THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016)
(through web-based video conferencing platform)

IA No.298/2020
in
CP (IB) No.312/Chd/Hry/2018
(admitted)

<u>In the matter of:</u>

Oriental Bank of Commerce
(Now Punjab National Bank)
….Petitioner-Financial Creditor

Versus

M/s Gupta Exim (India) Pvt. Ltd. ….Respondent-Corporate Debtor

And in the matter of:-
<u>IA No.298/2020</u> **Under Section 60(5) of the IBC, 2016 read with Rule 11 NCLT Rules, 2016**

Mr. Vivek Raheja, Resolution Professional
of M/s Gupta Exim (India) Pvt. Ltd. …Applicant/Resolution Professional

Vs.

1. Kotak Mahindra Bank, through its Branch Manager
M-57, Lajpat Nagar, Part-II, New Delhi - 110024

2. Employees' Provident Fund Organization (EPFO),
Bhavishya Nidhi Bhawan Sector 15A, Behind Fire Station,
Faridabad, Haryana - 121007 ….Respondents

Order delivered on: 03.08.2022

Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)

<u>Present through video-conferencing:</u>

For the Applicant in IA No.298/2020	:	1. Mrs. Munisha Gandhi, Senior Advocate 2. Harsh Garg, Advocate
For the Respondent No.1 IA No.298/2020	:	None
For the Respondent No.2 IA No.298/2020	:	None

Per: Subrata Kumar Dash, Member (Technical)

ORDER

IA No.298/2020

The present application has been filed under Section 60(5) of the IBC, 2016 read with Rule 11 of the NCLT Rules, 2016. In the present application, **Mr. Vivek Raheja, Resolution Professional of M/s M/s Gupta Exim (India) Pvt. Ltd.** is the applicant, and **Kotak Mahindra Bank, through its Branch Manager, Lajpat Nagar, New Delhi, and EPFO, Faridabad** are the respondents.

2. In the present application, the applicant-Resolution Professional prays that directions be issued to respondent No.1-Kotaka Mahindra Bank to lift the lien from the account bearing No.1211116245 belonging to the Corporate Debtor for an amount of Rs.62,24,082/-, which was imposed in view of the order dated 02.07.2019 passed by respondent No.2 i.e. Authorised Officer of the EPFO with the further direction to the respondent No.2 to hold the proceedings initiated against the corporate debtor in view of the EPF and MP Act, 1952 and to file its claim with the Resolution Professional for the proper adjudication in view of the provisions of IBC, 2016.

3. It is stated that the corporate debtor defaulted on a payment of Rs.62,24,082/- comprising a sum of Rs.26,48,660/- assessed towards the damages under Section 14B of EPF and MP Act, 1952 and a sum of Rs.35,75,422/- assessed as interest under Section 7Q of the aforesaid Act. In view of this default, the Authorised Officer of the Employees Provident Fund Organization (EPFO) exercised its power under Section 8B of the EPF and

MP Act, 1952 and wrote a letter dated 02.07.2019 to the respondent No.1-Kotak Mahindra Bank, where the corporate debtor maintained a current account bearing No.1211116245 to remit the amount of Rs.62,24,082/- to the EPFO. In response, respondent No.1-Kotak Mahindra Bank marked a lien for the said amount on the current account of the corporate debtor. In the meanwhile, CIRP was initiated by this Adjudicating Authority order dated 29.10.2019 and a moratorium was declared in view of Section 14 of the IBC, 2016. Subsequently, the applicant-Resolution Professional wrote to the Bank requesting to remove all the debit freeze on his account No.1211116245. The Resolution Professional also requested respondent No.2-EPFO to file a claim with the Resolution Professional by its letter dated 21.01.2020. The Resolution Professional had also requested respondent No.2-EPFO to put on hold the proceedings initiated by the EPFO by its letter dated 30.01.2020. It is stated that despite the above correspondence by the Resolution Professional, respondent No.2-EPFO, has not filed its claim with him nor the respondent No.1-Kotak Mahindra Bank had lifted the lien marked in the current account of the corporate debtor bearing No.1211116245 for an amount of Rs.62,24,082/-.

4. Notice was issued to respondents on 10.11.2020. The reply was filed by respondent No.2-EPFO by Diary No.01064/3 dated 09.02.2021 and Diary No.00071/9 dated 09.02.2021. None appeared on behalf of respondent No.1-Kotak Mahindra Bank and respondent No.2-EPFO.

5. In its reply filed by respondent No.2-EPFO by Diary No.01064/3 dated 09.02.2021 and Diary No.00071/9 dated 09.02.2021, it was stated that under the Scheme of the EPF and Misc. Provisions Act, 1952, the APFC had determined an amount of Rs.26,48,660/- under Section 7A proceedings as PF

dues for the period 09.02.2018 to 20.12.2019. Thereafter, due to failure to deposit the PF amount damages under Section 14-B of the EPF and MP Act, 1952 and interest under Section 7Q of the Act were added and a total amount of Rs.62,24,082/- was determined as recoverable from the corporate debtor. As the said amount was not deposited by the corporate debtor, an attachment order under Section 8F was issued on 02.07.2019 to respondent No.1-Kotak Mahindra Bank and the latter marked a lien for Rs.62,24,082/- but did not deposit the amount to the EPFO. It is further stated that another notice under Section 7Q/14B was issued on 17.01.2020 for an amount of Rs.1,32,15,962/- but the Resolution Professional approached the office of EPFO to hold the proceedings as a moratorium imposed by the admission order dated 29.10.2019 by this Adjudicating Authority was in force. It is further stated that the letter dated 02.07.2019 by EPFO was rightly issued to the Bank by the competent authority under Section 8F of EPF & MP Act, 1952. It is also mentioned that Resolution Professional’s request by his letter dated 21.01.2020 to lift the lien on the current account of the corporate debtor was against the provision of EPF & MP Act, 1952 and the provisions of the IBC, 2016 as the matter was finalized before the admission order dated 29.10.2019 and the amount would have already been realized if the bank has complied with the direction of the EPFO by order dated 02.07.2019. Thus, it was submitted that the present application is not maintainable because the Resolution Professional is trying to exercise authority beyond his jurisdiction and in contravention to the provisions of EPF & MP Act, 1952 and IBC, 2016.

6. The only additional fact submitted by the applicant’s replication filed by Diary No.01064/4 dated 23.11.2021, is that the Hon’ble Supreme

Court and the Hon'ble NCLAT have in a number of matters held that the Code being the later legislation will prevail over the existing laws like the EPF & MP Act, 1952.

7. We have heard the learned Senior Counsel for the applicant and have perused the records carefully.

8. Before adjudicating on the matter, the relevant Sections of the EPF and MP Act, 1952 are extracted below for the sake of clarity:-

Section 7A of the EPF & MP Act, 1952

"Section 7A in The Employees' Provident Funds and Miscellaneous Provisions Act, 1952
1[7A. Determination of moneys due from employers.—2[
(1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order,—
(a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and
(b) determine the amount due from any employer under any provision of this Act, the Scheme or the 3[Pension] Scheme or the Insurance Scheme, as the case may be, and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary.]"

Section 7Q of the EPF & MP Act, 1952

"7Q. Interest payable by the employer.—The employer shall be liable to pay simple interest at the rate of twelve per cent. per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment: Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank.]"

Section 8F of EPF & MP Act, 1952

"8F. Other modes of recovery.—

(1) Notwithstanding the issue of a certificate to the Recovery Officer under section 8B, the Central Provident Fund Commissioner or any other officer authorised by the Central Board may recover the amount by any one or more of the modes provided in this section.

(2) If any amount is due from any person to any employer who is in arrears, the Central Provident Fund Commissioner or any other officer authorised by the Central Board in this behalf may require such person to deduct from the said amount the arrears due from such employer under this Act and such person shall comply with any such requisition and shall pay the sum so deducted to the credit of the Central Provident Fund Commissioner or the officer so authorised, as the case may be: Provided that nothing in this sub-section shall apply to any part of the amount exempt from attachment in execution of a decree of a civil court under section 60 of the Code of Civil Procedure, 1908 (5 of 1908).

(3) (i) The Central Provident Fund Commissioner or any other officer authorised by the Central Board in this behalf may, at any time or from time to time, by notice in writing, require any person from whom money is due or may become due to the employer or, as the case may be, the establishment or any person who holds or may subsequently hold money for or on account of the employer or as the case may be, the establishment, to pay to the Central Provident Fund Commissioner either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due from the employer in respect of arrears or the whole of the money when it is equal to or less than that amount.

xxx xxx xxxx xxx xxxx

(4) The Central Provident Fund Commissioner or the officer authorised by the Central Board in this behalf may apply to the court in whose custody there is money belonging to the employer for payment to him of the entire amount of such money, or if it is more than the amount due, an amount sufficient to discharge the amount due.

(5) The Central Provident Fund Commissioner or any officer not below the rank of Assistant Provident Fund Commissioner may, if so authorised by the Central Government by general or special order, recover any arrears of amount due from an employer or, as the case may be, from the establishment by distraint and sale of his or its movable property in the manner laid down in the Third Schedule to the Income-tax Act, 1961 (43 to 1961).]"

Section 14B of the EPF & MP Act, 1952

> *"14B. Power to recover damages.—Where an employer makes default in the payment of any contribution to the Fund[46] [, the[47] [Pension] Fund or the Insurance Fund] or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 4[or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of 5[any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, 6[the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf] may recover 7[from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:] 8[Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:] 9[Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme.]"*

9. The issue at hand is whether the amount of Rs.62,24,082/- and also the subsequent demands arising out of the proceedings under the EPF and MP Act, 1952 are recoverable from the corporate debtor. We have carefully gone through the notice dated 26.12.2019 annexed as Annexure A-4 of the application. The records indicate that an enquiry under section 14B/7Q of the EPF and MP Act, 1952 was concluded and demand of 62,24,082/- was issued against the Establishment for the dues for the period from 09-02-2018 to 20-12-2019 and also for failure to deposit the PF amount. This amount also included damages under Section 14-B and interest under section 7Q of the Act. As the same was not deposited in time by the establishment, an attachment order under Section 8F was issued on 02.07.2019 to Kotak Mahindra Bank., which in turn marked a lien for Rs. 62,24,082/-but did not deposit the amount with the office of the EPFO. Subsequently, another notice

under Sections 7Q/14B was issued on 17.01.2020 for an amount of Rs.1,32,15,962/-. The records also indicate that the Resolution Professional has issued letters dated 21.01.2020 and 30.01.2020 to the EPFO pointing out that the demands for recovery are in the teeth of the provisions of Section 14(1)(c) of the IBC, 2016 inter alia provides for a moratorium during the CIRP, which is out-rightly prohibits (c) any action foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property.

10. We are conscious of the decision of the Hon'ble NCLAT on the same issues in the case of ***Sikander Singh Jamuwal versus Vinay Talwar and Others, Company Appeal (AT)(Ins) No.483 of 2019; Case Citation: (2022) iblaw.in 221, NCLAT***, the relevant part of which reads as follows:

> "It is very much clear vide Section 30(2)(e) that the Resolution Plan <u>does not contravene any of the provisions of the law for the time being in force.</u> The Resolution Professional/Adjudicating Authority is to look at the compliance of the provisions of law. In this context, we have to refer to Section 17B of the Employees Provident Funds and Miscellaneous Act, 1952 which is depicted below:
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> > *"[17B. Liability in case of transfer of establishment.--Where an employer, in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally be liable <u>to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme or [the [Pension] Scheme or the Insurance Scheme],</u> as the case may be, in respect of the period up to the date of such transfer: Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.]"*
> >
> > From the above-stated provisions of the PF Act that the Resolution Applicant is also liable to pay the contribution and other

sums due from the employer under any provisions of this act as the case may be in respect of the period up to the date of such transfer.

All this requires that the explicit provisions of the above said PF Act 26-04-2022 (Page 11 of 14) www.manupatra.com National Company Law Tribunal needs to be complied with. This aspect is justiciable as a duty has been cast on the Resolution Professional/Adjudicating Authority/on this Tribunal. This is not a commercial wisdom as compliance of the law is a must. The aspect of parity for payment of Finance Creditors and Operational creditors is not being looked into by this Tribunal as it is a commercial wisdom of CoC.

d. Since no provisions of the above said Act is in conflict with any of the provisions of the I & B Code, the applicability of even Section 238 of the I & B Code does not arise. <u>PF dues are not the assets of the CD as amply made clear by the provisions of Section 36(4)(a)(iii) of the I & B Code, 2016</u>

e. In this context, the following judgments are also referred to:

i. The judgment of this Tribunal (3 Members Bench - comprising of Hon'ble Chairperson & two Members) in ***C.A. (AT)(Ins) No. 354 of 2019, decided on 19th August, 2019 <u>Tourism Finance Corporation of India Ltd. Vs. Rainbow Papers Ltd. & Ors.</u>*** given below:

"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. The appeal preferred by 'Regional Provident Fund Commissioner' is allowed with aforesaid observations and directions. No costs."

It is also noted that the Judgement of the Hon'ble NCLAT in the case of ***Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd.(supra)*** has been affirmed by the ***Hon'ble Supreme Court Civil Appeal No. 1920 of 2020 decided on 20-05-2020(2020) ibclaw.in 145 SC***.

(emphasis supplied)

11. In short, it is a settled issue that when it comes to non-payment of the EPF arrears by the Corporate Debtor the issue is one of " compliance of Law". As clarified in the extracts above, all the dues raised by the EPFO under various sections, including interests and penalties are to be paid by the new establishment under Section 17B of the Employees Provident Funds and Miscellaneous Act, 1952.

12. Furthermore, under Section 30(2)(e) of the Resolution Plan, in order to be legitimate, the resolution plan cannot contravene any of the provisions of any law in force. Thus, in the present context, it is incumbent on the RP/SRA to ensure that Section 17B of the EPF and MP Act, 1952 are complied with. As mentioned, Section 17B lays down that in case of a transfer of Establishment, the person to whom the establishment is transferred is liable to pay the contributions and other sums due from the employer under any provision of the EPF and MP Act, 1952. Thus, the amount of Rs.62,24,082/-

demanded by the authorised officer of EPFO by letter dated 13.06.2019 and served on the Kotak Mahindra Bank on 05.07.2019 to be fully complied. The subsequent demands raised after following the procedure laid down in the EPF and MP Act, 1952 are also to be complied with subject to the provisions of appeal laid down in the said Act itself.

13. In view of the discussions above, the applicant's prayer to lift the lien from the account bearing No.1211116245 belonging to the Corporate Debtor for an amount of Rs.62,24,082/-, which was imposed in view of the order dated 02.07.2019 passed by respondent No.2 i.e. Authorised Officer of the EPFO cannot be acceded to. Furthermore, no directions can be issued to respondent No.2-EPFO either to hold the proceedings initiated against the corporate debtor in view of the EPF and MP Act, 1952 or to file its claim with the Resolution Professional for the proper adjudication in view of the provisions of IBC, 2016. The Resolution Professional is further directed to fully comply with the provisions of EPF and MP Act, 1952 and avail of the appellate proceedings provided in the said Act itself to redress his grievances if any. In the circumstances, IA No.298/2020 stands dismissed and disposed of accordingly.

Sd/-
(Subrata Kumar Dash)
Member (Technical)

Sd/-
(Harnam Singh Thakur)
Member (Judicial)

August 03, 2022
AV