NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

Company Appeal(AT) (Ins)No. 483 of 2019

IN THE MATTER OF:

Sikander Singh Jamuwal
S/o Munshi Ram
R/o A-40, Gali No. 5/3,
Shakti Vihar, Mithapur, Ext.,
Jaitpur, New Delhi – 110 044 **...Appellant**
(Dharamveer Singh, Withdrawn)
(Rakesh Kumar Raghav, Withdrawn)
(Sheetal Chauhan, Withdrawn)
(Sanjay Kumar, Withdrawn)

Vs.

1.Vinay Talwar
Resolution Professional
1-Link Road, Basement
Jangpura Ext.
New Delhi – 110 014 **...Respondent No.1**

2.S.M.Milkose,
Resolution Applicant
Through its Director,
Sharad Maheshwari
M-10, 2nd Floor,
Greater Kailash –II (Market)
New Delhi – 110 048 **...Respondent No.2**

3.Applied Electromagnetics Pvt. Ltd.
Corporate Debtor
Office: D-130, Sector 63, Noida
Uttar Pradesh – 201 301
Regd. Add. M-120, 1st Floor
G.K.-II, New Delhi – 110 048 **...Respondent No.3**

Present:
For Appellant: **Mr. Shantanu Awasthi, Mr. Shikhar Mittal, Advocates.**

For Respondents: **Mr. Abhishek Anand, Mr. Sahil Bhatia, Advocates for RP Mr. ManishKaushik, Mr. Anubhav Gupta, Mr. Ajit Singh Joher, Advocates for R2 & 3**

J U D G M E N T

1. The present appeal has been filed by the Appellant under Section 61 of the 'Insolvency and Bankruptcy Code, 2016' (in short 'Code') against the impugned order dated 02.04.2019 passed by the 'Adjudicating Authority' (National Company Law Tribunal), New Delhi in CA 371/C-II/ND/2018 (IB) -334(ND)/2017.

2. In order to bring clarity it is mentioned that originally as per the Appeal filed on 29th April, 2019 there were 5 (five) Appellants; but as per the order dated 19th October, 2020 Mr. Santanu, Ld. Counsel for the Appellant made the statement at Bar that Appellants No. 1, 3, 4 & 5 (names given in the memo of parties in bracket as 'withdrawn') have reached settlement with the Respondents and he has instruction to withdraw the Appeal. The Appeal was accordingly 'dismissed as withdrawn' insofar as the same relates to Appellant No.1, 3 4 & 5. Insofar as, the Appellant No.2 (Sikandar Singh Jamuwal, New Delhi) is concerned, the Appeal was heard and finally 'reserved for judgment' on 17th February, 2022.

3. The Appellant is an 'ex-employee of the Respondent No.3' who worked as 'Supervisor' (R&D) and he has a total outstanding dues of Rs. 12,49,702/-. It is the grievance of the employee that the employee and workman are the backbone of the Respondent No.3 Company/Corporate Debtor (CD) in CIRP who stood by Respondent No.3 by not resigning even when their rightful dues and salaries were not being paid / irregularly paid

from the year 2012 which is much prior to CIRP. It is also their grievance that the 'Resolution Plan' has not considered the full Provident Fund (PF) dues (1,35,06,391 full dues –(minus) considered in the Resolution Plan Rs.78,00,000) 'Provident Fund' (PF) dues of the employees which R3 /CD in CIRP was supposed to remit to the PF Authority under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 for the default period from 1st October, 2012 to 31st March, 2018 as assessed and communicated by the Assistant Provident Fund Commissioner regional officer Noida, Ministry of Labour and Employment, Govt. of India vide its order no.15521/Noida/48763/Comp.-III dated 19th March, 2019. Apart from the fact that the Resolution Plan is discriminatory insofar as it relates to the employees. It has also been submitted that the 'Financial Creditors' (21.6%) have been paid much more than the 'Operational Creditors' (12.67%). It is also their grievance that they have not been paid the gratuity amount as required under the 'Payment of the Gratuity Act, 1952'. In view of the above, the Appellant prays for setting aside the impugned order dated 02.04.2019 passed by the Adjudicating Authority.

4. Pursuant to issue of demand notice issued to Respondent No.3 by one of the employee of the Company i.e. Nitin Gupta and subsequently on his filing petition, the Adjudicating Authority vide its order dated 26th October, 2017 initiated the CIRP of the CD/Respondent No.3 under Section 9 of the Code. Mr. Naveen Kumar jain was appointed as the Interim Resolution Professional by the Adjudicating Authority who took charge on 18th November, 2017. The IRP was changed in the 1st 'Committee of Creditors' (CoC) meeting held on 22nd December, 2017 and Mr. Vinay Talwar, the

Resolution Professional (RP) was confirmed by the Adjudicating Authority on 29th January, 2018 (*appearing at page no.42 at para 3 of the impugned order).*

5. The CD in CIRP is engaged in designing and manufacturing of customized solutions in the field of electronic/IT applications including digital solutions. The liabilities of the CD as verified by the RP is Rs.68.50 Crore. The Resolution Applicant has provided an amount of Rs.12.99 Crore towards settlement of all past dues and liabilities of the CD which includes an amount of Rs.9 crore towards 'Secured Financial Creditors' and Rs. 50 lac towards 'Unsecured Financial Creditors'. The employees and workman are getting Rs.1.03 crore against the claim of Rs.8.17 crore. What is stated in the impugned order at page 45 para 5 (a) that the Resolution Application will infuse Rs.5 crore as working capital requirement of the Company out of the sale proceeds of the assets of the CD.

6. The Ld counsel for the Appellant is stated that the Resolution Applicant / R2 is in the business of manufacturing Ghee and schemed milk powder. It is one of the numerous groups of companies headed by 'Director' Sharad Maheshwari (appearing at page 11 of the Appeal paper book). It is also revealed from page 41 of the Reply of RP / R1 that Sharad Maheshwari has been supporting the CD since 4-5 years by providing financial facilities.

7. Pursuant to the issue of notification directing the 'Prospective Resolution Applicant' to submit their Resolution Plan by 25th March, 2018. The R2/Successful Resolution Applicant who is also one of the Financial Creditor of the CD submitted the Resolution Plan. The said Resolution Plan was presented in the 5th CoC meeting on 18th April, 2018 but could not be approved due to non-receipt of final approval from head office of Bank of India who is majority shareholder comprising approx. 90% of the voting power. The

representative of Operational Creditor expressed their displeasure due to non - payment of gratuity and PF. Their rightful dues were not being paid. However, the revised Resolution Plan was submitted by the R2 to the RP. The revised plan was subsequently approved in the 9th meeting of the CoC of the CD held on 21st July, 2018 (page 46 of the reply of the RP). The extract from the voting on the Resolution Plan reflects the following:

> *"As per Schedule 8 of Resolution Plan, RA proposed to pay the dues of Rs. 2.80(as 2.25 Crores to BOI) crores before the expiry of 30 days from effective date which is as defined in the Resolution Plan and balance of Rs. 6.75 crores would be paid to Bank of India by 31.03.2019 and to the others within 9 months of the effective date. Further as Schedule 8 on the request of CoC, RA also agreed and ordered to pay 75% of the amount recovered/ realized after the effective date out of the amount outstanding from debtors as per list attached in the Schedule 10."*

8. It is also revealed from the appeal paper book at page 71 that EPF organization, Govt. of India vide order under Section 7A of the EPF and MP Act, 1952 has determined an amount of Rs.1,35,06,391/- as the dues from the CD for the period upto March, 2018 against which only Rs.78 lacs has been provisioned for in the Resolution Plan submitted by the Resolution Applicant. The Ld counsel for the Appellant has submitted that this is a misconduct on the part of R1/RP in calculating the provident fund amount. The employee

has alleged that there is a disparity in releasing the percentage of payment between the dues of Financial Creditor and rightful due of employees and workmen. The plan is discriminatory and non-payment of PF dues amounts to violation of the provisions of EPF and MP Act, 1952. They have also alleged that initiation of CIRP has been filed first by the employees and workmen under Section 9 of the Code and their interest has not been taken care of in the Resolution Plan. The Resolution plan provides for unequal treatment to the employees and is violative of the principles enshrined under Article 14 of the Constitution of India. There is a large gap between the percentage of payment released to the Financial Creditor and workman. They have also challenged that how Resolution Applicant who is in totally unrelated business in dairy industry is eligible to take over highly technical and specialized field working on projects of national importance requiring expertise in the related field. They have alleged that the IRP Mr. Jain has leveled allegations in relation to extortionate transactions inter se between the R3 and sister concerned of R2 and others. They have also alleged that the Director of the Resolution Applicant is a related party and is covered by Section 29A of the Code and is disqualified for being considered as Resolution Applicant.

9. The Ld counsel for the Respondent No.1 has submitted that there is no infirmity in the impugned order. He has also submitted that against the verified claims of the workmen / employees of Rs.8.17 Crore. The RP has proposed an amount of Rs.1.03 Crore. He has also submitted that the Appeal itself is not maintainable in view of Hon'ble Supreme Court Judgment in case of 'Swiss Ribbon Pvt. Limited and Anr. Vs. Union of India and ors'. 2019 4SCC 17 at Para 46, 82 & 84 are enumerated below:

"46. The NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the committee of creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. It may be seen that a resolution plan cannot pass muster under Section 30(2)(b) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Further, on 05.10.2018, Regulation 38 has been amended. Prior to the amendment, Regulation 38 read as follows:

—38. Mandatory contents of the resolution plan.— (1) A resolution plan shall identify specific sources of funds that will be used to pay the—

(a) insolvency resolution process costs and provide that the [insolvency resolution process costs, to the extent unpaid, will be paid] in priority to any other creditor;

(b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority; and

(c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.‖ Post amendment, Regulation 38 reads as follows:

—38. Mandatory contents of the resolution plan.— (1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

(1-A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

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82. An argument has been made by counsel appearing on behalf of the petitioners that in the event of liquidation, operational creditors will never get anything as they rank below all other creditors, including other unsecured creditors who happen to be financial creditors. This, according to them, would render Section 53 and in particular, Section 53(1)(f) discriminatory and manifestly arbitrary and thus, violative of Article 14 of the Constitution of India.

Section 53(1) reads 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 and in such manner 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;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:—

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date; (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

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84. It will be seen that the reason for differentiating between financial debts, which are secured, and operational debts, which are unsecured, is in the relative importance of the two types of debts when it comes to the object sought to be achieved by the Insolvency Code. We have already seen that repayment of financial debts infuses capital into the economy inasmuch as banks and financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs for their businesses. This rationale creates an intelligible differentia between financial debts and operational debts, which are unsecured, which is directly related to the object sought to be achieved by the Code. In any case, workmen's dues, which are also unsecured debts, have traditionally been placed above most other debts. Thus, it can be seen that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in

question, Article 14 does not get infracted. For these reasons, the challenge to Section 53 of the Code must also fail."

10. It was also stated by the Ld. Counsel that the financial creditors are being paid 21.6% and the operational creditors are paid 12.67%. It was also submitted by them that it is the ultimate decision of the CoC to decide what to pay and how much to pay each class or sub-class of creditors. The payments approved by the CoC are a commercial decision of the CoC and Appellant has no locus standi to challenge the commercial decision of the CoC. They have referred the decision of Hon'ble supreme court in the case of K.Shashidhar Vs. Indian Overseas Bank Civil Appeal No.10673 of 2018 para 33 has given below:

"33.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 non-justiciable."

They have also cited of CoC of Essar Steel India Limited Vs Satish Kumar Gupta and Ors. In Civil Appeal No. 8766-67 of 2019 para 31, 36, 38 &46 have given below:

"31. Since it is the commercial wisdom of the Committee of Creditors that is to decide on whether or not to rehabilitate the corporate debtor by means of acceptance of a

particular resolution plan, the provisions of the Code and the Regulations outline in detail the importance of setting up of such Committee, and leaving decisions to be made by the requisite majority of the members of the aforesaid Committee in its discretion. Thus, Section 21(2) of the Code mandates that the Committee of Creditors shall comprise all financial creditors of the corporate debtor. "Financial creditors" are defined in Section 5(7) of the Code as meaning persons to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred. "Financial debt" is then defined in Section 5(8) of the Code as meaning a debt along with interest, if any, which is disbursed against the consideration for the time value of money. "Secured creditor" is separately defined in Section 3(30) of the Code as meaning a creditor in favour of whom a security interest is created and "security interest" is defined by Section 3(31) as follows: "3. Definitions. – In this Code, unless the context otherwise requires. – xxx xxx xxx (31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment 48 or performance of an obligation and includes mortgage,

charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person: Provided that security interest shall not include a performance guarantee;"

36. 36. Even though it is the resolution professional who is to run the business of the corporate debtor as a going concern during the intermediate period, yet, such resolution professional cannot take certain decisions relating to management of the corporate debtor without the prior approval of at least 66% of the votes of the Committee of Creditors. Section 28 of the Code is important and is set out hereinbelow:

"28. Approval of committee of creditors for certain actions (1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely:—

(a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;

(b) create any security interest over the assets of the corporate debtor;

(c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;

(d) record any change in the ownership interest of the corporate debtor;

(e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;

(f) undertake any related party transaction;

(g) amend any constitutional documents of the corporate debtor; (h) delegate its authority to any other person;

(i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;

(j) make any change in the management of the corporate debtor or its subsidiary; (k) transfer rights or financial

debts or operational debts under material contracts otherwise than in the ordinary course of business;

(l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or (m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor (2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under subsection (1).

(3) No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of sixty-six per cent of the voting shares.

(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.

(5) The committee of creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code."

Thus, it is clear that since corporate resolution is ultimately in the hands of the majority vote of the Committee of

Creditors, nothing can be done qua the management of the corporate debtor by the resolution professional which impacts major decisions to be made in the interregnum between the taking over of management of the corporate debtor and corporate resolution by the acceptance of a resolution plan by the requisite majority of the Committee of Creditors. Most importantly, under Section 30(4), the Committee of Creditors may approve a resolution plan by a vote of not less than 66% of the voting share of the financial creditors, after considering its feasibility and viability, and various other requirements as may be prescribed by the Regulations

38. This Regulation fleshes out Section 30(4) of the Code, making it clear that ultimately it is the commercial wisdom of the Committee of Creditors which operates to approve what is deemed by a majority of such creditors to be the best resolution plan, which is finally accepted after negotiation of its terms by such Committee with prospective resolution applicants.

46. 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. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass 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."

11. The Ld. Counsel for the R2 &3 has stated the followings:

    a. The Appellant is the employee/Operational creditor. The Resolution Amount of Rs.12.99 Crore is more than the fair value and the liquidation value.

    b. The non priority due of workman and employees were proposed at 7.5% but, however, on the request of the representative of the operational creditor was enhanced to 10% & finally to 12.67% and the Resolution Plan has been unanimously approved in the 9th meeting of the CoC where representative of the Operational creditor was present.

    c. They have also stated that since the company has no separate gratuity fund so the employees are not eligible to get the gratuity however the Resolution Applicant has committed to make a payment of 20% of the gratuity claim. They have also stated that the commercial decision of the CoC is non-justiciable. Hence, the appeal needs to be dismissed.

12. The Adjudicating Authority has approved the Resolution Plan vide impugned order dated 02nd April, 2019 in terms of the approval of the CoC and has also made the following observations as depicted below:

"While we are not endorsing any specified waivers or extinguishing of claims, the Resolution Applicant shall be entitled to all such waivers as are legally permissible under law."

13. We have carefully gone through the submissions made by the Ld counsel for the parties and the documents available on records and laid down provisions of the I& B Code, 2016, r/w the provisions of other related Acts as applicable to the case like the Employee Provident Funds and Miscellaneous Provisions Act, 1952 (EPF & MP Act), and we are having the following observations:-

a. What is very much clear from the submissions made by the Ld counsel for the parties and the documents available on record that the Resolution Plan fails to consider the payment of provident fund dues as computed by the Assistant Provident Fund Commissioner vide its order dated 19th March, 2019. The Resolution Plan approved by the Adjudicating Authority is on 02nd April, 2019. The amount so computed is Rs.1,35,06,391/- whereas the provisions has been made for Rs.78 lacs only.

b. Financial Creditors are being paid 21.6% whereas Operational creditors are being paid 12.67%.

c. Let us look at the provisions of Section 31 (1), Section 30(2), Section 36(4)(a) (iii) & Section 238 of the I& B Code, 2016. For ease of convenience the same is extracted below:

"Section 31: Approval of resolution plan.

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.]

Section 30 (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;]

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan; 3A

(e) does not contravene any of the provisions of the law for the time being in force;

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

[Explanation. — For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013 (18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.]"

Section 36 (4)(a)(iii) 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; (iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets;"

Section 238: Provisions of this Code to override other laws.

**238. 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."*

It is very much clear vide Section 30(2) (e) that the Resolution Plan does not contravene any of the provisions of the law for the time being in force. 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 17-B of the Employees Provident Funds and Miscellaneous Act, 1952 which is depicted below:

"[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 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], 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 needs to be complied with. This aspect is justiciable as a duty has been casted on the Resolution Professional/Adjudicating Authority/ on this Tribunal. This is not a commercial wisdom as compliance of law is a must. The aspect of parity for payment of Finance Creditors and Operational creditors are 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.

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

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 Tourism Finance Corporation of India Ltd. Vs. Rainbow Papers Ltd. & Ors. 2019 SCC Online NCLAT 910 para 44 45 & 46 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.

46. In the result, Company Appeal (AT) (Insolvency) Nos. 354, 364 & 404 of 2019 are dismissed. Company Appeal (AT) (Insolvency) No. 1001 of 2019 is allowed. No costs."

ii. The Hon'ble Apex court Judgment in State of Jharkhand and Ors. Vs. Jiterdra Kumar Srivastava and Anr. (2013) 12 SCC 210 held at para 7 & 8

> ***"****7. It is an accepted position that gratuity and pension are not the bounties. An employee earns these benefits by dint of his long, continuous, faithful and un-blemished service. Conceptually it is so lucidly described in D.S. Nakara and Ors. Vs. Union of India; (1983) 1 SCC 305 by Justice D.A. Desai, who spoke for the Bench, in his inimitable style, in the following words:*
>
> *"The approach of the respondents raises a vital and none too easy of answer, question as to why pension is paid. And why was it required to be liberalised? Is the employer, which expression will include even the State, bound to pay pension? Is there any obligation on the employer to provide for the erstwhile employee even after the contract of employment has come to an end and the employee has ceased to render service?*
>
> -
>
> *What is a pension? What are the goals of pension? What public interest or purpose, if any, it seeks to serve? If it does seek to serve some public purpose, is it thwarted by such*

artificial division of retirement pre and post a certain date? We need seek answer to these and incidental questions so as to render just justice between parties to this petition.

The antiquated notion of pension being a bounty a gratituous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nandan Prasad v. State of Bihar and Ors.[1971] Su. S.C.R. 634 wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied maters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab and Anr. V. Iqbal Singh (1976) IILLJ 377SC".

> *8. It is thus hard earned benefit which accrues to an employee and is in the nature of "property". This right to property cannot be taken away without the due process of law as per the provisions of Article 300 A of the Constitution of India.*

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.

g. Accordingly, the appeal is disposed of with aforesaid observations and directions. The Appeal is partially allowed.

Pending applications, if any, stands disposed of. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

(Dr. Ashok Kumar Mishra)
Member(Technical)

***11th March*, 2022**

New Delhi
Raushan.K