(2023) 05 NCLT CK 0087

In the National Company Law Appellate Tribunal

Case No : Company Appeal No. 36/ND/2022 In Company Petition No. (IB) - 418(ND)/2018

?Regional Provident Fund Organisation Vs Kuldeep Sharma ?

Date of Decision : 29-05-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 14, 36(4), 36(4)(a)(iii), 35(1)(j), 52, 53, 238
Limitation Act, 1963 — Section 5
Employees Provident Funds And Miscellaneous Provisions Act, 1952 — Section 7Q, 11, 14B

Citation : (2023) 05 NCLT CK 0087

Hon'ble Judges : Ashok Kumar Bhardwaj, Member (J);L. N. Gupta, Member (T)

Bench : Division Bench

Advocate : Vivek Sibal, Ayush Bhatia, Rahul Sharma, Rajesh Raina, Rehmat Ali, Rajesh Kumar, Mishal Vij

Final Decision : Dismissed

Judgement

Ashok Kumar Bhardwaj, Member (J)

1. The present appeal has been preferred by Regional Provident Fund Commissioner (for brevity, the 'Appellant') under Section 42 of the Insolvency and Bankruptcy Code, 2016 (for brevity, the 'IBC, 2016') challenging the partial rejection of the claim submitted by the Appellant before the Liquidator of the Corporate Debtor viz. M/s Hindustan Paper Corporation Limited (for brevity, the 'Respondent') praying therein:

"a. Allow the instant appeal;

b. Set aside the letters dated 12.05.2022 and 24.05.2022 issued by the Respondent Liquidator rejecting the claim of the Appellant for PF dues beyond Rs. 120.77 Crores; and

c. Direct the Respondent Liquidator to accept the entire claim of Rs. 386.48 Crores made by the Appellant for the PF dues of the Corporate Debtor as detailed in its letter dated 31.01.2022."

2. A brief conspectus of facts giving rise to the present appeal is that the Corporate Debtor was admitted to Corporate Insolvency Resolution Process and moratorium under Section 14 of the IBC, 2016 was declared vide order dated 13.06.2018 and the Resolution Professional was appointed accordingly. Subsequently, the Corporate Debtor was ordered to be liquidated and in terms of the order dated 02.05.2019 Shri Kuldeep Verma was appointed as the Liquidator. It is the case of the Appellant that the Respondent had invited the claims in terms of the provision of Section 35(1)(j) of IBC, 2016 read with Regulation 16, 17, 18, 19 and 20 of IBBI (Liquidation Process) Regulations, 2016 and the Appellant herein submitted its claim in three phases i.e., on 25.03.2021 for an amount of Rs. 124,89,21,329, on 25.11.2021 for an amount of Rs. 18,21,905 and on 06.12.2021 for an amount of Rs. 12,54,955.

3. According to the Appellant in terms of the letter dated 28.12.2021 the Respondent admitted its claim partially i.e., for an amount of Rs. 120 Crores. Therefore, the Appellant sent a missive dated 31.01.2022 to the Respondent providing him the details of the claims and subsequent request for releasing the PF dues as claimed in terms of the provision of Section 11 of the EPF & MP Act, 1952. The Respondent rejected the claim of the Appellant vide its letter dated 12.05.2022 stating therein that the claim for Rs. 10.57 Crores would be admitted and dealt with in accordance with Section 53 of the IBC, 2016. The Respondent sent another letter dated 24.05.2022 to the Appellant wherein it reiterated that the claim of the Appellant would be accepted only for an amount of Rs. 120.77 Crores.

4. The salient grounds espoused by the Appellant in its Appeal to assail the decision taken by the Respondent in terms of the letters dated 12.05.2022 and 24.05.2022 are:-

a. In terms of the provisions of Section 11 of the EPF & MP Act, 1952, the EPF payment should get priority over other dues, when any employer is adjudicated as insolvent. Such position has been vindicated by the Hon'ble Supreme Court in EPF Commissioner vs. O.L. of Esskay Pharmaceuticals (2011) 10 SCC 727 and in Maharashtra State Cooperative Bank Limited vs. Assistant Provident Fund Commissioner 2009 (10) SCC 123.

b. The first charge over the establishment's assets in favour of EPF dues by virtue of Section 11 has further been upheld by various High Courts including Hon'ble Gujarat High Court in Indian Overseas Bank vs. EPFO (4879 of 2017), Hon'ble High Court of Allahabad in Kotak Mahindra vs. Union Bank of India (45585 of 2015), Hon'ble High Court of Rajasthan in GMC Engineers and Contractors Ltd. vs. State (Finance Dept) (6872 of 2017).

c. In view of the judgment of Mumbai Bench of this Adjudicatory Authority in M.A. No. 576 & 752 of 2018 (Assets Reconstruction Company vs. Precision Fastners Limited), in alignment of provisions of EPF Act with Section 36(4)(a)(iii) of the IB Code, the dues of provident fund/ pension fund/ gratuity fund shall not be treated as part of liquidation estate and as long as such dues are not treated as part of liquidation estate, the provisions of IBC will not be applicable for realization of such dues from the asset of the Corporate Debtor. Therefore, Section 238 of the Code will not have an overriding effect over the asset of the workmen lying in the possession of the Corporate Debtor since that asset is not considered as part of the liquidation estate. For Section 238 to apply over any other law, the other law must be inconsistent with the provisions of the Code. Section 36(4)(a)(iii) has excluded the PF dues of the workmen from the liquidation estate assets and treated it as an asset of the workmen lying with Corporate Debtor and therefore Section 53 will not be applicable to bring such dues within the ambit of liquidation estate.

d. The Hon'ble Supreme Court in Maharashtra State Co-operative Bank Ltd. vs. Kannad Sahkari Sakhar Karkhana (SLP (C) No. 14772-14773 of 2010) dated 01.07.2013 has upheld the priority of PF dues including the amount assessed under Section 7A with interest under Section 7Q and damages under Section 14B of the EPF & MP Act.

e. The provisions of EPF Act being beneficial legislation and special act shall be given effect to and precedence over provisions of IBC, 2016. As PF dues belong to the workmen of Corporate Debtor they should be assessed and protected and it is the responsibility of the Resolution Professional to protect the rights of the workmen and pay the PF dues as per provisions of the EPF & MP Act, 1952.

5. In reply to the Appeal, the Respondent has broadly espoused the plea of limitation i.e., the Appeal preferred after the prescribed period of limitation i.e., 14 days is not maintainable. Nevertheless, during the course of the hearing, Ld. Sr. Counsel appearing for the Respondent/Liquidator referred to the letter dated 12.05.2022 written by the Liquidator/ Respondent to Mr. Bijay Prasad, Assistant Provident Fund Commissioner, impugned herein to espouse that the claim of the Appellant for interest and penalties could not have been admitted, thus the decision of liquidator to admit the claim for an amount of Rs. 10.57 Crores instead of Rs. 125.20 Crores was justified. The Ld. Sr. Counsel for the Respondent also contended that the Appellant herein could not bring forth any plea to establish that the view taken by the liquidator in orders dated 12.05.2022 and 24.05.2022 is incorrect in any manner. The Ld. Sr. Counsel for the Respondent sought to justify the impugned orders, also by contending that with the order of liquidation dated 02.05.2019, all employees and workers of the Corporate Debtor stood discharged from the employment of the Corporate Debtor. According to him the concerned workmen/ employees are entitled to provident fund, gratuity fund and pension fund only from such funds which are specifically kept out of liquidation assets, thus the concerned workmen/ employees shall have to be paid out of only such funds if any available. To buttress the plea the Ld. Sr. Counsel referred to the judgment of the Hon'ble Supreme Court in Sunil Kumar Jain and Ors. Vs. Sundaresh Bhatt & Ors. (Civil Appeal No. 5910/2019) and the judgment dated 11.02.2020 passed by Hon'ble

NCLAT in Company Appeal AT (Insolvency) No. 1229/2019. In sum and substance, the plea espoused by the Ld. Counsel appearing for liquidator is that the EPFO could raise claim only qua such amount of Provident Fund which was kept apart under such head (EPF) by CD and could not even be treated as part of assets of CD, as provided under Section 36(4)(a)(iii) of IBC. In his submission, no other amount including the interest and penalty imposed under EPF & MP Act, 1952 could be claimed by the Appellant herein against the CD under liquidation, if no such amount in this regard was kept apart for the purpose and was covered under Section 36(4)(a)(iii) of IBC, 2016.

6. We heard the Counsels for the parties and perused the record. As far as the Appellant is concerned, the grounds espoused by it with reference to the judicial precedents (ibid) are regarding the preferential claim of EPFO in disregard of the provisions of Section 53 of IBC, 2016. The grounds are misconceived and the reliance on different judicial precedents is misplaced for the simple reason that the grievance raised in the appeal is not regarding the priority of the claim of EPFO, but is for admission of the full claim (ibid) and not only part of the claim. The plea raised by the Respondent regarding maintainability of the present Appeal is noted only to be nixed for the simple reason that by order dated 17.03.2023, the IA 166 of 2023 filed by the Appellant for condonation of delay was allowed. The order reads thus:-

"IA-166/2023: Indubitably, the IA has been preferred by the Employees Provident Fund Organisation i.e., an instrumentality of the State. Indubitably, there is a delay of 49 days in filing the Company Appeal No. 36/2022. Ld. Counsel appearing for the Applicant espoused that it was in view of the involvement of administrative mechanism that the appeal could not be filed within 14 days. Mr. Vivek Sibal Ld. Sr. Counsel appearing for the Liquidator submitted that the application is quite vague and there is no explanation for the delay. The only reason we find in the application as espoused by the Ld. Counsel for the Applicant is that the time could be consumed in following the administrative process in filing the application. It is stare decisis that when a judicial proceeding is initiated or instituted on behalf of the State or it's instrument the decision in this regard does not rest with any single individual and it is a mechanism which is involved with the decision-making process and the process avoidably take some time. The issue was addressed by the Hon'ble Supreme Court in "State of Bihar vs. Kameshwar Prasad Singh" (Civil Appeal No. 3005 of 2000) wherein it was ruled that the yardsticks which are applicable to an individual while considering an application for condonation of delay may not be applied to state and such applications moved by the State need to be looked at differently, as there is public interest involved in filing such application. The relevant excerpt of the judgment reads thus:

11. "It is notorious and common knowledge that delay in more than 60 per cent of the cases filed in this Court - be it by private party or the State - are barred by limitation and this Court generally adopts liberal approach in

condonation of delay finding somewhat sufficient cause to decide the appeal on merits. It is equally common knowledge that litigants including the State are accorded the same treatment and the law is administered in an even-handed manner. When the State is an applicant, praying for condonation of delay, it is common knowledge that on account of impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing-on-the buck ethos, delay on the part of the State is less difficult to understand though more difficult to approve, but the State represents collective cause of the community. It is axiomatic that decisions are taken by officers/ agencies proverbially at slow pace and encumbered process of pushing the files from table to table and keeping it on table for considerable time causing delay - intentional or otherwise - is a routine. Considerable delay of procedural red-tape in the process of their making decision is a common feature. Therefore, certain amount of altitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression 'sufficient cause' should, therefore, be considered with pragmatism in justice-oriented process approach rather than the technical detention of sufficient case for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of pragmatic approach injustice-oriented process. The Court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-à-vis private litigant could be laid to prove strict standards of sufficient cause. The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the Courts or whether cases require adjustment and should authorise the officers to take a decision or give appropriate permission for settlement. In the event of decision to file the appeal needed prompt action should be pursued by the officer responsible to file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while State is an impersonal machinery working through its officers or servants.

To the same effect is the judgment of this Court in Special Tehsildar, Land Acquisition, Kerala v. K.V. Ayisumma

13. In Nand Kishore v. State of Punjab this Court under the peculiar circumstances of the case condoned the delay in approaching this Court of about 31 years. In N. Balakrishnan v. M. Krishnamurthy this Court held that the purpose of Limitation Act was not to destroy the rights. It is founded on public policy fixing a life span for the legal remedy for the general welfare. The primary function of a Court is to adjudicate disputes between the parties and to advance substantial justice. The time limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. The object of providing legal remedy is to repair the damage

caused by reason of legal injury. If the explanation given does not smack mala fides or is not shown to have been put forth as a part of a dilatory strategy, the Court must show utmost consideration to the suitor. In this context it was observed: SCC p.127, para 9)

" 9. It is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncontainable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the Court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior Court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first Court refuses to condone the delay. In such cases, the superior Court would be free to consider the cause shown for the delay afresh and it is open to such superior Court to come to its own finding even untrammelled by the conclusion of the lower Court.

14. Looking into the facts and circumstances of the case, as noticed earlier and with the object of doing substantial justice to all the parties concerned, we are of the opinion that sufficient cause has been made out by the petitioners which has persuaded us to condone the delay in filing the petitions. Dismissing the appeals on technical grounds of limitation would not, in any way, advance the interests of justice but admittedly, result in failure of justice as the impugned judgments are likely to affect not only the parties before us, but hundreds of other persons who are stated to be senior than the respondents. The technicalities of law cannot prevent us from doing substantial justice and undoing the illegalities perpetuated on the basis of the impugned judgments. However, while deciding the petitions, the reliefs, in the case can appropriately be moulded which may not amount to unsettle the settled rights of the parties on the basis of judicial pronouncements made by the Courts regarding which the State is shown to have been careless and negligent. It is paramount consideration of this Court to safeguard the interests of all the litigants and persons serving the Police Department of the State of Bihar by ensuring the security of the tenure and non-disturbance of accrual of rights upon them under the prevalent law and the rules made in that behalf. Accordingly delay in filing the petitions is condoned."

In view of the aforementioned judgement of the Hon'ble Supreme Court the IA-166/2023 is allowed and the delay is filing the Company Appeal No. 36/2022 is condoned.

With this, the present IA stands allowed."

7. After the order dated 12.05.2022, the Respondent had passed detailed order

dated 24.05.2022. The order dated 12.05.2022 stands merged in the subsequent order passed on 24.05.2022, after consideration of the plea raised by the Appellant in terms of the missive dated 13.05.2022. The order dated 24.05.2022 passed by the liquidator, with reference to judgments passed by the Hon'ble Supreme Court and Hon'ble NCLAT (ibid) is well reasoned. The relevant excerpt of the order reads thus:

"Your contention in para 3 of your letter that there is a legal fiction that "dues so payable" are still lying as part of current assets of the Corporate Debtor is incorrect. Your further contention that Liquidator must first pay off the dues under the Employees' Provident Fund Fund & Miscellaneous Provisions Act, 1952 and the schemes framed thereunder first before distributing the assets as stated under Section 52 and Section 53 of IBC, 2016 is also incorrect. The position in law is that the PF dues kept in a PF fund do not form part of the Liquidation estate assets as they are not an asset of the Corporate Debtor. All other PF claims will be governed by Section 53 of IBC, 2016.

Your attention in this regard is drawn to the judgement of the Hon'ble Supreme Court in Sunil Kumar Jain and others vs Sundaresh Bhatt & Others (Civil Appeal No. 5910/2019) wherein the Hon'ble Court has held that:-

13. .... "Therefore the concerned workmen/employees shall be entitled to provident fund, gratuity fund and pension fund from such funds which are specifically kept out of liquidation estate assets and as per Section 36(4) of the IB Code, they are not to be used for recovery in liquidation".

"14(ii) Considering Section 36(4) of the IB code and when the provident fund, gratuity fund and pension fund are kept out of the liquidation estate assets, the share of workmen dues shall be kept outside the liquidation process and the concerned workmen/ employees shall have to be paid the same out of such provident fund, gratuity fund and pension fund, if any, available and the Liquidator shall not have any claim over such funds."

Your attention is also drawn to the judgement dated 11.02.2020 passed by the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 1229/2019 wherein in relation to payment of Gratuity, the NCLT had held that the Liquidator cannot avoid the liability to pay Gratuity to the employees, on the ground that "Corporate Debtor" did not maintain separate funds, even if there is no separate fund, the Liquidator has to provide sufficient provision for the payment of Gratuity according to their eligibility. The Hon'ble NCLAT after noting that no separate Gratuity fund was created by the Corporate Debtor and held that the Liquidator should not have been directed by the NCLT to make provision for payment of Gratuity to workmen and set aside the NCLT order in this regard."

8. Finding no infirmity in the aforementioned order we are not inclined to interfere with the same. The Appeal is accordingly rejected. No cost.

