NCLT² which held that the Code has treated the dues of provident fund, pension fund and gratuity fund as assets of workmen/employees lying with the Corporate Debtor and therefore the workmen dues towards provident fund, pension fund and gratuity fund cannot be subject to distribution by waterfall mechanism under Section 53 of the Code.
- The NCLT thus directed to pay the dues towards provident fund, pension fund and gratuity fund on priority.
- The State Bank of India ("SBI") challenged the Impugned order in appeal before NCLAT.

Analysis: In the judgment, the NCLAT effectively dealt with the following question:

Whether workmen/employee dues, and specifically the provident fund, pension fund and gratuity fund come within the meaning of assets of the Corporate Debtor, to be part of the "liquidation estate" and then to be distributed as per the waterfall mechanism in terms of Section 53 of the Code?

The Appellant herein, i.e. the SBI submitted that the Explanation below Section 53 of the Code suggests that 'workmen's dues' shall have the same meaning as assigned to it in Section 326 of the Companies Act, 2013 ("CA 2013"). Since the definition of 'workmen's dues' under the said section of CA 2013 includes provident fund, pension fund and gratuity fund, 'workmen's dues' should form part of the "liquidation estate", to be then distributed as per the waterfall mechanism under Section 53 of the Code.

The Resolution Professional, on the other hand, submitted that the sums due towards provident fund, pension fund, gratuity fund are specifically excluded from the definition of "liquidation estate" under Section 36 of the Code.

Decision:

The NCLAT observed that the comparison between Section 326 of Companies Act and Section 53 of the Code would be misplaced as there is a stark difference between distribution of assets under the Code and preference/priority of workmen's dues as mentioned under CA 2013. The NCLAT noticed that the workmen's dues covered by Section 53(1)(b)(i) of the Code are only for a period of twenty-four months preceding the liquidation commencement date, while the "workmen's dues" falling under Section 326 of the CA 2013 are not confined to any such specified period. Furthermore, the provisions of the Code override the provisions of the CA 2013.

The NCLAT accordingly held that the definition of "liquidation estate" under Section 36 the Code specifically excludes the dues to the workmen and employees on account of provident fund, pension fund and gratuity fund. These dues

therefore do not form part of the liquidation estate/liquidation assets of the 'Corporate Debtor', and are rather treated as "assets of the workmen/employees" lying with the Corporate Debtor.

The NCLAT further observed that since the liquidation estate does not include the sums due to workmen and employees towards provident fund, pension fund and gratuity fund, the question of distribution of these funds as per Section 53 under the Code does not arise. On the aforesaid findings, the NCLAT declined to interfere with the findings of the Impugned Order.

Resultantly, the dues to any workmen and employees on account of provident fund, pension fund and gratuity fund are to be paid on priority and without preference to or waiting for distribution of assets as per the waterfall mechanism stipulated by the Code.

Endnotes:

[1] Alchemist Asset Reconstruction Company Ltd. v Moser Baer India, (IB-378(PB)/2017) https://nclt.gov.in/sites/default/files/Interim-order-pdf/Alchemist%20Asset%20Reconstruction%20Co.%20Ltd%20and%20Moser%20Baer%20India%20Limited%20_6.pdf

[2] *Precision Fasteners Limited v Employees' Provident Fund Organisation* (M.A.No.576 & 752/2018) in C.P.(IB)1339 (MB/2017) <https://nclt.gov.in/sites/default/files/final-orders-pdf/ASSET%20RECONSTRUCTION%20COMPANY%20LTD%20%20CP%201339-2017%20MA%20576-208%20MA%20752-2018%20NCLT%20ON%2012.09.2018%20FINAL.pdf>

Feedback

Disclaimer: LexCounsel provides this e-update on a complimentary basis solely for informational purposes. It is not intended to constitute, and should not be taken as, legal advice, or a communication intended to solicit or establish any attorney-client relationship between LexCounsel and the reader(s). LexCounsel shall not have any obligations or liabilities towards any acts or omission of any reader(s) consequent to any information contained in this e-newsletter. The readers are advised to consult competent professionals in their own judgment before acting on the basis of any information provided hereby.