

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH

Company Appeal (AT) (CH) (Ins.) No. 50 of 2021

[Arising out of Order dated July 20, 2020, passed by the Adjudicating Authority/National Company Law Tribunal, Chennai Bench, Chennai in MA No.1433 of 2019 in CP/941/IB/2018]

IN THE MATTER OF:

**Regional Provident Commissioner
Employees Provident Fund Organisation
Regional Office: 100 Ft. Dargah Road,
Kazipet, Warangal, Telengana – 506 004**

...Appellant

Versus

- 1. Vandana Garg
(Resolution Professional of
M/s GVR Savarkar Marg
Shivaji Park, Dadar, Mumbai – 400028** **...Respondent No.1**

- 2. UV Asset Reconstruction Company Limited
(Resolution Applicant)
704, 7th Floor, Deepali Building
93, Nehru Place, New Delhi – 110019** **...Respondent No.2**

Present:

For Appellant : Mr Manish Dhir, Advocate

**For Respondent : Mr Rajeev K. Panday, Advocate for R-1
Mr A R L Sundaresan, Sr. Advocate for R-2
Mr Alwin Godwin, Advocate for R-2**

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This Appeal emanates from the Order dated July 20, 2020, passed by the National Company Law Tribunal, Chennai Bench, Chennai in MA No.1433 of 2019 in CP/941/IB/2018, whereby the Adjudicating

Authority/NCLT approved the Resolution Plan, which waves off a major portion of the Provident Fund dues owed by the Corporate Debtor. The original parties status in the Company Petition represents them in this Appeal for the sake of convenience.

Brief facts:

2. The Corporate Debtor M/s GVR Infra Projects Limited had defaulted in payment of dues/damages/interest, including employees share of contributions, since April 2014, which were deducted from their wages. The total EPF dues up to the date are to the tune of ₹ 2,84,69,797/-.

3. The Adjudicating Authority had vide its Order dated October 15, 2018, initiated CIR Process against the Corporate Debtor 'GVR Infra Projects Limited'. Under the same, the Interim Resolution Professional (in short, 'IRP') issued a public announcement inviting claims pending against the Corporate Debtor. The Interim Resolution Professional was subsequently replaced by Respondent No.1, appointed as the Resolution Professional (in short, 'RP').

4. The Appellant submitted its claims in Form 'F', as suggested by the IRP vide his letter dated December 31, 2018. The claim Form 'F' was forwarded to the Resolution Professional on January 7, 2019. The RP, vide an email dated May 10, 2019, asked the Appellant to submit its claim and the supporting documents in Form 'B' again. In response to that, the Appellant submitted the claim in Form 'B', under protest to Respondent

No.1/ RP, along with all supporting documents vide its letter dated May 22, 2019.

5. After that, Respondent No. 1/RP vide letter dated January 22, 2020, has informed that the claim in form 'B' for the period from April 2014 to October 2017 amounting to ₹ 1,95,01,301/- is admitted to be paid when the prospective bidder takes over M/S GVR Infra Projects Limited. The RP further communicated that the PF dues from May 2017 to April 2019 of the Corporate Debtor had been admitted. As per the dues settlement, as forwarded by the Resolution Professional, the Corporate Debtor had to remit the total of ₹ 75,14,594/- from November 2017 to April 2019. However, out of these dues of ₹ 75,14,594/-, only dues amounting to ₹ 9,48,183/- was admitted.

6. The Appellant, vide its letter dated August 13, 2020, sought clarification from the RP regarding the amount payable to the Appellant. Then the RP responded that the claim already admitted would be settled as per the Resolution Plan.

7. The Appellant contends that waving off the Provident Fund dues is not only the violation of Section 11 of the Employees Provident Fund Act (EPF Act), which lays down the priority of charge of Provident Fund dues but also a violation of Section 36 (4) (a) (iii) and Section 30 (2) (e) of The Insolvency and Bankruptcy Code 2016 which lays down that the Provident Fund dues are outside Liquidation Estate.

Respondent's contention

8. The Corporate Insolvency Resolution Process against the Corporate Debtor 'GVR Infra Projects Limited' was initiated by the Adjudicating Authority vide Order dated October 15 2018. After that, IRP/RP was appointed. During the CIRP under the public announcement, the Appellant submitted the claim in Form 'B' for an amount of ₹ 1,95,01,301/-about the outstanding Provident Fund dues to Respondent No. 1, which Respondent No.1/RP admitted in total.

9. Respondent No. 2 submitted a Resolution Plan to the Committee of Creditors' (in short, CoC). The Appellant's claim amounting to ₹1,95,01,301/- has been dealt with in the Resolution Plan in conformity with Section 30 (2) of the I & B Code 2016.

10. The CoC approved the said Resolution Plan for the Corporate Debtor on November 27, 2019.After that, Respondent No. 1 filed an Application being MA/1433/2019 on December 5, 2019, before the Adjudicating Authority under Section 30 (6) of I&B Code read with Regulation 39 (4) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016 seeking approval of the same. The Adjudicating Authority approved the Resolution Plan vide its Order dated July 20, 2020, a Monitoring Committee was also constituted, and Respondent No. 1/RP has been appointed as the Monitoring Agent.

11. The Resolution Plan subsumes all the Financial Creditors, Operational Creditors, and any pending statutory dues per the payout plan under the

Resolution Plan. The Resolution Plan also subsumes all the dues of the Appellant as well, and the total claim amount of ₹ 1,95,01,301/-, as filed in Form 'B', was admitted and considered under the Resolution Plan.

12. Despite filing a claim of ₹ 1,95,01,301/-, in the present Appeal, the Appellant raises a claim of ₹ 2,84,69,797/-, i.e. much higher than the amount claimed by the Appellant in its claim before the Resolution Professional. There is no basis on which the Appellant has raised the additional claim, despite having full knowledge of the CIRP and having calculated its dues, which were admitted, cannot now enhance the same and seek more. The debts of the Corporate Debtor stood crystallised as on the date of initiation of CIRP.

13. Furthermore, there is no occasion for referring to the provisions of Section 36 (4) (a) (ii) of the Insolvency and Bankruptcy Code 2016 in the present matter since it would only arise upon the formation of the Liquidation Estate by the Liquidator in terms of the Code. The Corporate Debtor has not gone into Liquidation in the present matter and is currently under a Resolution Plan.

14. Furthermore, no separate corpus was maintained for the Provident Fund by the Corporate Debtor in the present case. Therefore, in the absence of any such funds of any recurring cash flows with the Corporate Debtor, Respondent No. 1/RP is not in a position to now make provision for the payment of Provident Fund dues. Therefore, no fund could be excluded from the Liquidation Estate in terms of Section 36 (4) (a) (iii) of the I&B Code to be

paid to the Appellant, even in Liquidation of the Corporate Debtor. However, in the present matter, the Corporate Debtor is currently under a Resolution Plan. Therefore, the said provisions are not applicable in the present case.

Respondent No. 2's Contention

15. The Appellant submitted the claim about its outstanding Provident Fund dues about the Corporate Debtor 'GVR Infra Projects Limited', in Form 'B', amounting to ₹1,95,01,301/-. The claim of the Appellant admitted by Respondent No. 1/RP had been considered while formulating the Resolution Plan of the Corporate Debtor. The Adjudicating Authority/NCLT further approved the said Resolution Plan vide its Order dated July 20, 2020, in conformity with Section 30 (2) of the I&B Code, 2016 and the Rules and Regulations framed thereunder. The Appellant has not provided any reason or justification for raising the claim of ₹ 2,84,69,797/-, which is much higher than the amount claimed by the Appellant in Form 'B'. In terms of Section 31 of the Code, the approved Resolution Plan is binding on the Corporate Debtor, Stakeholders, including the statutory authorities, to whom the Corporate Debtor owes any debt. No preferential treatment can be given to the creditor who has submitted a claim with the Resolution Professional. Accordingly, the Adjudicating Authority has approved the claim submitted by the Appellant, having been accorded suitable treatment in the approved Resolution Plan in terms of Section 31 of the Code. Every Stakeholder, including the present Appellant, is bound by such treatment of its claim in the approved Resolution Plan.

16. We have heard the arguments of the Learned Counsel for the parties and perused the record.

Discussions and findings

17. The Appellant challenges the approved Resolution Plan because the Adjudicating Authority has failed to consider and appreciate the legislative intent behind the exclusion of Provident Fund dues from the Liquidation Estate of the Corporate Debtor. The Adjudicating Authority has failed to consider that Provident Fund dues ought to be given priority over all other dues owed by the Corporate Debtor in view of the express provision of Section 36 of the Insolvency and Bankruptcy Code 2016 and Section 11 of the Employees Provident Fund and Miscellaneous Provision Act 1952 (in short "EPF Act"). The Appellant further contends that the Adjudicating Authority vide the impugned Order upheld a Resolution Plan which waves off the major portion of the Provident Fund dues owed by the Corporate Debtor.

18. Admittedly the Corporate Debtor "GVR Infra Projects Limited" has defaulted in payment of dues/damages/interest, including the employees share of contribution, since 2014, which were deducted from employees' wages. The Appellant now claims overall dues towards the Provident Fund to the tune of ₹ 2,84,69,747/-. In contrast, Appellant's Provident Fund claim amounting to ₹ 1,95,01,301/- had already been admitted and dealt with in the Resolution Plan.

19. The CIR Process started against the Corporate Debtor on October 15, 2018. The Appellant submitted its claim in form 'F' on December 31, 2018. After that, the RP suggested the Appellant for filing its claim in Form 'B'. In response to that, the Appellant submitted its claim in form "B". Thereafter, the Resolution Professional informed the Appellant about approval of the Resolution Plan by the Adjudicating Authority.

20. The Appellants claim that Section 11 of the EPF Act contains a non-obstante clause and lays down that if any amount is due from an employer, whether in respect of employees contribution deducted from the wages of employees or the employer's contribution, the same shall be deemed to be the 1st charge on the assets of the establishment and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts, gives a statutory priority to the amount payable to the employees over other debts.

21. The Appellant further claims that the legislature has inserted an exclusion in the IBC regarding the Provident Fund from the liquidation estate of the Corporate Debtor. Thereby making the intention clear that the Provident Fund dues cannot be equated with other debts and liabilities of the Company, as the amount relating to the same does not form part of the assets or estate of the Corporate Debtor. At best, the said amount can be seen to be that of workmen, lying with the Corporate Debtor.

22. The Appellant contends that the approved Resolution Plan fails to comply with the above-stated provisions and is therefore in contravention of

EPF Act and the I&B Code, is accordingly barred under Section 30 (2) Insolvency and Bankruptcy Code 2016.

23. The Resolution Professional contends that the Appellant, despite filing the claim of ₹ 1,95,01,301/-, is now raising a claim of ₹ 2,84,69, 797/-. There is no basis to raise the additional claim in the matter, and the Appellant having full knowledge of the CIRP and having calculated its due, which was admitted, cannot now enhance the same and seek more and has now estopped from doing so.

24. The RP submits that debts of the Corporate Debtor stood crystallised as on the date of initiation of CIRP. Further, it is established law by the Hon'ble Supreme Court that all claims which have not been submitted to or dealt with by the Resolution Professional stood extinguished.

25. The RP further contends that there is no occasion for referring to the provisions of Section 36 (4) (a) (iii) of the I&B Code in the present matter since it would only arise upon the formation of the Liquidation Estate by the Liquidator in terms of the I&B Code. In the facts of the present case, it is a matter of record that the Corporate Debtor has not gone into Liquidation and is currently under Insolvency Resolution. Moreover, there is no fund that could be excluded from the Liquidation Estate in terms of Section 36 (4) (a) (iii) of the I&B Code to be paid to the Appellant. Since no separate corpus was created for the Provident Fund, the said provisions are not applicable in the present case.

26. It is necessary to mention that the Hon'ble Supreme Court in the case of "The Committee of Creditors of Essar Steel India Ltd versus Satish Kumar Gupta has held;

"A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a Hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the corporate debtor".

27. Further, it is necessary to mention that the question of applicability of Section 36 (4) (a) (iii) of the Insolvency and Bankruptcy Code 2016 arises at the stage of the formation of Liquidation Estate by the Liquidator. Since the Corporate Debtor has not gone into Liquidation and is currently under Insolvency Resolution, Section 36 of the I&B Code cannot be applied. Moreover, no fund could be excluded from the Liquidation Estate in terms of Section 36 (4) (a)(iii) of the I & B Code 2016.

28. It is pertinent to mention that this Appellate Tribunal while dealing with the same issue in Company Appeal (AT) (insolvency) No 1229 of 2019 in the matter of Mr Savan Godiwala, Liquidator of Lanco Infratech Ltd v Apalla Siva Kumar held;

"Thus it is the settled position of law that the provident fund, the pension fund and the gratuity fund, do not come within the purview of 'liquidation estate' for the purpose of distribution of assets under Section 53 of the Code. Based on this, the only inference which can be drawn is that Pension Fund, Gratuity Fund and Provident Fund can't be utilised,

attached or distributed by the Liquidator, to satisfy the claim of other creditors.

Sec 36(2) of the I B Code 2016 provides that the Liquidator shall hold the Liquidation Estate in fiduciary for the benefit of all the Creditors. The Liquidator has no domain to deal with any other property of the corporate debtor, which is not the part of the Liquidation Estate. In a case, where no fund is created by a company, in violation of the Statutory provision of the Sec 4 of the Payment of Gratuity Act, 1972, then in that situation also, the Liquidator cannot be directed to make the payment of gratuity to the employees because the Liquidator has no domain to deal with the properties of the Corporate Debtor, which are not part of the liquidation estate.

On perusal of the statutory provision of Section 5 of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952. It is apparent that the establishment, to which the said Scheme of Employees' Provident Fund applies, has to create a fund in accordance with the provision of the Act and the Scheme. Section 5(1-a) provides that the Fund shall vest in, and be administered by the Central Board constituted under Section 5(a). Section 4 of the Payment Gratuity Act, 1972 provides that Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years

- (a) On his superannuation,*
- (b) On his retirement or resignation,*
- (c) On his death or disablement due to accident or disease.*

In this case, we are not concerned with determination about the entitlement of Gratuity by the employees of the 'Corporate Debtor '. Payment of Gratuity to employees depends on their

entitlement of Gratuity, subject to the fulfilment of the conditions laid down under the payment of Gratuity Act, 1972 and also on the availability of the fund in this regard.

Based on the judgment of this Appellate Tribunal in case of the State Bank of India Vs. Moser Baer Karamchari Union and Another, 2019 SCC Online NCLAT 447, it is clear that in terms of sub-Section (4)(a)(iii) of Section 36 all sums due to any workman or employees from the Provident Fund, Pension Fund and the Gratuity Fund, do not form part of the liquidation estate/liquidation assets of the 'Corporate Debtor'. Therefore, the question of distribution of Provident Fund or the Pension Fund or the Gratuity Fund in order to priority, and within such period as prescribed under Section 53(1), does not arise. It is further held in the above case that 53(1)(b)(i) of the I&B Code, regarding distribution of assets, relating to workmen's dues is confined to a period of 24 months, preceding the liquidation commencement date. This question has already been decided that Gratuity Fund does not form the part of the liquidation asset. Therefore, the question of distribution of the Gratuity Fund in Order of priority, provided under Section 53(1) of the Code does not arise. However, the Adjudicating Authority has given direction to the Liquidator that, –the Liquidator cannot avoid the liability to pay Gratuity to the employees, on the ground, that 'Corporate Debtor' did not maintain separate funds, even if, there is no fund maintained, the Liquidator has to provide sufficient provision for payment of Gratuity to the Applicants according to their eligibility."

29. The ratio of the above case applies to the facts of the present case. It is further necessary to mention that since the Corporate Debtor was under

severe financial distress, CIRP was initiated, culminating in the Resolution Plan.

30. In this regard, the proviso to Section 14B of the EPF Act is relevant. The said provision provides that the Central Board constituted under the EPF Act may reduce or waive the damages levied under the said section about an established sick industrial company. The Board has sanctioned a Scheme of Rehabilitation for Industrial and Financial Reconstruction. Section 14 B of EPF Act reads as under;

1[14-B. Power to recover damages.—

Where an employer makes default in the payment of any contribution to the Fund 2, the [Pension]3 Fund or the Insurance Fund] or in the transfer of accumulations required to be transferred by him under sub-section (2) of Section 15 [or sub-section (5) of Section 17]4 or in the payment of any charges payable under any other provision of this Act or of [any Scheme or Insurance Scheme]5 or under any of the conditions specified under Section 17, 6[the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf] may recover 7[from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:]

8[Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:]

9[Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company

and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under Section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme.]]"

31. It is thus clear that before coming into force of the Insolvency and Bankruptcy Code 2016 while sanctioning a scheme for rehabilitation of a sick company under Section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 Central Board constituted under the EPF Act was authorised under Section 14B of the Act to reduce or waive off the damages levied about an establishment which is a sick industrial company.

32. In the instant case, the Appellant, despite filing a claim of ₹1,95,01,301/- has raised a claim of ₹ 2,84,69,797/-, i.e. much higher than the amount claimed by the Appellant in its claim before the Resolution Professional. The Appellant's claim admitted by Respondent No. 1/RP had been considered while formulating the Resolution Plan of the Corporate Debtor. The said Resolution Plan was further approved by the Adjudicating Authority/NCLT vide its Order dated July 20 2020, in conformity with Section 30 (2) of the I&B Code, 2016 and the Rules and Regulations framed thereunder. The Appellant has not provided any reason or justification for raising the enhanced claim of ₹ 2,84,69,797/-, which is much higher than the amount claimed.

33. Hon'ble the Supreme Court of India in 2021 SCC OnLine SC 313 in Civil Appeal No 1554 of 2021 in case of Ghanashyam Mishra and Sons Private Limited v Edelweiss Asset Reconstruction Company Limited has held;

"86. As discussed hereinabove, one of the principal objects of I&B Code is, providing for revival of the Corporate Debtor and to make it a going concern. I&B Code is a complete Code in itself. Upon admission of petition under Section 7, there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure, that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the Corporate Debtor is revived and is made an on-going concern. After CoC approves the plan, the Adjudicating Authority is required to arrive at a subjective satisfaction, that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 of the I&B Code. Only thereafter, the Adjudicating Authority can grant its approval to the plan. It is at this stage, that the plan becomes binding on Corporate Debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution Plan. The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise

claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans, would go haywire and the plan would be unworkable.

87. We have no hesitation to say, that the word "other stakeholders" would squarely cover the Central Government, any State Government or any local authorities. The legislature, noticing that on account of obvious omission, certain tax authorities were not abiding by the mandate of I&B Code and continuing with the proceedings, has brought out the 2019 amendment so as to cure the said mischief. We therefore hold, that the 2019 amendment is declaratory and clarificatory in nature and therefore retrospective in operation.

CONCLUSION

95. *In the result, we answer the questions framed by us as under:*

(i) That once a resolution plan is duly approved by the Adjudicating Authority under subsection (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

(ii) 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be

effective from the date on which I&B Code has come into effect;

(iii) Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under Section 31 could be continued."

(Emphasis supplied)

34. Based on the above the law laid down by Hon'ble Supreme Court, it is clear that after approval of the Resolution Plan under Section 31, the claims as provided in the Resolution Plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors including the Central Government, any State Government or any Local Authority, Guarantors and other Stakeholders. On the approval of the Resolution Plan by the Adjudicating Authority, all such claims that are not a part of the Resolution Plan shall stand extinguished. No person will be entitled to initiate continuing any proceedings regarding a claim that is not part of the Resolution Plan. The Appellants claim about Provident Fund dues amounting to ₹1,95,01,301/-, which was earlier raised at the time of initiation of CIRP and was later admitted, stood frozen and will be binding on all the Stakeholders, including the Central Government. After approval of the Resolution Plan by the Adjudicating Authority, all such claims that are not part of the Resolution Plan shall stand extinguished. No person is

entitled to initiate or continue any proceeding regarding a claim that is not part of the Resolution Plan.

35. In the circumstances as stated above, we believe that the Appeal sans merit and deserve to be dismissed.

ORDER

The Appeal is dismissed – no order as to costs.

[Justice Venugopal M.]
Member (Judicial)

[V. P. Singh]
Member (Technical)

NEW DELHI
12 May, 2021

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