

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 808 of 2022

IN THE MATTER OF:

**Regional Provident Fund Commissioner,
Vatwa, Employees Provident Fund Organization,**
Regional Office Vatwa, 3rd & 4th Floor, Satyam Tower,
Opposite Railway Station, Maninagar,
Ahmedabad – 380008, Gujarat.

...Appellant

Versus

1. Shri Manish Kumar Bhagat,
(Resolution Professional of M/s. Perfect Boring
Pvt. Ltd.)
103-104, Panchdeep Complex,
Mithakhali Six Road, Narangpura,
Ahmedabad- 380009, Gujarat

2. M/s. N.A. Rota Machines & Moulds India
(Resolution Applicant of M/s. Perfect Boring
Pvt. Ltd.)
3725, Phase-IV, GIDC, Vatwa,
Ahmedabad – 382445, Gujarat

...Respondents

Present:

For Appellant: Mr. Subhash C. Gupta, Advocate.

For Respondent: Mr. Arvind Kr. Gupta, Ms. Henna George, Advocates
for R-2.
Ms. Honey Satpal, Advocate for R-1.

J U D G M E N T

ASHOK BHUSHAN, J:

1. This Appeal has been filed against the Order dated 16th March, 2021 passed by National Company Law Tribunal, Ahmedabad Bench in I.A. No. 926 of 2020 in CP(IB) No. 148/NCLT/AHM/2019. By the impugned order,

the Adjudicating Authority has approved the Resolution Plan submitted by Respondent No. 2-M/s N.A. Rota Machines & Moulds India.

2. Regional Provident Fund Commissioner aggrieved by the Order in so far as treatment of its claim under the Resolution Plan, has come up in this Appeal.

3. Brief facts of the case necessary to be noticed for deciding this Appeal are:-

- (i) The Adjudicating Authority vide order dated 30.09.2019 admitted the Application under Section 9 of Insolvency and Bankruptcy Code, 2016 (**IBC** in short) filed by Operational Creditor against the Corporate Debtor-M/s. Perfect Boring Pvt. Ltd.
- (ii) The IRP got the notice published on 07.10.2019 calling upon the creditors of the Corporate Debtor to lodge their respective claims on or before 18.10.2019.
- (iii) The Appellant filed two claims in Form-F for Rs. 1,32,44,314/- (payable under Section 7A and 7Q of Employees Provident Fund Miscellaneous Provisions Act, 1952) (Hereinafter referred to as **1952 Act**) and claim of Rs. 99,71,315/- (payable under Section 14B of 1952 Act).
- (iv) The Resolution Professional collated the claims and prepared a list of claims as on 10th August, 2020 in which list the claimed amount of Appellant Rs. 1,32,44,314/- and Rs. 99,71,315 were admitted with Nil security. The Resolution Plan was submitted by Respondent No. 2 which Resolution Plan was approved by the

Committee of Creditors with 96.37%. The Resolution Professional filed an application I.A. No. 926 of 2020 for approval of the Resolution Plan. By the Impugned Order, the Adjudicating Authority approved the Resolution Plan. In the Resolution Plan, claims admitted of workmen dues is Rs. 307.86 lacs and proposed payment is of Rs. 218.89 lacs which is 71.10% of workmen dues. The Appellant who was treated as an Operational Creditor was proposed payment of 1.5% of its dues through the Resolution Plan. The Appellant aggrieved by the approval of the Resolution Plan has come up in this Appeal.

4. Learned Counsel for the Appellant in support of the Appeal submits that dues of the Appellant were required to be paid in full. It is submitted that dues of the Appellant were admitted and all their claims need to be paid in full during CIRP period. Excluding/extinguishing 98.5% of the admitted claims is contrary to law. It is submitted that Resolution Professional has failed to act in accordance with sub-section (20) and (21) of Section 5 of the Code examining the resolution plan in light of Section 36(4)(a)(iii) of the Code and under Section 11 of the 1952 Act. Learned Counsel for the Appellant submits that in view of the law laid down by this Tribunal in **Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia Resolution Professional of Jet Airways (India) Ltd. and Ors.** 2022 SCC OnLine NCLAT 418, this Tribunal has held that PF dues are to be paid in full. It is submitted that Resolution Professional having admitted the entire claims submitted by the Appellant, it was

entitled to receive the full claim and Resolution Plan is not in accordance with the Code.

5. Learned counsel for Respondent No. 2 refuting the submissions of Learned Counsel for the Appellant submits that show cause notice in the claim statement clearly states that amounts are being claimed as an estimate and no details of workmen or of their dues were referred to in the claim. It is submitted that claims submitted by the Appellant are not workmen dues. It is submitted that in the Resolution Plan, workmen dues are being paid to the extent of 71.10%. It is submitted that the workmen dues having been paid to the extent of 71.10% which also included dues towards the provident fund clearly indicates that workmen dues towards PF has been fulfilled since no workmen has filed any appeal claiming their provident fund. It is submitted that copy of the Resolution Plan was shared with the Appellant by Resolution Professional but no objection was raised by Appellant to the Resolution Plan. It is submitted that PF Department is claiming to have found due on the basis of estimate while the Resolution Plan has already provided for the payment of actual workmen dues and as such the claim of PF Department stand subsumed in which plan an amount of Rs. 218.89 lacs made to the workmen. It is further submitted that the Appellant is not entitled to claim any damages under Section 14B. It is submitted that the claim of damages under Section 14B for amount of Rs. 68,54,869/- has been imposed by an order under Section 14B dated 14.10.2019 that is much after declaration of moratorium. It is further submitted that Corporate Debtor being in insolvency, other claim of

damages under Section 14B amounting to Rs. 31,16,446/- ought to be waived in view of Section 14B of the 1952 Act. It is submitted that thus total claim of damages under Section 14B of Rs. 99,71,315/- are not payable and no error can be found with regard to the aforesaid amount in the Resolution Plan. Coming to the claim under Section 7A, it is submitted that total claim under Section 7A is only Rs. 39,76,714/- and the other amount of Rs. 38,78,263 and Rs. 53,89,337/- are amount towards interest under Section 7Q which are not payable and liable to be waived. It is submitted that under Section 11(2) of 1952 Act, first charge is only for the amount of the employee's contribution deducted from his wages or the employer's contribution and does not apply to interest under section 7Q.

6. We have considered the submissions of Learned Counsel for the parties and have perused the record.

7. From the facts brought on record it is clear that Appellant has filed its claim on 18.10.2019 which includes claims under Section 7A, 7Q and 14B of the 1952 Act. The Resolution Professional has admitted the claim under two heads i.e. under one head, the claim of Rs. 1,32,44,314/- has been admitted that is claim pertaining under Order under Section 7A and 7Q another head, claim of Rs. 99,71,315 has been admitted pertaining to the Order under Section 14B. The law is well settled that Provident Fund Dues ought to be paid in full. Judgment in the matter of **Jet Airways** where this Tribunal relying on earlier Judgment of this Tribunal held that PF dues is required to be paid in full. In **Jet Airways**, three Member Bench Judgment of this Tribunal in **Tourism Finance Corporation Vs. Rainbow**

Papers, 2019 SCC OnLine NCLAT 910 and **State Bank of India Vs. Moser Baer Karamchari Union & Anr.**, 2019 SCC OnLine NCLAT 447 were relied. **Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia Resolution Professional of Jet Airways (India) Ltd. and Ors.** 2022 SCC OnLine NCLAT 418 is relied for the above proposition. The order indicates that Resolution Plan although makes payment of workmen dues to the extent of 71.10% but PF dues which are treated as Operational Creditor have not been paid in full and amount of 1.5% PF dues have been paid. The Respondent No. 2 has stated that amount of Rs. 3,48,234/- have been paid to the PF Department on 23rd April, 2021.

8. The treatment of the dues of the Appellant thus in the Resolution Plan cannot be said to be in accordance with law.

9. We however need to consider rival submissions of the parties as to what extent the Appellant's claim is entitled to be accepted in so far as its payments is concerned. Learned Counsel for the Appellant has raised various submissions challenging the assessment made by the Appellant with regard to section 7A and 7Q as well as section 14B. The challenge to assessment orders, made by Appellant in exercise of jurisdiction under 1952 Act cannot be subject matter of challenge in the proceedings under IBC. We have to proceed on the basis of assessment made by statutory authority under 1952 Act and challenge to the said proceedings cannot be entertained in this proceeding. However, the submission of Respondent No. 2 with regard to damages as imposed on the Corporate Debtor needs consideration. From the claim forms which was submitted by the Appellant

on 18.10.2019 annexed as Annexure C to the Appeal indicates that one of the assessment pertaining under Section 14B for amount of Rs. 68,54,869 was imposed by Order dated 14.10.2019 which is clear from Form-F which was submitted by the Appellant itself. The Copy of Order dated 14.10.2019 by which amount of Rs. 68,54,869/- has been imposed is clearly after initiation of CIRP against the Corporate Debtor vide Order dated 30.09.2019.

10. We thus are of the view that it is not necessary in this proceeding to issue any direction for payment of the damages as imposed by the Order dated 18.10.2019 which was subsequent to CIRP imposition of moratorium. We thus are of the view that no direction need to be issued for payment of damages under Section 14B of Rs. 68,54,869/-.

11. Now coming to another part of damages amounting to Rs. 31,16,446 which was imposed by order dated 25th July, 2017. Learned Counsel for Respondent No. 2 has referred to Section 14B as well as paragraph 32B of Employees Provident Fund Scheme 1952 Act. Section 14B of the 1952 Act provides as under:

“14B. Power to recover damages.—Where an employer makes default in the payment of any contribution to the Fund [, the [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 [or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of [any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, [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 [from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:

[Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard]:

[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, subject to such terms and conditions as may be specified in the Scheme.]

12. Paragraph 32 B of the Scheme is as follows:

“32B. Terms and conditions for reduction or waiver of damages. - *The Central Board may reduce or waive the damages levied under section 14B of the Act in relation to an establishment specified in the second proviso to section 14B, subject to the following terms and conditions, namely: —*

(a) in case of a change of management including transfer of the undertaking to workers' co-operative and in case of merger or amalgamation of the sick industrial company with any other industrial company, complete waiver of damages may be allowed;

(b) in cases where the Board for Industrial and Financial Reconstruction, for reasons to be recorded in its schemes, in this behalf recommends, waiver of damages up to 100 per cent may be allowed;
(c) in other cases, depending on merits, reduction of damages up to 50 per cent may be allowed.”

13. The above provision indicates that the Central Board is empowered to waive the damages under Section 14B of the Act. The Para 32B of the Scheme provides that Board for Industrial and Financial Reconstruction for reasons to be recorded in its schemes, in this behalf recommends, waiver of damages up to 100 per cent may be allowed. After enforcement of IBC, the provisions of Board for Industrial and Financial Reconstruction and Sick Industrial Companies (Special Provisions) Act, 1985 were repealed and earlier statutory regime for rehabilitation is now substituted by Insolvency Regime as contained in IBC. Thus when Insolvency Resolution Process has been initiated against a Corporate Debtor and Resolution plan has been approved under IBC, power of Central Board to reduce or waive the damages can be exercised with regard to the damages imposed under Section 14B. Paragraph 32 of the 1952 Scheme as extracted above also contemplate recommendation by Board for Industrial and Financial Reconstruction, 1985 Act being not in force and substituted by Insolvency Regime there can be now no recommendation for waiver of the damages under Section 14B of Board for Industrial and Financial Reconstruction. The power of recommendation as contemplated in paragraph 32B scheme can very well be exercised by the NCLT. We while hearing the Appeal

against order of NCLT in an appropriate case can make a recommendation to the Central Board to waive the damages.

14. In the facts of the present case as noted above, we are of the view that Successful Resolution Applicant along with the Order of this Tribunal may pray to the Central Board to waive 100 percent damages of Rs. 31,16,446 imposed by Order dated 25th July, 2017 under Section 14B which step to be taken by SRA within a period of one month from today. We grant liberty to both the parties to make an appropriate application in this Appeal, if any, occasion arises for any further order with regard to waiver as recommended herein. We thus are of the view that no direction need to be issued for payment of damages of Rs. 99,71,315/- which was imposed under Section 14B for reasons indicated above.

15. Now coming to the another part of the admitted claim i.e. claim for Rs. 1,32,44,314 along with Form F. The Appellant has brought details of an order under Section 7A. Copy of Order dated 25th February, 2019 with regard to 7A wherein total outstanding as per Order dated 25th February, 2019 is Rs. 44,40,119 (at page 76 of the Appeal). Other part of the amount of Rs. 1,32,44,314/- obviously relates to the interest imposed under Section 7Q. We are conscious that the amount as determined under Section 7Q is also part of amount to which the Appellant is entitled. However, looking to the fact that in the Resolution Plan to the extent of 71.10% workmen dues have been paid, the workmen dues obviously included payments towards PF and Gratuity. Workmen thus have received substantial amount of their dues. The workmen dues not only included the

PF and Gratuity but unpaid salary. In the records of this Appeal, there are no details as regards the payments made to the workmen towards PF dues under Resolution Plan. The Resolution Plan makes the payment of the workmen dues to the extent of Rs. 218.89 Lacs out of total admitted dues of Rs. 307.86 Lacs. What is the bifurcation of PF dues under the payment of 218.89 Lacs which have directly been given to the workmen? We have noticed above that total claim admitted of the Appellant for dues under Section 7A and 7Q was Rs. 1,32,44,314/-, we are of the view that in the amount which is claimed by the Appellant towards 7A and 7Q, the amount which has already been paid to the workmen need to be deducted. Resolution Professional needs to compute the amount paid to the workmen under Resolution Plan towards PF dues. Resolution Professional being ex-Resolution Professional i.e. Respondent No. 1 we direct the Respondent No. 1 to compute the amount of PF dues paid to the workmen under Resolution Plan and thereafter arrive at the amount which is required to be paid to the Appellant as against the admitted claim towards Section 7A and 7Q.

16. Let the aforesaid exercise be completed by the Respondent No. 1 within two months from today and communicate the amount payable to Appellant under 7A and 7Q. The amount to be determined for payment to Appellant has to be the amount after deducting from total claim of Rs. 1,32,44,314 by deducting the amount paid towards PF to the workmen and amount already paid to the Appellant under Resolution Plan. The Respondent No. 1 shall communicate the said computation to Successful Resolution Applicant (SRA in short) as well as to the Appellant and SRA

shall make the aforesaid payment within 60 days thereafter to the Appellant.

17. We have issued the above direction to make payment by the SRA to the Appellant to save the Resolution Plan from invalidity as noticed above.

18. In result, we dispose of this Appeal by following directions:

i. The Order passed by the Adjudicating Authority approving the Resolution Plan is upheld subject to following;

(a) SRA shall make the payment of dues of Appellant under Section 7A and 7Q on the basis of computation communicated by the Respondent No. 1 after deducting the amount paid to the workmen under Resolution Plan towards PF and the amount paid to the Appellant under Resolution Plan. SRA shall make the said payment within 30 days from computation as communicated by Respondent No. 1.

(b) No direction is issued to the SRA to make payment of amount of damages under Section 14B for amount of Rs. 68,54,869/- which was imposed by Order dated 14.10.2019 after enforcement of the moratorium.

(c) With regard to amount of Rs. 31,16,446/- under Section 14B we permit the SRA to make an application to Central Board for waiver of 100 per cent damages along with copy of this order within 30 days from today.

- ii. That in event of non-compliance of any of the directions as indicated above, both the parties are at liberty to file an appropriate application in this Appeal for further orders, if required.

The Appeal is disposed of with the aforesaid directions.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

New Delhi
11th October, 2023

Basant B.