



IN THE NATIONAL COMPANY LAW TRIBUNAL

COURT VI, NEW DELHI

I.A. 5939/2022

IN

Company Petition No. (IB) – 694/(PB)/2018

*Under Section 60(5) of the Insolvency and Bankruptcy
Code, 2016.*

IN THE MATTER OF:

M/S. L & T FINANCE LTD

.... PETITIONER

VERSUS

M/S ZILLION INFRAPROJECTS PVT. LTD.

..... RESPONDENT

AND IN THE MATTER OF-

EMPLOYEE PROVIDENT FUND ORGANISATION
(Through Assistant Provident Fund Commissioner)

.... APPLICANT

VERSUS

RESOLUTION PROFESSIONAL FOR M/S ZILLION
INFRAPROJECTS PVT. LTD.

...RESPONDENT



CORAM:

SHRI. BACHU VENKAT BALARAM DAS, MEMBER(JUDICIAL)

SHRI. RAHUL BHATNAGAR, MEMBER (TECHNICAL)

For the Applicant: Mr. Kaushik Kumar Dey

ORDER

PER- BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

Order Pronounced on: 24.05.2023

1. This application has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 against rejection of claims of the applicant by the Resolution Professional. The applicant in the present application has prayed for the following reliefs: -

- a) *Allow the present application and condone the delay in filing claim;*
- b) *Direct the Resolution Professional to accept the dues of the Applicant and release the payment amounting to Rs. 9,38,64,181/-; and*
- c) *Pass any other order which this Hon'ble Tribunal may deem fit and proper in favour of the applicant,*



2. Briefly stated the facts of the case as mentioned in the instant application, which are necessary for adjudication, are as follows: -

- i. That the Corporate Debtor came under the purview of Employees Provident Fund and Miscellaneous Provisions Act. 1952 and was required to pay the contribution and allied dues under code no. DL/15128 pertaining to the Employees' Provident Fund contributions.
- ii. That the establishment defaulted to pay the contributions and other allied dues for the period 04/2018 to 01/2019, within the prescribed time in respect of various employees.
- iii. That the Applicant organization issued a notice u/s 7A of the EPF Act bearing No. E/DL/15128/Comp-4/10066 dated 12.02.2019.
- iv. That subsequently, vide email letter dated 01.11.2021 the respondent informed the applicant that company is in CIRP and most of staff has left the corporate debtor and



records are not in synchronized manner and therefore company requested to provide a time period of 15 days to collate and compile all the remaining required documents.

- v. That vide letter dated 13.04.2022, the applicant informed the respondent /establishment and made demand of payment of Statutory EPF & allied dues amounting to Rs.5,22,37,018/- (considering tentative date as on 13.04.2022 of deposit of assessed dues vide 7A order dated 13.12.2021). It was communicated to respondent to make the payment of dues pertinent to workmen of the establishment.
- vi. That vide email communication dated 02.05.2022, the Respondent denied to recognize the outstanding dues of the establishment under the garb of the section 14 and 238 of IBC, 2016.
- vii. That this Tribunal has not approved the resolution plan. Hence, the applicant may be permitted to file the claim or PF due may be cleared by the establishment/resolution professional. Further, the PF



contribution shall be deemed to the first charge on the assets of the establishment.

viii. That Section 11 of the Employee Provident Fund Act, 1952 clearly states that the EPF dues have priority of payment of contributions over other debts of the insolvent company.

3. The resolution professional of the Corporate Debtor had filed his reply to the averments of the applicants. The defence taken by the resolution professional, respondent herein, are stated in brief as below: -

- i. That, the RP made public Announcement on 07.02.2019 for inviting the claims of the Creditors of the CD, wherein no claim was received by the RP from the Applicant even after the expiry of 90 days from the date of CIRP in view of Regulation 12(2) of IBBI (Insolvency Resolution Process for Corporate Person) Regulation, 2016 (hereinafter referred to as “CIRP Regulations”).
- ii. That in the 23rd CoC meeting held on 03.07.2020, the CoC members approved the Resolution Plan with 88% voting shares. Thereafter the RP submitted the



Resolution Plan before this Tribunal on 25.07.2020 vide IA 3018/2020.

- iii. The Applicant was required to submit its claim before the RP on or before 19.02.2019 (90 days from Insolvency Commencement date). However, the Applicant has not filed its claim till date.
- iv. That admitting the claim at a belated stage will not only affect the stakeholders but CIRP would be jeopardized.
- v. It is submitted that CIRP is a time bound process and there are various duties which are entrusted to the RP and the CoC.

4. We have gone through the rejoinder and documents on record filed by both the parties and arguments advanced by counsels of both the parties.

5. Employee Provident Fund (“EPF”) dues pertain to contributions that are to be made by the employer on behalf of the employee as a part of the employee welfare scheme mandated by the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (“EPF Act”). Accordingly,



Section 36(4)(a)(iii) of the Insolvency and Bankruptcy Code, 2016 provides that all sums due to any workmen or employee from the provident fund are assets owned by a third party which are in possession of the Corporate Debtor held in trust, and will therefore not form part of the liquidation estate of the Corporate Debtor. The intent of the legislature can be further ascertained by referring to para 5.5.5 of the Bankruptcy Law Reforms Committee (BLRC) Report, wherein the Committee observed that assets held in trust such as pension funds will not include assets of the Corporate Debtor and could therefore not be used to realize the dues of the creditors. Therefore, it is clear from the scheme of the Code that EPF dues are not to be included in the assets of the Corporate Debtor.

6. Payment of EPF dues is a statutory liability that needs to be undertaken by the management of the establishment. Since the management of the Corporate Debtor passes over from the Suspended Directors to the Resolution Professional (“RP”) upon commencement of the Corporate Insolvency Resolution Process (“CIRP”), the RP is tasked with



making payment of EPF dues during the tenor of the CIRP. Once a Resolution Plan has been received, the Resolution Applicant must provide for payments to the outstanding EPF dues under the Resolution Plan.

7. The Hon'ble NCLAT in *Tourism Finance Corporation of India Pvt. Ltd. v. Rainbow Papers Ltd & Ors, Company Appeal (AT) (Insolvency) No. 354 of 2019*, allowed an appeal filed by the Regional Provident Fund Commissioner for non-payment of entire EPF dues along with interest calculated as per the provisions of the EPF Act, by concluding that there was no inconsistency between the EPF Act and the Code since EPF dues have been categorically treated as assets not forming part of the liquidation estate under Section 36(4)(a)(iii) of the Code. The NCLAT partially modified the approved Resolution Plan while making the following observation:

“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.”

8. Further, the Hon’ble NCLAT in *Jet Aircraft Maintenance Engineers Welfare Association v. Ashish Chhawchharia Resolution Professional of Jet Airways (India) Ltd. & Ors Company Appeal (AT) (Insolvency) No. 628 of 2020* held as follows:

“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.”

9. In light of the above judgements, we are of the view that the EPF dues being a statutory liability of the Corporate Debtor cannot be escaped. The delay in claiming the EPF



dues was on account of delay in adjudication of Section 7A proceedings under The Employees' Provident Funds and Miscellaneous Provisions Act, 1952. Section 36(4) of IB Code, 2016 states that all sums due to any workmen or employee from the provident fund, the pension fund and gratuity fund will not be included in the liquidation estate assets and shall not be used for recovery in the liquidation. Since the EPF dues are not a part of the assets of the Corporate Debtor and are merely in possession of Corporate Debtor, we are of the view that the Applicant was not required to file his claim. Rather, the Resolution Professional was duty bound to release the dues of the Applicant. The EPF dues are to be given priority over all the other creditors during Liquidation. We thereby direct the Respondent/Resolution Professional to consider the claim of the Applicant. Further, since the Resolution Plan has already been approved by the CoC, the Resolution Professional should take steps to apprise the Successful Resolution Applicant ("SRA") about the claim of the Applicant to enable the SRA to make amends in the Resolution Plan to provide for the claim of the Applicant. In



the alternative, the SRA may file an additional affidavit undertaking to settle the claim of the Applicant.

10. I.A. 5939/2022 stands allowed and disposed off.

Let copy of the order be served to the parties concerned.

Sd/-

(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

Sd/-

(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)