

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency)No. 1292 of 2019

IN THE MATTER OF:

Technology Development Board

.....Appellant

Vs.

Nicco Corporation Ltd. (In Liquidation) & Ors.

.....Respondents

Present :

For Appellant: Mr. B.B. Sawhney, Sr. Advocate with Mr. Madhav Nanda, Mr. Lakshay Sawhney, Advocates

**For Respondents: Mr. Anirudh Wadhwa, Advocate
Ms. Nitu Poddar, PCS
Mr. Keshav Gulati**

O R D E R

19.11.2019 - The 'Nicco Corporation Ltd.' ('Corporate Debtor'), which is under liquidation, therein C.A. (IB) No. 788/KB/2019 was filed by the 'Nicco and Associates Companies Senior Management Superannuation Fund' a trust incorporated and registered under the Indian Trust Act, 1882. It was intimated that the said appeal represented the ex-employees of the 'Corporate Debtor' who

have served for more than 30 years in the service of the 'Corporate Debtor'. The 'Interim Resolution Professional' appointed in this matter constituted the 'Committee of Creditors' and in the 6th meeting of the 'Committee of Creditors' held on 6th October, 2017, the 'Resolution Plan' for revival of the 'Corporate Debtor' was put to vote, which resulted in around 88.38% of the members of the 'Committee of Creditors' voting against the 'Resolution Plan' and consequently the 'Resolution Plan' failed and order of liquidation was passed.

2. It was submitted that the employees of the 'Corporate Debtor' were discharged from the employment of the 'Corporate Debtor' and the present application has been moved by all ex-employees of the 'Corporate Debtor' who have served for a period of more than 10 years or more and whose superannuation funds are held in Trust by the Corporate Debtor and however, the same has not been released.

3. The application was filed by 393 employees of the Corporate Debtor (in liquidation) claiming payment of a shortfall amount of Rs. 5,70,12,800/- and the interest thereon on account of gratuity.

4. The Adjudicating Authority ('National Company Law Tribunal') Kolkata Bench, Kolkata taking into consideration the fact that there was no dispute about the unpaid Gratuity to the employees which are assets to the company held that the said Gratuity cannot be held to be a liquidation estate.

5. In view of such observation, the liquidator has been directed by impugned order dated 4th October, 2019 to make payment of the admitted shortfall in the principal amount due to the employees on account of Gratuity being the sum of Rs. 5,70,12,800/- by transferring the said amount to the existing Gratuity Fund Account of the Trust in the account maintained with the HDFC Bank, Branch at 2/6 Sarat Bose Road, Kolkata.

6. The Adjudicating Authority further observed that while providing such payment all the claims of the workmen / employees shall stand fully settled with respect to Gratuity, Superannuation and Provident Fund and prima facie all the proceedings pending before the Authority has been disposed of.

7. The Appellant - 'Technology Development Board' who claimed to be 'Secured Financial Creditor' has challenged the impugned order dated 4th October, 2019 on the ground that the assets of the 'Corporate Debtor' cannot be diverted except in the manner as provided u/s 53 of the I&B Code.

8. Learned Counsel also relied on an order passed by this Appellate Tribunal in the matter of '*Somesh Bagchi & Ors. V. Nicco Corporation, through liquidator in Company Appeal (AT) No. 209 of 2018*'.

9. In the said case the appeal was preferred by 'Somesh Bagchi and 20 others' retired employees of 'Nicco Corporation Limited' ('Corporate Debtor') with grievance that the liquidator is deviating the gratuity in terms of section 33 of the I&B Code. The decision of this Appellate Tribunal dated 18.7.2018 noticed the reply submitted by the liquidator with following observations:-

“3. Notice was issued on the question as to whether the gratuity amount lying in the ‘Gratuity Trust Fund’ can be treated to be asset of the Corporate Debtor. Mr. Vinod Kothari, Liquidator appeared in person and took plea that ‘Gratuity Trust Fund’ of the employees has not been treated as asset of the Corporate Debtor nor any amount has been disbursed from the said fund to any Creditor of the Corporate Debtor. A reply affidavit has been filed by the Liquidator with following statement: -

“2. That the amount of Rs. 27,94,19,639 crores (Twenty Seven Crores Ninety Four Lakhs Nineteen Thousand Six Hundred and Thirty Nine Rupees Only) lying in the No-lien account with Allahabad Bank as on the liquidation commencement date did not include the amount lying to the credit of the gratuity fund;

3. That no amount lying in the gratuity fund was used for making the interim distribution made by the Liquidator vide his decision dated 22.12.2018;

4. That as per the information received from the ex-Managing Director of the Corporate Debtor, the following are the present trustees of the Gratuity Fund:

a. *Mr. Kartick Kr. Chatterjee, Chairman*

b. *Mr. Shiv Siddhant Narayan Kaul, Member*

c. *Mr. Sibaji Datta, Member*

d. *Mr. Subrata Bhattacharjee, Member*

5. *That further, as per the information received from the ex-Human Resource Head, vide an email dated 06.07.2018, of the Corporate Debtor, attached herewith and marked as Annexure-I, Rs. 22634566 (Two Crores Twenty-Six Lakhs Thirty-Four Thousand Five Hundred and Sixty-Six Rupees Only) is lying in the gratuity fund as on 30.06.2018, bifurcation of which is as below:*

a. *Rs. 2,05,51,304 in HDFC as on 30.06.2018*

b. *Rs. 20,83,262 in LIC as on 06.07.2018.”*

4. *We appreciate the stand taken by the Liquidator, who has clearly stated that the gratuity amount of the employees/workmen lying in the ‘gratuity Trust Fund’ has not been treated as asset of the Corporate Debtor. The details relating to the Fund have been shown but we find that there is a shortage of Rs. 5.70 Crore in the said Fund. How such shortage in Gratuity Trust Fund has occurred*

and who is to make good of such amount and the competent authority, who is to ensure that the amount is paid to the ex-employees/workmen/officers of the Corporate Debtor to the extent they are entitled as per their share and law, could not be decided by the Adjudicating Authority or this Appellate Tribunal in the Company Petition or in this appeal.

5. Any decision of the Adjudicating Authority relating to the 'Gratuity Trust Fund' or observation made in the impugned order dated 08th March, 2018 should be treated as mere observation not binding on the Competent Authority or any Court of Law. In view of the fact that the 'Gratuity Trust Fund' has not been treated as asset of the Corporate Debtor, we leave other questions open for determination by appropriate authority/ a court of competent jurisdiction.

6. However, taking into consideration that the Corporate Debtor is undergoing liquidation and the creditors are entitled for their share in terms of Section 53 including wages, salaries of the employees, but the employees who are also entitle to withdraw their

gratuity amount from the Fund, we allow the Appellants or any other employee of other association to move before appropriate authority or a court of competent jurisdiction who may take care of their grievances. In view of the observations above, the application for impleadment has become infructuous I.A. No. 880 and another I.A. No. 881 stands disposed of. The appeal stands disposed of with aforesaid observations. No costs.”

10. Learned Counsel appearing on behalf of the Appellant submitted that this Appellate Tribunal having already decided that the Adjudicating Authority or this Appellate Tribunal has no jurisdiction to decide the issue, the impugned order should not have been passed by the Adjudicating Authority. However, such submission cannot be accepted as this Appellate Tribunal while passing the order on 18.7.18 merely observed that “how such shortage in Gratuity Trust Fund has occurred and who is to make good of such amount and the competent authority, who is to ensure that the amount is paid to the ex-employees/workmen/officers of the Corporate Debtor to the extent they are entitled as per their share and law, could not be decided by the Adjudicating Authority or this Appellate Tribunal in the Company Petition or in this appeal.”

11. However, while observing so and taking into consideration that the 'Corporate Debtor' is undergoing liquidation and the creditors are entitled for their share in terms of Section 53 including wages, salaries of the employees, but the employees who are also entitled to withdraw their gratuity amount from the fund, we allow the Appellants or any other employee or other association to move before appropriate authority or a court of competent jurisdiction who may take care of their grievances.

12. It is true that it is not the case of the employees who moved before the Adjudicating Authority but 'Nicco & Associate Companies Senior Management Superannuation Fund, a trust incorporated and registered under The Indian Trust Act, 1882 moved before the Adjudicating Authority and brought to its notice that although there was a Gratuity Trust Fund of the 'Corporate Debtor' created by a Trust Deed of 2nd February, 2010, however, there is only an amount of Rs. 2,23,75,454/- lying in such account as the Corporate Debtor(In Liquidation) had failed to make appropriate deposits in terms of its obligation under the payment of Gratuity Act, 1972.

13. We agree with the stand taken by the 'Nicco & Associate Companies Senior Management Superannuation Fund being 'Secured Financial Creditor' that in the light of the Trust Deed dated 2nd February, 2010, the 'Corporate Debtor' (in liquidation) had failed to make appropriate deposits in terms of obligation under the payment of Gratuity Act, 1972. Even during the liquidation process such obligation and the 'Corporate Debtor' continues in terms of payment of Gratuity

Act, 1972. Therefore, the Adjudicating Authority was right in providing the liquidator to fulfil obligation in terms of Gratuity Act, 1972 by depositing the amount of 5,70,12,800/- with interest in the account as fund.

14. This direction does not amount to determination of claim of one or other or payable by the Adjudicating Authority. If the obligation is there, it does not create any right in favour of any Financial Creditor whether 'Secured' or 'Unsecured' or 'Operational Creditor' to oppose the obligation of a 'Corporate Debtor' under the provisions of the Gratuity Payment Act from being fulfilled.

15. Learned counsel for the Appellant submitted that whatever has been to be in the fund is only extended however, we are not inclined to deliberate on such issue because we are determining the obligation of the 'Corporate Debtor' and not about the amount already deposited with the fund, particularly when during the liquidation process when the company remains going concern and the manufacturing and production of the company do not suffer and payment of wages to the employees/workmen and supplies made during Resolution Process are made on time. The Insolvency Resolution Professional will take aid of (suspended) Board of Directors, paid Directors, officers and the employees of the Corporate Debtor. The Banks having account of the corporate debtor will also cooperate with the Resolution Professional to ensure compliance of this order.

16. The 'Corporate Debtor' may be prohibited from buying the erstwhile debt and gratuity fund being not the debt of the employees it cannot be pleaded that the 'Corporate Debtor' is not liable to deposit the amount in accordance with the Funds Act.

We find no merit in the appeal. It is accordingly dismissed. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

[Justice Venugopal M.]
Member (Judicial)

ss/sk