

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

**COMPANY APPEAL NO. 12/2023
IN
C.P. No.(IB) NO. 402 OF 2018**

Under Section 42 OF Insolvency &
Bankruptcy Code, 2016 read with Rule 11
of the National Company Law Tribunal
Rules, 2016

Filed by

**Securities and Exchange Board of India,
...Applicant**

Vs.

Mr. Vishal Ghisulal Jain, Liquidator of,
Sterling International Enterprises Limited

In the matter of

SREI Infrastructure Finance Limited

..Financial Creditor

Vs.

Sterling International Enterprises Limited

...Corporate Debtor

Order Pronounced on: 14.09.2023

Coram:

MS. LAKSHMI GURUNG, HON'BLE MEMBER (J)
SH. CHARANJEET SINGH GULATI, HON'BLE MEMBER (T)

For the Applicant:

Adv. Gayatri Mohite,

For the Liquidator/Respondent:

Adv. G. Aniruth

PER: MS. LAKSHMI GURUNG, MEMBER (JUDICIAL)

ORDER

1. This appeal has been filed by the Securities and Exchange Board of India (**SEBI**) under section 42 of the Insolvency & Bankruptcy Code, 2016 (IBC) assailing the order of Liquidator rejecting its claim of Rs. 2,00,000/- vide communication dated 28.02.2023 and seeking consequential directions to the Liquidator to admit the said claim.

2. The brief facts leading to filing of the present appeal are as follows:-
 - 2.1. SEBI had carried out investigation in respect of irregular trading activities of certain entities in the scrip of the Corporate Debtor during the period 01.05.2008 to 30.09.2009 (**Investigation Period**).
 - 2.2. Pursuant to the Investigation, SEBI initiated adjudication proceedings under Section 15HA of The Securities and Exchange Board of India Act, 1992 (**SEBI Act**) against the Corporate Debtor for alleged violation of provisions of the Section 12A(a), (b), (c) of SEBI Act read with Regulations 3(a), (b), (c), (d) and Regulations 4(1), 4(2)(a) and (g) of Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003. (**PFUTP Regulations**).

- 2.3. Adjudicating Officer (AO) was appointed under section 19 of the SEBI Act read with section 15-I of the SEBI Act and rules thereunder to conduct adjudication proceedings in respect of 61 entities including the Corporate Debtor.
- 2.4. A Show Cause Notice dated 12.02.2020 was issued to the Corporate Debtor in terms of Rule 4(1) of the Adjudication Rules read with Section 15-I of SEBI Act, to show cause as to why an inquiry should not be initiated and penalty should not be imposed.
- 2.5. A reply letter dated 20.01.2021 was received from the Resolution Professional (RP) of the Corporate Debtor informing that the Corporate Debtor has been relegated to insolvency proceedings vide order dated 16.07.2018. Vide email dated 01.12.2021, it was informed that the Company has gone into liquidation vide order dated 18.10.2021.
- 2.6. The liquidator made a public announcement calling for the stakeholders to file their claims before him. As per the announcement, last date for submission of claims was **18.12.2021**.
- 2.7. It is the case of SEBI that 19 connected entities of the Corporate Debtor indulged in circular trades which resulted in creation of artificial volume in the scrip of

Corporate Debtor; connected entities of the Corporate Debtor had traded amongst themselves repeatedly with an intent to create false and misleading appearance of trading in its scrip; the connected entities indulged in 'Synchronized Trades' in a pre-determined manner which had an adverse impact on the fairness, integrity and transparency in the securities market.

- 2.8. Having considered all the facts and circumstances, the Adjudicating Officer of SEBI vide Adjudication Order No. Order/VV/NK/2021-22/15007 dated **17.02.2022** imposed a penalty of Rs. 2,00,000/- upon the Corporate Debtor in terms of Section 15HA for violation of provisions of Section 12A(a), (b), (c) of SEBI Act read with Regulations 3(a), (b), (c), (d) and Regulations 4(1), 4(2)(a) and (g) of PFUTP Regulations. Hence, SEBI submitted Form-C to Liquidator on 14.12.2022 claiming an amount of Rs. 2,00,000/-. However, the Liquidator vide communication dated 20.01.2023 rejected the claim on the technical ground of delay in submission of the same.
- 2.9. Being aggrieved by the rejection of its claim by the Liquidator, SEBI preferred Company Appeal No. 7 of 2023 seeking setting aside of the decision dated 20.01.2023 of the Liquidator, to condone the delay of 288 days in filing

the Form C- Proof of Claim and for a direction to the Liquidator to consider and admit the claim of the appellant.

2.10. This tribunal vide its order dated 07.02.2023 allowed the Company Appeal No.7 of 2023 condoning the delay with a direction to the Liquidator to decide the claim of the appellant independently.

2.11. In pursuance to the aforesaid order dated 07.02.2023, the Liquidator assessed the Form C- Proof of Claim submitted by the Appellant. The liquidator vide communication dated 28.02.2023 rejected the claim of the Appellant by stating as follows:

“...The liquidation proceeding has commenced on 18.10.2021, and as such the claim has to be filed as on that date. The Adjudication Order on the basis of which you have filed the claim dated 17.02.2022, which is after the liquidation commencement date, and is hence not admissible, as no claim existed as on 18.10.2021...”

2.12. Hence, being aggrieved by the rejection of the claim by the liquidator, the present Company Appeal has been filed by SEBI.

3. The Liquidator/Respondent filed affidavit in reply opposing the admission of the above Company Appeal. He submits that he has considered the claim on merit but rejected the same as a claim

against Corporate Debtor must exist as on the date of commencement of liquidation of the Corporate Debtor i.e. 18.10.2021. In the present case there was no claim against corporate Debtor on 18.10.2021. The Adjudication Order came to be passed on 17.02.2022 which was after the liquidation commencement date and hence the claim was not admissible.

FINDINGS & OBSERVATIONS

4. Based on the above submissions of the parties, the only question that falls for consideration in this Company Appeal is:

Whether the claim of SEBI amounting to Rs. 2,00,000/- which arose consequent to passing of the Adjudication Order on 17.02.2022 and is admittedly after commencement of liquidation of Corporate Debtor on 18.10.2021, can be considered for the purpose of distribution of assets under section 53 of IBC?

5. Heard the counsel appearing on both sides and perused the material available on record.
6. The Appellant contended that it is a Statutory Authority and has only taken steps to determine the penalty payable by Corporate Debtor. The appellant has not enforced claim for recovery of penalty due from Corporate Debtor during the period of moratorium under Section 33(5) of the IBC.

7. She further contended that the appellant has initiated adjudication proceedings and imposed a penalty of Rs. 2,00,000/- by relying on the principle laid down by Hon'ble Supreme Court in case of **Sundaresh Bhatt, Liquidator of ABG Shipyard Vs. Central Board of Indirect Taxes and Customs**, Civil Appeal No. 7667 of 2021 decided on 26.08.2022 and the liquidator has an obligation to ensure that the levy of penalty is legal. The appellant also placed reliance on the IBBI Circular No. IP/002/2018 dated 03.01.2018 which inter alia stipulates that a Corporate Debtor undergoing liquidation process, needs to comply with provisions of the applicable laws (Act, Rules, and Regulations, Circulars, Guidelines, Orders, Direction, etc.) during such process.
8. In response to the above contention the learned counsel appearing for the Respondent/Liquidator contended that the Judgement cited by the appellant is immaterial with regard to this case. He also replied that the claim being in nature of "Statutory Dues" falls within the purview of Section 53(1)(e)(i) which delineates the manner in which disbursement of asset will take effect wherein any amount due to the Central or the State Government, including the amount to be received on account of Consolidates Fund of India or Consolidated Fund of a State shall be considered for disbursement of proceeds only till the extent of

‘such due arisen in whole or any part of the period of two years’
preceding the liquidation commencement date.

9. In the case of **Sundaresh Bhatt** (Supra) before dealing with moratorium under Section 14 or Section 33(5) of IBC, the Supreme Court has referred to the judgment of *S.V. Kondaskar v. V.M. Deshpande*, (1972) 1 SCC 438 which was a case of winding up under Companies Act, 1956 wherein while expounding the interplay of section 446 of Companies Act, 1956 (bankruptcy provision) with the Income Tax Act, 1961 Court held as follows:-

“7. Looking at the legislative history and the scheme of the Indian Companies Act, particularly the language of Section 446, read as a whole, it appears to us that the expression “other legal preceding” in sub-section (1) and the expression “legal proceeding” in sub-section (2) convey the same sense and the proceedings in both the sub-sections must be such as can appropriately be dealt with by the winding up court. The Income Tax Act is, in our opinion, a complete code and it is particularly so with respect to the assessment and re-assessment of income tax with which alone we are concerned in the present case...

8. The argument that the proceedings for assessment or re-assessment of a company which is being wound up can only be started or continued with the leave of the liquidation court is also, on the scheme both of the Act and of the Income Tax Act, unacceptable. We have not been shown any principle on which the liquidation

court should be vested with the power to stop assessment proceedings for determining the amount of tax payable by the company which is being wound up. The liquidation court would have full power to scrutinise the claim of the revenue after income tax has been determined and its payment demanded from the liquidator. It would be open to the liquidation court then to decide how far under the law the amount of income tax determined by the Department should be accepted as a lawful liability on the funds of the company in liquidation. At that stage the winding up court can fully safeguard the interests of the company and its creditors under the Act.”

10. Thereafter, the Hon'ble Supreme Court held as follows:

“46. Therefore, this Court held that the authorities can only take steps to determine the tax, interest, fines or any penalty which is due. However, the authority cannot enforce a claim for recovery or levy of interest on the tax due during the period of moratorium. We are of the opinion that the above ratio squarely applies to the interplay between the IBC and the Customs Act in this context.

*47. From the above discussion, we hold that the respondent could only initiate assessment or re-assessment of the duties and other levies. They cannot transgress such boundary and proceed to initiate recovery in violation of Section 14 or 33(5) of the IBC. **The interim resolution professional, resolution profession or the liquidator, as the case may be, has an obligation to ensure that assessment is legal** and he has been provided with sufficient power to question any assessment, if he finds the same to be excessive.*

(emphasis provided)

11. The Hon'ble Supreme Court has referred to moratorium not only under Section 14 but also under Section 33(5) of IBC. In fact, the Court categorically states that the interim resolution professional, resolution profession or **the liquidator** as the case may be, has an obligation to ensure that the assessment of statutory dues like taxes, fine, penalty etc. is legally completed. Natural corollary to this is, if determination of the statutory dues is allowed during liquidation period then filing of the claim arising out of such determination cannot be barred under IBC otherwise it would amount to empty formality. The only restriction the belated claimant has to face is that it cannot disturb the amount already distributed as per waterfall mechanism under Section 53 of the IBC.

12. It is settled law that any creditor who files belated claim has to suffer the consequences that it is entitled to receive the amount only from the left over assets of CD and has no right to disturb the distribution already made as held in ***Ganeshilal Gupta v. Bharatpur Oil Mills through Official Liquidator (1972)***, the Rajasthan High Court observed that:

“There has been a long delay in filing the proof, but the claim is within the period of limitation prescribed by the Limitation Act, the only consequence of the delay will be that prescribed by Section 474 of the Companies Act according to

which a creditor, who does not prove his debt or claim within the time fixed by the court, has to be excluded from the benefit of any distribution made before his debt or claim is proved.”

13. In view of the above discussion, we answer the question raised in this appeal in affirmative i.e. the dues arising out of Adjudication Order passed on 17.02.2022 by SEBI which is admittedly after liquidation commencement date i.e. 18.10.2021, can be claimed before Liquidator.
14. Accordingly, the above Appeal is **allowed** directing the Liquidator to admit the claim of the Appellant/SEBI amounting to Rs. 2,00,000. It is hereby made clear that Liquidator shall strictly adhere to the provisions of Section 53 of the IBC.
15. With the above direction, the **COMPANY APPEAL NO. 12/2023 is disposed of.**

Sd/-

CHARANJEET SINGH GULATI
Member (Technical)

Sd/-

LAKSHMI GURUNG
Member (Judicial)