

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI**

(APPELLATE JURISDICTION)

**Company Appeal (AT) (CH) (Ins) No. 268/2021
(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)**

**(Arising out of the Impugned Order dated 29/01/2021 in
IA(IBC)/21/KOB/2021 in TIBA/03/KOB/2019, passed by the ‘Adjudicating
Authority’, National Company Law Tribunal, Kochi Bench, Kerala)**

In the matter of:

Central Board of Trustees,

(Under the Employees’ Provident Funds and
Miscellaneous Provisions Act 1952)

Represented by the Assistant Provident Fund Commissioner (Legal)

Employees’ Provident Fund Organisation

Regional office, Kottayam

Aditya Sabari Tower, Post Office Road

Thirunakkara, Kottayam

Kerala – 686 001.

...Appellant

Versus

Shri Kumar Rajan

Resolution Professional

Hindustan Newsprint Limited

Unit No. 104, First Floor, Sufiya Elite

#18. Cunningham Road,

Near Sigma Mall, Bengaluru – 560 052.

...Respondent No. 1

M/s Kerala Industrial Infrastructure Development Corporation

KINFRA House,

Tc 31/2312, Sasthamangalam,

Trivandram,

Kerala – 695 010.

...Respondent No. 2

Present:

For Appellant : Mr. R. Vishnu, Advocate
For Respondents : Mr. P.V. Vinod, Advocate, For R1

J U D G E M E N T

(Physical Mode)

[Per: Shreesha Merla, Member (Technical)]

1. Aggrieved by the Order dated 29/02/2021 in IA(IBC)/21/KOB/2021 in TIBA/03/KOB/2019, passed by the National Company Law Tribunal, Kochi Bench, whereby this Application, preferred by the Resolution Professional (RP) was approved. Subsequent to the approval of the Resolution Plan on 29/01/2021, the RP sent an email dated 09/02/2021 informing the Appellant regarding the Admission of their claim only to the extent of 35.13%. It is submitted by the Learned Counsel for the Appellant that the RP had classified them as ‘Operational Creditors’ without approving the Notice of the Adjudicating Authority based on the ratio laid down by this Tribunal in the matter of ***‘Jet Aircraft Maintenance Engineers Welfare Association Vs Ashish Chhawchharia, Resolution Professional of Jet Airways (India) Ltd. & Ors.’*** reported in ***Company Appeal (AT) (CH) (Ins) No. 752/2021*** which relied upon the Apex Court Judgment in the matter of ***‘Sunil Kumar Jain vs Sundaresh Bhatt’***, reported in ***Civil Appeal No. 407/2023***, dated 30/01/2023.

2. Initially, the Claim Petition under Form F was filed for Rs. 23,74,92,674/- (Rupees Twenty Three Crores Seventy Four Lakhs Ninety Two Thousand Six Hundred and Seventy Four Only) before the ‘Interim Resolution Professional’

(“IRP”) on 26/02/2020. Thereafter a revised claim in Form F was filed for Rs. 30,46,31,880/- (Rupees Thirty Crore Forty Six Lakhs Thirty One Thousand Eight Hundred and Eighty Only) on 21/10/2020 and the same was also admitted by the RP. It is submitted that the EPFO would have to be paid in priority to all other claims and that even in Liquidation Proceedings, the EPFO is outside the waterfall mechanism provided under Section 53 of the Code. However, the RP intimated them that they are entitled to only 35.13% of the total admitted claim of Rs. 30,46,31,880/- (Rupees Thirty Crore Forty Six Lakhs Thirty One Thousand Eight Hundred and Eighty Only). This Tribunal in **‘Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia, Resolution Professional of Jet Airways (India) Ltd. & Ors.’** reported in **[(2022) SCC OnLine NCLAT 418]** dated 21/10/2022 has observed as follows:

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.”

3. In the aforementioned Judgment a clear direction was given to the ‘Successful Resolution Applicant’ to make payment of the admitted Claims towards Provident Fund dues and the same was upheld by the Hon'ble Apex Court in Civil Appeal No. 407/2023, dated 30/01/2023. The Hon'ble Apex Court has laid down that the share of workmen dues shall be kept outside the ‘Liquidation

assets and the concerned workmen / Employees shall have to be paid the same, out of such Provident fund, Gratuity Fund, if any available. The words, ‘if any available’, cannot be read to mean that the workmen and employees are not entitled for Provident fund, Gratuity Fund, Pension fund, if not available with the Liquidator. As ratio of the Judgement in ***‘Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia, Resolution Professional of Jet Airways (India) Ltd. & Ors.*** (Supra) of this Tribunal was upheld by the Hon’ble Apex Court, this Tribunal is of the earnest view that both Provident Fund and Gratuity Fund is to be paid in full as per the Provisions of ‘EPF and NP Act, 1952’ and ‘Payment of Gratuity Act, 1972’. This Tribunal in the matter of ***‘Mrs. C.G. Vijayalakshmi Vs. Shri. Kumar Rajan, Resolution Professional of Hindustan Newsprint Limited (Corporate Debtor) & Ors. and Batch matters’***, in ***Company Appeal (AT) (Ins) No. 29, 44, 56 to 58 & 62 to 86 of 2021***, while allowing the Appeals of the same Corporate Debtor and dealing with the same issue has observed as follows:

“.....Since admittedly the amounts paid are only 35.13% having treated them as ‘Secured Creditors’, we are of the considered view that indeed there was a violation of the provisions of Section 30(2) of the Code, with respect to the payment of ‘PF’ and ‘Gratuity’ only.”

4. Keeping in view, the afore noted principle is applicable to the facts of this case, the instant Company Appeal (AT) (CH) (Ins) No. 268/2021 is allowed with

a direction to include these amounts in the ‘Resolution Plan’. No Order as to Costs. Connected Pending Interlocutory Applications, if any, are ‘closed’.

[Justice M. Venugopal]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

21/06/2023
SPR/TM