

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal(AT) (Insolvency) No. 857 of 2019

IN THE MATTER OF:

Employees of Indus Fila

...Appellant

Vs

SPG Macrocosm Ltd. and Ors.

....Respondents

Present:

For Appellant: Mr. L. Murlidhar Peshwa, Mr. Sabrish Subramanian, Mr. Y. William Vinoth Kumar, Mr. Ragnatha Sethupathy and Mr. Vishnu Unikrishnan, Advocates

For Respondents: Ms. Vanika Gupta, Advocate for Respondent No. 1.

Ms. Madhooja Mulay, Advocate for Respondent No. 2.

ORDER

15.11.2019 Heard Advocate Mr. Murlidhar Peshwa along with Advocate Mr. Sabarish Subramanian for the Appellant, Advocate Ms. Madhooja Mulay for Respondent No. 2 – Resolution Profession and Advocate Ms. Vanika Gupta for Respondent No. 1- successful Resolution Applicant.

2. This appeal has been filed by the Appellants claiming to be workers of the Corporate Debtor – Indus Fila Ltd against the impugned order dated 10.05.2019 passed by the Adjudicating Authority (National Company Law Tribunal) Bengaluru Bench, Bengaluru in IA. No. 54 of 2019 in CP(IB) No. 136/BB/2017 whereby it is claimed that the Tribunal dismissed the Application of the Appellants and approved Resolution Plan. The Appellants claim that I.A. No. 54 of 2019 was filed claiming that they should be made party to the Company Petition and given opportunity to be heard with regard to the proposal of

Resolution Plan and for directing supply of copies of the petition. The Appellants claimed before the Adjudicating Authority that they are workers of the Corporate Debtor who have been rendering their services and the request was made on behalf of the Workers and Employees. The Appellants claimed that Corporate Debtor had failed to make payment of wages of the workmen. Reference was made to lock out of employees/workers and taking up of the issues in the Industrial Tribunal. The Appellants claim that claims were made before the Resolution Professional. The Appellants put up a claim that Rs. 17 lakhs towards dues of 138 workmen was insufficient; the orders passed under payment of Wages Act were required to be considered; Provident Fund of employees, Gratuity have not been remitted to them since 2011-2013 and that the same should be considered with the Resolution Plan. They also sought assurance regarding continuance of employees in the Resolution Plan and also sought representation in the monitoring agency.

3. The Adjudicating Authority heard both the sides and observed in paragraph-4 of the impugned order as follows:

...

“4. After hearing the learned Counsel for Applicant, the bench has directed the Resolution Professional to reconsider the grievance of the workers with regard to the provident fund, Pension fund, gratuity fund etc. Accordingly, the Authorised representative of workers and employees submitted that detailed calculations of the claims pertaining to Bonus, Gratuity, Employees Provident Fund and Wages including

bifurcation of the amount due pertaining to the 24 months prior to the Insolvency Commencement dated 19th March, 2019 with regard to the 138 workmen and none out of the 5 employees.”

It was even held by the Adjudicating Authority in paragraphs 6 & 7 as under:

..

“6. Therefore, I am satisfied that the grievances of the applicants were duly considered by the Resolution professional and COC, in accordance with law. As per provision of Code, CIRP would be conducted by IRP/RP with COC at the helm of affairs of Corporate Debtor, subject to overall superintending powers to be exercised by Adjudicating Authorities. All the decisions of COC would be taken as per law and those decisions would be binding on Corporate Debtors, employee, all stake holders etc. as per Section 31(1) of the Code. It is settled position of law that even the Adjudicating Authority will have power only to direct COC to reconsider the grievance of other parties, who are not part of COC, if it finds that those grievances are required to be re-considered again. Basically all issues/claims arise out of CIRP would be decided basing on liquidation value of Assets and Liabilities of Corporate Debtor. Since the COC has already reconsidered the claims of the applicant vide CoC Meeting dated 15th April, 2019, I

cannot entertain the instant application and it is not maintainable and thus it is liable to be disposed of.

7. In the result, I.A. No. 54 of 2019 in C.P.(IB) No. 136/BB/2017 is hereby disposed of with an observation that Resolution Applicant would sympathetically consider the remaining grievances of Applicant, in accordance with law, while resolution plan is under implementation. No Order as to costs.'

..

4. Learned Counsel for the parties stated that on 10.05.2019, in addition to the present order which is impugned, there was yet another separate order passed by the Adjudicating Authority in CP(IB) No. 136/BB/2017 and I.A. No. 40 of 2019 whereby the Resolution Plan submitted by Respondent No. 1 was approved.

5. Learned Counsel for Respondent No. 2- Resolution Professional submits that Resolution Plan was approved by a separate order at the time of implementation of Resolution Plan. It is further stated that subsequently due to the developments, the Resolution Professional has already filed an application under Sections 60(5), 43(3) and other provisions of Insolvency and Bankruptcy Code, 2016 (in short '**IBC**') and sought liquidation order as provided under Section 43(3) of IBC which application is pending before the Adjudicating Authority.

6. Learned Counsel for the Appellants is relying on judgment in the matter of **State Bank of India Vs. Moser Baer Karamchari Union & Anr.**- Company Appeal(AT)(Insolvency) No. 396 of 2019 dated 19th August, 2019 wherein in paragraphs 23 to 25, this Tribunal has held as under:-

...

“23. This apart, as the provisions of the ‘I&B Code’ have overriding effect in case of consistency (sic-inconsistency) in any other law for the time being enforced, we hold that Section 53(1) (b) read with Section 36(4) will have overriding effect on Section 326(1) (a), including the Explanation (iv) mentioned below Section 326 of the Companies Act, 2013.

24. Once the liquidation estate/ assets of the ‘Corporate Debtor’ under Section 36(1) read with Section 36 (3), do not include all sum due to any workman and employees from the provident fund, the pension fund and the gratuity fund, for the purpose of distribution of assets under Section 53, the provident fund, the pension fund and the gratuity fund cannot be included.

25. The Adjudicating Authority having come to such finding that the aforesaid funds i.e., the provident fund, the pension fund and the gratuity fund do not come within the meaning of ‘liquidation estate’ for the purpose of distribution of assets under Section 53, we find no ground to interfere with the impugned order dated 19th March, 2019.”

7. Section 36 of IBC deals with liquidation estate assets. While dealing with the subject as to what shall comprise in liquidation estate, Section 36 subsection 4 points out as what is not to be included. Section 36(4) reads as follows:

..

“36. Liquidation Estate

...

(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:—

(a) assets owned by a third party which are in possession of the corporate debtor, including—

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.”

It is clear amounts of provident fund, pension fund and gratuity funds belong to employees and cannot for part of liquidation asset.

8. The present impugned order is partly in the nature of giving direction to the Resolution Professional and Resolution Applicant to consider the aspects as pointed out by the Adjudicating Authority in the impugned order and which observations have been referred above. The order approving the Resolution Plan is not in challenge before us. What was finally included or not included cannot be looked into in the present appeal.

9. Request was made by learned Counsel for the Appellant if in the Resolution Plan there could be assurance of continuation of service but nothing is shown what provides for this.

10. Considering further developments which have taken place, including that application for resorting to liquidation has already been filed, it would not be

proper for us to pass any specific order in this appeal. We have already pointed out aspects as mentioned above which have been dealt with in ***State Bank of India Vs. Moser Baer Karamchari Union & Anr..***

11. When Resolution Plan is already approved, Appellants may raise issues if Resolution Plan does not take care of dues of Employees/workers for which we give liberty. It may be subject to limitation for Appellant. But then any other employee also can raise issue if Resolution Plan is not as per law.

Appellants are given further liberty to raise issues with liquidator, in case Liquidation Order gets passed.

Appeal is disposed with observations as above.

[Justice A.I.S. Cheema]
Member (Judicial)

(Kanthi Narahari)
Member(Technical)

Akc/Md