

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.5393 OF 2023

1. Anupam DikshitPetitioner

V/S

1. S. Kumars Nationwide Limited

2. Om Prakash Agarwal
Appointed as the Liquidator of
S. Kumars Nationwide Limited

....Respondents

Mr. Rohan Savant with Mr. Huzefa Khokhawala i/b M/s. Nankani & Associates, *for the Petitioner.*

Mr. Harsh Sheth i/b M/s. MDP Legal *for Respondents.*

**CORAM : SANDEEP V. MARNE, J.
RESERVED ON: 29 JANUARY 2026.
PRONOUNCED ON : 05 FEBRUARY 2026.**

JUDGMENT:

1. By this Petition, Petitioner challenges order dated 17 October 2022 passed by the learned Judge of City Civil Court, Greater Mumbai, dismissing Chamber Summons No.1769 of 2019 filed by the Petitioner-Plaintiff for adding Official Liquidator as party Defendant in the Suit.

2. Briefly stated, facts of the case are that Petitioner is a Plaintiff in Summary Suit No.1398 of 2017 filed before the City Civil Court for recovery of monies from the Defendant. Petitioner-Plaintiff is a management professional and had joined the services with the Respondent No.1 as Chief Operating Officer on 24 April 2006 in the High

Value Fine Cotton Division. He was confirmed in service on 24 January 2007. According to the Plaintiff, Respondent No.1 was irregular in payment of salaries. Plaintiff resigned from services of Respondent No.1 with effect from 10 October 2014 alleging irregularities in payment of salaries. By his letter dated 9 October 2014, he requested release of his full gratuity. He was paid lump sum amount of Rs.5,00,000/- towards gratuity. According to the Plaintiff, there are dues in respect of salaries and other allowances from Respondent No.1. According to Petitioner-Plaintiff, Respondent No.1 never disputed the liability to pay salaries but cited the reason of financial crunch. Plaintiff has filed Summary Suit No.1398 of 2017 on 4 October 2017 under Order XXXVII, Rule 2 of the Code of Civil Procedure, 1908 (**Code**) before the City Civil Court for recovery of principal sum of Rs.76,85,981/-.

3. Despite service of summons, Respondent No.1 failed to appear or to apply for leave to defend within the prescribed time limit. Accordingly, order has been passed on 22 June 2018 directing that the Suit would proceed *ex parte* against Respondent No.1.

4. Petitioner-Plaintiff claims that he became aware about filing of Company Petition No.294 of 2018 under Section 7 of Insolvency and Bankruptcy Code, 2016 (**IBC**) by IDBI Bank Limited as financial creditor before National Company Law Tribunal (**NCLT**) and by order dated 24 April 2018, moratorium was imposed in respect of Respondent No.1 and an Interim Resolution Professional (**IRP**) was appointed. Petitioner-Plaintiff informed the IRP about pendency of Summary Suit by letter dated 18 July 2018. Petitioner-Plaintiff also lodged his claim with IRP. Later, Resolution Professional (**RP**) was appointed in respect of

Respondent No.1 and Petitioner pursued his claim with the RP. By order dated 19 June 2019, NCLT made an order of liquidation in respect of Respondent No.1. After acquisition of knowledge about liquidation of Respondent No.1, Petitioner-Plaintiff preferred Chamber Summons No.1769 of 2019 in the Summary Suit, seeking impleadment of the Liquidator of Respondent No.1 (Respondent No.2) as party Defendant to the Suit. Respondent No.2-Liquidator opposed his impleadment to the Suit. By order dated 17 October 2022, the learned Trial Judge has dismissed the Chamber Summons preferred by the Petitioner-Plaintiff. Aggrieved by order dated 17 October 2022, the Petitioner-Plaintiff has filed the present Petition.

5. Mr. Savant, the learned counsel appearing for Petitioner would submit that the Trial Court has erred in rejecting Chamber Summons for impleadment of the Liquidator. He would submit that the bar under Section 63 of the IBC on jurisdiction of Civil Court is not applicable in the present case. He would submit that under provisions of Section 33(5) of the IBC, the prohibition is against institution of suit against corporate debtor after passing of liquidation order. That there is no prohibition on continuation of the suits already filed. That so far as the Liquidator is concerned, he can file a suit on behalf of corporate debtor. That if Liquidator can file a suit, he can also defend the same. He relies on the judgment of Kerala High Court in ***The Liquidator of the Corporate Debtor vs. The State of Kerala and Anr.***¹ in support of his contention that the prohibition is only on filing of fresh suit or proceedings and that there is no prohibition for continuation of pending suits or proceedings under Section 33(5) of the IBC after liquidation order. He also relies on

¹ WP (C) No.22096 of 2019 decided on 8 April 2022

the judgment of Delhi High Court in *Elecon Engineering Company Limited vs. Energo Engineering Projects Limited and others*² in support of the contention that Section 63 of the IBC does not apply to suits which are already pending before commencement of liquidation proceedings. He also relies on the judgment of this Court in *Urban Infrastructure Trustees Ltd. vs. Bhavik Bhimjiyani and others*³ in support of his contention that Official Liquidator can be impleaded as party to the Suit. He however clarifies that the judgment of this Court is subject matter of challenge before the Supreme Court in which initially proceedings before this Court were stayed and subsequently the matter was compromised before the Apex Court leaving open the question of law. He relies on judgment of Division Bench of this Court in *Cipla Limited vs. Competent Authority and the District Deputy Registrar, Co-operative Society and others*⁴ in support of his contention that the ratio of judgment of this Court in *Urban Infrastructure Trustees Ltd.* (supra) does not get diluted merely on account of leaving of question of law open by the Apex Court while disposing of the Special Leave Petition. He also relies upon judgment of Madras High Court in *Chennai Metro Rail Limited vs. Lanco Infratech Limited*⁵ in support of his contention that Section 33(5) of the IBC does not apply to pending cases. Mr. Savant would accordingly submit that the Trial Court has grossly erred in dismissing the Chamber Summons.

6. Mr. Savant relies on judgment in *Rajesh Kumar Agarwal and Others vs. K.K. Modi and Others*⁶ in support of his contention that the

² 2022 SCC OnLine Del 2860

³ 2018 SCC OnLine Bom 20447

⁴ 2021 SCC OnLine Bom 622

⁵ 2020 SCC OnLine Mad 26397

⁶ (2006) 4 SCC 385

learned Trial Judge has erroneously gone into merits of the amendment while deciding the Chamber Summons.

7. Mr. Savant further submits that Section 53 of the IBC only deals with priority of claims and the said provision cannot be read to mean as if claims towards salary in excess of 24 months get obliterated. He would pray for setting aside the impugned order dated 17 October 2022 and for impleadment of Liquidator as Defendant to the Suit.

8. Mr. Sheth, the learned counsel appearing for Respondents opposes the Petition submitting that the learned Trial Judge has rightly rejected the baseless Chamber Summons preferred by the Plaintiff. That since the Company is in liquidation, neither Plaintiff's Suit against the Company is maintainable nor Official Liquidator can be joined as a party Defendant. He relies on Section 38 of the IBC in support of his contention that the Liquidator needs to collect and consolidate all claims of creditors. That the Plaintiff would be like a creditor and needs to lodge his claim before Liquidator. That under Section 40 of the IBC, Liquidator can adjudicate the claims and its decision *qua* claim is appealable under Section 42 of the IBC. He would therefore submit that once Company goes in liquidation, there is a completely different mechanism under Sections 38 to 42 of IBC for adjudication of claims. That there cannot be a parallel inquiry into the claim of the Plaintiff in the pending Suit. That the Suit itself has become infructuous and therefore there is no question of addition of Liquidator to the Suit. He also relies upon provisions of Section 53 of IBC in support of his contention that the Plaintiff can no longer pursue the Suit for recovery

of wages in excess of 24 months as workers dues of only upto 24 months can be granted under Section 53 of the IBC. Relying on provisions of Section 63 of the IBC, he submits that the jurisdiction of the Civil Court is expressly barred. He would pray for dismissal of the Petition.

9. Rival contentions of the parties now fall for my consideration.

10. Petitioner's Application for impleadment of second Respondent-Liquidator has been rejected by the learned Trial Judge by the impugned order. The reasons recorded by the learned Judge for rejection of the Application are to be found in paragraphs 3 and 4 of the Order, which read thus:

“3. Heard the Learned Advocate for plaintiff. The Advocate for plaintiff relied upon **Rajesh Kumar Aggarwal and Ors. Vs. K.K. Modi and Ors.**, reported (2006) 4 Supreme Court Cases 385. The said citation is in respect of the amendment. It has been observed that at the time of deciding the application for amendment the correctness of the amendment should not be considered.

4. After going through the submission raised by the plaintiff and the reply of the official liquidator /respondents, it seems that the plaintiff filed the present suit for recovery of the amount against the defendant. Admittedly, the defendant Company has gone into liquidation and an official liquidator has been appointed by the NCLT in the Company Petition bearing No.CP(IV)294/NCLT/MB/2018 as per Order dated 24.04.2018. Since all the proceedings of the defendant Company are taken by the official liquidator, all the claims of the creditors are to be taken up by the official liquidator. As per express bar of Section 63 of the Code of Civil Courts are barred from entertaining any suit or proceedings in respect of the matter over which NCLT has jurisdiction. Similarly, since Civil Court does not have jurisdiction to try the suit, the official liquidator also cannot be added as a party defendant to the suit. The plaintiff will have to appear before the Liquidator to seek his claim and therefore, the present Chamber Summons is not maintainable. I, therefore, proceed to pass the following Order:

ORDER

1. Chamber Summons No.1769 of 2019 is dismissed.
2. Parties to bear their own costs.”

11. Thus, the learned Trial Judge has relied on provisions of Section 63 of the IBC for holding that it does not have jurisdiction to try the Suit.

This finding of the learned Trial Judge appears to be contrary to the provisions of Section 63 of the IBC which provides thus:

“63. Civil Court not to have jurisdiction.—No Civil Court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code.”

12. Thus, jurisdiction of Civil Court is barred only in respect of Suit or proceedings in respect of any matters on which NCLT or National Company Law Appellate Tribunal (NCLAT) has jurisdiction under the IBC. It cannot be contended that Plaintiff’s claim for unpaid salary can be adjudicated by NCLT or NCLAT. The Suit is not filed in respect of a matter on which NCLT or NCLAT has jurisdiction under the IBC. More importantly, the Suit was already instituted well before admission of Company Petition and before imposition of moratorium by order dated 24 April 2018. In my *prima facie* view therefore, bar of jurisdiction under Section 63 of the IBC would not be attracted in the present case. Also, what effect Section 63 of the IBC would have on pending suit also needs to be decided independently and cannot be mixed up with the issue of amendment of Plaintiff and impleadment of the Liquidator.

13. However, as of now, the issue of bar of jurisdiction under Section 63 of IBC is not really relevant. I have referred to provisions of Section 63 of IBC only because the learned Trial Judge has relied upon the same in the impugned order. However, though findings are recorded that the Court does not have the jurisdiction to try the Suit, the Suit has not been dismissed as yet. The said finding is recorded only in relation to the ratio of impleadment of the Liquidator to the Suit. While deciding that issue, the Court ought not to have gone into issue of maintainability of the

Suit in view of provisions of Section 63 of IBC. The Court was dealing with application for amendment of the Plaintiff and ought to have restricted the consideration only to the aspect of permissibility to amend the Plaintiff and implead the Liquidator. The approach of the Court in touching upon the issue of maintainability of the Suit while deciding the application for amendment is not appreciated. Reliance by Mr. Savant on judgment of the Supreme Court in *Rajesh Kumar Aggarwal* (supra) is apposite in which it is held thus:

19. While considering whether an application for amendment should or should not be allowed, the court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principle has not been followed by the High Court in the instant case.

14. In the present case, the Trial Court has decided not just merits of the averments sought to be added in the Plaintiff but also the issue of maintainability of suit and has ruled that the suit itself is not maintainable.

15. Coming to the issue of permissibility to implead the Liquidator to the Suit, it is seen that for deciding the issue of impleadment of Liquidator to the Suit, provisions of Section 33 of the IBC are relevant, and which are pressed into service by the Respondent and which provide thus:

“33. Initiation of liquidation.—

(1) Where the Adjudicating Authority,—

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30;

or

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein,
it shall—

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six per cent. of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

Explanation.—For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.

(3) Where the resolution plan approved by the Adjudicating Authority under section 31 or under sub-section (1) of section 54-L, is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:
Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

(6) The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.”

(emphasis added)

16. Thus, under Section 33(5) of the IBC, once liquidation order is passed, no Suit or other legal proceedings can be initiated by or against the corporate debtor. However, there is no embargo on the Liquidator, who is free to sue on behalf of the corporate debtor with prior approval of Adjudicating Authority. Since Liquidator can sue, I do not see any reason why Liquidator cannot defend an action on behalf of the corporate debtor.

17. In the present case, the Suit has been instituted by the Plaintiff on 4 October 2017, whereas the liquidation order is passed on 19 June 2019. In *The Liquidator of the Corporate Debtor* (supra), the learned Single Judge of Kerala High Court has considered the effect of provisions of Section 33(5) of IBC and has held in paragraph 10 as under;

“10. M/s. Orieon Kuries and Loans Private Limited was undergoing Corporate Insolvency Resolution Process (CIRP) since 10.07.2017 and upon failure to resolve the insolvency, the NCLT, in exercise of the powers under Section 33 (1) (a) of the Code, by Ext.P1 order dated 15.01.2018, ordered liquidation of the Corporate Debtor. The moratorium which was in force from 10.07.2017 ceased to have effect from 15.01.2018. Under Section 14(1) (a) of the Code, on declaration of moratorium, the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor is prohibited. With the passing of Ext.P1 order, the moratorium ceased to have effect. As per Section 33(5) of the Code, after Ext.P1 liquidation order, no suit or legal proceedings can be instituted against the Corporate Debtor. Under Section 33 (5), unlike Section 14(1) (a), there is no prohibition for continuance of already instituted suits and proceedings. Section 5 (17) of the Code defines “liquidation commencement date” to mean the date on which proceedings for liquidation commence in accordance with Section 33 or Section 59, as the case may be. The liquidation commencement date is the date of Ext.P1, viz; 15.01.2018 and the date of filing the claim petition under the Minimum Wages Act, 1948 is 25.04.2012. The prohibition for continuation of pending suits or proceedings against the Corporate Debtor under Section 14 (1) (a) was only for the period from 10.07.2017 to 15.01.2018. Thereafter, the prohibition is only in respect of institution of fresh suits or proceedings. There is no prohibition of continuation of pending suits or proceedings under Section 33(5) of the Code after 15.01.2018. The petitioner received summons from the Controlling Authority under the Minimum Wages Act, 1948 on 10.01.2019 and entered appearance and filed written statement. Ext.P3 order was passed on

18.07.2019. Since there is no prohibition of continuation of pending suits or proceedings under Section 33(5) of the Code, the Controlling Authority was well within its powers to pass Ext.P3 order during the liquidation process.”

18. Thus, the Kerala High Court has held that there is no prohibition under Section 33(5) of the IBC for continuance of Suits already instituted and that the prohibition is only in respect of institution of fresh suits or proceedings.

19. Similar view is taken by this Court in *Urban Infrastructure Trustees Ltd.* (supra) in which Respondent No.5 therein was ordered to be wound up by NCLT. The Applicant therein had filed application under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrator. The Applicant therein applied for amendment of Section 11 Application for its substitution with the Liquidator. The Respondent therein opposed substitution by referring to Section 33(5) of the IBC. This Court however held in paragraph 8 as under:

“8. Having heard the learned Counsel for the parties and having perused the orders passed by National Company Law Tribunal and the provisions of Section 33(5) as also the provisions of Section 35(1)(k), I am not persuaded to accept the submissions as urged on behalf of respondent nos.1 and 2. This for the reason that Section 33(5) provides that when a liquidation order has been passed, “no suit or legal proceedings shall be instituted by or against the corporate debtor”. Even the proviso under the said provision says that a suit or other legal proceedings may be instituted by the liquidator, on behalf of the corporate debtor, only with prior approval of adjudicating authority (NCLT). Thus it is the institution of a proceeding which is of relevance. The present case is not a case where the Official Liquidator would be instituting the proceedings but would be pursuing the proceedings already executed. Even Section 35(1) recognizes various powers as conferred on the liquidator subject to directions of the Adjudicating Authority (NCLT). On a plain reading of this provision it can be clearly seen that the powers are substantive and which includes power to take such measures and protect the property of the corporate debtor. Sub- section (1)(k) of Section 35 provides that the liquidator would have power to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of or on behalf of the corporate debtor. **On a conjoint reading of Section 33(5) read with Section 35(1) and more particularly 35(1)(k), I am of the opinion that there is no embargo on the**

Official Liquidator to be impleaded as a party to the present proceedings and for the Official Liquidator to prosecute this proceeding.”

20. Thus, in *Urban Infrastructure Trustees Ltd.* (supra), this Court held that on conjoint reading of Section 33(5) read with Section 35(1) and more particularly 35(1)(k) of the IBC that there is no embargo on Official Liquidator to be impleaded as a party to Section 11 proceedings. In his usual fairness, Mr. Savant has invited attention of this Court to the fact that the judgment of this Court in *Urban Infrastructure Trustees Ltd.* (supra), which was challenged before the Supreme Court in Special Leave Petition (C) Nos.391-392 of 2019, in which initially stay was granted to the further proceedings by order dated 14 January 2019. However, the dispute was compromised before the Apex Court by which Respondent No.5 (Company in liquidation) was agreed to be dropped from arbitration proceedings and accordingly permission was granted for withdrawal of the SLP. However, while permitting withdrawal of SLP, the Apex Court left question of law raised in the Petition open to be considered in appropriate proceedings. It is well settled position that even if question of law is left open by the Supreme Court while disposing of proceedings with consent of parties, it does not amount to setting aside the principles of law in the judgment rendered after adjudicating the rights of the parties. It would be apposite to refer to the judgment of this Court in *Cipla Limited* (supra), in which it is held in paragraphs 171 to 174 are as under:

“171. A perusal of the order dated 18th April 2018 passed by the Hon’ble Supreme Court in the Special Leave to Appeal arising out of the judgment delivered by this Court in the case of *Paul Parambi, Chief Promoter, Springs CHS Ltd. v. The Bombay Dyeing and Manufacturing Co. Ltd.* (supra) indicates that the Hon’ble Supreme Court had granted leave in the said Special Leave to Appeal. By consent of parties, the Hon’ble Supreme Court had set aside the said judgment of this Court in the case of *Paul Parambi, Chief Promoter,*

Springs CHS Ltd. v. The Bombay Dyeing and Manufacturing Co. Ltd. (supra) and had kept the question of law decided therein open. There were no arguments advanced by any of the parties. No reasons were recorded by the Hon'ble Supreme Court in the said order. The said order was by consent of parties.

172. A Division Bench of this Court in the case of *Indian Cork Mills Private Limited v. The State of Maharashtra* (supra) after advertizing to the judgment of Supreme Court in the case of *Municipal Corporation of Delhi v. Gurnam Kaur*, (1989) 1 SCC 101 has held that it is a settled principle of law that when the Court passes an order, by consent of the parties, the Court does not adjudicate upon the rights of the parties nor does it lay down any principle. Thus it cannot be said that the statement of law as declared by the Division Bench of this Court in interpreting the provisions of Section 3B and Section 13 falling under Chapter I-A of Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 in the case of *Anil Gulabdas Shah*, in any manner stands diluted by the consent order between the parties. In our view, the principles laid down by the Division Bench of this Court in the case of *Indian Cork Mills Private Limited v. The State of Maharashtra* (supra) squarely applies to the facts of this Court.

173. **In our view, by consent of parties, principles of law laid down by this Court after adjudicating upon the rights of parties cannot be set aside before the Hon'ble Supreme Court.** The said order passed by the Hon'ble Supreme Court on 18th April 2018 was not passed on adjudication of any issue or after considering the arguments advanced by the parties and was passed without recording any reason by consent of parties. **In our view, the principles of law laid down by this Court in the judgment in case of *Paul Parambi, Chief Promoter, Springs CHS Ltd.* (supra) does not cease to have effect as binding precedent.** The view taken by the Division Bench of this Court in the case of *Indian Cork Mills Private Limited v. The State of Maharashtra* (supra) is advertizing to the principle of law laid down by the Hon'ble Supreme Court in the case of *Municipal Corporation of Delhi v. Gurnam Kaur* (supra).

174. It has been held by the Hon'ble Supreme Court in the said judgment that when a direction or order is made by consent of the parties, the Court does not adjudicate upon the rights of the parties nor does it lay down any principle. Quotability as 'law' applies to the principle of a case, its ratio decidendi. The only thing in a Judge's decision binding as an authority upon a subsequent Judge is the principle upon which the case was decided. The task of finding the principle is fraught with difficulty because without an investigation into the facts, as in the present case, it could not be assumed whether a similar direction must or ought to be made as a measure of social justice. This Court rejected the contentions of the respondents in that matter that the judgment of Division Bench in the case of *Anil Gulabdas Shah* (supra) had merged in the consent orders passed by the Supreme Court considering the well settled position in the law as laid down in the decision in *S. Shanmugavel Nadar v. State of T.N.*, (2002) 8 SCC 361.

(emphasis added)

21. Therefore, even though the question of law is left open by the Apex Court while permitting withdrawal of proceedings in *Urban Infrastructure Trustees Ltd.* (supra), it cannot be a reason for not following the judgment of this Court in which a principle of law is enunciated that there is no embargo on impleadment of liquidator in view of the provisions of Section 33(5) read with Sections 35(1) and 35(1)(k) of the IBC.

22. In *Elecon Engineering Company Limited* (supra), the issue before learned Single Judge of Delhi High Court was whether Suit could proceed after liquidation of Defendant No.1-Company. The Suit was filed seeking permanent injunction to restrain the Company from encashing the bank guarantee and recovery of monies. During pendency of Suit, order of liquidation was passed against the Company. The Delhi High Court took into consideration various provisions of IBC, particularly Section 33(5) of the IBC. It also took into consideration the ratio of the judgment of Madras High Court in *Chennai Metro Rail Limited* (supra), in which it is held that pending matters are consciously excluded under Section 33(5) of the IBC. Agreeing with the view expressed by Madras High Court, Delhi High Court held in paragraphs 17 to 20 as under:

“17. I am in respectful agreement with the views expressed by the Madras High Court and Kerala High Court above. To appreciate the difference in the language of Sections 14 and 33(5) of the IBC it may be useful to refer to the scheme of the IBC in the context of the aforesaid sections. Section 14 and Section 33 are part of two separate Chapters of IBC. Section 14 is part of Chapter II which deals with “**Corporate Insolvency Resolution Process**”, whereas Section 33 is a part of Chapter III which deals with “**Liquidation Process**”. Chapter II of the IBC deals with the Resolution Process in respect of a ‘corporate debtor’, where the objective is to revive the corporate debtor by coming out with a resolution plan, which is to be approved by the committee of creditors and thereafter, by the Adjudicating Authority. Chapter III of the IBC deals with the liquidation process which comes into effect upon the failure

to come out with a resolution plan within the prescribed time period or a resolution plan not being approved. The moratorium under Section 14 of the IBC comes into effect upon the Adjudicating Authority passing an order declaring a moratorium and continues till the completion of Corporate Insolvency Resolution Process. Upon the approval of the resolution plan by the Adjudicating Authority or upon passing of a liquidation order under Section 33 of the IBC, the moratorium shall cease to have effect. After the Adjudicating Authority (NCLT) passes a liquidation order under section 33(4) of the IBC, a fresh moratorium in terms of section 33(5) of the IBC comes into place.

18. The objective of the liquidation process is to derive the maximum value from the assets of the corporate debtor for the benefit of various creditors and other stakeholders in the company under liquidation. The objective is not the revival of the company. It is perhaps for this reason that unlike Chapter II, no time limits have been provided in Chapter III of the IBC. Therefore, the legislature in its wisdom has decided not to include "*pending suits or legal proceedings*" within the scope of moratorium under Section 33(5) of the IBC. To be noted that even the proviso to section 33(5) of the IBC only uses the word "*instituted*" but does not use the word "*pending*". Further, in terms of the said proviso, even a fresh suit or legal proceedings may be instituted by the Liquidator with the prior approval of the Adjudicating Authority. So, unlike Section 14 of the IBC, under Section 33(5) of the IBC there is no absolute bar in a suit or legal proceedings continuing along with the liquidation proceedings.

19. It is vehemently contended on behalf of counsel for the Liquidator that in light of Sections 63 and 231 of the IBC, the jurisdiction of the Civil Court is barred and therefore, the present suit cannot be continued as the claims made in the said suit fall within the jurisdiction of NCLT. Reliance is also placed on Section 60(5) of the IBC.

20. A reading of Section 63 of the IBC would reveal that the bar on the Civil Court is only to "*entertain any suit or proceeding in respect of any matter on which National Company Law Tribunal has the jurisdiction under this Code*". This would not apply to suits, which were already pending before the commencement of liquidation proceedings. Section 231 of the IBC, *inter alia*, states that no injunction shall be granted by a Court in respect of action taken in pursuance to any order passed by the Adjudicating Authority. The intent is clear that the bar is only in respect of civil suits filed after an order has been passed by the Adjudicating Authority. In my view, the aforesaid bar under Sections 63 and 231 of the IBC would only be in respect of fresh suits. Sections 63 and 231 of the IBC cannot be read in manner so as to defeat the provisions of Section 33(5) of the IBC. If Sections 63 and 231 of the IBC are interpreted in the manner canvassed by counsel for the Liquidator, the provision of Section 33(5) of the IBC would be rendered otiose and the moratorium under Section 33(5) of the IBC, which was to apply only in respect of fresh suits would also apply to pending suits. This cannot be the intention of the legislature. Therefore, I do not find any merit in the submission of the Liquidator that the present suit cannot proceed in view of Sections 63 or 231 of the IBC."

23. Considering the principles enunciated in the above judgment, I am of the view that there is no embargo on liquidator defending the Suit under Section 33(5) of the IBC. More importantly, Section 33(5) does not apply to pending Suits. In the present case, the Suit has been instituted well before liquidation of Respondent No.1. Thus, bar under Section 63 of the IBC is not attracted to the present Suit, which is filed for recovery of unpaid salary, which issue cannot be adjudicated by NCLT or NCLAT.

24. Respondents have relied on provisions of Sections 38 to 42 of the IBC in support of the contention that there is complete mechanism for adjudication of claims before Liquidator and that therefore separate Suits would not be maintainable. I am unable to agree. It would only be an option open to a Claimant to raise a claim before the Liquidator which can be adjudicated under Sections 38 to 40 of IBC. However, in a case where Plaintiff has already instituted the Suit, it cannot be contended that provisions of Sections 38 to 42 would have the effect of rendering the Suit not maintainable upon liquidation of Defendant therein.

25. So far as reliance of Respondent on Section 53 of the IBC is concerned, the same deals with distribution of assets and provides thus:

53. Distribution of assets.—

(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely:—

- (a) the insolvency resolution process costs and the liquidation costs paid in full;
- (b) the following debts which shall rank equally between and among the following:—

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:—

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.—For the purpose of this section—

(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) the term “workmen's dues” shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 (18 of 2013).

26. Thus, what is provided under Section 53 is only the priority of debts. Respondent No.2 is not right in contending that workmen's dues only for the period of 24 months can be paid from assets by the

Liquidator. It is just that the said dues of the workmen for a period of 24 months have priority over other debts. Therefore, provisions of Section 53(1)(b)(i) cannot be read to mean that the wages beyond 24 months get obliterated. Also, the said provision does not mean an embargo on jurisdiction of Civil Court in adjudicating claims towards unpaid salary in excess of period of 24 months.

27. Considering the overall conspectus of the case, I am of the view that the learned Trial Judge has erred in rejecting the Chamber Summons for impleadment of the Liquidator. It has erred in holding that it has no jurisdiction to try the Suit or that Plaintiff must appear before the Liquidator to seek his claim. Impugned order dated 17 October 2022 is thus indefensible and liable to be set aside.

28. The Petition accordingly succeeds, and I proceed to pass the following order:

- i) The impugned order dated 17 October 2022 passed by the City Civil Court in Chamber Summons No.1769 of 2019 filed in Summary Suit No.1398 of 2017 is set aside.
- ii) Chamber Summons No.1769 of 2019 is made absolute in terms of the prayers made therein. Necessary amendments in the Plaintiff be carried out within a period of four weeks.

29. With the above directions, the Writ Petition is **allowed and disposed of**. There shall be no orders as to costs.

SUDARSHAN
RAJALINGAM
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(SANDEEP V. MARNE, J.)

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