

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT-V

I.A. 2229 OF 2022

IN

C.P.(IB) No. 2534 of 2019

Under Section 60(5) read with Section 34
of the Insolvency & Bankruptcy Code,
2016

Anuj Bajpai

Liquidator of the Corporate Debtor

.....Applicant

Vs

**Employee Provident Fund
Organisation, Regional Office,
Coimbatore** ...Respondent No. 1

**Regional Provident Fund
Commissioner – II & Recovery Officer,
Regional Office, Coimbatore**

..Respondent no. 2

Enforcement Officer, Recovery

..Respondent No. 3

In the matter of

Hingiri Textiles

.....Operational Creditor

Versus

Shirt Company (India) Pvt. Limited

.....Corporate Debtor

Order Pronounced on: 30.06.2023

Coram:

Hon'ble Shri. Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Shri. Prabhat Kumar, Member (Technical)

Appearances (Via Videoconferencing)

For the Applicant: - Mr. Rahul Gaikwad, Advocate a/w Adv. Nikita Abhyankar a/w Adv. Aman Jhawar a/w Adv. Garima Joshi i/b Gravitas Legal.

For the Respondent: Ms. Shraddha Talkar, Advocate i/b Ravi Rattesar

ORDER

1. The present Application is filed by the Applicant, namely, Mr. Anuj Bajpai being the Liquidator of the Shirt Company (India) Private Limited (hereinafter referred to as "**liquidator**") under Section 60 (5) of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "**Code**") read with Rule 11 of the National Company Law Tribunals Rules, 2016 seeking the following reliefs:
 - a) to allow the present Application.
 - b) to restrain the Respondent No. 2 from continuing and/or conducting proceedings in the matter of EPFO vs M/s Together Textile Mills Pvt. Ltd. numbered as CB/CBE/34159 in the files of the Respondent No. 2.
 - c) to declare that the Orders passed by the Respondents in the matter of EPFO vs M/s Together Textile Mills Pvt. Ltd. numbered as CB/CBE/34159 in the files of the Respondent No. 2 are not binding on the Applicant;
 - d) to declare that the claim of the Respondents shall be treated as per the waterfall mechanism envisaged under Section 53 of the Code;

- e) to direct the Respondents to lift the attachment levied by the Respondents on the assets of the Corporate Debtor with immediate effect;
- f) In an alternative to prayer clause e, to pass an Order thereby releasing the attachment imposed on the assets of the Corporate Debtor;
- g) to restrain the Respondents from attaching and conducting sale of the assets of the Corporate Debtor;

FACTS OF THE CASE

2. The present Company Petition was admitted under Section 9 of the Code vide order dated 26.02.2020 passed by this Tribunal. Accordingly, Corporate Insolvency Resolution Process (“CIRP”) was initiated against the Corporate Debtor and Mr. Vakati Bala Subramanyam Reddy was appointed as Interim Resolution Professional.
3. During the course of CIRP, the Respondent No. 1 herein filed its claim before the IRP under “Form B” dated June 30, 2020 and claimed an amount of Rs. 1,24,86,750/-. The said claim of Rs.1,24,86,750/- raised by the Respondent no. 1 was admitted by the IRP during his tenure. Subsequently, Mr. Anuj Bajpai (**Applicant herein**) was appointed as the Resolution Professional of the Corporate Debtor vide an order dated 18.09.2020 passed by this Tribunal.
4. Eventually, the Committee of Creditors resolved to initiate liquidation process against the Corporate Debtor and therefore, an Application under Section 33 of the Code being I.A. No. 871 of 2021 was filed and the same was allowed vide an Order dated 22.12.2021 passed by this Tribunal.
5. The Respondent no. 1 has stated that claim has been filed on 14.08.2020 during CIRP in Form-B and the same was also sent vide an email dated 28.01.2021. By way of the said communication, the Respondent has again submitted the same Form B as its claim in the Liquidation process on the

unsubstantiated pretext that their claim was outside the Liquidation Estate and in priority over any other claim and hence only the computation of amount was important, not the form itself.

6. Thereafter, the Respondent No. 2 also vide letter dated 21.04.2021 has stated that the claim of the Respondent No. 1 shall be given priority and the claim of the Respondent shall not be part of the waterfall mechanism under Section 53 of the Code.
7. In response to the letter dated 21.04.2022, the Applicant addressed a letter dated 07.05.2022 and stated that since the management of the Corporate Debtor did not maintain a separate fund with respect to the Pension Fund and Provident Fund, the claim of the Respondent shall be treated under the waterfall mechanism as per Section 53 of the Code.
8. On 23.05.2022, the Respondent No. 2 conducted a hearing in the proceedings initiated under Section 8(B) to 8(G) of the EPF & MP Act, 1952 for recovery of its dues, in the matter of **EPFO vs. M/s Together Textile Mills Pvt. Ltd.** numbered as CB/CBE/34159 and issued summons to the Applicant purportedly under Section 30 of the Code of Civil Procedure, 1908 for production, dissemination of information/record. The order dated 23.05.2022 was communicated to the Applicant vide a letter dated 06.06.2022.
9. In response to the Order dated 23.05.2022 and the letter dated 06.06.2022 by the Respondent No. 2, the Applicant addressed a letter dated 15.06.2022 to the Respondents stating that as per Section 238 of the Code, the provisions of the IBC will override other prevailing laws. In this regard, the Applicant reiterated that since there were no funds maintained by the erstwhile management, the claim of the Respondent shall come under the waterfall mechanism under Section 53. It has further been stated that since

the liquidation process is ongoing, the Respondents shall refrain itself from taking any action against the assets of the Corporate Debtor.

10. The Respondent No. 2 considered the letter dated 15.06.2022 as the reply of the Applicant and conducted a hearing on 20.06.2022. Vide the Order dated June 20, 2022, the Respondent No. 2 directed the Respondent No. 1 Department to issue sale proclamations for the assets of the Corporate Debtor as publish it as per the recovery provisions of the EPF & MP Act, 1952.
11. It has been submitted that the purported proceedings initiated under Section 8(B) to 8(G) of the EPF & MP Act, 1952 by the Respondents, thereby issuing the sale proclamations for the assets of the Corporate Debtor are illegal and bad in law as the Corporate Debtor is undergoing liquidation process as envisaged under the Code and therefore, the Respondents are liable to be restrained from initiating and/or continuing with the said proceedings.
12. It has further been submitted that since erstwhile management of the Corporate Debtor did not maintain any separate funds for the Provident Fund Pension Fund or Gratuity Fund, the claim of the Respondents shall be treated as per the waterfall mechanism under Section 53 of the Code.
13. The Applicant has further placed its reliance on the judgement of the Hon'ble Apex Court in the matter of Sunil Kumar Jain & Ors. Vs Sundaresh Bhatt & Ors. (Civil Appeal No. 5910 of 2019), wherein it has categorically laid down that the Provident Fund, Gratuity Fund and Pension Fund are to be kept outside the liquidation estate, the share of the workmen dues shall be kept outside the liquidation process and the concerned workmen have to be paid out of such Provident Fund, Gratuity Fund and Pension Fund, available if any, and the Liquidator shall not have any claim over such funds.

14. It has further been submitted that since the initiation of the liquidation, all the assets of the Corporate Debtor shall be included in the liquidation estate and the Respondents do not have any charge on the assets of the Corporate Debtor, nor do the Respondents enjoy any priority in the satisfaction of its claim arising out of the Provident Fund and Pension Fund, as asserted by them in their orders and proceedings.

REPLY FILED ON BEHALF OF RESPONDENT NO. 1

15. At the outset, Respondent denied all the averments and contentions made by the Applicant in the Application.

16. M/s Together textiles Mills Pvt. Ltd. (CB/CBE/34159) defaulted in payment of Provident Fund dues of its employees for the period between April, 2010 to April, 2017. On receipt of the Revenue Recovery Certificate, Recovery Officer initiated action to recover the provident dues as stipulated in Section 8B to 8G of the EPF&MP Act 1952 and an order of Attachment of Immovable Property (CP-16) dated 11.06.2018 was issued to the Sub-Registrar, Vadavalli. It was done for attachment of the immovable property of the establishment (M/s Together Textile Mills (P) Limited) situated in Somalyampalayam Village, District Coimbatore.

17. The attachment of said property was done well before the commencement of CIRP. Even the asset valuation was carried before admission of the Company Petition for CIRP. During the course of CIRP and in correspondence with Official Liquidator of the Corporate Debtor, the Recovery Officer had always requested that the Provident Fund dues of the M/s Together textiles Pvt. Limited should be remitted on priority as stipulated in Section 36(4)(iii) of Code. At no point of time the Recovery Officer is against the sale of the property of the establishment by Official Liquidator. Therefore, it has been submitted that the Official Liquidator has failed to consider this legitimate request and stated vide letter dated 7th May 2022 that Provident Fund dues will be settled only as per Section 53 of The Insolvency and Bankruptcy Code, 2016.

18. It has been submitted that the Recovery Officer had highlighted the priority of Provident Fund dues stating that no provisions of the 'Employees Provident Funds and Miscellaneous Provision Act, 1952' are 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. Thus, it was submitted that Official Liquidator's interpretations of the laws/ acts are against the interest of poor worker and in contrast to the line with the judgments of various judicial forums.
19. The Respondent has placed reliance upon recent judgment of the Hon'ble NCLAT dated 11.03.2022 in Company Appeal (AT) (Ins)No. 483 of 2019 in the matter of ***Sikander Singh Jamuwal Vs Vinay Talwar (Resolution Professional) and others***, whereby the priority of Provident Fund dues over other debts was upheld. It has further been submitted that The Hon'ble Apex Court has also upheld the same in Civil Appeal No.6721 of 2022.

FINDINGS

20. We have heard the Ld. Counsel appeared for the parties and perused the records.
21. The Applicant, being the liquidator has filed the present application seeking the lifting of the attachment order by the Respondent on the assets of the Corporate Debtor and seeking directions to restrain the Respondents from attaching and conducting sale of the assets of the Corporate Debtor.
22. It is an undisputed fact that this Tribunal vide order dated 26.02.2020 passed an admission order under Section 9 against the Corporate Debtor in CP No. 2534 of 2019 and thereby the CIRP was initiated. Pursuant to this, the Respondent No. 1 has filed its claim before the IRP under "Form B" dated June 30, 2020 and has claimed an amount of Rs. 1,24,86,750/-

which was admitted by IRP during his tenure. Thereafter, the Applicant was appointed as the RP vide order dated 18.09.2020 by this Tribunal.

23. It is pertinent to mention at Respondent No. 2 conducted the proceeding in the matter of EPFO vs M/s Together Textile Mills Pvt. Ltd. numbered as CB/CBE/34159 and created a lien on the assets of Corporate Debtor for the claim of EPFO which is challenged hereunder.
24. During the course of argument, the Applicant/Resolution Professional has argued that since the management of the Corporate Debtor did not maintain a separate fund with respect to the Pension Fund and Provident Fund, the claim of the Respondent shall be treated under the waterfall mechanism as per Section 53 of the Code.
25. On the other hand, the Respondent/EPFO has argued that since the Corporate Debtor has committed a default against the claim of EPFO, the recovery proceeding was initiated. It has also been argued that the default by the Corporate Debtor was in existence prior to the initiation of CIRP. The Respondent has placed its reliance on Section 36(4) and has stated that the provident fund and the gratuity fund are not the assets of the Corporate Debtor and, therefore, the claims of EPFO should be given priority and cannot be treated under waterfall mechanism as envisaged under Section 53. It has also been argued that claims of EPFO shall be given priority over the claims of other stakeholders. In this regard, the Respondent placed reliance upon the judgment of ***Sikander Singh Jamuwal Vs Vinay Talwar (Resolution Professional) and others.***
26. It is noteworthy that with the direction of this Tribunal vide order dated 13.12.2022, the Applicant had created a Fixed Deposit of an amount of Rs. 1,24,86,750/- in a Nationalised Bank and the same has been rectified in IA. 136 of 2022. Therefore, the Applicant's contention for not maintaining the separate account of provident fund for EPFO does not survive.

Therefore, the Bench is of the considered view that since a Fixed account has already been created by the Applicant for the claims of the Respondent EPFO, the contention of not having a separate account for the claims of EPFO is untenable.

27. In order to determine whether the claims of EPFO fall under the waterfall mechanism envisaged under section 53 of the Code, it is significant to place reliance upon the decision of Hon'ble NCLAT in the case of **Regional P.F. Commissioner Vs T.V. Balasubramanian (RP) (Sholingur Textiles Ltd) & anr (2020) ibclaw.in 127 NCLAT**, wherein the Hon'ble NCLAT allowed the appeal of the PF department noting that attachment of the property of the Corporate Debtor was made much before the initiation of CIRP, but it was only recorded in the registered during CIRP. Further, a decision of Hon'ble NCLAT Chennai in the case of **Mr. B. Parameshwar Udpa Vs. Assistant PF Commissioner and Anr. {Company Appeal (AT) (CH) (Ins) No. 231 of 2021}** wherein the Hon'ble NCLAT had allowed the appeal against the Adjudicating Authority's direction to the Resolution professional to make provisions for PF funds without receiving claims by the concerned authority. The decision of Hon'ble NCLAT was upheld by the Hon'ble Supreme Court in the case of **Jet Aircraft Maintenance Engineer's Welfare Association (202) ibclaw.in 861, vide its decision reported at {(2023) ibclaw.in 12 SC}** wherein it was held that PF and ESI funds are not part of Corporate Debtor's estate and do not belong to the Corporate Debtor. Further, this decision has been followed by the Hon'ble NCLAT Chennai in the case of **Ms. C.G. Vijay laxmi Vs. Sri Kumar Rajan, RP Hindustan News print Limited, (2023) ibclaw.in 123 NCLAT**, wherein the Hon'ble NCLAT further held that the question whether the fund maintained by the Corporate Debtor or not pales into insignificance.
28. Following the decision in the case of **Jet Aircraft Maintenance Engineer's Welfare Association (Supra)**, this Bench is of the opinion that PF dues do not form part of Corporate Debtor's Assets and accordingly need to be

excluded therefrom. Since, the Fixed Deposit has already been created by the Applicant vide order of this Tribunal, the same shall be used for repayment of dues of the EPFO. The Bench thereby directs the Applicant that the claims of the EPFO shall be given priority over the claims of other stakeholders in light of the law laid down by the Hon'ble Apex Court.

29. The Bench also aware of the provision of Section 36(4)(iii) of I & B Code 2016 which states that the amount deducted for 'Provident Fund', purely belongs to an 'Employees' and is not to be treated as an 'Asset' of the 'Corporate Debtor' and cannot be touched by an 'Interim Resolution Professional'/'Resolution Professional'/'Liquidator' as the case may be. Therefore, The Bench is of the considered view that claims of the EPFO would not fall part of liquidation estate as provided under section 36(4) of the Code and the EPFO dues would not fall under the waterfall mechanism envisaged under Section 53 of the Code.
30. Since, the claim amount of the EPFO has already been kept separately via creating a Fixed Deposit of Rs.1,24,86,750/- in a Nationalised Bank. Therefore, the separate recovery proceedings against the Corporate Debtor cannot be continued and the attachment levied by the Respondents i.e EPFO over the assets of the of the Corporate Debtor shall be removed.
31. Accordingly, the present IA. No. 2229 of 2022 is **Partly allowed** to the extent that separate recovery proceedings against the Corporate Debtor shall not be continued anyfurther and the attachment imposed by the Respondents over the assets of the Corporate Debtor shall stand discharged considering the fact that an amount of Rs.1,24,86,750/- equivalent to the claimed amount on account of EPF has already been secured in the shape of Fixed Deposit bearing an Account No. 41518465189 maintained with State Bank of India.

Sd/-

**PRABHAT KUMAR
MEMBER (TECHNICAL)**

Sd/-

**KULDIP KUMAR KAREER
MEMBER (JUDICIAL)**