

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 631 of 2019

IN THE MATTER OF:

Union Bank of India & Ors.

...Appellants

Versus

**Mr. Shashi Kan Nemani,
Appointed Liquidator of Vedika Nut
Crafts Pvt. Ltd. (in liquidation) & Ors.**

...Respondents

Present:

For Appellant :

**Mr. Rajiv s. Roy, Mr. Avrojoyoti Chatterjee,
Mr. Abhijit Roy and Ms. Jayasree Saha, Advocates**

For Respondent:

**Mr. Rajendra Beniwal, Ms. Priyanka and Mr. Manjoj
Kumar Sharma, Advocates**

O R D E R

19.07.2019 The Appellant – ‘Union Bank of India’ & Ors. (Committee of Creditors) have preferred this appeal against the impugned order dated 25th April, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi directing the ‘Committee of Creditors’ to pay the fee and cost of the ‘Liquidator’ a sum of Rs. 14 Lakhs and settle the rest of the amount in the time bound manner with the following observations and directions :

“The other issues raised by the Ld. Counsel for the liquidator is that with regard to the expenses incurred and fee chargeable for the liquidation process. If was on the recommendation of the CoC that application under Section 33 was filed and the

same was accepted by us by passing a detail order on 04.04.2018 and the liquidator was appointed on the recommendation made by the CoC. However, the liquidator has to complete the process and, in the process incurred expenses as per the direction issued, as well as to comply with the provisions of the IBC and Regulations. However, the CoC is dragging its feet and is not paying the expenses as well as fee of the liquidator which is wholly unwarranted. According to the estimation given, the fee of the liquidator as on date is about 14, 00,000/- We direct the CoC to pay Rs. 10, 00,000/- and settle the rest of the amount in a time bound manner preferably within a period of one month. The members of the CoC shall bear the expenditure/fee in accordance with their voting share proportionately.”

Learned counsel appearing on behalf of the Appellant submits that the ‘Committee of Creditors is not liable to pay the ‘fee or cost’ of the Liquidation as the function of the ‘Committee of Creditors’ comes to an end when the order of liquidation is passed. On the other hand, according to the counsel appearing on behalf of the Liquidator, at the time of decision taken by the ‘Committee of Creditors’ referred the matter for liquidation, they should be decided the fee and cost payable to the liquidator.

The provisions to pay the fee of ‘Liquidator’ is prescribed u/s 34 (8) and (9) of the I&B Code, which is as follows:

“34. (1) *Where the Adjudicating Authority passes an order for liquidation of the corporate debtor under section 33, the resolution professional appointed for the corporate insolvency resolution process under Chapter II shall act as the liquidator for the purposes of liquidation unless replaced by the Adjudicating Authority under sub-section (4).*

- (8) An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be specified by the Board.
- (9) The fees for the conduct of the liquidation proceedings under sub-section (8) shall be paid to the liquidator from the proceeds of the liquidation estate under section 53.

Regulation 4 of the ‘Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 also prescribed the ‘Liquidator’s Fee’, which reads as follows:

“4. *Liquidator’s fee.*

- (1) *The fee payable to the liquidator shall form part of the liquidation cost.*

- (2) *The liquidator shall be entitled to such fee and in such manner as has been decided by the committee of creditors before a liquidation order is passed under sections 33(1)(a) or 33(2).*
- (3) *In all cases other than those covered under sub-regulation (2), the liquidator shall be entitled to a fee as a percentage of the amount realized net of other liquidation costs, and of the amount distributed, as under:*

Amount of Realisation/ Distribution (In rupees)	Percentage of fee on the amount realized/distributed			
	In the first Six months	In the next Six months	In the next one year	Thereafter
Amount of Realisation (exclusive of liquidation costs)				
On the first 1 crore	5.00	3.75	2.50	1.88
On the next 9 crore	3.75	2.80	1.88	1.41
On the next 40 crore	2.50	1.88	1.25	0.94
On the next 50 crore	1.25	0.94	0.68	0.51
On further sums realized	0.25	0.19	0.13	0.10
Amount Distributed to Stakeholders				
On the first 1 crore	2.50	1.88	1.25	0.94
On the next 9 crore	1.88	1.40	0.94	0.71

On the next 40 crore	1.25	0.94	0.63	0.47
On the next 50 crore	0.63	0.48	0.34	0.25
On further sums realized	0.13	0.10	0.06	0.05

(4) The liquidator shall be entitled to receive half of the fee payable on realization under sub-regulation (3) only after such realized amount is distributed.”

Learned counsel for the Respondent referred to Section 53 of the I&B Code to suggest that at the time of distribution of assets if fee payable to the liquidator is required to be deducted proportionately from the proceeds payable to each class of recipients. However, such question does not arise, which will be after the death of the ‘corporate debtor’. In the case of “**Y. Shivram Prasad Vs. S. Dhanapal & Ors. - Company Appeal (AT) (Insolvency) No. 224 of 2018 etc.**” this Appellate Tribunal at the stage of liquidation has directed to take steps u/s 230 of the Companies Act, 2013 and on failure taken for outright sale of the ‘Corporate Debtor’ instead of liquidating the ‘Corporate Debtor’ by sale of its assets, observed and held :

“15. Learned counsel appearing on behalf of the Appellant (Promoter) submitted that the provisions under Section 230 may not be

completed within 90 days, as observed in “S.C. Sekaran v. Amit Gupta & Ors.” (Supra).

16. *It is further submitted that there will be objections by some of the creditors or members who may not allow the Tribunal to pass appropriate order under Section 230 of the Companies Act, 2013.*
17. *Normally, the total period for liquidation is to be completed preferably within two years. Therefore, in “S.C. Sekaran v. Amit Gupta & Ors.” (Supra), this Appellate Tribunal allowed 90 days’ time to take steps under Section 230 of the Companies Act, 2013. In case, for any reason the liquidation process under Section 230 takes more time, it is open to the Adjudicating Authority (Tribunal) to extend the period if there is a chance of approval of arrangement of the scheme.*
18. *During proceeding under Section 230, if any, objection is raised, it is open to the Adjudicating Authority (National Company Law Tribunal) which has power to pass order under Section 230 to overrule the objections, if the arrangement and scheme is beneficial for revival of the ‘Corporate Debtor’ (Company). While passing such order, the*

Adjudicating Authority is to play dual role, one as the Adjudicating Authority in the matter of liquidation and other as a Tribunal for passing order under Section 230 of the Companies Act, 2013. As the liquidation so taken up under the 'I&B Code', the arrangement of scheme should be in consonance with the statement and object of the 'I&B Code'. Meaning thereby, the scheme must ensure maximisation of the assets of the 'Corporate Debtor' and balance the stakeholders such as, the 'Financial Creditors', 'Operational Creditors', 'Secured Creditors' and 'Unsecured Creditors' without any discrimination. Before approval of an arrangement or Scheme, the Adjudicating Authority (National Company Law Tribunal) should follow the same principle and should allow the 'Liquidator' to constitute a 'Committee of Creditors' for its opinion to find out whether the arrangement of Scheme is viable, feasible and having appropriate financial matrix. It will be open for the Adjudicating Authority as a Tribunal to approve the arrangement or Scheme in spite of some irrelevant objections as may be raised by one or other creditor or member keeping

in mind the object of the Insolvency and Bankruptcy Code, 2016.

19. *In view of the observations aforesaid, we hold that the liquidator is required to act in terms of the aforesaid directions of the Appellate Tribunal and take steps under Section 230 of the Companies Act. If the members or the ‘Corporate Debtor’ or the ‘creditors’ or a class of creditors like ‘Financial Creditor’ or ‘Operational Creditor’ approach the company through the liquidator for compromise or arrangement by making proposal of payment to all the creditor(s), the Liquidator on behalf of the company will move an application under Section 230 of the Companies Act, 2013 before the Adjudicating Authority i.e. National Company Law Tribunal, Chennai Bench, in terms of the observations as made in above. On failure, as observed above, steps should be taken for outright sale of the ‘Corporate Debtor’ so as to enable the employees to continue.*

In view of the same, the question of application of Section 53 at this stage does not arise as the ‘Liquidator’ not took steps in terms of this Appellate Tribunal’s order as in “**Y. Shivram Prasad Vs. S. Dhanapal & Ors. (Supra)**. The Adjudicating Authority has failed to notice the aforesaid provisions

including sub-section (8) and (9) of Section 38 and Regulation 4 of the aforesaid, we set aside the impugned order dated 25th April, 2019 passed in (IB) 40(PB)/2017 and remit the case to the Adjudicating Authority (National Company law Tribunal), New Delhi for passing fresh order for payment of fee and cost of the 'Liquidator' in terms of the provisions of the 'I&B Code' and the Regulations aforesaid.

The appeal is allowed with aforesaid observations. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Kanthi Narahari]
Member (Technical)

/ns/gc