IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT-IV

I.A. 4167 OF 2023
IN
C.P.(IB) No. 738/MB/2021

Under Section 60(5) of the Insolvency & Bankruptcy Code, 2016

Mr. Indrajit Mukherjee,

(Resolution Professional of First Flight Couriers)

…Applicant

Vs

Employees' Provident Fund Organisation & Ors,

…Respondents

In the matter of

Srinidhi Comprint Private Limited,

…Financial Creditor

Vs

First Flight Couriers Limited

…Corporate Debtor

Order Pronounced on: **11.01.2024**

Coram:

Ms. Anu Jagmohan Singh Hon'ble Member (Technical)	Mr. Kishore Vemulapalli Hon'ble Member (Judicial)

Appearances:

For the Applicant:	Ms. Suyesha Kakarla a/w Adv. Nancy Singh i/b Apex Law Partners, Ld. Counsel.
For the Respondents:	Mr. Gunjan Chaubey, Ld. Counsel.

ORDER

1. The present Application is filed by the Applicant, namely, Mr. Indrajit Mukherjee, under section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("Code") read with rule 11 of the National Company Law Tribunal Rules, 2016 ("NCLT Rules") on 29.08.2023 seeking directions to the Regional Provident Fund Commissioners and various banks (hereinafter referred to as "Respondents") to remove the lien and release the amount which is held in its custody during the Corporate Insolvency Resolution Process.

Submissions of the Applicant

2. The Applicant is the Resolution Professional of First Flight Couriers Limited (hereinafter referred to as "Corporate Debtor").

3. Company Petition No. 738 of 2021 was admitted vide order dated 03.10.2022 u/s 9 of the Code and the Corporate Insolvency Resolution

Process was commenced against the Corporate Debtor. Mr. Indrajit Mukherjee was appointed as the Interim Resolution Professional (IRP) and subsequently during the 1st COC meeting the Applicant was appointed as the Resolution Professional by the Committee of the Creditors.

4. The Applicant has submitted that he had published Form A on 04.10.2022 and informed about the commencement of CIRP of the Corporate Debtor to various banks in which the accounts of the Corporate Debtor were maintained and sought for the bank statements. The Applicant also requested the Punjab National Bank to convert the amount of Rs. 78,79,000/- into fixed deposit which was in the account of the Corporate Debtor but the same was refused by the Punjab National Bank on the ground that the said account was marked as lien by EPFO and Income tax Authorities.

5. The Applicant has submitted that he requested Punjab National Bank to provide details of the Government authorities under whose instructions the lien was created on the said bank account, wherein the Punjab National Bank provided with the order dated 22.09.2022 from EPFO stating that there were arrears amounting to Rs. 1,93,32,168/- which is due and payable by the Corporate Debtor.

6. The Applicant has submitted that he informed about the commencement of CIRP to Respondent no. 2 who is the Recovery Officer of EPFO, Lucknow vide letter dated 19.12.2022 and also invited claims from Respondent no.2. However, the Punjab National Bank refused to release the attachment of EPFO vide email dated 20.06.2023 stating that there was previous lien of EPFO marked on it and there were no directions on unfreezing of the said

account by this tribunal. Moreover, the Applicant explained the effect of moratorium under section 14 of the code vide email dated 27.07.2023 to EPFO, Delhi and Punjab National Bank, further attached the order of this tribunal dated 10.07.2023 in I.A. 962 OF 2022 IN C.P. No. 3703/MB/2019, having similar factual matrix, wherein the lien created on the said account of the Corporate Debtor by EPFO was quashed and set aside. However, the lien created on the said account was still not lifted by the Respondents.

7. The Applicant was directed by the Regional Provident Fund Commissioner II, EPFO, Thane to pay the outstanding dues including damages under section 14B of Employees Provident Fund and Miscellaneous Provisions Act, 1952 (EPF & MF Act) after taking the moratorium period into consideration and issued the certificates to Recovery Officers.

8. The Applicant further submitted that EPFO's claims lie and arose before the commencement of CIRP post which moratorium became operative after which the only remedy to be availed by EPFO was to submit their proof of claims under regulation 12 of the IBBI Regulations, 2016. The Regional Provident Fund Commissioner II, EPFO, Thane by relying on section 36(4) has misinterpreted the code and is of view that the outstanding dues payable towards provident fund, pension and gratuity constitute third -party assets and are excluded from liquidation estate of the Corporate debtor and cannot be utilised for making any recovery.

9. The Applicant has submitted that all the current accounts and fixed deposits of the Corporate debtor have been under the blanket attachment by the EPFO because of which the banks are unable to provide the true balance of the said account wherein the RP is unable to assess the total available balance in bank for the Corporate debtor.

10. The Applicant has further submitted that the order of this Hon'ble Tribunal dated 10.07.2023 having similar factual matrix to this case, have quashed and set aside the lien created by EPFO on the bank account of the Corporate debtor.
11. With the above averments, the Applicant has prayed to allow the present Application.

Submissions of the Respondent no. 3

12. At the outset, the Respondents denied each and every contention raised by the Applicant in the present Application.

13. The Respondent no. 3 who is Regional Provident Fund Commissioner -II, Jaipur (hereinafter referred as Respondent No. 3) has submitted that the dues as on 17.10.2022 was Rs.1,31,73,971/- for the period from June 2016 to September 2019 under Section 7A, 14 B and 7Q of the EPF and MP Act, 1952. Further, the above claims pertain to period before date of commencement of CIRP i.e. 03.10.2022 which is the liability of the Corporate Debtor and is statutorily binding upon it.

14. The Respondent no. 3 has submitted that due to non-payment of entire dues within the stipulated period Recovery certificates both dated 06.05.2020 for Rs. 21,19,030/- and 21,65,262/- respectively were issued to the Recovery Officer to recover the entire dues and accordingly, lien was created by the Respondent by issuing attachment order dated 26.11.2021 under section 8F (3) of the EPF &MP Act, 1952 to ICICI, Axis, PNB, HDFC, SBI, YES Bank, on bank account of the Corporate debtor which is prior to initiation of CIRP.

15. The Respondent no. 3 has further submitted that the period of default for which orders under section 14B and 7Q have been passed is the period prior to period of moratorium which the Applicant has failed to understand. Whereas EPF dues are social dues for the welfare of the workers and such statutory dues need to be assessed and recovered in the interest of the workmen so that their financial interests can be secured.

16. The Respondent no. 3 has further placed its reliance upon Section 11 of the EPF & MP Act, 1952 and has submitted that it gives statutory priority to the amount payable to employees over other debts and lays down that the amount due from the employer in respect of any contribution payable to the fund or damages recoverable or any charges payable by him under section 14B or any other provision of the act or scheme shall be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up as the case may be.

17. The Respondent no. 3 has relied upon several judgements of Hon'ble Supreme Court and High Court wherein it has been observed that in terms of section 36(4) (iii), the 'Provident Fund' and 'Gratuity Fund' are not assets of the Corporate Debtor and the EPF Act is a special Act therefore it prevails over all other acts, therefore this being specific provision the application of section 238 of the 'I&B Code' does not arise. Further, it is a settled position of law that the provident fund, gratuity fund and pension fund does not come under the purview of 'liquidation estate' for the purpose of distribution of assets under section 53 of the code.

18. It has further been submitted that the Resolution Professional, while rejecting the claims of the Respondent, has failed to secure the rights of

employees and also to honour the statutory provisions of EPF Act. The Respondent no. 3 has further submitted that it is well settled and established law that there is no inconsistency between Section 238 and other provision of IBC and section 11(2) and other provisions of EPF & MP Act.

19. With reference to other contentions and allegation made in the application, the Respondent no. 3 has denied the same and has prayed for the dismissal of the Application.

<u>Submissions of the Respondent no. 5</u>

20. The Respondent no. 5 who is Regional Provident Fund Commissioner -II, Thane (hereinafter referred as Respondent No. 5) has submitted that the dues as on 09.02.2023 was Rs.21,54,40,605/- in respect of EPFO RO Thane (North), RO Chennai, RO Delhi (South), RO Lucknow and RO Ludhiana. Further, the above claims were revised by Respondent no. 5 for Rs. 21,47,84,916/- vide email dated 14.08.2023 along with amount of Rs. 43,03,299/- in respect of EPFO RO Thane (North), RO Chennai, RO Delhi (South), RO Lucknow, RO Ludhiana and RO Indore.

21. The Respondent no. 5 has further stated that the Applicant vide its email dated 14.08.2023 rejected the claim filed by Respondent no. 5 by giving reason for rejection that, "*Time barred as claim period is more than 3 years prior to CIRP commencement*." Further, the above claims pertain to period before date of commencement of CIRP i.e. 03.10.2022 which is the liability of the Corporate Debtor and is statutorily binding upon it.

22. The Respondent no. 5 while referring to paragraph 5 of application has submitted that there was no lien created by Respondent no. 5 on any bank

accounts of the Corporate Debtor. The Respondent no. 5 has further submitted that the period of default for which orders under section 14B and 7Q have been passed is the period prior to period of moratorium which the Applicant has failed to understand. Whereas EPF dues are social dues for the welfare of the workers and such statutory dues need to be assessed and recovered in the interest of the workmen so that their financial interests can be secured.

23. With reference to other contentions and allegation made in the application, the Respondent no. 5 has denied the same and has prayed for the dismissal of the Application

Findings

24. We have heard the Ld. Counsels appeared for the parties and perused the record.

25. The present Application has been filed by the Applicant who is the Resolution Professional of the Corporate Debtor against the lien created by the Respondent (Regional Provident Fund Commissioner) on account of the Corporate Debtor during the pendency of the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

26. It is noted that the Punjab National Bank Account bearing Account Number 1281002100058994 (hereinafter referred to as "Bank Account") was marked as lien by the Employee's Provident Fund Organisation and Income Tax Authorities. However, the CIRP was commenced against the Corporate Debtor vide order dated 03.10.2022.

27. It is observed by the Bench that vide order of attachment dated 22.09.2022 addressed by the EPFO to Punjab National Bank under section 8G of EPF

& MF Act EPFO informed that there were arrears amounting to Rs. 1,93,32,168/- which is due and payable by the Corporate Debtor and *directed Punjab National Bank to restrain all types of account pertaining to M/s First Flight Couriers Ltd.* (Corporate Debtor). The Applicant issued letter dated 19.12.2022 to Respondent No. 2 (Recovery Officer of EPFO, Lucknow) and Respondent No. 3 (Regional Provident Fund Commissioner -II, Jaipur) to inform about the commencement of Corporate Insolvency Resolution Process. Furthermore, the Applicant explained about the ongoing moratorium period and also invited claims from the Respondents.

28. The issue which needs to be resolved is that whether an Attachment on Corporate Debtor's bank account that was imposed before the initiation of CIRP, can continue during Moratorium under Section 14 of IBC?

29. The Bench takes note of order of Co-ordinate bench dated 10.07.2023 in I.A. 962 OF 2022 IN C.P. No. 3703/MB/2019, wherein an identical application was filed by the Resolution Professional of the Corporate Debtor. In that said matter the bank account of the Corporate Debtor was frozen by the Respondents subsequent to which the CIRP was initiated against the Corporate Debtor and the lien created by EPFO on the bank account of the Corporate debtor was quashed and set aside. The bench in the abovementioned has taken following view, that:

> *"From the above, 14(1)(a), it is clear that continuation of pending suits or proceedings against the 'Corporate Debtor' including Execution of any Judgment, decree or order in any `Court of Law', `Tribunal', `Arbitration Panel' or other `Authority' will temporarily cease to operate during `Moratorium'. The purpose of the Section 14 is to ensure that no depletion of `Assets' of the 'Corporate Debtor' takes place during the 'Corporate Insolvency*

Resolution Process' and the 'Corporate Debtor' is allowed to continue as a going concern in order to maximise the value for all the `Stakeholders'. Accordingly, this Bench is of the considered view that Section 14(1)(a) imposes complete embargo on any proceeding against the Corporate Debtor by any Authority till the completion of CIRP. Moratorium covers attachment of Bank accounts by any Authority including `EPFO' and it is required to be lifted to grant Corporate Debtor a fair chance of revival and to ensure that Resolution Plans are received. It may also be inferred from the circumstances and intent of legislation that in the present cases, the lien created prior to the initiation of the 'Corporate Insolvency Resolution Process cannot sustain as it will hinder the entire resolution process.

The Bench is aware about the provision of Section 36(4) of I & B Code 2016 which provides as under:

"36(4). The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation-
(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;"

From the above referred Section, it is evident that the that amount deducted for `Provident Fund', purely belongs to an `Employees' and is not to be treated as an `Asset' of the 'Corporate Debtor' and cannot be touched by an `Interim Resolution Professional'/`Resolution Professional'/ `Liquidator' as the case may be. However, it is important to note that such `Provident

Fund', has to be an `Establishment Fund', kept separately by the company and only then this proviso will be applicable. If even wrongly and in violation of the laws of the land, the company fails to establish such `Provident Fund', in that event `Interim Resolution Professional/Resolution Professional/Liquidator' is not expected to provide for same, except under Section 53 of the I & B Code, 2016.

30. This Bench notes that facts of the present case are identical. Therefore, the bench is of the considered view that the `Resolution Professional' is right in seeking lifting of the lien created by the Respondent on Bank Account of the Corporate Debtor.

31. Accordingly, this Interlocutory Application No. 4167 of 2023 is "**Allowed**" with an order that the lien created by the Respondent on the Punjab National Bank Account bearing Account Number 1281002100058994 is hereby quashed/ set aside and the Resolution Professional shall be at liberty to deal with the same in accordance with the IB Code 2016. A copy of this order shall be forwarded to the Bank concerned for necessary compliance.

Sd/-	Sd/-
ANU JAGMOHAN SINGH	**KISHORE VEMULAPALLI**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**