

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 116 of 2022

(Arising out of Order dated 14.12.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in I.A. (IB)No. 802/KB/2021 in C.P. (IB) No. 993/KB 2018)

IN THE MATTER OF:

**Employees Provident Fund Organisation
Through Regional Provident Fund Commissioner-II**

Having Office at:
Bhavishya Nidhi Bhawan,
28, Community Center,
Wairpur Industrial Area,
Delhi-110052.

Also at:
Regional Office: Patna
Bhavishyanidhi Bhawan
R-Block, Road No.-6
Patna – 800 001

...Appellant

Versus

1. Mr. Subodh Kumar Agarwal

Resolution Professional
Ambient Computronics Private Limited
1 Ganesh Chandar Avenue, Room No. 301,
3rd Floor, Kolkata – 700013

2. Mr. Sujeet Kumar

Successful Resolution Applicant of
Ambient Computronics Private Limited
3, BSIDC Colony, Dr. Rameshwar Dayal Path
Patliputra, Patna

3. M/s Ambient Computronics Pvt. Ltd.

Through its Resolution Professional of
House No. 38 A.N. Path, Boring Rd,
North Sri Krishna Puri,
Patna, Bihar 800013

...Respondents

Present:

For Appellant: Mr. Hitesh Sachar and Ms. Anju Jain, Advocates.

**For Respondents: Mr. Subodh Kumar Agarwal, Resolution Professional in person for Respondent No.1.
Mr. Tanishq Mehta, Advocate for Respondent No.2.**

Cont'd.../

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been against the order dated 14.12.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata allowing application filed by the Resolution Professional for approval of the Resolution Plan in respect of 'M/s Ambient Computronics Private Limited', the Corporate Debtor. Brief facts of the case are:-

- (i) W.e.f. 01.11.2017 the Corporate Debtor - 'M/s Ambient Computronics Private Limited' was brought under the purview of Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short '1952 Act').
- (ii) Insolvency proceedings were initiated against the Corporate Debtor by order dated 10.12.2020 passed by the Adjudicating Authority.
- (iii) The Corporate Debtor has committed default in compliance of provisions of 1952 Act for the period October, 2011 to October, 2020. On 01.12.2020, a case as E-Court Diary No. 123/2020 was registered by the Appellant for assessment of the dues of all categories of employees of the Corporate Debtor.

- (iv) On 12.01.2021, the Appellant sent a letter to the Respondent No.1 – Resolution Professional informing that inquiry has been initiated for determination of dues and tentative dues against the Corporate Debtor are to the extent of Rs.6,16,716/-. The RP was informed to take the needful action at the earliest.
- (v) Prior to 12.01.2021, the Appellant has issued Show Cause Notice under Section 7A of the 1952 Act to the Corporate Debtor asking the Corporate Debtor to show cause as to why inquiry be not initiated. Letter dated 02.12.2020 was also sent to the Corporate Debtor.
- (vi) In the CIRP process of the Corporate Debtor, a Resolution Plan was filed by Respondent No. 2- 'Sujeet Kumar' who was also one of the Director of the Suspended Board of Directors of the Corporate Debtor. Resolution Plan was approved by the Committee of Creditors (CoC) and letter of intent dated 28.08.2021 was issued to the Resolution Applicant and an application for approval of the Resolution Plan was also filed before the Adjudicating Authority.
- (vii) In pursuance of the Show Cause Notice issued by the Competent Authority, the Respondent No.2, Director of the Corporate Debtor had appeared on several occasions in the year 2001. On 22.03.2021, Respondent No.2 appeared before the Employees Provident Fund, Patna through Video Conferencing. Proceedings

by the Employees Provident Fund Organisation were continued and Employees Provident Fund Organisation issued a final order dated 21.01.2022 in the Section 7A proceeding computing the liability of the Corporate Debtor as Rs.12,17,854/- which order has been filed by the Appellant alongwith Rejoinder Affidavit.

(viii) The Resolution Plan came to be approved by the Adjudicating Authority on 14.12.201, wherein no allocation has been made towards dues of Employees Provident Fund Organisation as mentioned under Section 7A. Aggrieved by the said order this Appeal has been filed.

2. Learned counsel for the Appellant submits that the Appellant having issued Show Cause Notice to the Corporate Debtor and the Respondent No.2, who was Director of the Corporate Debtor was duly served with the Show Cause Notice and he also appeared before the Organisation on several occasions prior to even submission of Resolution Plan, it was obligatory on his part to provide for payment of the provident fund dues of the employees. It is submitted that notice was also issued to the Interim Resolution Professional on 12.01.2021 who subsequently was confirmed as Resolution Professional about the proceedings under Section 7A, therefore, it was obligatory for the Resolution Professional to apprise the Committee of Creditors (CoC) and provide for payment of provident fund dues. It is submitted that Resolution Plan which does not provide any provision for payment of provident fund dues deserves to be set aside.

3. Resolution Professional has appeared in person and submits that no claim was filed by the Appellant before the Resolution Professional, hence, there is no occasions for entertaining their claim. The Resolution Professional relying on Section 36(4)(a)(iii) submits that provision contemplates all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund. He submits that the provision contemplates any amount due from the Corporate Debtor to be paid towards provident fund, pension or gratuity. He submits that as per the provision assets in provident fund, pension and gratuity are not assets of the Corporate Debtor and there is no indication that said amount is to be paid by the Corporate Debtor.

4. Learned counsel for the Successful Resolution Applicant submits that no claim has been filed by the Appellant, therefore, there was no occasions for inclusion of their claim in the Resolution Plan. He submits that Resolution Plan is in accordance with Section 30(2) of the Code which does not warrant any interference.

5. We have heard learned counsel for the parties and perused the record.

6. From the facts of the present case as noticed above it is apparent that the proceedings under Section 7A of 1952 Act were initiated against the Corporate Debtor by issuing Show Cause Notice dated 12.01.2021. Notice was sent to Resolution Professional as well as to the Respondent No.2, who was the Ex-Director of the Corporate Debtor. The Corporate

Debtor being a Micro, Small & Medium Enterprise (MSME), the Resolution Plan ultimately was filed by Respondent No.2, the Ex-Director of the Corporate Director. From the materials on record, it is clear the Mr. Sujeet Kumar, Director of the Corporate Debtor and now Resolution Applicant was presented himself before the Employees Provident Fund Organisation, Patna through VC and also made his submissions on several occasions even before submission of Resolution Plan by him. Ex-Director/ the Resolution Applicant was also issued Show Cause Notice by the Employees Provident Fund Organisation informing about the initiation of inquiry under Section 7A under the 1952 Act. It is submitted that the Appellant did not submit their claim before the IRP/RP during the CIRP process or before the Adjudicating Authority at any point of time, hence, Appellant was not mentioned in the list of creditors prepared by the Respondent No.1. In the Information Memorandum all details as prescribed in Regulation 36 are included. The Corporate Debtor being a MSME, Respondent No.2 member of the Board of Directors was found eligible to submit a Resolution Plan. The Respondent No.2, however, in its reply filed in this Appeal has not denied that he was not aware of the proceedings under Section 7A, he submits that said proceedings are still going on. In para 10 of the Reply following has been pleaded by the Resolution Applicant:

“10. I state that the Appellant’s alleged claim is still ongoing under section 7A of the Employees Provident Fund & Miscellaneous Provisions Act, 1952 to determine the Employees Provident Fund and dues in respect of all categories of employees

of Respondent No. 3/Corporate Debtor having PF Code No. BR/PAT/9160 is still undetermined.”

7. Further plea of the Respondent No. 2 in view of the Judgment of the Hon'ble Supreme Court in the matter of 'Ghanashyam Mishra and Sons Pvt. Ltd. Through the Authorized Signatory vs. Edelweiss Asset Reconstruction Company Limited through the Directors & Ors.', Civil Appeal No. 8129 is that all claims which are not part of the Resolution Plan shall stand extinguished.

8. From the facts which are brought on the record, it is clear that no claim was submitted by the Appellant in the CIRP process but there is no denying to the fact that in CIRP process notice of proceedings under Section 7A were issued to the Resolution Professionals as well as to the Corporate Debtor. Director of the Corporate Debtor who is now the Resolution Applicant also participated in the proceedings under Section 7A but the proceeding under Section 7A does not find any mention in the Resolution Plan, supposedly due to non-filing of any claim.

9. Now, we notice certain sections of the Code and Regulations under CIRP Regulations, 2016. Section 18 contains duties of the Interim Resolution Professional. Under Section 18(1)(b), the IRP is under duty to receive and collate all claims submitted by creditors to him in pursuance of the public announcement made under Section 13 and 15. Resolution Professional is also under Section 25 under duty to maintain an updated list of claims. When we look into the CIRP Regulations, 2016, Regulation

6 provides for public announcement inviting proof of claim. Regulation 7 deals with dues of the operational creditors, Regulation 8 deals with due of financial creditors, Regulation 8(a) deals with creditors in a class, Regulation 9 deals with claims of workmen and employees and 9(a) deals with claims by other creditors. The provisions of the Code and Regulations do not contemplate any cognizance of any ongoing proceeding under which Corporate Debtor may be saddled with any liability financial or otherwise.

10. The present case is a case of that nature where inspite of Director of the Corporate Debtor and the Resolution Professional being aware of the inquiry under 7A did not take steps to inform the Department concerned to file its claim in the CIRP process and both Resolution Professional and Respondent No.2 – Resolution Applicant now contend that no claim has been filed by the Appellant. There is no error in the Resolution Plan not noticing and reflecting their claim. Although Section 18 of the Code uses the expression “collate all the claims” but the said expressions being followed by the words “submitted by creditors”, the Resolution Professional is entitled to contend that unless the claim is received by him, he has no obligation to include it in the list of claims or even the Information Memorandum.

11. We may also deal with the submission raised by the Resolution Professional i.e. the Corporate Debtor is not obliged to make any payment towards the provident fund, the pension fund and the gratuity fund. It is submitted that Section 36(4)(a)(iii) does not contemplate any payment

towards the above fund by the Corporate Debtor and the above funds have been kept out of the liquidation assets under the statutory scheme. The submission is completely devoid of merit. It is the statutory obligation of the Corporate Debtor to contribute to the dues of workmen and employees towards the provident fund, the pension fund and the gratuity fund. If above funds are deficient or the Corporate Debtor has failed to perform its statutory obligation, it is the Corporate Debtor who has to make payment towards the above funds which amounts have to be kept out of the liquidation assets. We, thus, reject the submission of the Resolution Professional that Corporate Debtor has no liability to make payment towards the above funds.

12. We are of the view that there are certain gaps in the statutory scheme to cover the statutory claims which are part of any ongoing statutory proceedings or inquiry. Regulation 36 which provides for Information Memorandum is as follows:-

“36. Information memorandum. – [(1) *Subject to sub-regulation (4), the resolution professional shall submit the information memorandum in electronic form to each member of the committee within two weeks of his appointment, but not later than fifty-fourth day from the insolvency commencement date, whichever is earlier.*]

(2) *The information memorandum shall contain the following details of the corporate debtor-*

[(a) assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.

Explanation: 'Description' includes the details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details.]

(b) the latest annual financial statements;

(c) audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;

(d) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;

(e) particulars of a debt due from or to the corporate debtor with respect to related parties;

(f) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;

(g) the names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;

(h) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;

(i) the number of workers and employees and liabilities of the corporate debtor towards them;

*(j) [***]*

*(k) [***]*

(l) other information, which the resolution professional deems relevant to the committee.

(3) A member of the committee may request the resolution professional for further information of the nature described in this Regulation and the resolution professional shall provide such information to all members within reasonable time if such information has a bearing on the resolution plan.

*[(4) The resolution professional shall share the information memorandum after receiving an undertaking from a member of the committee [***] to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss*

to itself or any other person and comply with the requirements under sub-section (2) of section 29.]

13. Although Regulation 36 Sub-Regulation (2)(l) provides for other information which the resolution professional deems relevant to the committee but the said information being under subjective satisfaction of Resolution Professional does not cast any obligation for bringing in the notice of the Committee any ongoing proceeding where statutory liabilities were likely to accrue on the Corporate Debtor.

14. The Regulation framing authority need to consider as to whether the Regulations need any amendment, clarification so as to include in the Information Memorandum any ongoing statutory proceeding which is likely to saddle the Corporate Debtor with financial or other liability. Further, even if the Resolution Professional has details of record, notices, orders indicating that certain amounts have been finalized to the received from the Corporate Debtor but due to want of claims being filed of such statutory authority they do not find any mention in the list of claims or Information Memorandum.

15. Large number of cases are coming where Resolution Professional although have record of the Corporate Debtor which indicates several liability and claims against Corporate Debtor but in absence of want of any claim by such statutory authority, the claim does not find place anywhere in the list of claims or Information Memorandum and there is no obligation of the IRP/RP place such information before the CoC. When the IRP/RP

come into knowledge of orders against the Corporate Debtor or notice against the Corporate Debtor of ongoing proceeding he should be under obligation to include it in the Information Memorandum and bring the same into the notice of the CoC to enable the CoC to take a wholesome view of entire sequence of facts and circumstances.

16. The law as it exists today does not oblige the IRP/RP to send any information to any creditor or statutory authority even if the records of the Corporate Debtor reflect any liabilities of the Corporate Debtor towards them. It is his sweet will to give information or not to any such entities. We are of the view that there has to be an obligation of the IRP/RP to inform the creditors whose liabilities are on the record of the Corporate Debtor since the object of insolvency resolution is to take into account all liabilities of Corporate Debtor and thereafter resolve it. It is the matter on which attention of regulation making authority and Government has to be drawn by this Tribunal so as to take remedial measures, if any.

17. The law as it stands today does not require any claim which is not filed to be included in the Resolution Plan. In the present case, the claim which is now crystalized under Section 7A was not there at the time of currency of the Corporate Insolvency Resolution Process, hence, it is not necessary for us to express any concluding opinion as to what steps to be taken by the Appellant for a claim which has been crystalized after close of CIRP process. Appellant are at liberty to take such appropriate remedy for recovery of the amount under Section 7 as may be advised. However, we

cannot find any fault due to above ground in the Resolution Plan nor Resolution Plan deserves any interference by this Tribunal on the aforesaid grounds. We, thus, dispose of this appeal with observations and liberty as noted above.

18. Let a copy of this order be also forwarded to the Insolvency and Bankruptcy Board of India and to the Secretary, Ministry of Corporate Affairs to take into consideration observations as made above for action, if any.

**[Justice Ashok Bhushan]
Chairperson**

**[Shreesha Merla]
Member (Technical)**

**[Naresh Salecha]
Member (Technical)**

NEW DELHI

27th May, 2022

Archana