

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 262 of 2022

IN THE MATTER OF:

**1. Assam Tea Employees Provident Fund
Organization, through an Authorized
Representative**

Address:- Nidhi Bhawan, Basistha Lalmati,
N.H. – 37, Guwahati - 781029

...Appellant

Versus

1. Mr. Madhur Agarwal,

IBB Reg No. IBBI/IPA-001/IP-001/IP-
P00653/2017-2018/11127

Resolution Professional of Hail Tea Limited

Flat No. 24, BA, Alipore Road, Kolkata – 700027

...Respondent No. 1

2. HAIL Tea Limited,

Through its Director,

1st Floor, Room No. 11, Shantineketan Building,

8 Camac Street, Kolkata - 700017

...Respondent No. 2

For Appellant: Mr. Karan Mehra, Advocate.

For Respondent: Mr. Dhruv Surana, Mr. Madhav Bhatia, Mr. Aditya
Pandey, Advocate for R-1

Mr. Mohit Yadav, Mr. R.Pratap Singh, Advocates for R-2

J U D G E M E N T

Ashok Bhushan, J:

1. This Appeal has been filed challenging the Judgement/Order dated 03rd January, 2022 passed by the National Company Law Tribunal, Kolkata Bench, Kolkata (hereinafter referred to as “**The Adjudicating Authority**”) in I.A. No. 290/KB/2021 in C.P. (IB) No. 1911/KB/2019.

2. Brief facts of the case for deciding this Appeal are:-

- The Adjudicating Authority vide Order dated 21st January, 2020 initiated “Corporate Insolvency Resolution Process” (hereinafter referred to as “**CIRP**”) against the Corporate Debtor-HAIL Tea Limited.
 - In pursuance of the Public Announcement, the Appellant-Organization submitted its claim in Form-B for an amount of Rs. 2,10,13,797.92/- on account of default on part of the Corporate Debtor to deposit its Provident Fund Contribution, Provident Fund Administrative Cost, Interest for delay in deposit of the Provident Fund Dues, Interest for delay in deposit of Deposit Linked Insurance Dues and Provident Fund Contribution due and payment for the period commencing from 28th March, 2019 till 26th September, 2019.
 - The Resolution Professional admitted the entire claim of the Appellant-Organization of Rs. 2,10,13,797.92/-. Resolution Plan came to be submitted by the Respondent No. 2. Resolution Plan came to be approved by National Company Law Tribunal, Kolkata Bench vide Order dated 3rd January, 2022. In the Resolution Plan, the Appellant was proposed an amount of only Rs. 1,07,21,592/-. The Resolution professional shared a copy of the Judgement dated 03rd January, 2022 and made part payment of Rs. 64,30,222/-. Being aggrieved by the said Order, the Appellant-Organization has come up in this Appeal.
- 3.** Learned Counsel for the Appellant-Mr. Karan Mehra challenging the Impugned Order submits that Provident Fund Dues were entitled to be paid in full. The Resolution Professional having admitted the amount of Rs. 2,10,13,797.92/-, was required to be paid in full. He further submits that non-payment of the full amount is violation of provision of Section 30(2)(e).

Learned Counsel for the Appellant has referred to Section 11(2) of EPF Act, 1952. It is submitted that Provident Fund Dues are not dues of any other Operational Creditor.

4. Learned Counsel for the Respondents opposed the Appeal. It is submitted that the Appeal is barred by time it having been filed on 28th February, 2022 challenging the Order dated 3rd January, 2022, ought to be rejected since limitation for filing an Appeal is only for 30 days. It is further submitted that approval of the Resolution Plan is in the domain of the commercial wisdom of the Committee of Creditors. Haircut has been given to all the Financial Creditor(s) and Operational Creditor(s).

5. We have considered the submissions of Learned Counsel for the parties and have perused the record.

6. There is no dispute between the parties regarding the amount of claim admitted by the Resolution Professional as was submitted by the Learned Counsel for the Appellant-Organization. Paragraph 8 of the Judgement gives particulars of dues amount and the amount proposed. In the PF dues, amount mentioned in paragraph 8 of the Judgement is Rs. 2,10,13,798/- whereas total payment proposed in the plan is Rs. 1,07,21,592. The question which has arisen in this Appeal is fully covered by a recent Judgement of this Tribunal delivered on 21st October, 2022 in Company Appeal (AT) Ins. No. 643 of 2021 with other connected Appeals in the matter of **“Association of Aggrieved Workmen of Jet airways (India) Limited VS Jet Airways India Limited & Ors”**. One of the Appeals which has been decided on 21st October, 2022 along with Appeals is Judgement of this Tribunal in Company Appeal (AT) Ins. No. 987 of 2022 in the matter of

“Regional P.F. Commissioner Vs Ashish Chhawchharia, Resolution Professional for Jet Airways (India) Ltd. & Anr.”.

7. In the Company Appeal (AT) Ins. No. 987/2022 filed by the Regional P.F. Commissioner, the Claim of the Appellant-Regional P.F. Commissioner was for the Provident Fund dues and was not accepted in the Resolution Plan. Claim was filed by the Provident Fund Commissioner for Rs.24,40,65,594/-whereas the plan treating the Appellant as Operational Creditor held that Appellant is not entitled for any amount in view of the liquidation value of the Operational Creditor being Nil. One of the questions which was framed is Question No. XI in the above judgement, which is to the following effect:

“XI. Whether the claim of Regional Provident Fund Commissioner verified to the extent of Rs.24,40,65,594/- arising out of an order dated 17.10.2018 passed under Section 14B of Employees' Provident Funds & Miscellaneous Provisions Act 1952 can be treated as secured debt and the Appellant was entitled to receive the amount as secured creditors?”

8. The answer to the Question No. XI is in paragraphs 117, 118 and 119 of Judgement dated 21st October, 2022, which is to the following effect:

“QUESTION - XI

117. In the appeal filed by the Regional Provident Fund Commissioner, it has been pleaded that the claim was filed by the Appellant for an amount of Rs.24,40,65,594/- towards damages under Section 14B of Employees' Provident Funds & Miscellaneous Provisions Act 1952, as per the order dated 17.10.2018. It is further mentioned that interest

under Section 7Q was also levied of Rs.12,85,92,763/-, which amount was paid by the establishment. The amount which was claimed by the Appellant was fully admitted by the Resolution Professional. List of Creditors mentions the admitted amount of the Appellant. The Appellant has filed his claim in Form B, which Form B is at page 102 to 104 of the Appeal. The Appellant's claim was not in the nature of workmen dues. The claim was also with regard to damages imposed under Section 14B of the 1952 Act. The Appellant was treated as Operational Creditor by the Resolution Professional, hence, the Appellant was allocated a fixed amount of Rs.15,000/- which was allocated to all Operational Creditors except the workmen.

118. Challenge to the Resolution Plan by the Appellant is on the ground that Section 11 of the 1952 Act requires priority over all other dues and further Section 36(4)(a)(iii) excludes provident fund dues from the liquidation estate of the Corporate Debtor. We have already dealt with provisions of Section 36(4)(a)(iii) in foregoing paras of this judgment. Now, we, need to look into Section 11 of 1952 Act. The Section 11 of the 1952 Act provides for priority of payment of contributions over other debts. Learned counsel for the Appellant has relied on judgment of the Hon'ble Supreme Court in **"Maharashtra State Cooperative Bank Limited vs. Assistant Provident Fund Commissioner & Others, (2009) 10 SCC 123"**. The Hon'ble Supreme Court dealing with Section 11 of 1952 Act laid down following in Para 67:

“67. The expression "any amount due from an employer" appearing in sub-section (2) of Section 11 has to be interpreted keeping in view the object of the Act and other provisions contained therein including sub-section (1) of Section 11 and Sections 7A, 7Q, 14B and 15(2) which provide for determination of the dues payable by the employer, liability of the employer to pay interest in case the payment of the amount due is delayed and also pay damages, if there is default in making contribution to the Fund. If any amount payable by the employer becomes due and the same is not paid within the stipulated time, then the employer is required to pay interest in terms of the mandate of Section 7Q. Likewise, default on the employer's part to pay any contribution to the Fund can visit him with the consequence of levy of damages.”

119. The above judgment lays down that any amount due from employer appearing in sub-section (2) of Section 11 also covers the amount determined under Section 14B and there cannot be any quarrel to the proposition as laid down by the Hon'ble Supreme Court in the above case. The priority for payment of debt under Section 11 of the 1952 Act has to be looked into in view of the mechanism which is specifically provided under Section 53(1) of the Code. We have already dealt the provision of Section 36(4)(a)(iii) of the Code and held that provident fund dues are not subject to distribution under Section 53(1) of the Code. The issue is fully covered by three member bench judgment of this Tribunal in **“Tourism Finance Corporation of India Ltd. vs. Rainbow**

Papers Ltd. & Ors.” (Supra). In view of foregoing discussion, we hold that provident fund dues were entitled to be paid in full. In view of the judgment of Supreme Court in **“Maharashtra State Cooperative Bank Limited vs. Assistant Provident Fund Commissioner & Others”** (Supra), the claim of Appellant was to be satisfied in full, otherwise breach of provision of Section 30(2)(e) would have occurred. We, thus, are inclined to issue direction to the Successful Resolution Applicant to make payment of the admitted claim of the Appellant towards provident fund dues to save the plan from invalidity.”

9. The facts of the present case are fully covered by the Judgement in Appeal filed by the “Regional P.F. Commissioner” i.e. Company Appeal (AT) Ins. No. 987 of 2022 dated 21.10.2022. The above Appeal had been allowed and direction has been issued to Successful Resolution Applicant (SRA) to make the payment of Provident Funds dues in full.

10. The submissions of Learned Counsel for the Respondent that Appeal is barred by time, cannot be accepted. The Appeal has been filed on 28th February, 2022 against the Order dated 3rd January, 2022. The Judgement of the Hon’ble Supreme Court in **Suo Moto Writ Petition No. 03/2022** extended the period of limitation till 28th February, 2022 for all Appeals and has further granted 90 days’ time to file the Appeal. The present Appeal is fully covered by the Judgment of the Hon’ble Supreme Court in *Suo Moto Writ Petition No. 03 of 2022* extending the period of limitation as afore-noted. Thus objection of the Respondent regarding limitation cannot be accepted.

11. Submission of Learned Counsel for the Respondent that Appellant is an Operational Creditor and both Operational Creditor and Financial Creditor has taken haircut, also cannot be accepted. As held by this Tribunal in above case “**Regional P.F. Commissioner**” (*supra*), provident fund dues are not the assets of the Corporate Debtor and they have to be paid in full. Hence, the Appellant was clearly entitled for payment of full provident fund dues i.e. an amount of Rs. 2,10,13,798/-.

12. Ends of Justice will be served in issuing direction to Successful Resolution Applicant to make the payment of balance amount of Provident Fund to the Appellant to save the Resolution Plan from invalidity. We thus dispose of this Appeal by directing the Respondent to make payment of balance amount of Provident Fund i.e. Rs. 1,02,92,206/-.

The Appeal is allowed to the above extent.

**[Justice Ashok Bhushan]
Chairperson**

**[Mr. Barun Mitra]
Member (Technical)**

**NEW DELHI
02nd November, 2022**

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