NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 752 of 2021

(Arising out of Order dated 22.06.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-Court No.-I in IA No.2081 of 2020 in CP (IB) No.2205/MB/2019)

IN THE MATTER OF:

Jet Aircraft Maintenance Engineers
Welfare Association .... Appellant

Vs

Ashish Chhawchharia
Resolution Professional of Jet Airways
(India) Ltd. & Ors. .... Respondents

Present:

For Appellant: **Mr. Vikas Mehta, Mr. Mayan Prasad, Ms. Nitika Grover, Mr. Apoorv Khator & Ms. Anshula Grover, Advocates.**

For Respondent: **Mr. Malhar Zatakia, Mr. Dhiraj Kumar Totala, Ms. Aditi Bhansali, Ms. Tanya Chib and Mr. Parimal Kashyap, Advocates for RP (AZB & Partners)**
Mr. Raghav Chadha, Advocate.

Mr. Krishnan Venugopal, Sr. Advocate with Mr. Raunak Dhillon, Ms. Isha Malik, Ms. Niharika Shukla, Advocates for R-2/ CoC

Mr. Krishnendu Datta, Sr. Advocate with Mr. Rajat Sinha, Mr. Burjis Shabir, Ms. Srishty Kaul, Advocates for SRA

Company Appeal (AT) (Insolvency) No. 643 of 2021
& I.A. No. 1700 of 2021

IN THE MATTER OF:

Association of Aggrieved Workmen of
Jet Airways (India) Ltd. .... Appellant

Vs

Jet Airways (India) Ltd. & Ors. ... Respondent

Present:

For Appellant: **Mr. Swarnendu Chatterjee, Ms. Deepakshi Garg, Mr. Yashwardhan Singh, Advocates.**

For Respondent: **Mr. Malhar Zatakia, Mr. Dhiraj Kumar Totala, Ms. Aditi Bhansali, Ms. Tanya Chib and Mr. Parimal Kashyap, Advocates for RP (AZB & Partners)**
Mr. Raghav Chadha, Advocate.

Mr. Raunak Dhillon, Ms. Isha Malik and Ms. Niharika Shukla, Advocates for R-2.

Ms. Ritu Sobti, Ms. Priyanka Sethia, Advocates for Intervenor in I.A 1985, 1986 of 2022.

Mr. Krishnendu Datta, Sr. Advocate with Mr. Rajat Sinha, Mr. Burjis Shabir, Ms. Srishty Kaul, Advocates for SRA

Company Appeal (AT) (Insolvency) No. 801 of 2021

IN THE MATTER OF:

Bhartiya Kamgar Sena & Anr. .... Appellants

Vs

Ashish Chhawchharia
Resolution Professional of Jet Airways
(India) Ltd. &Ors. .... Respondents

Present:

For Appellant: **Mr. Gaurav H. Sethi, Mr. Rahul D Oak, Mr. Arya Hardik, Advocates.**

For Respondent: **Mr. Malhar Zatakia, Mr. Dhiraj Kumar Totala, Ms. Aditi Bhansali, Ms. Tanya Chib and Mr. Parimal Kashyap, Advocates for RP (AZB & Partners)**
Mr. Raghav Chadha, Advocate.

Mr. Krishnan Venugopal, Sr. Advocate with Mr. Raunak Dhillon, Ms. Isha Malik, Ms. Niharika Shukla, Advocates for R-2/ CoC

Mr. Krishnendu Datta, Sr. Advocate with Mr. Rajat Sinha, Mr. Burjis Shabir, Ms. Srishty Kaul, Advocates for SRA

Company Appeal (AT) (Insolvency) No. 915 of 2021

IN THE MATTER OF:

Rohit Sharma & Ors. .... Appellants

Vs

Monitoring Committee Through
Ashish Chhawchharia & Ors. .... Respondents

Present:

For Appellant: **Mr. Swarnendu Chatterjee, Ms. Deepakshi Garg, Mr. Yashwardhan Singh, Advocates.**

For Respondent: **Mr. Malhar Zatakia, Mr. Dhiraj Kumar Totala, Ms. Aditi Bhansali, Ms. Tanya Chib and Mr. Parimal Kashyap, Advocates for RP (AZB & Partners)**
Mr. Raghav Chadha, Advocate.

Mr. Krishnan Venugopal, Sr. Advocate with Mr.Raunak Dhillon, Ms. Isha Malik, Ms. Niharika Shukla, Advocates for R-2/ CoC

Mr. Krishnendu Datta, Sr. Advocate with Mr. Rajat Sinha, Mr. Burjis Shabir, Ms. Srishty Kaul, Advocates for SRA

Company Appeal (AT) (Insolvency) No. 771 of 2022

IN THE MATTER OF:

All India Jet Airways Officers and Staff Association .... Appellant

Vs

Ashish Chhawchharia
Resolution Professional &Ors. .... Respondents

Present:

For Appellant: **Ms. Ronita Bhattacharya Bector, Ms. Nupur Kumar, Mr. Divyansh Tiwari, Advocates.**

For Respondents: **Mr. Malhar Zatakia, Mr. Dhiraj Kumar Totala, Ms. Aditi Bhansali, Ms. Tanya Chib and Mr. Parimal Kashyap, Advocates for RP (AZB & Partners)**
Mr. Raghav Chadha, Advocate.

Mr. Krishnan Venugopal, Sr. Advocate with Mr. Raunak Dhillon, Ms. Isha Malik, Ms. Niharika Shukla, Advocates for R-2/ CoC

Mr. Krishnendu Datta, Sr. Advocate with Mr. Rajat Sinha, Mr. Burjis Shabir, Ms. Srishty Kaul, Advocates for SRA

Company Appeal (AT) (Insolvency) No. 792 of 2021

IN THE MATTER OF:

Department of State Tax .... Appellant

Vs

Ashish Chhawchharia Resolution Professional
For Jet Airways (India) Ltd. & Anr. .... Respondent

Present:

For Appellant: **Mr. Aaditya Pande, Mr. Rahul Chitnis, Ms. Shwetal Shepal, Advocates**

For Respondent: **Mr. Malhar Zatakia, Mr. Dhiraj Kumar Totala, Ms. Aditi Bhansali, Ms. Tanya Chib and Mr. Parimal Kashyap, Advocates for RP (AZB & Partners)**
Mr. Raghav Chadha, Advocate.

Mr. Krishnan Venugopal, Sr. Advocate with Mr.Raunak Dhillon, Ms. Isha Malik, Ms. Niharika Shukla, Advocates for R-2/ CoC

Mr. Krishnendu Datta, Sr. Advocate with Mr. Rajat Sinha, Mr. Burjis Shabir, Ms. Srishty Kaul, Advocates for SRA

Company Appeal (AT) (Insolvency) No. 361 of 2022

IN THE MATTER OF:

Concor Air Ltd. .... Appellant

Vs

Ashish Chhawchharia & Anr. .... Respondents

Present:

For Appellant: **Ms. Yukti Anand, Mr. Rishi K. Awasthi, Avinash Ankit and Ms. Zohra Bano, Advocates**

For Respondents: **Mr. Malhar Zatakia, Mr. Dhiraj Kumar Totala, Ms. Aditi Bhansali, Ms. Tanya Chib and Mr. Parimal Kashyap, Advocates for RP (AZB & Partners)**
Mr. Raghav Chadha, Advocate.

Mr. Krishnan Venugopal, Sr. Advocate with Mr.Raunak Dhillon, Ms. Isha Malik, Ms. Niharika Shukla, Advocates for R-2/ CoC

Mr. Krishnendu Datta, Sr. Advocate with Mr. Rajat Sinha, Mr. Burjis Shabir, Ms. Srishty Kaul, Advocates for SRA

Company Appeal (AT) (Insolvency) No. 987 of 2022

IN THE MATTER OF:

Regional P.F. Commissioner .... Appellant

Vs

Ashish Chhawchharia
Resolution Professional for Jet Airways
(India) Ltd. & Anr. .... Respondents

Present:

For Appellant: **Mr. B.B. Pradhan, Mr. Sandeep Kumar, Mr. Kishor Kumar, Advocates.**

For Respondents: **Dr. Krishnendu Dutta, Mr. Anant Singh, Mr. Burgis Shabir, Ms. Shrishty Kaul and Mr. Aashish Vats.**
Mr. Raghav Chadha, Advocate for RP.

J U D G M E N T

ASHOK BHUSHAN, J.

All these Appeals have been filed against the same order dated 22.06.2021 Passed by the National Company Law Tribunal (NCLT), Mumbai Bench, Court No.I approving the Resolution Plan submitted by

'Jalan Fritesch Consortium' with respect to the Corporate Debtor – 'Jet Airways (India) Limited'. First five appeals have been filed by workmen and employees of Jet Airways (India) Limited and last three appeals have been filed by Operational Creditors of Jet Airways (India) Limited. All the Appellant(s) aggrieved by order of Adjudicating Authority dated 22.06.2021 approving the resolution plan has come up in these Appeal(s).

2. Before we notice the individual facts in each of the above Appeal(s), it is necessary to notice few background facts giving rise to these appeals:

(i) The Corporate Debtor - Jet Airways (India) Limited has been in airline operation since 1993. Due to various reasons Jet Airways (India) Limited stopped its operation on 17.04. 2019. An Application under Section 7 was filed by State Bank of India being CP (IB) No.2205/MB/2019, which Application was admitted by NCLT, Mumbai Bench Wide order dated 22.06.2019. The Adjudicating Authority appointed Mr. Ashish Chhawachharia, as an Interim Resolution Professional (IRP), who was confirmed as Resolution Professional (RP) in the First Meeting of Committee of Creditors (CoC) dated 16.07.2019.

(ii) Public announcement was made on 24.07.2019. The first advertisement for calling of 'Expression of Interest' from prospective Resolution Applicant was issued on 20.07.2019. Expression of Interest was issued in four rounds and last on

13.07.2020. The Resolution Plan submitted by Jalan Fritesch Consortium was approved in the 17th CoC Meeting held on 03.10.2020.

(iii) An Application was filed by Resolution Professional seeking approval of the Resolution Plan submitted by Jalan Fritesch Consortium. The Adjudicating Authority vide impugned order dated 22.06.2021 approved the Resolution Plan submitted by Resolution Applicant. While approving the Resolution Plan, the Adjudicating Authority also issued various directions.

(iv) Aggrieved by the order approving the Resolution Plan, these Appeal(s) have been filed.

3. We now proceed to notice certain facts with respect to each of the above Appellant(s).

Company Appeal (AT) (Insolvency) No. 752 of 2021

4. The Appellant - Jet Aircraft Maintenance Engineers Welfare Association is a Trade Union representing over 95% of the Aircraft Maintenance Engineers of the Jet Airways (India) Limited. In pursuance of public advertisement, the Appellant Union submitted a claim of Rs.1,889,438,035/- on behalf of 509 workers. Out of the aforesaid claim, the Resolution Professional has admitted the claim worth Rs.1,539,783,525/- as reflected in the 7th List of Creditors. The List of

Creditors was revised and in the 9th List of Creditors, admitted claim was Rs.1,697,034,005/-. The Appeal has been filed on behalf of 109 workers, whose admitted claims were Rs.37,13,79,866/-.

5. A Notice dated 27th May, 2020 was issued by the Resolution Professional requiring all employees of Jet Airways (India) Limited, who have exited without completing formalities to submit their resignation and complete their formalities. Resolution Professional filed an Application being I.A. No.1263/MB/2020 praying for a declaration that the dues arising after the insolvency commencement date of the workmen and employees of the Corporate Debtor, who are not part of the Asset Preservation Team are not covered under "insolvency resolution process costs under the Code". The Adjudicating Authority did not decide the issue at that point of time and IA was permitted to be withdrawn. Liberty was granted to RP to raise the matter again. The Appellant had also filed an Application before the Adjudicating Authority praying for copy of the Resolution Plan and the right to be heard by Adjudicating Authority, which application was rejected by the order dated 22.02.2021. A clarification note was also filed by the Resolution Applicant in I.A. No.2081 of 2020 clarifying certain queries raised by Adjudicating Authority during hearing of the Resolution Plan. The Resolution Applicant on 05.07.2021 submitted a proposal for employees and workmen of Jet Airways (India) Limited. As per Resolution Plan of the Consortium, it offered certain amounts and benefits for persons who were the employees and workmen of Jet Airways as on

20.06.2019. The Consortium proposal was over and above any amount that the employees and workmen were entitled as per the Resolution Plan. The proposal further stated that the proposal is valid only if 95% of the employees and workmen vote in favour of it. The Consortium proposal proposed creation of a trust, equity stake in the Corporate Debtor, equity stake in Airjet Ground Services Limited ("**AGSL**"), cash payment, IT assets etc. However, the proposal dated 05.07.2021 could not be voted by 95% of the employees and workmen and stood withdrawn. In the Resolution Plan, which was approved by the Adjudicating Authority, employees and workmen were proposed a fixed sum of Rs.52 crores towards settlement of all the claims made by them. The Plan further mentioned that in any case, if the liquidation value due to admitted employees and workmen dues is not "NIL", then the Successful Resolution Applicant undertakes that the liquidation value due to such admitted employees and workmen dues shall be paid and shall be paid in priority over payment of Financial Creditors. The Resolution Applicant has further proposed a scheme for absorption of the employees. It was decided to retain only 50 employees and workmen forming part of the Asset Protection Team ("**APT**"), who were given option to resign and seek re-employment by the Corporate Debtor on fresh employment terms. Excluding the retained employees, all employees and workmen on the payrolls of the Corporate Debtor as on 15.09.2020 will be demerged from the Corporate Debtor and absorbed into AGSL with effect from the approved date. As part of such demerger, all the past dues

towards salaries and other benefits (such as PF dues, leave encashment, retirement benefits, notice pay, termination dues etc.) of the demerged employees for the period after the insolvency commencement date and until approval date, shall also stand demerged from the Corporate Debtor to AGSL. The Appellant aggrieved by the Resolution Plan has filed this Appeal.

Company Appeal (AT) (Insolvency) No. 643 of 2021

6. This Appeal has been filed by aggrieved workmen of Jet Airways (India) Limited, which is an Association of workmen of the Corporate Debtor numbering more than 270 workmen. The Members of the Association are aircraft maintenance engineers and have been working for several years on the rolls of the Corporate Debtor. The Successful Resolution Applicant has arbitrarily provided only a sum of Rs.52 crores to employees and workmen. The Resolution Professional did not account the salaries and other benefits due to employees and workmen, which estimated approximately Rs.715 crores as on September 2020 as CIRP cost. The employees and workmen are entitled to their full provident fund, gratuity, leave encashment etc., which have not been provided to employees and workmen. The Appellant has also referred to the Audited Financial Statement for 2019-20, which contained the provisions for employees benefits. The Audited Financial Statement mentions that as many as 13530 workmen and employees have submitted their claims. Various ground to challenge the Resolution Plan have been enumerated in the Appeal.

Company Appeal (AT) (Insolvency) No. 801 of 2021

7. The Appellant – 'Bhartiya Kamgar Sena' is a registered Trade Union representing approximately more than 70% of the ground staff of Jet Airways (India) Limited including workers recruited through contractors. The Appellant No.2 is Jet Airways Cabin Crew Association, represents majority of cabin crew employees, which is also affiliated to Appellant No.1. Appellant No.2 has submitted consolidated claims of its Members with the Resolution Professional. The Members of the Appellant had not received their salaries since March 2019. The Appellant had preferred a Miscellaneous Application No.3574 of 2019 praying for release of part payment of salary of the Members. The Appellant has also filed an IA No.2248 of 2020 demanding the copy of the Resolution Plan or the relevant extract of the said Resolution Plan, which Application was rejected by the Adjudicating Authority. By a letter dated 05.07.2021, the Resolution Professional communicated a proposal for employees and workmen of the Corporate Debtor, which was subject to approval of the same by 95% of the employees and workmen. The Resolution Professional vide letter dated 10.07.2021 communicated the main features of approved Resolution Plan. By letter dated 14.07.2021, the Union demanded explanation to various aspects of the said proposal as well as approved Resolution Plan. Certain explanation was given by Resolution Professional vide its letter dated 29.07.2021, which were not complete. The statutory rights of the employees and workmen cannot be done away by Resolution Plan. The

dues of employees and workmen were about Rs.1254 crores. During the CIRP, the employees and workmen were also entitled to Rs.715 crores. The Resolution Plan violates the provisions of Industrial Disputes Act, 1947. The provident fund and gratuity have not been taken into account. The CIRP dues of Rs.715 crores were denied by the Resolution Professional on the pretext that except 50 no other employees and workmen worked for the Corporate Debtor, whereas all employees and workmen were on the rolls of the Corporate Debtor, were ready and willing to work, but they were never allotted any work.

Company Appeal (AT) (Insolvency) No. 915 of 2021

8. This Appeal has been filed by 43 Appellants, who were Engineers employees of the Corporate Debtor. The Appellants by the appeal challenges the order dated 22nd June, 2021 and pray for a direction to pay the Appellants gratuity and provident fund dues upto beginning of CIRP or respective date of resignation, whichever is earlier. The gratuity and provident fund dues are claimed for the employees from different dates prior to initiation of CIRP and from the date of initiation of CIRP, i.e., 20.06.2019. It is stated that admitted claim of workmen and employees is Rs.1254 crores. The case of the Appellants is that gratuity and provident fund are required to be paid in full before making any other payment whatsoever under the Resolution Plan as these payments are outside the Waterfall Mechanism under Section 53 of the Code. The employees are illegally deprived of their statutory dues. The gratuity and provident fund

dues are excluded from the Liquidation Estate of the Waterfall Mechanism, so as to enable the employees to realize their savings as well as the matching contribution, which comes from the employer. They are the assets of the workers lying in the possession of the Corporate Debtor. The Resolution Plan does not provide for payment of full gratuity and provident fund of the workmen and employees. By letter dated 29.07.2021, the amount payable to the workmen and employees in the Plan, i.e., Rs.52 crores have been revised to Rs.100 crores, which is 8% of Rs.1254 crores.

Company Appeal (AT) (Insolvency) No. 771 of 2022

9. This Appeal has been filed by All India Jet Airways Officers and Staff Association, which is a Trade Union having approximately 1500 employees in Mumbai and over 5000 employees across the country. The Appellant Union along with other Operational Creditors submitted their claim to the Resolution Professional on 27.07.2019. The admitted claim of the workers and employees in their capacity as Operational Creditors represented by the Appellant Union amounting to Rs.905 crores was uploaded on the website of the Corporate Debtor. Claim for Rs.11 crores was rejected or not admitted. The additional wages of workers since commencement of CIRP, amounting to Rs.715 crores was not admitted. The Resolution Professional has published the List of Creditors, where details of admitted claims of creditors have been listed. The Resolution Plan provided payment of Rs.52 crores as payment of the dues of workmen and employees of the Corporate Debtor. A part of Resolution Plan, only 50 employees of the

Corporate Debtor were to be reinstated. Twenty four months wages of the workmen would amount to Rs.334.84 crores and 12 months of wages of the workmen and employees would amount to Rs.160.56 crores. The Plan fall short of the mandatory requirements under Section 53 read with Section 30(2)(b) of the Code. The Resolution Applicant has arbitrarily proposed wholly inadequate sum of Rs.52 crores to offer as full and final settlement of dues of workmen and employees, which does not cover the mandatory payments of gratuity, privilege leave encashment, bonus from April 2018 to June 2019 and retrenchment compensation that must be paid to the workers. The Resolution Plan does not comply the mandatory statutory requirement under the Code. The Plan was in contravention of the provisions of Labour Laws for the time being in force, including Industrial Disputes Act, 1947 and the Payment of Gratuity Act, 1972. The Adjudicating Authority committed error in not holding the Resolution Plan in contravention of Section 30, sub-section (2) (e) of the Code. The Plan is in breach of Section 25N and Section 25FF of the Industrial Disputes Act, 1947. The question of gratuity being covered under Section 36(4) of the Code, there is no question of inconsistency and a valid Resolution Plan is required to comply with the provisions of the Payment of Gratuity Act, 1972.

Company Appeal (AT) (Insolvency) No. 792 of 2021

10. This Appeal has been filed by Department of State Tax, challenging the order dated 22nd June, 2021. The Appellant's case is that the Corporate

Debtor is liable to pay GST from the period July 2017 to March 2020, which is Rs.80,60,39,949/-. Out of the above GST dues, the Resolution Professional has admitted claim of Rs.56,85,78,421/-, vide List of Creditors published on the official website of Corporate Debtor. The Resolution Professional has admitted the interest upto the date of commencement of CIRP and rejected the post CIRP GST and interest and penalty. The Appellant was not party to I.A. No.2081 of 2020. The Adjudicating Authority has accepted the Resolution Plan, which presumed the claim of the Appellant to be NIL. The Resolution Plan mentions that the net worth of the Corporate Debtor would be insufficient to cover the debts of the Financial Creditors and therefore, the liquidation value due to the Operational Creditors including government dues, taxes or the other creditors or stakeholders is presumed to be NIL. The Appellant prays for setting aside order dated 22.06.2021 with prayer for such other further orders be passed by this Tribunal as may be deemed fit.

Company Appeal (AT) (Insolvency) No. 361 of 2022

11. This Appeal has been filed by Concor Air Limited, a Government of India Enterprise & a fully owned subsidiary of CONCOR, Ministry of Railways with a prayer to set aside the order dated 22.06.2021. The Appellant's case is that under the approved Resolution Plan, each of the Operational Creditors have been proposed a fixed sum of Rs.15,000/- irrespective of the value of the estimated claim, which is against the doctrine of fair and equitable treatment within one class. The Resolution

Plan does not take into account the interest of all stakeholders. The Plan is neither fair nor equitable and violates Section 30(2)(b) of the Code. The Plan grossly failed to adequately balance the interest of all stakeholders, including the Appellant, who is one of the Operational Creditor in the present case. The Appellant for essential goods and services has submitted a claim of Rs.1,60,48,700/- out of which Resolution Professional has admitted the claim of Rs.82,61,378/-.

Company Appeal (AT) (Insolvency) No. 987 of 2022

12. This Appeal has been filed by Regional P.F. Commissioner, Mumbai-III. The Appellant's case is that Jet Airways (India) Limited is a covered establishment and was reporting compliance under the EPF & MP Act, 1952 in respect of its employees and workmen. The establishment failed to pay the provident fund and allied dues in time for the period from November 2008 to October 2016 in respect of international workers. A summon under Section 14-B of the EPF & MP Act was issued vide letter dated 05.06.2017. An order dated 17.10.2018 for an amount of Rs.24,40,65,594/- towards damages under Section 14-B and an amount of Rs.12,85,92,763/- towards interest under Section 7Q have been passed against the Corporate Debtor. The establishment paid the interest amount of Rs.12,85,92,763/- assessed under Section 7Q in December 2018. The Corporate Debtor filed an Appeal against 14-B order and Appeal is still pending for disposal. The Appellant had submitted claim with the IRP on 26.09.2019 in Form-B in respect of EPF dues of Rs.24,40,65,594/-, which

was rejected by IRP on 27.09.2019. The Appellant issued a letter to IRP for status of claim and also sent reminder, but no reply has been received from IRP. The Plan was approved on 22.06.2021 wherein no provision has been made for EPFO dues.

13. We have heard learned Counsel for the Appellant(s), learned Counsel appearing for Resolution Professional, learned Counsel for the Committee of Creditors and the learned Counsel appearing for Successful Resolution Applicant.

14. The submissions, which have been advanced on behalf of the Appellant(s) can be divided into two groups. The first group of submission are on behalf of employees and workmen of the Jet Airways (India) Limited and the second group of submissions are on behalf of Appellant(s) who are Operational Creditors (other than employees and workmen). The submissions on behalf of employees and workmen have been led by Shri Vikas Mehta, learned Counsel. We may first notice the submissions, which have been advanced on behalf of the employees and workmen.

15. The learned Counsel for the Appellant(s) submits that provident fund/ gratuity, pension is not part of Liquidation Estate by virtue of Section 36(4)(a)(iii) of the Code. The workmen and employees are entitled for payment of their entire dues of provident fund, gratuity, pension subject to distribution in accordance with Waterfall Mechanism under Section 53 of the Code. The Resolution Applicant was obliged to make payment of entire

dues of provident fund, gratuity and other retiral benefits in full. The Resolution Plan having not made provisions of payment of entire provident fund, gratuity and retiral benefits in full, violates mandatory provisions of the Code and deserves to be set aside on this ground alone. In event of liquidation, the workmen and employees under Section 36(4)(a)(iii) could have received the entire payment and gratuity dues. The workmen and employees could not be placed in a worse situation in the event of resolution of the Corporate Debtor, than they would have been in the event of liquidation. The three Member judgment in ***State Bank of India vs. Moser Baer Karamchari Union & Anr. in Company Appeal (AT) (Insolvency) No.396 of 2019*** after considering Section 36(4), Section 53 of the Code and Section 326 of the Companies Act, 2013, upheld the order of the Adjudicating Authority to exclude provident fund and gratuity dues from the Liquidation Estate. Further, three Member Bench in ***Tourism Finance Corporation vs. Rainbow Papers in Company Appeal (AT) (Insolvency) No.354 of 2019*** held that no provision of the EPF&MP Act, 1952 is in conflict with the provisions of the Code. Relying on Section 36(4)(a)(iii) a direction was given to pay the entire dues along with interest against which order an Appeal has already been dismissed by Hon'ble Supreme Court. Two Member Bench judgment relied by the Respondent in ***Savan Godiwala vs. Apalla Siva Kumar in Company Appeal (AT) (Insolvency) No.1229 of 2019*** does not notice the decision in ***Tourism Finance*** (supra). Further another two Member Bench judgment of this

Tribunal relied by Respondent is ***Regional Provident Commissioner v. Vandana Garg*** does not note the decisions of three Judges in ***Moser Baer and Tourism Finance*** (supra). The issue raised in the present case are fully covered by the Two Member Bench judgment in ***Sikander Singh Jamuwal vs. Vinay Talwar Company Appeal (AT) (Insolvency) No.483 of 2019***. The gratuity and pension are not bounties but hard-earned benefits which accrue to an employee and thus, is in the nature of property. The Resolution Plan cannot contravene provisions of any law for the time being in force. The Resolution Plan contravenes provisions of Section 30, sub-section (2)(e) of the Code.

16. The learned Counsel for the Appellant(s) submitted that this Tribunal can exercise its jurisdiction of judicial review in setting aside the Resolution Plan or remitting the Plan to CoC, since the Plan contravenes statutory and mandatory provisions of Section 30, sub-section (2) and (4). The learned Counsel for the Appellant(s) in support of his submission stated that the Adjudicating Authority and this Tribunal could exercise jurisdiction to interfere with the Resolution Plan, when the Plan contravenes the mandatory provisions of the Code, i.e., Section 30, sub-section (2)(b) and (e). The learned Counsel for the Appellant has referred to judgment of the Hon'ble Supreme Court in ***K. Sashidhar vs. Indian Overseas Bank (2019) 12 SCC 150*** and the judgment of the Hon'ble Supreme Court in ***(2020) 8 SCC 531 – Committee of Creditors Essar vs. Satish Kumar Gupta***. To support his submission in respect of Section 36, sub-section

(4)(a)(iii), learned Counsel for the Appellant has relied on BLRC Report para 5.5.5. The learned Counsel further submits that an amount already deposited in the provident fund and gratuity fund is not a sum due. An amount deposited in the provident fund can be withdrawn by the employee/ workmen as per the provisions of the EPF&MP Act. On the other hand, an amount which has not been deposited by the employer is an amount due. It is submitted that provident fund and gratuity dues are to be paid in full despite fact that these dues are included in the definition of term "workmen's dues". It is further submitted that the intention of the Legislature was to protect the dues of the workmen payable towards gratuity and provident fund, hence, the same were kept out of liquidation estate under Section 36, sub-clause (4)(a)(iii). Shri Vikas Mehta elaborating his submission further contended that mandatory provision of Section 30, sub-section (2)(b) has been contravened in the Resolution Plan. The workmen have not even been allowed the minimum liquidation value, which would be payable to Operational Creditors even in the event of liquidation of Corporate Debtor under Section 53. In the present case, liquidation value being Rs.2555 crores and as per additional affidavit dated 25.07.2022 filed by the Resolution Professional, the workmen are entitled to Rs.104 crores as per Section 30(2)(b). Hence, the allocation of Rs.52/- crores in all is clearly in contravention of Section 30(2)(b) of the Code. It is further submitted that Financial Creditors have been given additional benefit. The Financial Creditors under the Plan are not only getting only

Rs.959 crores, but they are getting several other additional benefits as has been mentioned in the Plan. The excess payment to the Financial Creditors under the Resolution Plan violates Section 30, sub-section (2)(b) as the workmen are also entitled to *pari passu* share. Additional benefits given to Assenting Financial Creditor should be considered as amount to be distributed under the Resolution Plan for the purpose of Sec30(2)(b).

17. The Resolution Professional has not treated the amounts payable to workmen and employees subsequent to 20.06.2019 as CIRP costs. Whereas, till September 2020, the employees and workmen were entitled to receive Rs.715 crores as CIRP costs, which has wrongly been denied. It is submitted that the principle of no work no pay, could not be applied for denying the payment to workmen and employees subsequent to 20.06.2019, since the workmen and employee were in the rolls of the Corporate Debtor and were not allocated any duties by the Resolution Professional. The dues of Rs.715 crores have been completely wiped out, which dues must have also increased upto the date of approval of Resolution Plan. It is further submitted that Section 53, sub-section (1), treats dues of Secured Creditor to rank equally with dues of 24 months of the workmen's dues. The Resolution Professional while computing the entitlement of the workmen has treated the entire financial debt of the secured creditors, whereas the financial debt only to the extent of value of security interest ought to have been considered. The interest of secured creditor is restricted to the value of their security under Section 53(1)(b)(ii).

In view of treating the entire financial debt of the secured creditor under Section 53(1)(b)(ii), the calculation of 24 months of dues of workmen have substantially reduced. The Resolution Professional further has not disclosed the value of secured interest of the secured creditor in the present case. The entire claim of Rs.7258 crores of Financial Creditors has been accepted. In the additional affidavit of Resolution Professional of 25.07.2022, there are various discrepancies in Form-H and CIRP costs is mentioned as Rs.25 crores. In the impugned order also the CIRP costs is mentioned as Rs.25 crores.

18. The learned Counsel for the Appellants has also attacked the provisions of the Resolution Plan regarding demerger of the employees and workmen into AGSL. The transfer of employees and workmen to AGSL is contrary to the provisions of Section 25FF of the Industrial Disputes Act, 1947. Consequently, it violates Section 30, sub-section (2)(e) of the Code. The requirement of proviso of Section 25FF is also not satisfied in the facts of the present case. The AGSL neither have any capacity nor fundings to carry on any business to offer any employment to the employees and workmen of the Corporate Debtor. Transfer to AGSL is a subterfuge in order to deny retrenchment compensation to the workmen of the Corporate Debtor. The AGSL has assets of only Rs.10 crores and liabilities are more than Rs.715 crores and with effect from the date of approval of the Resolution Plan all liabilities to pay salary and other dues of workmen and employees are on AGSL. The Corporate Debtor could not have transferred

its liabilities. The Successful Resolution Applicant should have submitted a Plan to meet all liabilities of Jet Airways and the workmen and employees are not asked to recover their debts from another entity. Such transfer of liabilities is a ruse to get rid of the statutory obligation cast under the various labour laws. It is further submitted that Resolution Plan is a contingent Resolution Plan, which could not have been implemented. In the event of non-fulfilment of various approvals and permissions required for carrying on the operations by Resolution Applicant, the Plan was sure to fail, hence, the Adjudicating Authority ought not to have approved such contingent Plan, which has no sufficient provisions for its implementation.

19. Shri Swarendu Chatterjee, learned Counsel has also supported the submissions advanced by Shri Vikas Mehta. Shri Chatterjee also submits that it is not open to Respondents to deny the gratuity and provident fund. The judgments relied by Respondents to support non-payment of provident fund and gratuity fund, does not help the Respondents. There has been retrenchment of workmen and employees in the guise of demerger and transfer to AGSL. The contingent Resolution Plan is barred as per judgment of Hon'ble Supreme Court in ***Ebix Singapore vs. Committee of Creditors of Educomp Solutions Limited and Anr. (2021) SCC OnLine SC 707***.

20. Ms. Ronita Bhattacharya Bector also contended that the Resolution Plan violates Section 30(2)(b) and Section 30(2)(e). It is submitted that demerger of AGSL and absorption of workers and employees of Jet airways,

does not amount to a transfer falling within the scope of the proviso to Section 25FF of Industrial Dispute Act, 1947. The consent of a worker is required in order for him to accept a transfer and agree to waiving his retrenchment compensation under Section 25FF of the Industrial Disputes Act, 1947. The burden of proving the applicability of proviso of Section 25FF lies with the Resolution Professional and Resolution Applicant. The liabilities to pay gratuity, pension and retrenchment compensation and leave encashment etc. cannot be passed on to AGSL. The learned Counsel further submitted that legislative scheme always has been to give priority to payment of provident fund, gratuity and other benefits etc. while creating a first charge over the assets of a Corporate Debtor, which is also reflected in Section 151(3) of the Code on Social Security, 2020.

21. We have heard other learned counsel appearing for the Appellant(s).

22. Learned Counsel for the Resolution Professional supported the impugned order passed by the Adjudicating Authority as well as the Resolution Plan submitted by the Resolution Applicant. It is submitted that Resolution Plan satisfies the requirement of Section 30(2)(b). The Resolution Professional has admitted the total claims of workmen amounting to Rs.578.7 crores, including provident fund, gratuity and the total claims of the employees of Rs.674.9 crores including salary, privileged leaves and gratuity benefits. The Resolution Plan proposed a fixed sum of Rs.52 crores to the workmen and employees towards settlement of the claims made by them. However, the Plan further contemplated that in

case, if the liquidation value due to admitted workmen and employees dues is not NIL, then the Successful Resolution Applicant undertakes that liquidation value due to such admitted workmen and employees dues shall be paid in priority over payment to financial creditors. The erstwhile Management of the Corporate Debtor had not maintained any gratuity fund under the Payment of Gratuity Act, 1972. The dues of workmen and employees till insolvency commencement date including the salary (for the months not paid); unpaid portion of the provident fund dues; retirement benefits (leaves and gratuity) and other dues for period 24 months prior to the liquidation commencement date was computed for employees. Section 36 of the Code provides that all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund, would be excluded from the Liquidation Estate of a Corporate Debtor. The existence of a fund is essential and a pre-requisite for the dues to become as provident fund, gratuity fund or pension fund dues. The erstwhile Management of the Corporate Debtor failed to maintain gratuity fund for workmen and employees and payments towards provident fund were not made after February 2019. The workmen's dues have been treated *pari passu* with Secured Financial Creditors, in accordance with Section 53(1)(b)(ii) of the Code. The payment from provident/ gratuity fund would only arise when the same are maintained by erstwhile Management. When such funds are absent, no amounts are exclusively payable to workmen/ employees. Dues of all workmen and employees with effect from

20.06.2019 are not CIRP dues. The Corporate Debtor has ceased its airline operations since April 2019 and it was not a going concern. In order to preserve the assets of Corporate Debtor, certain existing employees were retained in Asset Protection Team (total 50). As regards, the workmen and employees, who were not part of APT, no dues are payable for the CIRP period. The wages of workmen and employees accrued during CIRP period amounting to Rs.715 crores cannot be considered as CIRP costs as the Corporate Debtor was not a going concern and during the CIRP, the workmen and employees did not work during the said period. The salaries and dues of workmen and employees arising prior to insolvency commencement date has been duly admitted by the Resolution Professional. The Resolution Plan has been in accordance with the Section 30, sub-section (2). Form-H was issued by Resolution Professional after being fully satisfied that Plan complies with the requirement as provided in Section 30. The Plan also provided for effective implementation. The condition precedent in Resolution Plan is not in the nature of contingencies as contemplated by the Hon'ble Supreme Court in ***Ebix Singapore (P) Ltd. vs. CoC of Educomp Solutions Ltd.*** (supra) but *inter alia* relate to mandatory permissions for revival of the Corporate Debtor. The question of feasibility and viability of the Resolution Plan is left to the majority decision of the Committee of Creditors. What payments are to be made to the Operational Creditors and Financial Creditors are in the domain of the Committee of Creditors and the commercial decision taken by the

Committee of Creditors for disbursement of amount to various creditors is not subject to judicial review of the Adjudicating Authority or of this Tribunal. Resolution Plan contemplates demerger of third-party ground handling business of the Corporate Debtor to its wholly owned subsidiary, i.e, AGSL, which includes transferring of the ground support equipment owned by the Corporate Debtor to AGSL. The same falls under the commercial wisdom of the Committee of Creditors and is non-justiciable. The demerger of the ground handling business of Corporate Debtor along with employees and the workmen of the Corporate Debtor into AGSL forms part of the Resolution Plan. The letter issued by Resolution Applicant subsequent to approval of the Plan, Resolution Applicant had offered to increase the payment to workmen and employees.

23. Shri Krishnan Venugopal, learned senior counsel appearing for the CoC refuting the submissions of learned counsel for the Appellant submits that the Resolution Plan satisfies all the checks and balances in place under the Code and the balance of convenience is in favour of approval of plan and consequently, towards successful revival of the Corporate Debtor. The Resolution Plan is in critical and final stages of implementation. The Resolution Plan provides for a fixed sum of Rs.52 Crores to be paid to the workmen towards settlement of all the claims made by them. Further, in compliance with Section 30(2)(b) of the Code, the Resolution Plan provides that in event the liquidation value (which was assumed to be Nil under the Resolution Plan) is in fact not nil, then the liquidation value payable to

such admitted workmen and employees shall be paid in full, first out of the positive bank balance of the Corporate Debtor as on effective date and the remaining amounts shall be paid out of amounts reserved for the assenting financial creditors on a pro rata basis, subject to a maximum amount of Rs.475 Crores. Replying to the submission of learned counsel for the Appellant on Section 36(4)(a)(iii) of the Code, it is submitted that the provision provides exclusion of all sums due to workmen or employees from the provident funds and gratuity funds etc., which constitutes as their assets from the estate of the Corporate Debtor. The said provision uses the term "assets" and does not by definition cover a liability that is owed to the workmen by the Corporate Debtor. Jet Airways was not maintaining any provident fund and gratuity fund of its own. The provision of Section 36(4)(a)(iii) can come in play in liquidation proceeding and in cases where the fund is being maintained by the Corporate Debtor, whereas in the facts of the present case, there was no fund being maintained by the Corporate Debtor for these statutory dues and same were being directly deposited with the Employees Provident Fund Organization. Accepting the submission of Appellants that preference to be given to the dues that become payable under Employees' Provident Fund and Miscellaneous Provisions Act, 1952 or any other Act providing a first charge pertaining to payment to workmen is wholly contrary to the provisions of the Code. The Code itself prescribes a waterfall mechanism for payment of creditors including employees and workmen under the Resolution Plan. It is to be

strictly observed and any deviation from the aforesaid mechanism will be against the settled law. The legislature has expressly chosen to limit and compress the entirety of debt that is owed by the Corporate Debtor to the workmen by limiting it to the period of 24 months, and further giving such debt a *pari passu* charge with the debt of the secured financial creditors. The intent behind the same was to balance the interest of the workmen vis-à-vis the various other stakeholders of the Corporate Debtor, and also keeping the overall objective of revival of the Corporate Debtor in mind. Judgments relied by learned counsel for the Appellant of this Tribunal in "***Sikander Singh Jamuwal" (Supra)*** and ***"Tourism Finance Corporation of India Ltd." (Supra)*** are distinctly different from the facts at hand. The submission advanced by the Appellant that an amount of Rs.715 Crores constituting dues towards workmen and employees were accrued during the CIRP period has rightly been rejected by the Adjudicating Authority. Only those workmen and employees who have actually worked to run the Corporate Debtor as going concern are entitled to be paid as part of CIRP cost. Appellant failed to prove that they have worked during the CIRP period, hence, they are not entitled for any CIRP cost. It is settled law that there is no equity based jurisdiction with the Adjudicating Authority and the Appellate Tribunal. The payments to be made to the creditors under the Code whether are fair and equitable had to be determined within the framework of the Code, which is the commercial wisdom of the CoC, subject to minimum liquidation value to

be given to creditors. The commercial wisdom of the CoC is not amenable to judicial review. The Resolution Plan as it stands today provides for 22.3% to 25.8% approximately recovery percentage to the workmen, and a mere 13.1% to the secured financial creditors. The submission of the Appellant that Section 53(1)(b) contemplates only security value of the secured creditors is not correct. The effect and purport of Section 53(1)(b) of the code is to include the entire dues of the secured financial creditors, and not to limit it to security interest. The legislative intent behind giving priority for such creditors is to promote relinquishment, so as to promote overall value maximization of value of the Corporate Debtor's estate during liquidation. Insofar as submission that the Resolution Plan is contingent, is also not correct. Condition precedent referred under Clause 7.6.1 of the Resolution Plan relate to obtaining the statutory approvals, which are imperative to be fulfilled, in order to ensure successful revival of the Corporate Debtor. The judgment of Hon'ble Supreme Court in ***"Ebix Singapore" (Supra)*** is clearly distinguishable in the facts of the present case. The scheme of demerger is also valid under the Code. The Resolution Plan does envisage a business plan for AGSL by providing for inter alia the Corporate Debtor to transfer of identified related assets book valued at approx. Rs.10 Crores as well as the ground support equipment, after it has received the necessary approvals, to enable AGSL, to start operations. The Adjudicating Authority as well as this Appellate Tribunal does not have the

jurisdiction to review or reverse the commercial wisdom of the CoC in pursuance of which Resolution Plan was approved.

24. Shri Krishnendu Datta, learned senior counsel appearing for the Successful Resolution Applicant also supported the Resolution Plan as well as the order of the Adjudicating Authority. Learned counsel has referred to provision in the plan related to workmen and employees, which part of the plan was supplied by the Successful Resolution Applicant in pursuance of order passed by this Tribunal dated 20.01.2022 in Company Appeal (AT) (Ins.) No. 643 of 2021. Learned counsel for the Successful Resolution Applicant has referred to clause 6.4.2 of the plan. It is submitted that the Resolution Applicant has proposed to pay a fixed sum of Rs.52 Crores to the workmen/employees towards settlement of all the claims made by them. However, the plan also envisages that if the liquidation value due to Operational Creditors (employees/workmen dues) is not 'NIL', then the Resolution Applicant undertakes that the liquidation value due to such Operational Creditors (workmen/employees) shall be paid and shall be given priority in payment over Financial Creditors, which payment shall be first paid out of the positive bank balance of the Corporate Debtor as on the effective date and the remaining amounts shall be paid out of amounts reserved for other creditors of the Corporate Debtor on a pro-rata basis, subject to a maximum of Rs.475 Crores. The Resolution Applicant had proposed to retain only 50 employees and workmen forming part of the Asset Protection Team (APT). Excluding the retained employees, all

employees and workmen of the Corporate Debtor on the payrolls of the Corporate Debtor as on September 15, 2020 will be demerged from the Corporate Debtor into Airjet Ground Services Limited, with effect from the approval date. As part of such demerger, all the past dues towards salaries and other benefits (such as provident fund dues, leave encashment, retirement benefits, notice pay, termination dues etc.) of the demerged employees for the period after ICD and until the approval date; and/or retirement benefits accruing to demerged employees shall also stand demerged from the Corporate Debtor to AGSL. It is submitted that the Resolution Applicant has also made offer on 05.07.2021 proposing to give certain additional benefits to workmen and employees. It is submitted the scheme would have approved if 95% or more of the employees and workmen would have voted in its favour, which ultimately was not approved. Dues of all workmen and employees after initiation of CIRP are not CIRP cost. Only 50 workmen and employees who were retained are entitled to receive salary and other benefits as CIRP cost. The submission of the Appellant that the plan and the scheme of demerger according to which all workers and employees except 50 employees are being transferred to AGSL, amounts to retrenchment as per Section 25F of the ID Act, hence, the Appellants were entitled for retrenchment compensation, is not correct. It is submitted that there was no termination of the employment of the workmen/employees, hence, no question of retrenchment compensation arises. The Resolution Plan falls squarely within the four corners of the

proviso to Section 25FF. Since, the service of the workmen has not been interrupted by the transfer and other conditions were fulfilled, the scheme of demerger under the Resolution Plan is neither contrary to law nor against the contours of IBC. The submission of the Appellant that the workmen and employees were entitled to provident fund and gratuity fund in full by virtue of Section 36(4)(a)(iii) of the Code is not correct. Section 36(4)(a)(iii) uses the term 'fund' instead of 'dues'. In absence of any such fund, the Resolution Professional cannot apportion a part of the assets of the Corporate Debtor for payments to be made against such provident fund, pension or gratuity fund as claimed. Workmen dues as defined in Section 326 of the Companies Act applicable to the Code have been paid and are the only amount to be paid to the workmen and employees. Section 36(4)(a)(iii) is applicable to only liquidation proceeding and not in CIRP process. Reliance on Section 36(4) is wholly misplaced. The submission of the Appellant that plan is a conditional plan and ought not to have been approved, is also not correct. The Appellants have misconstrued the nature of the condition precedent mentioned in the plan. The condition precedents are conditions that are necessary for revival of the business. They are business pre-requisites and not conditions precedent as mentioned by the Hon'ble Supreme Court in Ebix (supra). The conditions as enumerated in the plan are conditions essential for the airlines to recommence its operations. The submission of the Appellant that condition precedent related to the demerger is not been completed is also completely

misconceived. The conditions precedent pertaining to the demerger as envisaged in the plan was automatically fulfilled by the approval of the plan by the Adjudicating Authority. Thus, the Successful Resolution Applicant has completed all condition precedent to the satisfaction of the Monitoring Committee as well as the Adjudicating Authority. The Appellant has no locus to question the domain of the Monitoring Committee and the Adjudicating Authority. Learned counsel for the Respondent No.3 further contended that commercial decision taken by the CoC regarding distribution of amounts to various stakeholders is a business decision which cannot be interfered either by the Adjudicating Authority or by this Appellate Tribunal.

25. Learned counsel for the parties have also referred to and relied on various judgments of the Hon'ble Supreme Court and this Tribunal which shall be considered while considering the submission in the foregoing paragraphs.

26. Now, we proceed to notice the submissions made by learned counsel appearing for the Appellants in appeals filed by the Operational Creditors (other than workmen and employees). As noted above, Department of State Tax has filed Company Appeal (AT) (Ins.) No. 792 of 2021. Company Appeal (AT) (Ins.) No. 361 of 2022 has been filed by Concor Air Ltd. and Company Appeal (AT) (Ins.) No. 987 of 2022 has been filed by Regional Provident Fund Commissioner and other Operational Creditors. Learned counsel for the Appellants in support of the above appeals contend that Operational

Creditors have filed their claims which are reflected in the List of Creditors maintained by the Resolution Professional. It is submitted that Resolution Plan is in violation of Section 30(2)(b).

27. Learned counsel appearing for the Appellant in the appeal filed by Department of State Tax contends that the name of Department appears in the list of creditors maintained by the Resolution Professional but note has been made that claim are under dispute which are pending before various authorities and appeals. It is contended that charge has been created in favour of State Tax Department by operation of law for the adjudicated amount of Tax payable by the Corporate Debtor. State Tax Department has security interest and it is a secured creditor. The Adjudicating Authority committed error in not treating the Department of State Tax as a secured creditor. The Resolution Plan does not provide for payment of amount to the State Tax Department as per security interest. Plan also violates Section 30(2)(e). At the highest, the Appellant's liability ought to have been treated as a contingent liability and not a disputed liability. The Adjudicating Authority could not have ordered extinguishment of the adjudicated claim. The order of the Adjudicating Authority to the extent it directs extinguishment of already adjudicated claim deserves to be set aside.

28. Learned counsel for the Appellant appearing in Company Appeal (AT) (Ins.) No. 361 of 2022 on behalf of Concor Air Ltd. submits that Appellants claim as Operational Creditor has been admitted to the extent of

Rs.82,61,378/- whereas the Resolution Plan only provide for a fixed sum of Rs.15,000/-. The payment made to the Appellant is neither fair nor equitable, hence, it violates Section 30(2)(b).

29. Learned counsel appearing in Company Appeal (AT) (Ins.) No. 987 of 2022 submits that Appellant's claim was submitted in stipulated period. Appellant's claim of Rs.24,40,65,594/- was verified and admitted by the Resolution Professional. According to the Appellant the said claim arose out of an order dated 17.10.2018 passed under Section 14B of Employees' Provident Fund and Miscellaneous Provisions Act, 1952 for damages towards delayed contribution of certain employees funds. Learned counsel for the Resolution Professional refuting the claims of the Appellants contends that in so far as the claim of Regional Provident Fund Commissioner is concerned that was a claim based on damages and was claim of an Operational Creditor and under the plan all the Operational Creditors have been proposed a fixed amount of Rs.15,000/-. Regional Provident Fund Commissioner does not have any priority charge on the assets of the Corporate Debtor. The Resolution Plan complies with all the provisions of law.

30. Replying to the submission made on behalf of Department of State Tax, learned counsel for the Resolution Professional submits that no priority can be claimed by the Appellant in view of Section 82 of the Maharashtra GST Act, 2017. The claim of the Department of State Tax was only claim of an Operational Creditor which has been similarly dealt by the

Resolution Applicant with regard to all the Operational Creditors by allocating an amount of Rs.15,000/-.

31. Replying to the submission made on behalf of learned counsel appearing in Company Appeal (AT) (Ins.) No. 361 of 2022 – Concor Air Ltd., it is submitted that claim as Operational Creditor of the Concor Air Ltd. was admitted by the Resolution Professional for an amount of Rs.82,61,378/-. It is submitted that the decision regarding feasibility and viability of the Resolution Plan vests with the Committee of Creditors which takes into consideration all aspects of the plan including distribution of funds to various claimant of the Corporate Debtor. The Committee of Creditor has approved the plan with 99.22% majority and all the Operational Creditors have been allocated similar fixed amount, hence, there is no error in the Resolution Plan which may warrant any interference. The plan does not violates Section 30(2)(b).

32. We have considered submissions of learned counsel for the parties and perused the record.

33. From the submissions of learned counsel for the parties and the materials on record following questions arise for consideration in these appeals:

QUESTIONS

I. What is the extent and the limitation of the judicial review by the Adjudicating Authority and the Appellate Tribunal in context of a Resolution Plan approved by the CoC with requisite majority?

II. Whether the workmen and employees are entitled to receive the payment of provident fund, gratuity and other retirement benefits in full since they are not part of the liquidation estate under Section 36(4)(b)(iii) of the Code?

III. Whether the workmen and employees are entitled to receive their dues from the Corporate Debtor as per the provisions of the Code i.e. the minimum liquidation value envisaged under Section 30(2)(b) by referring to waterfall mechanism provided under Section 53(1) of the Code?

IV. Whether the Resolution Plan approved by the Adjudicating Authority violates the provisions of Section 30(2)(b) of the Code since it does not provide the minimum amount to the workmen/ employees as contemplated under Section 30(2)(b)?

V. Whether the Resolution Plan as approved by the Adjudicating Authority violates provisions of Section 30(2)(e) of the Code since it contravenes provisions of Industrial Disputes Act, 1947 it having not provided for retrenchment compensation to the

workmen/employees who were so entitled under Section 25-F and 25-FF of the Industrial Disputes Act, 1947 and other legislations?

VI. Whether the demerger of entire workforce except of 50 employees as Asset Protection Team to AGSL is illegal and contrary to the provision of Section 25-FF of Industrial Disputes Act, thus, violates Section 30(2) of the Code?

VII. Whether the workmen/employees are entitled for payment of Rs.750 crores (or more) as CIRP cost subsequent to insolvency commencement date they being on the roll of the Corporate Debtor and principle of no work no pay could not have been applied by the Resolution Professional?

VIII. Whether for computing the payment to secured financial creditors under Section 53(1)(b) only the value of their security interest has to be taken into consideration or their entire financial debt is to be considered while computing their entitlement?

IX. Whether the Resolution Plan being contingent and conditional ought not to have been approved in view of the law laid down by the Hon'ble Supreme Court in *"Ebix Singapore Pvt. Ltd. Vs. CoC of Educomp Solutions Ltd. & Anr., (2022) 4 SCC 401"?*

X. Whether the allocation of fixed amount of Rs.15,000/- each to the Operational Creditors (other than workmen/employees) in the

resolution plan can be held to be fair and equitable and deserves no interference by this Appellate Tribunal?

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?

XII. Whether the claim of Department of State Tax which was submitted within time created a charge in favour of the Department on the assets of the Corporate Debtor by virtue of operation of law and the State Tax Department has the security interest and is a secured creditor?

XIII. Reliefs, if any, to which the appellants are entitled?

QUESTION - I

34. Section 31 of the Code provides for approval of Resolution Plan. Section 31(1) provides as follows:

> *"31(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order*

approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation."

35. The satisfaction referred to in Sub-section (1) of Section 31 of the Adjudicating Authority is objective satisfaction based on materials on record. The crucial words in Sub-section (1) are:

"*the resolution plan as approved by the committee of creditors under sub-section (4) of section 30* ***meets the requirements as referred to in sub-section (2) of section 30***"

[Emphasis supplied]

36. The statutory scheme itself delineate that a plan which meets requirement of Sub-section (2) of Section 30 can be approved. The connotation is that when the plan does not meet requirements of Sub-section (2) of Section 30, it need not be approved. Hon'ble Supreme Court

had occasion to consider the scope of judicial review by Adjudicating Authority of a Resolution Plan approved by the CoC in several cases. We may first notice the judgment of Hon'ble Supreme Court in ***"K. Sashidhar vs. Indian Overseas Bank, (2019) 12 SCC 150"***. Dealing with the functions of the Adjudicating Authority after receipt of the proposal from the Resolution Professional for approval of a plan, following has been observed in Para 35:

> *"35. …… On receipt of such a proposal, the adjudicating authority (NCLT) is required to satisfy itself that the resolution plan as approved by CoC meets the requirements specified in Section 30(2). No more and no less. This is explicitly spelt out in Section 31 of the I&B Code,"*

37. Further in Para 52, Hon'ble Supreme Court laid down that commercial wisdom of the CoC has to be given paramount status. In Para 52 and 55 following has been laid down: -

> *"52. Besides, the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of*

experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made nonjusticiable."

x…x…x

"55. Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan "as approved" by the requisite percent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides : (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force,

(vi) conforms to such other requirements as may be specified by the Board."

38. While explaining the scope of judicial review following has been further observed in Para 62 and 64: -

"62. …… Be that as it may, the scope of enquiry and the grounds on which the decision of "approval" of the resolution plan by the CoC can be interfered with by the adjudicating authority (NCLT), has been set out in Section 31(1) read with Section 30(2) and by the appellate tribunal (NCLAT) under Section 32 read with Section 61(3) of the I&B Code. No corresponding provision has been envisaged by the legislature to empower the resolution professional, the adjudicating authority (NCLT) or for that matter the appellate authority (NCLAT), to reverse the "commercial decision" of the CoC muchless of the dissenting financial creditors for not supporting the proposed resolution plan. Whereas, from the legislative history there is contra indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority."

x…x…x

"64. At best, the Adjudicating Authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B

Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors - be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the Appellate Authority (NCLAT) is limited to the grounds under Section 61(3) of the I&B Code. It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting. To take any other view would enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite percent of voting share to approve the resolution plan; and in the process authorize the adjudicating authority to reject the approved resolution plan upon accepting such a challenge. That is not the scope of jurisdiction vested in the adjudicating authority under Section 31 of the I&B Code dealing with approval of the resolution plan."

39. Next judgment which need to be noticed is judgment of Hon'ble Supreme Court in ***"Committee of Creditors of Essar Steel India Limited Through Authorised Signatory vs. Satish Kumar Gupta & Ors., (2020) 8 SCC 531"***. Justice Nariman referred to and relied on the judgment in K. Sashidhar's case (supra). In Para 65, 72 and 73 following has been laid down: -

"65. As has already been seen hereinabove, it is the Adjudicating Authority which first admits an application by a financial or operational creditor, or by the corporate debtor itself under Section 7, 9 and 10 of the Code. Once this is done, within the parameters fixed by the Code, and as expounded upon by our judgments in Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407 and Macquarie Bank Ltd v. Shilpi Cable Technologies Ltd. (2018) 2 SCC 674, the Adjudicating Authority then appoints an interim resolution professional who takes administrative decisions as to the day to day running of the corporate debtor; collation of claims and their admissions; and the calling for resolution plans in the manner stated above. After a resolution plan is approved by the requisite majority of the Committee of Creditors, the aforesaid plan must then pass muster of the Adjudicating Authority under Section 31(1) of the Code. The Adjudicating Authority's jurisdiction is circumscribed by Section 30(2) of the Code. In this context, the decision of this court in K. Sashidhar (supra) is of great relevance."

"72. This is the reason why Regulation 38(1A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a resolution plan shall be given priority in payment

over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value - which in most cases would amount to nil after secured creditors have been paid - would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors."

"73. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or sub- class of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being

in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal."

40. Hon'ble Supreme Court in subsequent judgment in ***"Kalpraj Dharamrishi vs. Kotak Investment Advisors Ltd. (2021) 10 SCC 401",*** after referring to the earlier judgments of the Supreme Court reiterated the principle in Para 171 in following words: -

> *"171. It would thus be clear, that the legislative scheme, as interpreted by various decisions of this Court, is unambiguous. The commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 of the I&B Code."*

41. It is, thus, settled that commercial wisdom of CoC in approving the Resolution Plan is not to be interfered in exercise of jurisdiction of judicial review by Adjudicating Authority or by this Appellate Tribunal except in cases where Resolution Plan violates mandatory requirement as provided under Sub-section (2) of Section 30 of the Code. We, thus, need to proceed to examine the contention of both the parties in light of the above ratio laid down by the Hon'ble Supreme Court in above noted cases.

QUESTION - II & III

42. A great emphasis has been laid down by learned counsel for the appellant on workmen/employees entitlement to payment of provident fund, gratuity and other retirement benefits in full. The submission is supported by provisions of Section 36 Sub-section (4) of the Code. Section 36 deals with liquidation estate. Section 36(1) provides as follows: -

> *"**36. Liquidation Estate. –** (1) For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor."*

43. Section 36(4) provides that the assets which shall not include in the liquidation estate. Section 36(4)(a) is as follows:-

> *"36(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;"*

44. Section 36(4) contains an injunction *"the following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation".* We, in the present case, are concerned with clause (iii) of sub-section 4(a) which is *"all sums due to any workman/employee from the provident fund, pension fund or the gratuity fund".*

45. A plain reading of the above provision indicate that what is excluded from the liquidation estate are sums due to any workman or employee from the provident fund, pension fund and gratuity fund. Thus, sums due to any workman from the above funds are excluded from the liquidation estate. Legislative intent is clear that any sums due to any workman from aforesaid fund are excluded and cannot be used for recovery in the liquidation. The object is that sums due to any workman and employee

from the aforesaid funds should not be used for recovery in liquidation for dues of other creditors since those dues are exclusive to workmen and employees.

46. Learned counsel for the Appellant has relied on **"Report of the *Bankruptcy Law Reforms Committee, November, 2015"***. He has referred to Para 5.5.5. The Committee opined that assets held by the entity in trust, such as employee pension must be kept out of the liquidation process. The submission of the Appellant is that when the sums due to the workmen from provident fund, gratuity fund and pension fund are excluded from the liquidation estate, the sums due to any workmen towards provident fund, gratuity fund and pension fund should be paid in full and waterfall mechanism provided under Section 53(1)(b) should not be made applicable for computing such claims of the workmen and employees.

47. Learned counsel for the Appellant has also relied on *"**Report of the Joint Committee on The Insolvency and Bankruptcy Code, 2015 - April, 2016",*** where in para 27 following has been stated which is reflected in Section 36(4). Para 27 is as follows:-

> *"**27. Exclusion of provident fund, pension fund and the gratuity fund from the liquidation estate assets and estate of bankrupt – Clause 36(4) and 155(2)***
>
> *The representative of EPFO during the course of deliberations stated that the priority of*

payment of debts under the Code is changed and EPF dues in the Bill have been placed on a lower priority and the Eleventh Schedule of the Code proposes that Section 326 and 327 shall not be applicable in the event of liquidation under the Code. By this the provisions of Section 11 of the EPF and MP Act are rendered null and void. The representative drew the attention of the Committee to the Supreme Court Judgment whereby it was held that the EPF dues shall get priority over all other debts including secured creditors.

Similarly, PFRDA in the memorandum has stated that the investment for old age security/pension should be given higher priority in case of liquidation of assets of bankrupt entities in line with the priority given to the dues of employees. Further, as most of the subscribers under NPS regulated by PFRDA are from Government sector and the NPS Life (Scheme for Economically Weaker Section), where the share of the contribution is from the Government funds also, higher priority should be given to the dues to pension fund investments to the bankrupt entities.

The Committee after in depth examination are of the view that provident fund, pension fund and the gratuity fund provide the social safety net to the workmen and employees and hence need to be secured in the event of liquidation of a company or bankruptcy of partnership firm. The

Committee, therefore, feel that all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund should not be included in the liquidation estate assets and estate of the bankrupt.

In view of the above the Committee decide that the Clause 36(4)(a)(iii) may be substituted by the following:

> *'all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund'*

Similarly, the following new sub-Clause 155(2)(d) may be added after Clause 155(2)(c).

> *'all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund.'*

Clause 155(2)(c) may accordingly be renumbered 155(2)(d)."

48. Learned counsel for both the parties have referred to and relied on various judgment of this Tribunal as well as the Hon'ble Supreme Court in the above context which need to be noticed by us. The first judgment which has been relied by the Appellant is judgment of this Tribunal in ***"Company Appeal (AT) (Ins.) No.396 of 2019, State Bank of India vs. Moser Baer Karamchari Union & Anr.".*** In the above case, order of liquidation was

passed by the Adjudicating Authority in which proceeding an application was filed by *'Moser Baer Karamchari Union'* praying that direction be issued to the liquidator to exclude the amount of provident fund from the waterfall mechanism envisaged under Section 53 of the Code. The Adjudicating Authority allowed the application holding that the provident fund, pension fund dues and gratuity fund dues cannot be part of Section 53 for the Code. State Bank of India filed an Appeal. This Tribunal after noticing Section 36(4) and 53 of the Code as well as Section 326 and 327 of the Companies Act, 2013 laid down following in Para 20 to 25:-

> *"20. There is a difference between the distribution of assets and preference/ priority of workmen's dues as mentioned under Section 53(1) (b) of the 'I&B Code' and Section 326(1) (a) of the Companies Act, 2013. It has also been noticed that Section 53(1) (b) (i) which relates to distribution of assets, workmen's dues is confined to a period of twentyfour months preceding the liquidation commencement date.*
>
> *21. While applying Section 53 of the 'I&B Code', Section 326 of the Companies Act, 2013 is relevant for the limited purpose of understanding 'workmen's dues" which can be more than provident fund, pension fund and the gratuity fund kept aside and protected under Section 36(4) (iii).*
>
> *22. On the other hand, the workmen's dues as mentioned in Section 326(1) (a) is not confined to a*

period like twenty-four months preceding the liquidation commencement date and, therefore, the Appellant for the purpose of determining the workmen's dues as mentioned in Section 53(1) (b), cannot derive any advantage of Explanation (iv) of Section 326 of the Companies Act, 2013.

23. This apart, as the provisions of the 'I&B Code' have overriding effect in case of consistency 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."

49. In the above case, this Tribunal approved the decision of the Adjudicating Authority by which the Adjudicating Authority directed that the provident fund, pension fund and gratuity fund do not come within the meaning of liquidation estate which has been specifically noticed in Para 25 of the judgment, as extracted above.

50. Next judgment which we need to notice is judgment of ***"Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd. & Ors., Company Appeal (AT) (Ins.) No. 354 of 2019 & Other Appeals"***. Above was a case where Resolution Plan was approved by the Adjudicating Authority. One of the Appeal was filed by the Regional Provident Fund Commissioner. It was submitted in the Appeal that Successful Resolution Applicant was supposed to pay the total provident fund amount but only part of the amount has been allowed by the Resolution Professional. Section 36(4)(a)(iii) was relied. In Para 40 to 45 while allowing the Company Appeal (AT) (Ins.) No. 1001 of 2019 following was held by this Tribunal:-

> *"40. According to Appellant- 'Regional Provident Fund Commissioner', 'Successful Resolution Applicant' is supposed to pay the total provident fund amount, but only a part of the amount has been allowed by the 'Resolution Professional'.*
>
> *41. It was submitted that the 'Resolution Plan' is against the provisions of Section 36(4) (iii) of the 'I&B Code' as per which the 'provident fund' and*

'gratuity fund' cannot be included as assets of the 'Corporate Debtor'.

42. An Affidavit has been filed by 'Kushal Limited'- ('Successful Resolution Applicant') stating that the approved 'Resolution Plan' has duly taken care of all the statutory dues amounting to total Rs.5.09 crore. It was further submitted that the principal amount of 'provident fund' has been taken into consideration whereas the order of levying of interest by the 'PF Authority' post 'Corporate Insolvency Resolution process' is not permissible under the law for the time being in force.

43. Further, according to 'Successful Resolution Applicant', Section 7Q and 14B of the 'Employees Provident Funds and Miscellaneous Provision Act, 1952' cannot be relied upon as the provision of the 'I&B Code' has overriding effect on the same in terms of Section 238 of the 'I&B Code'.

44. However, as no provisions of the 'Employees Provident Funds and Miscellaneous Provision Act, 1952' is in conflict with any of the provisions of the 'I&B Code' and, on the other hand, in terms of Section 36 (4) (iii), the 'provident fund' and the 'gratuity fund' are not the assets of the 'Corporate Debtor', there being specific provisions, the application of Section 238 of the 'I&B Code' does not arise.

45. Therefore, we direct the 'Successful Resolution Applicant'- 2nd Respondent ('Kushal Limited') to

release full provident fund and interest thereof in terms of the provisions of the 'Employees Provident Funds and Miscellaneous Provision Act, 1952' immediately, as it does not include as an asset of the 'Corporate Debtor'. The impugned order dated 27th February, 2019 approving the 'Resolution Plan' stands modified to the extent above."

51. Against the above judgment of this Tribunal a Civil Appeal was filed in the Supreme Court which was dismissed on 22.05.2020 by following order:

"**O R D E R**

We find no merit in this appeal. The Civil Appeal is, accordingly, dismissed."

52. In the above case, it is clear that the case of the Regional Provident Fund Commissioner was that the total provident fund amount has not been included in the Resolution Plan whereas the Successful Resolution Applicant has contended that Principal Amount of provident fund has been taken in consideration, whereas the order of levying of interest by the PF Authority post Corporate Insolvency Resolution process has not been included. This Tribunal held that no provision of the Employees Provident Funds and Miscellaneous Provision Act, 1952 is in conflict with the provisions of I&B Code and direction was issued to pay the full amount of provident fund by the Successful Resolution Applicant.

53. Learned counsel for the Respondents have placed reliance on two other judgments of this tribunal rendered by two member bench i.e. judgment of this Tribunal in ***"Company Appeal (AT) (Ins.) No. 1229 of 2019, Mr Savan Godiwala, the liquidator of Lanco Infratech Limited vs. Apalla Siva Kumar"***. In which case, the Adjudicating Authority has directed the Liquidator to pay gratuity to the employees. An appeal was filed in this Tribunal which has been allowed. After noticing the three member bench judgment in *"State Bank of India v Moser Baer Karamchari Union and Another"* following observations have been made in Paras 16, 17 and 18:-

> *"16. ..... 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****.*

17. 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 as already been decided that Gratuity Fund does not form the part of the liquidation asset.

18. 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."

54. Against the above judgment, appeal has been filed in the Supreme Court and the judgment is under scrutiny by Hon'ble Supreme Court in Civil Appeal No. 2520 of 2020.

55. The next judgment relied by learned counsel for the Respondent is the judgment of ***"Regional Provident Fund Commissioner, Employees Provident Fund Organisation vs. Vandana Garg, Company Appeal (AT) (CH) (Ins) No. 50 of 2021"***, which judgment follows the earlier judgment of this Tribunal in ***'Sawan Godiwala vs. Apalla Siva Kumar'.*** In the above case, the Adjudicating Authority approved the Resolution Plan which waives off a major portion of provident fund dues owed by the Corporate Debtor. An Appeal was filed by the Regional Provident Fund Commissioner challenging the resolution plan on the ground that it violates Section 11 of the 1952 Act and also violates Section 36(4)(a)(iii) and Section 32(e) of the Code. In Para 27 and 28 of the Judgment following has been held:-

"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."”

56. In the above case the claim submitted by EPFO of Rs.1,95,01,301/- was admitted by Resolution Professional and reflected in the Resolution Plan. In appeal enhanced claim of Rs.2,84,69,497/- was sought to be

raised which was not accepted by this Appellate Tribunal. Further the Judgment of this Tribunal in above case is based on Judgment of ***"Savan Godiwala"*** which is pending consideration before Hon'ble Supreme Court.

57. Learned counsel for the Appellant has relied on Judgment of this Tribunal in ***"Sikander Singh Jamuwal vs. Vinay Talwar & Ors., Company Appeal (AT) (Ins.) No. 483 of 2019"***, decided on 11.03.2022. In the above case, an appeal was filed by ex-employee of Respondent No.3, Corporate Debtor, challenging the order dated 02.04.2019 passed by the Adjudicating Authority approving the resolution plan. Grievance of the Appellant was that they have not been made the full payment of provident fund due to the Corporate Debtor. Other grounds for challenge were also raised. This Tribunal while considering the appeal considered provisions of Section 36(4) and Section 53 of the Code. This Tribunal placed reliance on the judgment of ***Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd." (Supra)*** and issued following directions in Para 13(f):

> *"(f) Hence, We direct the Respondent No.2/Successful Resolution Applicant to release full provident fund dues in terms of the provisions of the Employees Provident Funds and Miscellaneous Provident Fund Act, 1952 immediately by releasing the balance amount of (Rs. 1,35,06,391 full dues – (minus) considered in the Resolution Plan Rs.78,00,000). The impugned order*

dated 02nd April, 2019 approving the 'Resolution Plan' stands modified to the extent above."

58. Against the above judgment of this Tribunal Civil Appeal was filed before Hon'ble Supreme Court which has been dismissed on 23.09.2022 by following order:

"O R D E R

Having heard learned counsel for the appellant, we find no merits in the appeal.

The Civil Appeal is, accordingly, dismissed.

However, the appellant is permitted to make a request before the appropriate forum, to provide sometime for the deposit of the difference of the provident fund."

59. Another judgment relied by learned counsel for the Appellant is judgment of this Tribunal in ***"Nitin Gupta vs. Applied Electro-Magnetics Pvt. Ltd. & Ors., Company Appeal (AT) (Ins.) No. 502 of 2019"***, decided on 16.03.2022. Judgment of ***"Nitin Gupta"*** relied on earlier judgment of ***"Sikander Singh Jamuwal"***. Resolution Plan wad modified with direction as issued in Para 30:

"30. We are, therefore, of the view that the approved resolution plan complies with the provisions of the IBC with slight modification in the amounts proposed to be paid to the workmen and

employees in relation to their dues including provident fund which is as follows:

- *The workmen should get an additional payment of Rs. 0.1652 crores - Rs. 0.09 crores = Rs. 0.8834 crores to be distributed among them as per their proportionate shares.*

- *The payment of provident fund amounts should be in accordance with the judgment of this tribunal in the matter Sikander Singh Jamuwal Vs. Vinay Talwar & Ors. [CA (AT) (Ins) No. 483 of 2019].*

With the above-stated modifications in the Resolution Plan we uphold the approval of the Resolution Plan by the Adjudicating Authority. The appeal is disposed of accordingly."

60. The submissions which has been pressed by learned counsel for the Appellant are based on two three bench judgments of this Tribunal in ***"State Bank of India vs Moser Baer Karamchari Union" (Supra)*** and "***Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd." (Supra).*** The judgment of "State Bank of India vs. Moser Baer Karamchari Union" was a case relating to liquidation proceeding, in which proceeding, relying on Section 36(4)(a)(iii) the Adjudicating Authority has directed the Liquidator to make the payment of provident fund, pension fund and gratuity fund. The basis of judgment of this Tribunal in State Bank of

India's Case was that the I&B Code will have overriding effect and the Section 53(1) (b) read with Section 36(4) will have overriding effect on Section 326(1) (a), including the Explanation mentioned below Section 326 of the Companies Act, 2013. Explanation to Section 326 of the Companies Act, 2013 is as follows:-

> *"Explanation.—For the purposes of this section, and section 327—*
>
> > *(a) "workmen", in relation to a company, means the employees of the company, being workmen within the meaning of clause (s) of section 2 of the Industrial Disputes Act, 1947 (14 of 1947);*
> >
> > *(b) "workmen's dues", in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely:—*
> >
> > > *(i) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947 (14 of 1947);*
> > >
> > > *(ii) all accrued holiday remuneration becoming payable to any workman or,*

in the case of his death, to any other person in his right on the termination of his employment before or by the effect of the winding up order or resolution;

(iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or amalgamation with another company or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (19 of 1923), rights capable of being transferred to and vested in the workmen, all amount due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company;

(iv) all sums due to any workman from the provident fund, the pension fund, the gratuity fund or any other fund for the welfare of the workmen, maintained by the company;

(c) "workmen's portion", in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion

as the amount of the workmen's dues bears to the aggregate of the amount of workmen's dues and the amount of the debts due to the secured creditors."

61. Section 326 and 327 of the Companies Act is not applicable in the event of liquidation under the Insolvency and Bankruptcy Code, 2016 as per Sub-section (7) added in Section 327 by Schedule Eleven of the Code. Section 53 refers to workmen dues and by explanation appended to Section 53(1) at (ii) the term "workmen's dues" shall have the same meaning as assigned to it in Section 326 of the Companies Act, 2013. Thus, for computation of the workmen's dues the definition under Section 326 has to be resorted to. Workmen dues for period of 24 months include salary, allowances and all other claims which workmen is entitled. For computation of workmen dues, which is to be paid by the Corporate Debtor, in event of liquidation under Section 53(1)(b) workmen's dues are ranked equally with the secured creditors. The question which has arisen before us is with regard to payment of provident fund and gratuity which is due to an applicant.

62. Three Member Bench judgment in both ***"State Bank of India vs Moser Baer Karamchari Union and Another" (Supra)*** and ***"Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd." (Supra)*** where this Tribunal has categorically held that provident fund has to be paid to workmen and employees in full and that cannot be made subject to

distribution under waterfall mechanism of Section 53(1). Hon'ble Supreme Court has dismissed the appeal against the judgment of the Tribunal in ***"Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd."***, as noted above.

63. Learned counsel for the Respondent has relied on two two members judgments delivered by this Tribunal in ***"Sawan Godiwala vs. Apalla Siva Kumar"*** and ***"Regional Provident Fund Commissioner, Employees Provident Fund Organisation vs. Vandana Garg" (Supra)*** where direction issued by the Adjudicating Authority for payment of provident fund was interfered with by this Appellate Tribunal. The judgment of ***"Sawan Godiwala"*** only refers to the judgment of ***"State Bank of India vs Moser Baer Karamchari Union"***, and does not notice the another three member bench judgment in ***"Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd."***. The two member bench judgment in ***"Sawan Godiwala"*** also follows the three member bench judgment in ***"State Bank of India vs Moser Baer Karamchari Union"*** and does not take any different view. However, with regard to direction to pay gratuity the two member bench judgment set aside the order of Adjudicating Authority holding that no gratuity fund was created. Another judgment in ***"Regional Provident Fund Commissioner, Employees Provident Fund Organisation vs. Vandana Garg" (Supra)*** delivered by two member bench does not refer to any of the earlier three member bench judgments and has relied on ***"Sawan Godiwala"*** judgment. We find ourself bound to follow

the three member bench judgment in ***"Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd."*** where direction was issued to the Successful Resolution Applicant to release full provident fund and interest thereof in terms the Employees' Provident Funds and Miscellaneous Provision Act, 1952, which judgment has also received approval by the Hon'ble Supreme Court.

64. The Hon'ble Supreme Court in ***"Sunil Kumar Jain vs Sundaresh Bhatt, Civil Appeal No. 5910 of 2019"*** decided on 19th April, 2022, had occasion to consider a case where an appeal by workmen/employees of M/s ABG Shipyard Limited Mumbai was dismissed by this Tribunal. The facts of the above case need to be noticed in some details. The Adjudicating Authority admitted an application under Section 7 on 01.08.2017 against the Corporate Debtor. An order of liquidation was passed. An application was filed by the workmen and employees for claim of salary for the period involving CIRP and the prior period, which was rejected. Before the Hon'ble Supreme Court submission was made that employees and workmen were entitled to wages/salary during the CIRP period and were also entitled for their dues of provident fund, gratuity and pension fund. The said submission has been noted in Para 13 of the judgment:-

> *"13. Learned counsel appearing on behalf of the appellants has taken us to the relevant provisions of the IB Code in support of her submission that the workmen/employees of the Dahej Yard and Mumbai Head Office are at least entitled to the*

wages/salaries during the period of CIRP and are also entitled to the amount due and payable towards provident fund, gratuity and pension. Learned counsel appearing on behalf of the appellants has taken us to Section 3(36); Section 5(13); Section 5(14); Section 5(23); Section 17, Section 18; Section 19; Section 20; Section 25; Section 33(7); Section 36(4) and Section 53 of the IB Code."

65. Hon'ble Supreme Court has noticed all provisions of I&B Code including Section 36(4) and Section 53. While considering the claim of dues of employees and workmen towards provident fund, pension fund and gratuity following was laid down by Hon'ble Supreme Court in Para 53 and 54:-

"53. Now so far as the dues of the workmen/employees on account of provident fund, gratuity and pension are concerned, they shall be governed by Section 36(4) of the IB Code. Section 36(4)(iii) of the IB Code specifically excludes "all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund", from the ambit of "liquidation estate assets". Therefore, Section 53(1) of the IB Code shall not be applicable to such dues, which are to be treated outside the liquidation process and liquidation estate assets under the IB Code. Thus, Section 36(4) of the IB Code has clearly given outright protection to

workmen's dues under provident fund, gratuity fund and pension fund which are not to be treated as liquidation estate assets and the Liquidator shall have no claim over such dues. Therefore, the concerned workmen/employees shall be entitled to provident fund, gratuity fund and pension fund from such funds which are specifically kept out of liquidation estate assets and as per Section 36(4) of the IB Code, they are not to be used for recovery in the liquidation.

54. In view of the above and for the reasons stated above, it is held as under:

i) that the wages/salaries of the workmen/ employees of the Corporate Debtor for the period during CIRP can be included in the CIRP costs provided it is established and proved that the Interim Resolution Professional/ Resolution Professional managed the operations of the corporate debtor as a going concern during the CIRP and that the concerned workmen/ employees of the corporate debtor actually worked during the CIRP and in such an eventuality, the wages/salaries of those workmen/ employees who actually worked during the CIRP period when the resolution professional managed the operations of the corporate debtor as a going concern, shall be paid treating it and/or considering it as part of CIRP costs and the same shall be payable in full first as per Section 53(1)(a) of the IB Code;

ii) considering Section 36(4) of the IB code and when the provident fund, gratuity fund and pension fund are kept out of the liquidation estate assets, the share of the workmen dues shall be kept outside the liquidation process and the concerned workmen/employees shall have to be paid the same out of such provident fund, gratuity fund and pension fund, if any, available and the Liquidator shall not have any claim over such funds."

66. The conclusions and directions of Hon'ble Supreme Court are contained in Para 54(ii) in reference to provident fund, gratuity fund and pension fund. The Hon'ble Supreme Court has directed that the share of workmen dues shall be kept outside the liquidation process and the concerned workmen/employees shall have to be paid the same out of such provident fund, gratuity fund and pension fund, if any, available.

67. Thus, from the above preposition it is clear that share of workmen dues have to be kept out of liquidation process and same shall have to be paid to the employees and workmen out of such provident fund, gratuity fund and pension fund, **if any, available**. Thus, it is clear that if any provident fund, gratuity fund and pension fund is available with the Corporate Debtor, the share of employees and workmen has to be paid from the said fund which has to be kept out of the liquidation process. Thus, if the claim of workmen/employees regarding payment of provident fund, gratuity fund and pension fund can be satisfied from the fund maintained

by the Corporate Debtor that has to be kept out of the liquidation and cannot be utilized for distribution amongst other stakeholders.

68. The judgment of Hon'ble Supreme Court as relied by learned counsel for the Respondent also in Para 53 clearly held that Section 53(1) of the Code shall not be applicable to such sums, which are to be treated outside the liquidation process and liquidation estate assets under the Code. Direction issued by Hon'ble Supreme Court in Para 54(i) was with regard to wages and salary of the workmen/employees of the Corporate Debtor during the CIRP period and under direction (ii) at Para 54, Hon'ble Supreme Court directed in reference to Section 36(4) of the Code that provident fund, gratuity fund and pension fund are kept out of the liquidation estate assets and the share of the workmen dues shall be kept outside the liquidation process. Learned counsel for the Respondent has relied on words "if any, available" occurring in direction (ii). The above words cannot be read to mean that the workmen and employees are not entitled for provident fund, gratuity fund and pension fund if not available with the Liquidator.

69. The present is a case where resolution plan has been approved; present is not a case of liquidation. Under the provisions of 1952 Act, the Corporate Debtor is statutorily obliged to deposit the provident fund of the workmen and employees with the EPFO. It has been clearly stated in the Additional Affidavit of the Resolution Professional dated 25.07.2022 that no amount towards provident fund of the workmen and employees were deposited after February, 2019. Insolvency commencement date being

20.06.2019, the Corporate Debtor was obliged to deposit the contribution towards provident fund with EPFO. The claim of provident fund till the insolvency commencement date, of the workmen and employees was to be accepted and Successful Resolution Applicant was liable to make payment of provident fund till the date of initiation of CIRP and statutory obligation of the Corporate Debtor was liable to be discharged by the Successful Resolution Applicant. From the Affidavit of Resolution Professional it is clear that Resolution Professional in the claim which has been admitted of the workmen for 24 months, the provident fund and gratuity amount was also included. The workmen have received payments with regard to provident fund and gratuity in part under the Resolution Plan subject to the liquidation value of the workmen. We, thus, are satisfied that workmen are entitled for issuing appropriate direction to Successful Resolution Applicant to make payment of the workmen of the provident fund and gratuity dues upto the date of insolvency commencement date less the amount already received under the Resolution Plan towards provident fund and gratuity. The Corporate Debtor having not deposited the statutory dues with the EPFO, the said statutory liability has to be discharged by the Successful Resolution Applicant.

70. It is further relevant to notice with regard to pension no materials have been brought before us to indicate that the Corporate Debtor has any rules /provisions for payment of pension, hence, no direction with regard to pension need to be issued.

71. In view of the aforesaid discussion, we arrive at following conclusions:

(i) The workmen and employees are entitled for payment of full amount of provident fund and gratuity till the date of commencement of the insolvency which amount is to be paid by the Successful Resolution Applicant consequent to approval of the Resolution Plan in addition to the 24 months workmen dues as the workmen is entitled to under Section 53(1)(b) of the Code. It is made clear that in addition to part amount of provident fund and gratuity as proposed in Resolution Plan to workmen, Successful Resolution Applicant is obliged to make payment of balance unpaid amount of provident fund and gratuity to workmen and employees.

72. Our answer to Question II and III is as follows:

(i) The workmen and employees are entitled to receive the amount of provident fund and gratuity in full since they are not part of the liquidation estate under Section 36(4)(b)(iii).

(ii) The workmen are entitled to receive their dues from the Corporate Debtor for period of 24 months as per provision of Section 53(1)(b) at least to minimum liquidation value envisaged under Section 32(2)(b) read with Section 53(1).

73. To further examine the issues, we need to look into few more provisions of the Code as well as facts on record relating to provident fund, gratuity fund and other retirement benefits.

74. Although Section 36, sub-section (4)(a)(iii) of the Code applies to liquidation, but the purpose and object for which the above provisions was enacted also finds reflections in Section 18 of the Code. Section 18 enumerates the duties of IRP. Section 18, sub-section (f) provides as follows:

> *"**18(f)** take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including –*
>
> *(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;*
>
> *(ii) assets that may or may not be in possession of the corporate debtor;*
>
> *(iii) tangible assets, whether movable or immovable;*
>
> *(iv) intangible assets including intellectual property;*
>
> *(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;*

(vi) assets subject to the determination of ownership by a court or authority;"

75. The Explanation to Section 18, which is also relevant provides:

"Explanation. – For the purposes of this 1[section], the term "assets" shall not include the following, namely:-

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

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

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

76. If a Corporate Debtor maintains a fund for payment of provident fund, gratuity fund and other retirement benefits to its workers and employees, that shall be an asset, but IRP is required to take control and custody of the assets over which the Corporate Debtor has ownership rights by virtue of Section 18(1)(f)(i). When we look into the Explanation to Section 18(1), the assets comprising of provident funds, gratuity funds or a pension fund and belonging to be maintained by Corporate Debtor, are assets on which employees and workmen have right although assets are in possession and control of the Corporate Debtor. The above mentioned assets, thus, are not to be taken control by IRP, after initiation of CIRP.

Hence, the said funds, i.e., provident fund, pension fund and gratuity fund maintained by the Corporate Debtor, have to be utilized fully for payment of provident fund, pension fund and gratuity fund of the workmen and employees and thus, these assets cannot be included in the Information Memorandum as the assets of the Corporate Debtor, while inviting the Resolution Plan.

77. Now we look into the facts of the present case. The Resolution Professional has filed an additional affidavit dated 25.07.2022 as directed by this Tribunal vide its order dated 22.07.2022. In paragraph 11.1 while dealing with provident fund, following has been stated:

> *"11.1 I say that the amounts deposited by the erstwhile management of the Corporate Debtor into Employee Provident Fund Organisation ("EPFO") do not form part of the estate of the Corporate Debtor and accordingly, such amounts do not form part of the Resolution Plan. I state that the provident fund deductions from the salaries of the employees/workmen which were deposited into the respective accounts of such workmen/employees maintained with the EPFO can be withdrawn by the respective employees/workmen from their respective accounts, without the knowledge of the employer. Hence, pursuant to the ICD when I assumed control of the accounts of the Corporate Debtor, the amounts in the above accounts of the workmen/employees which were deposited with*

the EPFO did not form part of the records of the Corporate Debtor. Hence, I am unaware of the total amounts deposited prior to the ICD or the balance in the respective employee/workmen accounts as on date. The records of the Corporate Debtor as on ICD show that in February 2019, a payment of INR 13.94 Crore was made by the Corporate Debtor into the EPFO account However, after monies are deposited with the EPFO, the amounts are under the control of the respective employee/workmen and not the Corporate Debtor."

78. The above facts indicate that the workmen and employees are Members of the provident fund, which is maintained by Employees Provident Fund Organisation ("**EPFO**") and the Corporate Debtor was depositing provident fund deductions from the salaries of the employees and workmen into EPFO. The Resolution Professional has stated that in February 2019, a payment of Rs.13.94 crores was made by the Corporate Debtor into the EPFO account. No payments have been made in the EPFO account thereafter. The above fact clearly indicate that Corporate Debtor does not maintain any provident fund for payment of provident fund to its workmen and employees and workmen and employees are entitled to withdraw the provident fund deposited with EPFO as per the Scheme. The provident fund deposited by the Corporate Debtor in the EPFO account towards deduction with regard to its workmen and employees can be withdrawn directly by the workmen and employees from the EPFO. The claim of workmen and employees towards provident fund shall obviously

be towards the provident fund which is not deposited in the EPFO account. After issuance of publication by the Resolution Professional, claims have been filed by the workmen and employees before the Resolution Professional towards their salary, provident fund, gratuity etc., which after verification were admitted by the Resolution Professional. The Resolution Professional in paragraph 8.3 of the additional affidavit dated 25.07.2022 has given details of workmen dues (for the period of 24 months) ICD as well as employees dues (for the period of 12 months) ICD in paragraph 8.3 is as follows:

> *"8.3 It is pertinent to note that under Section 30(2)(b) read with Section 53 of the Code: (i) workmen's dues for the period of twenty-four months preceding the ICD rank pari passu with the dues of the financial creditors terms of Section 53(1)(b); and (ii) employees' dues for the period of twelve months preceding the ICD are to be calculated in terms of Section 53(1)(c). I say that the dues of the workmen (for the period of twenty-four months) and employees (for the period of twelve months) under Section 53 of the Code are as follows:*

Details of dues of workmen (24 Months) and employees (12 Months)

In INR Cr.

Category	**Salary**	**Provident Fund**	**Leaves**	**Gratuity**	**Total**
Workmen	411.6	9.8	25.2	18.7	465.3
Employees	466.8	6.7	16.0	9.6	499.1
Total	**878.4**	**16.5**	**41.2**	**28.3**	**964.4**

Details of dues of workmen (beyond 24 Months) and Employees (12 Months) In INR Cr.					
Category	**Salary**	**Provident Fund**	**Leaves**	**Gratuity**	**Total**
Workmen	--	--	2.2	111.2	113.4
Employees	--	--	39.2	136.6	175.8
Total	**--**	**--**	**41.4**	**247.8**	**289.2**

79. The above table indicates that the claim admitted by the Resolution Professional includes the provident fund, gratuity fund and leave encashment also. The above claim submitted by employees and workmen were obviously the claim of unpaid provident fund, leave encashment and gratuity fund as well as salary. When no provident fund, gratuity fund and fund for leave encashment is maintained by the Corporate Debtor, obviously, such claim which have been filed before Resolution Professional and admitted by Resolution Professional have to be satisfied as per the provisions of the Code and as per Section 30, sub-section (2) read with Section 53(1) of the Code. Present is not a case where Resolution Professional has in Information Memorandum entered provident fund, gratuity fund or other funds or retirement benefits maintained by the Corporate Debtor, so as to be part of resolution process.

80. As observed above, in admitted claim of workmen provident fund, gratuity and leave encashment was included, and payment proposed in plan partly satisfy above dues also. The workmen are entitled to full payment of provident fund and gratuity, hence, the balance of above dues are to be paid by the Successful Resolution Applicant, to satisfy statutory

obligations. Non-payment of full provident fund and gratuity shall lead to violation of Section 30(2)(e), hence, to save the plan the above payments have to be made.

QUESTION – IV

81. As noted above, law is well settled, i.e., Resolution Plan, which requires approval by Adjudicating Authority must comply the requirement as provided in Section 30, sub-section (2) of the Code. Section 30, sub-section (2) provides as follows:

> *"**30.** Submission of resolution plan. - (1) A resolution applicant may submit a resolution plan 2[along with an affidavit stating that he is eligible under section 29A] to the resolution professional prepared on the basis of the information memorandum.*
>
> *(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -*
>
> *(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;*
>
> *[(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-*
>
> *(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or*

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1. — For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanation 2. — For the purpose of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;"

82. We need to examine as to whether the Resolution Plan approved by the Committee of Creditors on 03.10.2020 and by Adjudicating Authority on 22.06.2021 complies the requirement under Section 30, sub-section (2) (b) of the Code.

83. The Resolution Professional in its additional affidavit dated 25.07.2022 has given details of liquidation value of the Corporate Debtor, which is also reflected in Form-H. The approximate liquidation value of the Corporate Debtor is Rs.2,555/- crores. Regulation 39, sub-regulation (4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation 2016 provides:

(4) The resolution professional shall endeavour to submit the resolution plan approved by the committee to the Adjudicating Authority at least fifteen days before the maximum period for completion of corporate insolvency resolution process under Section 12, along with a compliance certificate in Form H of the Schedule and evidence of receipt of performance security required under sub-regulation (4-A) of regulation 36-B).

84. After approval of the Resolution Plan by the Committee of Creditors, a compliance certificate in Form-H is required to be filed before the

Adjudicating Authority. After approval of the Resolution Plan, Resolution Professional has filed Form-H along with his application for approval of Resolution Plan, which has been brought on record by the Resolution Professional along with additional compilation filed on 06.07.2022. Form-H mentions the liquidation value as Rs.2555,21,40,000/-. Form-H in Clause-7 refers to Annexure-A. Note-3 deals with breakup of payments to workmen and employees. It is relevant to extract Note-3, which is to the following effect:

Sl. No.	**Particulars**	**Amount (INR Lakhs)**	**Remarks**
1	Total amount proposed by Resolution Professional	52,00	Please refer S. No.11 in the table in Annexure A for details
2	Add: Additional payout towards the workmen & employees	6100	Resolution Applicant has proposed total INR 5200 lakhs towards the dues of workmen & employees The estimated minimum liquidation value due towards the workmen is INR 11300 lakhs. For the purposes of the computations set out herein, the shortfall of INR 6100 lakhs has been deducted from the amount allocated to the assenting FCs & Operational Creditors in the ratio of their payouts. In relation to the above, for the purposes of this table, an amount of INR 6044 lakhs has been deducted in computing the payout to be made to the assenting FCs and an amount of INR 56 lakhs has been deducted in

			computing the payouts to be made to the Operational Creditors (other than workmen and employees).
3.	**Total Payout to Workmen & Employees**	**11,300**	

85. The above breakup, which is part of Form-H estimate minimum liquidation value due to the workmen is INR 11,300 lakhs, i.e., Rs.113/- Crores.

86. At this stage, we may also notice the paragraph 6.42 of the Resolution Plan, which refers to treatment of employees/ workmen dues. Para 6.4.2, (a), (b) and (c) is as follows:

> *"**6.4.2 Treatment of Employees/ Workmen dues, including dues of Authorized Representatives of Employees/ Workmen***
>
> *(a) The Resolution Applicant proposes to pay a fixed sum of Rs.52 Crores to the Workmen/ Employees towards settlement of all the claims made by the Employees and Workmen of the Corporate Debtor, including to the Authorized Representatives of Employees and Workmen as set out in the List of Creditors ("Admitted Workmen and Employees Dues").*
>
> *(b) The payments towards Admitted Workmen and Employees Dues shall be made out of funds infused by the Resolution Applicant in the Corporate Debtor and as per the Implementation Schedule set out in Clause 7.7 below. The said payment is also being made in priority to the payment to the financial creditors.*

(c) *In any case, if the Liquidation Value due to Operational Creditors (Employees/ Workmen dues, including dues of the Authorized Representatives of Employees/ Workmen) is not "NIL", then the Resolution Applicant undertakes that the Liquidation Value due to such Operational Creditors (Employees/ workmen dues including dues of Authorized Representatives of Employees/ Workmen) shall be paid and shall be given priority in payment over Financial Creditors as is already reflected in the Implementation Schedule in Clause 7.7 below. The entire payment to the Employees/ Workmen dues including dues of Authorized Representatives of Employees/ Workmen is being made in priority within 175 (one hundred seventy five) days from the Effective Date."*

87. The Resolution Plan clearly contains an undertaking of the Resolution Applicant that liquidation value due to Operational Creditors, i.e., employees and workmen shall be paid. When liquidation value has been estimated by Resolution Professional in Form-H as Rs.113 crores for workmen and employees, we fail to see the reason for allocating only Rs.52 crores towards dues of workmen. Hence, the workmen are entitled to at least Rs.113 crores, which is their minimum liquidation value estimated by Resolution Professional. The above fact clearly mandates direction to be issued to Resolution Applicant to pay at least Rs.113 crores towards workmen dues as per their entitlement under Section 30, sub-section (2) (b) read with Section 53(1) of the Code.

88. We, thus, arrive at a conclusion that had there not been an undertaking as contained in paragraph 6.4.2 (c) for payment of liquidation value, allocation of Rs.52 crores only was in clear violation of Section 30, sub-section (2), sub-clause (b), but in view of the undertaking by the Resolution Applicant, we do not find any necessity of interfering with the Resolution Plan except issuing a direction for payment of Rs.113 crores, which is a minimum liquidation value of workmen dues.

QUESTION – V & VI

89. The issue to be considered is as to whether the Resolution Plan as approved by the Adjudicating Authority violates provisions of Section 30(2)(e) of the Code. Section 30(2)(e) requires that Resolution Plan does not contravene any of the provisions of the law for the time being in force. The contention pressed by the Appellant is that provisions of Section 25F and 25FF of the Industrial Dispute Act, 1947 are the law time being in force and demerger of the workmen and employees of the Corporate Debtor to AGSL is in essence retrenchment of the workmen and workmen were entitled for retrenchment compensation and no retrenchment compensation having been paid to the workmen, there is violation of Section 25F and 25FF of the Industrial Disputes Act, 1947.

90. Before we proceed further, we may notice Section 25F and 25FF of the Industrial Disputes Act, 1947, which is as follows:

*"**25F.** Conditions precedent to retrenchment of workmen.--No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until--*

(a) the workman has been given one months notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay 3[for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government 4[or such authority as may be specified by the appropriate Government by notification in the Official Gazette.

***25FF.** Compensation to workmen in case of transfer of undertakings.--Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of section 25F, as if the workman had been retrenched:*

Provided that nothing in this section shall apply to a workman in any case where there has been a change of employers by reason of the transfer, if--

(a) the service of the workman has not been interrupted by such transfer;

(b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and

(c) the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer."

91. We may also first notice certain clauses of Resolution Plan. The Scheme of demerger is contained in Clause 6.4.2 (i), which is as follows:

*"**6.4.2 (i) Scheme***

(i) The Resolution Applicant propose to retain 50 (fifty) employees and workmen forming part of the APT. Such employees will be given the option to resign and seek re-employment by the Corporate Debtor on fresh employment terms as agreed between the Resolution Applicant and such employees, commencing from the Approval Date. An employee who refuses to exercise such option shall not be retained by the Corporate Debtor ("Retained Employees").

(ii) Excluding the Retained Employees, all employees and workmen of the Corporate Debtor on the payrolls of the Corporate Debtor ("Demerged Employees") as on September 15, 2020 ("Record Date") will be demerged from the Corporate Debtor into Airjet Ground Services Limited, with effect from the Approval Date.

(iii) As part of such demerger, all the past dues towards salaries and other benefits (such as PF dues, leave encashment, retirement benefits, notice pay, termination dues etc.) of the Demerged Employees for the period after the ICD and until the Approval Date; and/ or retirement benefits accruing to Demerged Employees which have arisen after the ICD, shall also stand demerged from the Corporate Debtor to AGSL with effect from the Approval Date and the Corporate Debtor shall absorb no liability or responsibility for such payments as the Resolution Professional has not accounted such salaries and other benefits as CIRP Costs of the Corporate Debtor.

(iv) As part of such demerger, ground handling services business of the Corporate Debtor will be demerged into AGSL along with identified related assets of the Corporate Debtor book valued at approx. Rupees Ten Crore. The business of AGSL will be to provide third party ground handling services in India to any person interested in taking their services and AGSL will apply for all necessary approvals from the relevant Governmental Authority for carrying out such third

party ground handling business after the Approval Date.

(v) The Resolution Applicant commits to utilize the ground handling services of AGSL on first priority basis after it has received all necessary approvals from the relevant Governmental Authority.

(vi) The Resolution Applicant commits to transfer the ground support equipment owned by the Corporate Debtor to AGSL after it has received the necessary approvals, to enable AGSL to start operations. Any such transfer of equipment by Corporate Debtor to AGSL will be at nominal consideration in compliance with Applicable Laws.

(vii) The Corporate Debtor will offer 76% of its shareholding in AGSL to the employees Trust and retain the remaining 24% shareholding. If the Trust fails to exercise or refuses to accept such offer within 30 (thirty) days from the Approval Date or challenges the implementation of this Resolution Plan, then the Corporate Debtor will retain 100% shareholding in AGSL and deal with AGSL in such manner as deemed appropriate by it, without any interference of any other person.

(viii) The Corporate Debtor shall not be required to make any separate application before the Adjudicating Authority under the provisions of the IBC for the demerger as stated herein and the approval of this Resolution Plan by the Adjudicating Authority along with the Scheme shall be treated as if the necessary approvals required to have been obtained under the CA 2013, including the consent

of shareholders or creditors of the Corporate Debtor and AGSL and application for demerger to Adjudication Authority or any other person/ appropriate authority, as required under CA 2013 (including Chapter XV of the CA 2013), together with the process laid down under the CA 2013, have been obtained and duly complied with. No further approval of the Adjudicating Authority or any other person or authority will be required to give effect to the Scheme, as proposed hereunder.

(ix) The demerger will be on the above-mentioned principal terms and a Scheme will be filed before the Adjudicating Authority for its approval as part of this Resolution Plan. For the purposes of such demerger, the Scheme as set out in its present form or with any modification(s) approved or imposed or directed by the Adjudicating Authority, shall be effective and operative from the "Appointed Date", being the Approval Date for the purposes of this Resolution Plan.

(x) The Scheme is expected to result in the following benefits:

- *Demerger is in the commercial interest of the Demerged Employees, given as part of such demerger, AGSL will be entitled to carry out ground handling services, subject to receipt of approvals under Applicable Laws.*
- *It would facilitate focused growth, concentrated approach, business synergies and increased operational and focus of the*

Demerged Employees in the business verticals they have knowledge of.

- *The demerger will help in the rationalization of operations, with greater degree of operational efficiency and optimum utilization of various resources for both AGSL and the Corporate Debtor.*
- *Demerger is the most suited manner to address unemployment in skilled/ unskilled sectors associated to aviation and welfare of the Demerged Employees will be taken care of through such demerger and concentrating of resources and associated manpower in the relevant entity and business vertical.*
- *Demerger of AGSL will be enable it to address its independent business opportunities with efficient capital allocation and attract different set of investors, strategic partners, lenders and other stakeholders, thus leading to enhanced value creation for the employees and shareholders of AGSL and would therefore be in the best interest of AGSL, the Corporate Debtor and their respective stakeholders connected therewith.*

(xi) For the avoidance of doubt it is hereby clarified that notwithstanding the acceptance or rejection of the terms of the proposed demerger by the employees and/or workmen, the Resolution Applicant shall ensure the payment of (i) minimum value due and payable to such employees and

workmen (under Section 30(2) of the IBC); and (ii) the CIRP costs admitted by the Resolution Professional, subject to a maximum of Rs. 475 Crores."

92. The learned Counsel for the Resolution Applicant referring to Demerger Scheme submits that case of retrenchment can be made out only when there is termination by the employer. The learned Counsel for Successful Resolution Applicant relied on Clause 8 of Scheme of Arrangement between Jet Airways and AGSL, which Scheme was filed as part of the Resolution Plan. Clause 8.1 of the Scheme provides:

"8.1 On the Scheme coming into effect, the Demerged Employees will become workmen and employees of Resulting Company with effect from the Appointed Date on terms to be notified by the Resulting Company. The Resulting Company shall make best efforts to retain the Demerged Employees, subject to assessment and due diligence on the basis of their competencies and abilities to perform their functional obligations. It is clarified that no employee or workman of Demerged Undertaking will be laid off in contravention to the law or of the contracts already entered into between the Corporate Debtor and the respective employee or workmen, before the Appointed Date provided the employee or workmen have adhered to the same. The position, rank and designation of the employees and

workmen would however be decided by the Resultant Company."

93. It is submitted that allegation regarding the purported future prospect of AGSL is only an apprehension. The Scheme of demerger cannot be turned down. The facts of present case squarely falls within the four corners of proviso to Section 25FF of Industrial Disputes Act. The Resolution Plan fulfill the requirement under the proviso. The Committee of Creditors has approved the Resolution Plan, which contains Clause 8.1 of the Scheme and Clause 6.4.2(i) as extracted above, which is a business decision to somehow create revenues for continuing the workmen and employees in employment to a subsidiary of the Corporate Debtor. The Scheme is beneficial for all the employees, who have been out of the employment for last three years. The decision of hiving-off of Ground Handling Business to AGSL was contemplated and considered by the erstwhile Corporate Debtor, in its commercial wisdom to ensure stability in the primary aviation business. The Resolution Plan, which had received approval by the Committee of Creditors by 99.22% vote share is a business decision of the Committee of Creditors, which has to be given paramount importance. The submission of the Appellant(s) that AGSL is only a smoke screen, who has no capacity to carry on any business or to make payment of salary and wages to workmen and employees, this submission needs to be considered in the background of the fact that Corporate Debtor is in CIRP and efforts are being made to revive the Corporate Debtor by

Resolution Applicant. The Corporate Debtor was a sinking ship, due to its inability to carry on the weight of its debt. The submission that Corporate Debtor is obliged to continue with all liabilities of its employees and workmen even after insolvency commencement date, cannot be accepted keeping in view that the object and purpose of the Insolvency Resolution Process, is to revive the Corporate Debtor. Hence, we do not subscribe to the submission of the learned Counsel for the Appellant(s) that Resolution Plan violates Section 25F and 25FF of the Industrial Disputes Act, resulting in violation of Section 30(2)(e) of the Code.

94. Now we come to submission that non-compliance of provisions of Employees' Provident Funds & Miscellaneous Provisions Act, 1952 and Payment of Gratuity Act, 1972. It is an admitted case that Corporate Debtor was covered by 1952 Act and Employees Provident Fund Scheme and it was statutory obligation of the Corporate Debtor to deposit provident fund contribution to EPFO. Resolution Professional in its affidavit dated 25.07.2022 has stated that no contribution was deposited after February, 2019, thus depositing of the provident fund contribution till 20.06.2019 was statutory obligation of Corporate Debtor and making no provision in plan for unpaid provident fund dues may lead to breach of Section 30(2)(e). Further, the payment of Gratuity Act, 1972 also cast a statutory obligation on Corporate Debtor to make payment of Gratuity for those workmen and employee for which it became due till insolvency commencement date.

95. The Successful Resolution Applicant in plan has not made provision of full payment of provident fund dues which were due till insolvency commencement date. Ends of justice be served in directing the Successful Resolution Applicant to move payment of full provident fund dues which were unpaid till insolvency commencement dated after adjusting the payment to workmen towards provident fund in the Plan.

96. The employees have not been paid anything in the plan towards provident fund which became due till insolvency commencement date. The employees are entitled to be paid provident fund amount as admitted by Resolution Professional till insolvency commencement date. Similarly, the workmen whose gratuity amount became due before insolvency commencement date are also entitled to receive the same after adjusting the part amount of gratuity paid in the Plan. Employees who became entitled to gratuity before insolvency commencement date are also entitled to receive the same. At this juncture, we may clarify that those workmen and employees who were demerged from the Corporate Debtor to AGSL and have not been treated to be terminated were not entitled for any gratuity or leave encashment.

97. The above deficiencies in the plan need to be remedied by issuing appropriate direction to the Successful Resolution Applicant to make requisite plan so that plan may become compliant of Section 30(2)(e).

QUESTION - VII

98. The workmen and employees attacked the Resolution Plan on the ground that it does not take into consideration payment of Rs.750 crores or more, which was dues of the workmen and employees after insolvency commencement date. The Resolution Professional in his additional affidavit in paragraph 7, while dealing with the aforesaid contention stated following:

> *"**7.** In view thereof, wages of workmen/employees accrued during CIRP (amounting to approx. INR 715 crores) cannot be considered as CIRP costs as the Corporate Debtor was not a going concern during the CIRP and the workmen/employees did not work during such period. Accordingly, the dated June 22, 2021. approving the Resolution Plan, has rightfully records that claims of employees and workmen are not CIRP costs as the workmen/employees did not work for the Corporate Debtor during the CIRP period and any payments to such persons for the period after ICD were not approved by the CoC. In any event, salaries and dues of these workmen/employees arising prior to ICD have been duly admitted by me and will be distributed to employees/workmen as per the Resolution Plan in accordance with Section 30 read with Section 53 of the Code."*

99. In the Resolution Plan, we have already noticed that the Scheme, which was contemplated was to retain only 50 workmen, forming part of

Asset Protection Team and rest of the workmen and employees were demerged to another subsidiary, i.e., AGSL. Insolvency Resolution Process Costs defined in Section 5(13) in following words:

> *"**(13)** "insolvency resolution process costs" means –*
>
> *(a) the amount of any interim finance and the costs incurred in raising such finance;*
>
> *(b) the fees payable to any person acting as a resolution professional;*
>
> *(c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;*
>
> *(d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and*
>
> *(e) any other costs as may be specified by the Board;"*

100. As per above definition any costs incurred by the Resolution Professional for running the business of the Corporate Debtor as a going concern is CIRP Costs. The Resolution Professional has not utilized services of workmen and employees apart from 50 employees and workmen during the CIRP period. The issue, which has been raised is fully covered by the Hon'ble Supreme Court judgment in ***Sunil Kumar Jain & Ors. vs. Sundaresh Bhatt & Ors. – (2022) SCC OnLine SC 467***. In the above case also, an application was filed by workmen and employees for payment

of their wages during the CIRP period, which Application was rejected by the Adjudicating Authority. In paragraphs 25.1 and 25.2, Hon'ble Supreme Court laid down following:

> *"**25.1.** That the wages/salaries of the workmen/employees of the corporate debtor for the period during CIRP can be included in the CIRP costs provided it is established and proved that the interim resolution professional/resolution professional managed the operations of the corporate debtor as a going concern during the CIRP and that the workmen/employees concerned of the corporate debtor actually worked during the CIRP and in such an eventuality, the wages/salaries of those workmen/employees who actually worked during the CIRP period when the resolution professional managed the operations of the corporate debtor as a going concern, shall be paid treating it and/or considering it as part of CIRP costs and the same shall be payable in full first as per Section 53(1)(a) IBC.*
>
> ***25.2.** Considering Section 36(4) IBC and when the provident fund, gratuity fund and pension fund are kept out of the liquidation estate assets, the share of the workmen's dues shall be kept outside the liquidation process and the workmen/employees concerned shall have to be paid the same out of such provident fund, gratuity fund and pension fund, if any, available and the Liquidator shall not have any claim over such funds."*

101. The Corporate Debtor had stopped its airline operations since April 2019 and during CIRP period till the approval of Resolution Plan, Corporate

Debtor was not a going concern. There is no material on record to indicate that Corporate Debtor was a going concern during CIRP period. Hon'ble Supreme Court has clearly laid down in the above case that dues towards wages and salaries of only those workmen and employees who actually worked during CIRP are to be included in the CIRP Costs. We, thus, do not find any error in not including the aforesaid claim of salary and wages of the workmen and employees after insolvency commencement date.

QUESTION - VIII

102. The Appellants' contention is that while computing the entitlement of Secured Financial Creditors under Section 53(1)(b)(ii), only value of their security interest has to be taken into consideration. Section 53(1)(a) and (b) is as follows:

> *"**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 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;*

103. Section 53(1)(b)(ii) uses the expression "debts owned to a secured creditor". The plain meaning of the expression is that debt owned to secured creditor has to be taken into consideration. The submission of the Appellant(s), if accepted, shall be adding words to Section 53(1)(b)(ii), i.e., by adding word 'value of security interest of the secured creditors', which is impermissible.

104. The learned Counsel for the Appellant has relied on Report of Insolvency Law Committee (February 2020), which discussed Section 52, 53(1)(b)(ii). We had occasion to examine a similar contention in ***Company Appeal (AT) (Insolvency) No. 570 of 2022 – Small Industries Development Bank of India (SIDBI) vs. Vivek Raheja and Ors.***, where the Appellant Financial Creditor claimed that it was entitled for distribution of proceeds of the Plan as per value of the security interest of the Appellant and not as per the debt of the Appellant. The said submission was rejected in the above judgment. In paragraphs 14 and 15, following has been laid down:

*"**14.** Section 53(1)(b)(ii) uses expression "debts owed to a secured creditor" which is the basis for distribution in the order of priority as provided in Section 53(1)(ii). The debt owed to a secured creditor is a debt which is relatable to his claim as admitted in CIRP Process. The claim/ debt of a secured financial creditor which is admitted in CIRP Process of a secured creditor is a fixed amount determined in CIRP process as reflected in Information Memorandum prepared by the Resolution Professional. The debt owed to a secured creditor is not the value of security of a secured creditor. The value of security of secured creditor is not the debt owed to a secured creditor in the CIRP Process. Section 53(1) does not contemplate distribution as per value of security of a secured creditor. Submission of the Appellant that he is entitled to distribution of the proceeds of the plan value as per value of security possessed by him is not in accord with the legislative scheme as delineated in Section 53(1) of the Code. The above issue has been decided by this Appellate Tribunal in Company Appeal (AT) Ins. No. 665 of 2022* ***"Union Bank of India Vs. Resolution Professional of M/s Kudos Chemie Ltd. & Ors."****. In the above case also, the Financial Creditor of the Corporate Debtor has filed an Application seeking direction to distribute the resolution plan amount as per value of the security of the Appellant. The CoC has decided to distribute the amount as per amount accepted by the Resolution Professional. The CoC decision was challenged before the Adjudicating Authority who rejected the Application against which the Appeal was filed. The view of the Adjudicating Authority for distribution of plan amount as per voting share found approval by this Tribunal in Paragraph 4 and 5 of the Judgement. This Tribunal laid down as under:*

"4. The objection was raised by the Appellant Bank and it wanted that distribution should be done as per the Option-3. The CoC by majority having taken decision to distribute the amount as per Option-1 by 97.61% vote, we see no reason to take a different view from one which has been taken by the Adjudicating Authority. The Adjudicating Authority in paragraph 40 has made following observations:-

> *"40. Both these contentions of learned counsel for the applicant are not tenable because the distribution of the amount was made by the Committee of Creditors resting on total dues of voting share of individual creditors which is neither whimsical nor arbitrary in any manner. Although the applicant gave a dissenting vote for approval of the Plan, based on the reason that distribution of resolution fund was discriminatory against it and despite the plea that it was entitled to the equal share in regard to the distribution of the resolution fund on the value of the assets of the corporate debtor as security. However, the committee of creditors, deciding to go with option no.1 i.e. distribution of plan amount as per claims admitted, has approved the resolution plan by 97.61% votes."*

5. The decision of the CoC regarding the distribution of amount is in its commercial wisdom which we cannot question or be questioned by the Appellant. The Adjudicating Authority has rightly referred the judgment of the Hon'ble Supreme Court in **"India Resurgence Arc. Pvt. Ltd. Vs. M/s. Amit Metaliks Ltd. & Anr.- Civil**

Appeal No. 1700 of 2021" *where in paragraph 13.1, the Hon'ble Supreme Court has held that what amount is to be paid to different classes or sub-classes of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest. Paragraph 13.1 of the judgment is as follows:-*

> *"13.1.Thus, what amount is to be paid to different classes or sub-classes of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.""*

15. The Judgment of the Hon'ble Supreme Court in Civil Appeal No. 1700/2021 "India Resurgence" (supra) was a case where Hon'ble Supreme Court had occasion to consider where also the Financial Creditor has objected to distribution contending that distribution should be as per value of the security interest held by the financial creditor. Hon'ble Supreme Court after referring to Section 30(2) and submission of the Appellant that distribution ought to have been as per value of security interest expressly rejected the submission. In paragraph 13, 13.1 and 14.2, following was laid down:

> *"13. The repeated submissions on behalf of the appellant with reference to the value of its security interest neither carry any meaning nor any*

substance. What the dissenting financial creditor is entitled to is specified in the later part of sub-section (2)(b) of Section 30 of the Code and the same has been explained by this Court in Essar Steel as under:-

"128. When it comes to the validity of the substitution of Section 30(2)(b) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(b) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in subclauses (i) and (ii) of sub-clause (b) that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (b) which refers to dissentient financial creditors. Ms Madhavi Divan is correct in her argument that Section 30(2)(b) is in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount, the minimum in the case of operational creditors being the higher of the two figures calculated under sub-clauses (i) and (ii) of clause (b), and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable. As a matter of fact, pre-amendment, secured financial creditors may cram down unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have been

possible to have done this but after the amendment such financial creditors are now to be paid the minimum amount mentioned in sub-section (2). Ms Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in sub-section (2)(b) as amended. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and subclasses of creditors in accordance with the provisions of the Code and the Regulations made thereunder."

(underlining supplied for emphasis)

13.1. Thus, what amount is to be paid to different classes or subclasses of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.

…….

14.2. The extent of value receivable by the appellant is distinctly given out in the resolution plan i.e., a sum of INR 2.026 crores which is in the same proportion and percentage as provided to the

other secured financial creditors with reference to their respective admitted claims. Repeated reference on behalf of the appellant to the value of security at about INR 12 crores is wholly inapt and is rather ill-conceived."

105. In the above judgment, the Report of the Insolvency Law Committee (February 2020) also was considered, in reference of which, following observation was made in paragraph 21:

*"**21.** Learned Counsel for the Appellant has also referred to Report of Insolvency Law Committee (February, 2020) which report discussed Section 52, 53(1)(b)(ii). The Committee in paragraph 7.4 opined that provision does not necessitate any further amendment to the provisions of the Code. What was said by the Committee was that priority to secured creditors under Section 53(1)(b)(ii) should be applicable only to the extent of the value of the security interest that is relinquished by the secured creditor. The said observation was for different purpose i.e. in reference to priority which with respect to debt owed to secured creditor, in the event secured creditor relinquishes the security in the manner set out in Section 52. The Committee in its report nowhere even suggested that secured financial creditor is entitled to distribution as per value of security. The conclusion of the committee is that the priority under Section 53(1)(b)(ii) shall be only to the extent of security interest of the secured creditor. The secured creditor cannot claim priority under Section 53(1)(b)(ii) of the whole debt where only part of the debt is secured, the above report of the Committee in no*

manner helps the appellant to support the submission which is canvassed before us.

106. The Report of the Insolvency Law Committee (February 2020) has opined that priority under Section 53(1)(b)(ii) should be only to the extent of the security interest of the Secured Creditor, but in the earlier part of the Report, it was opined that provision does not necessitate any further amendment. When no amendments have been made in the statute, i.e., Section 53(1)(b)(ii), the provisions cannot be interpreted in any manner except the plain and literal reading of the provisions. The Report of Insolvency Committee (February 2020) can at best be reason for making any further amendment in the statute, but till amendment is made, the provision of the statute has to be read as it exists as on the date.

107. We, thus, do not find any substance in the submission of the learned Counsel that payment to the Secured Financial Creditors under Section 53(1)(b) has to be made as per their value of the security interest and the Resolution Plan did not take into consideration their debt, which is the debt of the Financial Creditors while allocating the amount.

QUESTION - IX

108. The Appellant submits that Resolution Plan is conditional and contingent plan which ought not to have been approved by the Adjudicating Authority. It is submitted that Resolution Plan lays down certain condition precedents for the plan to be successful. All condition precedents as on

the effective dated i.e. 20.05.2020 having not been fulfilled, interference was warranted by the Adjudicating Authority and by this Tribunal. The case of the Successful Resolution Applicant is that the condition precedents are the conditions which are necessary for revival of the business of the Corporate Debtor. Condition precedent are, in fact, business pre-requisites. For running the aviation business, several approvals from DGCA, Ministry of Civil Aviation and other statutory authorities are required. As per requirement of international traffic license, the said license is granted only to airlines which has a minimum 20 aircrafts or 20% total capacity in its fleet. The Successful Resolution Applicant has scheduled the recommencement with only six airplanes for domestic operations, hence, the said condition is not applicable in the present case. Learned counsel for the Appellant relied on the judgment of Hon'ble Supreme Court in ***"Ebix Singapore Private Limited vs. Committee of Creditors of Educomp Solutions Limited & Anr., (2022) 2 SCC 401"***. We may first notice the judgment of Hon'ble Apex Court in ***"Ebix Singapore" (Supra)***. In the Ebix Case, the NCLT had allowed an application filed by the Resolution Application to withdraw from the Resolution Plan which order was set aside by this Appellate Tribunal. Challenging the order passed by the Appellate Tribunal, an appeal was filed before the Hon'ble Supreme Court. The Hon'ble Supreme Court dismissed the Appeal filed by the 'Ebix' by maintaining the order passed by this Tribunal. Hon'ble Supreme Court held that approval by the Adjudicating

Authority under Section 31(1) of the Code has effect of making the Resolution Plan binding on all the stakeholders. It has been held that the Resolution Plan become binding between the CoC and Successful Resolution Professional after it is approved by the CoC. In Para 166 and 172 following has been laid down:

> *"166. The binding nature, as between the CoC and the successful Resolution Applicant, of the Resolution Plan submitted for approval by the Adjudicating Authority is further evidenced from the fact that the CoC issues a LOI to a successful Resolution Applicant stating that it has been selected as the successful Resolution Applicant and its Plan would be submitted to the Adjudicating Authority for its approval. The successful Resolution Applicant is typically required to accept the LOI unconditionally and submit a PBG. Sequentially, the issuance of an LOI is followed by its unconditional acceptance by the successful Resolution Applicant."*
>
> *"172. Based on the plain terms of the statute, the Adjudicating Authority lacks the authority to allow the withdrawal or modification of the Resolution Plan by a successful Resolution Applicant or to give effect to any such clauses in the Resolution Plan. Unlike Section 18(3)(b) of the erstwhile SICA which vested the Board for Industrial and Financial Reconstruction with the power to make modifications to a draft scheme for sick industrial*

companies, the Adjudicating Authority under Section 31(2) of the IBC can only examine the validity of the plan on the anvil of the grounds stipulated in Section 30(2) and either approve or reject the plan. The Adjudicating Authority cannot compel a CoC to negotiate further with a successful Resolution Applicant. A rejection by the Adjudicating Authority is followed by a direction of mandatory liquidation under Section 33. Section 30(2) does not envisage setting aside of the Resolution Plan because the Resolution Applicant is unwilling to execute it, based on terms of its own Resolution Plan."

109. When we look into the relevant clauses of the plan which has also been captured by the Resolution Applicant in Form H. Para 7.6.1 refers to condition precedents i.e. obligation of the Resolution Applicant to re-commence operations as an aviation company subject to fulfillment of conditions after the approval date mentioned therein. Para 7.6.2 deals with fulfilment of condition precedents and Para 7.6.4 deals with automatic withdrawal. In view of the judgment of Hon'ble Supreme Court in ***"Ebix Singapore" (Supra)***, as noted above, after approval by the CoC, the clause for automatic withdrawal becomes redundant and Resolution Applicant has no jurisdiction to withdraw from the Resolution Plan. The condition precedents as mentioned in Para 7.6.1 are basically condition precedents required for aviation business which are must for any company carrying on aviation business. Enumeration of condition precedent is only

for purposes of noticing obligations of the Resolution Applicant to recommence the operations as an aviation company after obtaining necessary approvals. Such condition precedent cannot be said to be any hindrance in the approval of the plan by the Adjudicating Authority. We, thus, do not find any substance in the submission of the Appellant that the resolution plan ought to have rejected in view of the condition precedent contained in the resolution plan. The Resolution Applicant has also completed all necessary condition precedents to the satisfaction of the Monitoring Committee. We, thus, are of the view that the judgment of Hon'ble Supreme Court in ***"Ebix Singapore"*** does not help the Appellant to support his contention that the Resolution Plan is liable to be rejected due to condition precedents.

QUESTION - X

110. Allocation of the amount to the Operational Creditors including the employees has been challenged by the Appellant. The submission is that the allocation of amount to employees of the Corporate Debtor and other Operational Creditors (apart from workmen) is neither fair nor equitable, hence, clearly violates provisions of Section 30(2) and the plan deserves to be set aside on this ground alone. We have noticed above that the Adjudicating Authority has ample jurisdiction to interfere with the resolution plan which violates, does not comply with, any of the provisions of Section 30(2). The question to be answered is as to whether the resolution plan violates Section 30(2) on the ground that Operational

Creditors including the employees except workmen have been allocated only an amount of Rs.15,000/- each. Resolution Professional in his Additional Affidavit dated 25.07.2022 has mentioned in tabular form the claim admitted of the employees. The claim of employees for 12 months as per Section 53(1)(c) has been mentioned as amount of Rs.499.1 crore which include Salary – Rs.466.8 crore, Provident Fund – Rs.6.7 crore, Leave Encashment – Rs.16.0 crore and Gratuity – Rs.9.6 crore. In Para 10 under the heading 'Treatment of employees of the Corporate Debtor under the Resolution Plan' following has been stated in Para 10.1:

> *"10.1 I say that as regards the employees of the Corporate Debtor, their dues are referred to in Section 53(1)(c) of the Code. Since the amount allocated under the Resolution Plan payable towards the workmen and employees (i.e,. INR 52 crores) is lower than the liquidation value payable to the workmen (i.e. approx. INR 103 crores), the amount payable towards employees dues which ranks lower in priority (under Section 53(1)(c) of the Code) is nil."*

111. It is categorically mentioned by the Resolution Professional that amount payable towards employees' dues being lower in priority is nil. Similarly with other Operational Creditors, the priority of the other Operational Creditors is below the employees who are referred in Section 553(1)(c), hence, the liquidation value payable to the other Operational

Creditors shall also be nil. Under Section 30(2) of the Code, the statutory requirement is that amount paid to Operational Creditors shall be minimum which is to be paid in the event of the liquidation of the Corporate Debtor under Section 53 and when the amount to be distributed under the resolution plan has been distributed in order of priority under Sub-section (1) of Section 53 no exception can be taken. From the above it is clear that the contention of the Appellant that payment to the employees and other Operational Creditors is not in accordance with Section 30(2)(b) cannot be accepted.

112. We have noticed the judgment of Hon'ble Supreme Court in ***"K. Sashidhar vs. Indian Overseas Bank" (Supra)***, where it has been held that the commercial wisdom has been given the paramount status without any judicial intervention. The limited enquiry which can be made by the Adjudicating Authority while examining the plan is as to whether the plan complies with the requirements as contained in Section 30(2). In Para 62 of the judgment following has been mentioned:

> *"62. …… Be that as it may, the scope of enquiry and the grounds on which the decision of "approval" of the resolution plan by the CoC can be interfered with by the adjudicating authority (NCLT), has been set out in Section 31(1) read with Section 30(2) and by the appellate tribunal (NCLAT) under Section 32 read with Section 61(3) of the I&B Code. No corresponding provision has been envisaged by the legislature to empower the*

resolution professional, the adjudicating authority (NCLT) or for that matter the appellate authority (NCLAT), to reverse the "commercial decision" of the CoC muchless of the dissenting financial creditors for not supporting the proposed resolution plan. Whereas, from the legislative history there is contra indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority."

113. This principle was again reiterated by the Hon'ble Supreme Court in ***"Committee of Creditors of Essar Steel India Limited Through Authorised Signatory vs. Satish Kumar Gupta & Ors." (Supra)***. In Para 70, the Hon'ble Supreme Court has held that minimum value that is required to be paid by the Operational Creditor is set up under Section 30(2)(b) apart from the minimum value nothing more is required. Para 70 is as follows:

"70. The minimum value that is required to be paid to operational creditors under a resolution plan is set out under Section 30(2)(b) of the Code as being the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under Section 53. The Insolvency Committee constituted by the Government in 2018 was tasked with studying the major issues that arise in the working of the Code and to recommend changes, if any, required to be made to the Code.

The Insolvency Committee Report, 2018 (hereinafter referred to as "The Committee Report, 2018"), inter alia, deliberated upon the objections to Section 30(2)(b) of the Code, inasmuch as it provided for a minimum payment of a "liquidation value" to the operational creditors and nothing more, and concluded as follows:

> *"**18. VALUE GUARANTEED TO OPERATIONAL CREDITORS UNDER A RESOLUTION PLAN***
>
> ***18.1** Section 30(2)(b) of the Code requires the RP to ensure that every resolution plan provides for payment of at least the liquidation value to all operational creditors. Regulation 38(1)(b) of the CIRP Regulations provides that liquidation value must be paid to operational creditors prior in time to all financial creditors and within thirty days of approval of resolution plan by the NCLT. The BLRC Report states that the guarantee of liquidation value has been provided to operational creditors since they are not allowed to be part of the CoC which determines the fate of the corporate debtor. (BLRC Report, 2015)*
>
> ***18.2** However, certain public comments received by the Committee stated that, in practice, the liquidation value which is guaranteed to the operational creditors may be negligible as they fall under the residual category of creditors under section 53 of the Code. Particularly, in the case of unsecured operational creditors, it was argued that they will have no incentive to continue supplying goods or services to the corporate debtor for it to remain a 'going concern' given that their chances of recovery are abysmally low.*

18.3 *The Committee deliberated on the status of operational creditors and their role in the CIRP. It considered the viability of using 'fair value' as the floor to determine the value to be given to operational creditors. Fair value is defined under regulation 2(1)(hb) of the CIRP Regulations to mean "the estimated realizable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion." However, it was felt that assessment and payment of the fair value upfront, may be difficult. The Committee also discussed the possibility of using 'resolution value' or 'bid value' as the floor to be guaranteed to operational creditors but neither of these were deemed suitable.*

18.4 *It was stated to the Committee that liquidation value has been provided as a floor and in practice, many operational creditors may get payments above this value. The Committee appreciated the need to protect interests of operational creditors and particularly Micro, Small and Medium Enterprises ("MSMEs"). In this regard, the Committee observed that in practice most of the operational creditors that are critical to the business of the corporate debtor are paid out as part of the resolution plan as they have the power to choke the corporate debtor by cutting off supplies. Illustratively, in the case of Synergies-Dooray Automative Ltd. (Company Appeal No. 123/2017, NCLT Hyderabad, Date of decision – 02 August, 2017), the original resolution plan provided for payment to operational creditors above the liquidation value but contemplated that it would be made in a*

staggered manner after payment to financial creditors, easing the burden of the 30-day mandate provided under regulation 38 of the CIRP Regulations. However, the same was modified by the NCLT and operational creditors were required to be paid prior in time, due to the quantum of debt and nature of the creditors. Similarly, the approved resolution plan in the case of Hotel Gaudavan Pvt. Ltd. (Company Appeal No. 37/2017, NCLT Principal Bench, Date of decision – 13 December, 2017) provided for payment of all existing dues of the operational creditors without any write-off. The Committee felt that the interests of operational creditors must be protected, not by tinkering with what minimum must be guaranteed to them statutorily, but by improving the quality of resolution plans overall. This could be achieved by dedicated efforts of regulatory bodies including the IBBI and Indian Banks' Association.

18.5 *Finally, the Committee agreed that presently, most of the resolution plans are in the process of submission and there is no empirical evidence to further the argument that operational creditors do not receive a fair share in the resolution process under the current scheme of the Code. Hence, the Committee decided to continue with the present arrangement without making any amendments to the Code."*

(emphasis supplied)

Ultimately, the Committee decided against any amendment to be made to the existing scheme of the Code, thereby retaining the prescription as to the minimum value that was to be paid to the operational creditors under a resolution plan."

114. It is, thus, clear that in the event of minimum liquidation value which is payable to the Operational Creditor is paid there shall be compliance of Section 30(2)(b).

115. The facts of the present case indicate that the Resolution Plan proposed almost nil amount to the Operational Creditor except the workmen. According to the Resolution Professional, the liquidation value of the employees as well as other Operational Creditors is nil, hence, they are not entitle for any amount under Section 30(2)(b) of the Code. The facts of the present case depicts that amount paid to the Operation Creditor except workmen is almost nil. This Tribunal while hearing an appeal against approval of Resolution Plan where Operational Creditors were paid negligible amount, after noticing the relevant provisions of the Code had made observations suggesting consideration for amendment in the I&B Code so as to fulfil the objective of equitable and fair distribution. It is useful to extract the observations made by this Tribunal in ***"Company Appeal (AT) (Ins.) No. 62 of 2022, Damodar Valley Corporation vs. Dimension Steel and Alloys & Ors."***, where in Para 31 following observations have been made:

> *"31. The Operational Creditors normally had claims pertaining to supply made to the Corporate Debtor, which amounts normally as compared to the Financial Creditors' claim are less. Operational Creditors consist of various type of industries including MSMEs, public sector organization and small entities. Altogether denying their*

claim or receiving ineligible amount in the Resolution Plan causes hardship and misery to the Operational Creditors. Even the statutory dues, which by virtue of law as it exists today are dealt in the same manner, resulting in no payment or negligible payment and some time even less than 1% of the claim. The Operational Creditors are not part of CoC like Financial Creditors and they have no control over the CIRP. It is the Financial Creditors, who control the entire process and take commercial decision regarding payment to the Financial Creditors, Operational Creditors and other creditors. Law gives complete freedom to the Committee of Creditors to take commercial decision and it is not obligatory that in the Resolution Plan, if the liquidation value of Operational Creditor is negligible/ nil to allot any higher amount to the Operational Creditors. We are consistently receiving the Plans, where Operational Creditors either not paid any amount towards their claim or paid negligible amount, sometime even less than 1%. In the present case, the Operational Creditors have been given only miniscule of their admitted claim to the extent of only 0.19%. As the law stand today, no exception can be taken to such Plans, which provide payment to Operational Creditor in accordance with Section 30(2)(b) of the Code. However, the time has come when it should be examined by the Government and the Board to find out as to whether there are any grounds for considering change in the legislative scheme towards the payment to the Operational Creditors, which also consist of Government dues and other statutory dues. We make it clear that our observation is only to facilitate the

Government and other competent Authority to consider this issue and take decision, so as to the objective of equitable and fair distribution can be fulfilled with clear parameters to guide the all concerned to arrive at the fair and equitable distribution."

116. In the present case, there is material on record to indicate that as explained by the Resolution Professional in Additional Affidavit dated 25.07.2022 that liquidation value for employees and other Operational Creditors except workmen is nil. We have already held that the employees were also entitled to receive their full amount of provident fund to which they were entitled under 1952 Act and gratuity due till commencement of insolvency under the Payment of Gratuity Act, 1972, which they were entitled as per Section 30(2)(e) of the Code. However, the liquidation value of employees being nil under Section 30(2)(b), they were not entitled to receive any amount. Similarly, other Operational Creditors whose liquidation value was nil were not entitled to receive any amount under Section 30(2)(b). This conclusion is subject to decision with regard to Operational Creditor, Provident Fund Commissioner whose claim we will consider hereinafter.

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 preposition 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.

QUESTION - XII

120. The Department of State Tax has filed an appeal challenging the approval of resolution plan. The case of the Appellant is that the claim of the Department of State Tax was admitted by the Resolution Professional with a note "under disputes which are pending before various authorities and/or under appeals" and the liability of the Corporate Debtor is subject to the outcome of these Appeals. The claim for which proof was filed by the Appellant was total Rs.77,81,53,013/- out of which claim of Rs.56,49,40,491/- was admitted by Resolution Professional by rejecting the claim of interest and penalty in the List of Creditors as updated on 03.10.2020. The Appellant in this Appeal has claimed his entitlement to

make full payment of the claim. Appellant also claimed that in view of the claim for GST they can be treated as Financial Creditor which issue has not been decided by the Hon'ble Supreme Court. It has been further pleaded that Appellant is a secured financial creditor since the recovery of tax on goods and services has priority over other secured creditors under the Code. In the reply filed by the Resolution Professional it has been categorically admitted that claim of the Appellant for Rs.56,85,78,421/- was admitted.

121. The issue which arise for consideration is as to whether the Appellant can be treated as secured creditor and there shall be charge on the assets of the Corporate Debtor. The letter by which the claim was submitted by the Appellant is filed as Annexure A-3 of the appeal paper book in which the claim been filed in Form B, which is proof of claim by Operational Creditor except workmen and employees and now Appellant is claiming his claim as Financial Creditor, hence, we do not find any error in admitting the claim by Resolution Professional as an Operational Creditor. Whether the Appellant will be a secured creditor of the Corporate Debtor also needs consideration. In the Resolution Plan the allocation to the Appellant is nil, its liquidation value being nil. We may notice the provision of Section 82 of Maharashtra GST Act, 2017, which provides as follows:-

> *"Tax to be first charge on property. – Notwithstanding anything to the contrary*

contained in any law for the time being in force, ***save as otherwise provided in the Insolvency and Bankruptcy Code, 2016 (31 of 2016),*** *any amount payable by a taxable person or any other person on account of tax, interest or penalty which he is liable to pay to the Government shall be a first charge on the property of such taxable person or such person.*

[Emphasis supplied] "

122. The first charge on the property which is envisaged by Section 82 is **except as provided under Insolvency and Bankruptcy Code, 2016.** Thus, Section 82 of the Maharashtra GST Act, 2017 shall not give any precedence to the charge of claim of the Appellant. In this context, we may refer to a recent judgment of Hon'ble Supreme Court in ***"Sundaresh Bhatt, Liquidator of ABG Shipyad vs. Central Board of Indirect Taxes and Customs, 2022 SCC Online SC 1101"***. In the above case, before the Hon'ble Supreme Court submission was raised relying on Section 142A of the Customs Act. Section 142A has been extracted in Para 31 of the judgment, which is to the following effect:

"31. In order to complete the discussion on the Customs Act, it may be necessary to take note of Section 142A extracted below:

> ***142A. Liability under Act to be first charge****.— Notwithstanding anything to the contrary contained in any Central Act or State Act, any amount of duty, penalty, interest or any other sum payable by an assesse or any other*

person under this Act, shall, save as otherwise provided in section 529A of the Companies Act, 1956 (1 of 1956), the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 (51 of 1993), and the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002 (54 of 2002) and the Insolvency and Bankruptcy Code, 2016 (31 of 2016) be the first charge on the property of the assesse or the person, as the case may be.."

123. Hon'ble Supreme Court considered the provisions of Section 142A of the Customs Act and similar provisions of I&B Code and ultimately has held that I&B Code clearly overrides the Customs Act. In para 40 of the judgment following has been held:

"40. We may note that the IBC, being the more recent statute, clearly overrides the Customs Act. This is clearly made out by a reading of Section 142A of the Customs Act. The aforesaid provision notes that the Custom Authorities would have first charge on the assets of an assessee under the Customs Act, except with respect to cases under Section 529A of Companies Act 1956, Recovery of Debts Due to Banks and Financial Institutions Act 1993, Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the IBC, 2016. Accordingly, such an exception created under the Customs Act is duly acknowledged under Section 238 of the IBC as well. Additionally, we may note that Section 238 of the IBC clearly overrides any provision of law which is inconsistent with the IBC. Section 238 of IBC provides as under:

> ***238. Provisions of this Code to override other laws*** *-*
>
> *The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

124. The provisions of Section 82 of the Maharashtra GST Act, 2017, as extracted above, clearly contains an exception with regard to I&B Code, hence, on the strength of dues under Maharashtra GST Act, 2017, no charge can be claimed on the assets of the Corporate Debtor.

125. We may also notice a recent judgment of the Hon'ble Supreme Court in ***"Civil Appeal No. 1661 of 2020, State Tax Officer vs. Rainbow Papers Limited".*** In the above case, the Hon'ble Supreme Court had occasion to consider Section 48 of the Gujarat Value Added Tax Act, 2003. Section 48 was set out in Para 2 of the judgment, which is to the following effect:

> *"2. The short question raised by the appellant in this appeal is, whether the provisions of the IBC and , in particular, Section 53 thereof, overrides Section 48 of the GVAT Act which is set out herein below for convenience:*
>
> > *"**48. Tax to be first charge on property.** – Notwithstanding anything to the contrary contained in any law for the time being in force, any amount payable by a dealer for which he is liable to pay to the Government shall be a first charge on the property of such dealer, or as the case may be, such person.""*

126. The Hon'ble Supreme Court held that Section 48 of the Gujarat Value Added Tax, 2003 is not contrary to Section 53 of the I&B Code and the State was held to be secured creditor on the strength of the charge under Section 48. In Para 55, 56 & 57 of the judgment following has been laid down:

> *"55. In our considered view, the NCLAT clearly erred in its observation that Section 53 of the IBC over-rides Section 48 of the GVAT Act. Section 53 of the IBC begins with a non-obstante clause which reads :-*
>
> > *"Not withstanding 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....."*
>
> *56. Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of the IBC. Under Section 53(1)(b)(ii), the debts owed to a secured creditor, which would include the State under the GVAT Act, are to rank equally with other specified debts including debts on account of workman's dues for a period of 24 months preceding the liquidation commencement date.*
>
> *57. As observed above, the State is a secured creditor under the GVAT Act. Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of*

secured creditor in the IBC does not exclude any Government or Governmental Authority."

127. The above judgment of the Hon'ble Supreme Court was passed on the strength of Section 48 of Gujarat Value Added Tax Act and the reason for holding the State Tax Officer as secured creditor was clearly mentioned in Paras 55, 56 and 57, as noted above, which judgment also does not come to any aid to the Appellant before us in view of the specific exclusion of I&B Code under Section 82 of the Maharashtra GST Act, 2017, as noticed above. We, thus, are of the view that Department of State Tax, the Appellant, is an Operational Creditor and its liquidation value being nil, on the ground raised by the Appellant, no interference is called for in approval of the Resolution Plan.

QUESTION – XIII

Reliefs, if any to which Appellant(s) are entitled?

128. In the forgoing discussions, we have noted that the liquidation value of the workmen as has been referred to in Form-H preferred by the Resolution Professional is Rs.113 crores and workmen were entitled to receive at least Rs.113 crores as per Section 30(2)(b) read with Section 53(1)(b) of the Code. Shri Krishnendu Datta, learned Counsel for Successful Resolution Applicant during his submission, submitted that Successful Resolution Applicant shall be paying an amount of Rs.113 crores to the workmen as per the Resolution Plan, since it was

contemplated that, if liquidation value is more than Rs.52 crores, the liquidation value shall be payable to the workmen. To clear any doubt, we deem it fit and proper to issue direction to Successful Resolution Applicant to make payment to the workmen of Rs.113 crores as per the Resolution Plan.

129. Now we come to the entitlement of payment of provident fund to the workmen and employees. We have held that workmen and employees were entitled for payment of unpaid provident fund dues till the insolvency commencement date, which was statutory obligation of the Corporate Debtor to deposit with the EPFO. The Resolution Professional in his additional affidavit dated 25.07.2022 has stated that last deposit of the provident fund was made in February 2019. Thus, all workmen are entitled for payment of their full unpaid provident dues till the insolvency commencement date, after adjusting the amount of provident fund received by them under the Resolution Plan. The payment of Rs.113 crores, as per the case of Resolution Professional also contains the payment towards provident fund dues. The payment of amount to the workmen regarding salary of 24 months as well as the provident fund, gratuity etc. were not paid in full. In view of provisions of Section 53(1)(b), we having held that payment of provident fund has to be in full, the workmen are entitled to receive unpaid provident fund dues in full minus the amount which they have already received under the Resolution Plan towards provident fund and gratuity dues.

130. Now coming to the employees of the Corporate Debtor, the liquidation value of the employees having been found "NIL", no amount has been paid to them under the Resolution Plan. We having held that employees are entitled to receive the full amount of provident fund till the insolvency commencement date. Thus, Successful Resolution Applicant is to make payment of amount of provident fund payable to the employees till the insolvency commencement date in full. We make it clear that any amount towards provident fund dues for workmen and employees, which has been deposited with the EPFO can be withdrawn by the workmen and employees and the amount deposited has not to be held to be amount due towards provident fund to the workmen and employees.

131. While considering the Question No.XI, we have found that Regional Provident Fund Commissioner was entitled for payment of provident fund dues as per admitted claim and the Appeal field by Regional Provident Fund Commissioner being Company Appeal (AT) (Insolvency) No. 987 of 2022 deserve to be allowed. We have already held that workmen and employees were not entitled for payment of the salary and other dues during the CIRP period, since except 50 workmen and employees, who were part of the Asset Protection Team, the salary and other dues of the workmen and employees have not been rightly treated to be CIRP costs.

132. With regard to payment of gratuity to the workmen and employees, we are of the view that workmen and employees are entitled to gratuity payments, due to them before the insolvency commencement date. Any

claim towards gratuity payment after insolvency commencement date is not admissible, since the workmen and employees having demerged into AGSL and their services were not deemed to have been terminated. Thus, gratuity payment under the provisions of Payment of Gratuity Act, 1972 is confined only to the date of insolvency commencement date and Successful Resolution Applicant is also liable to make the said payment. It goes without saying that with regard to payment of gratuity to workmen, any amount towards gratuity paid under the Resolution Plan is liable to be deducted and adjusted.

133. In view of forgoing discussions, we have found that non-payment of full provident fund amount to the workmen and employees and the gratuity payment till the insolvency commencement date amounts to non-compliance of provisions of Section 30(2)(e) of the Code. However, in the facts of the present case, all other parts of the Resolution Plan have not been found to infirm in any manner, we do not find any case for interfering with the order approving the Resolution Plan. The ends of justice will be served in issuing direction to Successful Resolution Applicant to make payment of provident fund and gratuity to the workmen and the employees as directed above.

134. In result, the Appeal(s) are decided in following manner:

(I) The Appeal(s) of workmen and employees being Company Appeal (AT) (Insolvency) Nos. 643 of 2021, 752 of 2021, 801 of

2021, 915 of 2021, 771 of 2022 are partly allowed with following directions:

(a) Successful Resolution Applicant is directed to make payment of unpaid provident fund to the workmen till date of insolvency commencement, after deducting the amount already paid towards provident fund in the Resolution Plan to the workmen.

(b) The workmen are also entitled for payment of their gratuity dues as on insolvency commencement date, after adjusting any amount towards gratuity paid under the Resolution Plan.

It is made clear that entitlement of those employees and workmen, who were demerged into AGSL shall not be there, since demerger has not been treated as termination of their services.

(c) The employees are also entitled for the payment of their full provident fund, unpaid up to the date of insolvency commencement date. It is made clear that full payment of provident fund would be of that unpaid part of provident fund, which has not been deposited by the Corporate Debtor in the EPFO.

(d) Employees shall also be entitled for the gratuity, which fell due up to insolvency commencement date.

(e) The rest of the prayers of the workmen and employees are denied.

(f) The Chairman of the Monitoring Committee, erstwhile Resolution Professional is directed to compute the payments to be made to workmen and employees within one month from today and communicate the same to the Successful Resolution Applicant to take steps for payment.

(II) *Company Appeal (AT) (Insolvency) No. 987 of 2022 - Regional P.F. Commissioner vs. Ashish Chhawchharia, Resolution Professional for Jet Airways (India) Ltd. & Anr.* – is allowed. The Successful Resolution Applicant is directed to make payment to the Appellant of provident fund dues as admitted by the Resolution Professional.

(III) Company Appeal (AT) (Insolvency) No. 792 of 2021 and Company Appeal (AT) (Insolvency) No. 361 of 2022 are dismissed.

(IV) The order of the Adjudicating Authority dated 22.06.2021 approving the Resolution Plan is upheld subject to orders as above.

135. Before we close, we record our deep appreciation to learned Counsel for the parties, who have rendered valuable assistance to the Court in deciding somewhat complicated issues, which had arisen in this group of Appeals. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

21st October, 2022

Archana/Ashwani