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W.P.No.18328 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.11.2023

CORAM :

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

W.P.No.18328 of 2022

Radhakrishnan Dharmarajan, Liquidator,
Flora Footwear Pvt. Limited.
D3, Block 1, Triumph Apartments,
Jawaharlal Nehru Salai
Arumbakkam, Chennai 600 106.

... Petitioner

Vs.

1. Central Board of Trustees, EPF
Bhavishya Nidhi Bhawan
14, Bhikaiji Cama Place,
New Delhi 110 066.

2. Employees' Provident Fund Organisation
Regional Office, S-1, TNHB, Phase III,
Sathuvachari, Vellore 632 009.

... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari to call for the records on the file of the 1st respondent letter dated 08.03.2022 bearing No.PRC/18(09)2021/TN communicated to the 2nd respondent who in turn issued the impugned order bearing notice No.ZACC/7/C-43(5)/2020-PART(1) dated 23.03.2022 and quash the same.



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For Petitioner : Mr.T. Ravichandran
For Respondents : Mr.P.K. Panneer Selvam

ORDER

This Writ Petition is filed by the Company Liquidator R.Dharmarajan appointed by National Company Law Tribunal (NCLT) for M/s. Flora Footwear Private Limited. It challenges the impugned order dated 23.03.2022 issued by the Employees' Provident Fund Organisation, Regional Office, Chennai, through the 2nd respondent based on the letter dated 08.03.2022 issued by the 1st respondent, Central Board of Trustees, EPF, New Delhi.

2. Briefly into the essential facts:

2.1. The Petitioner R.Dharmarajan is the Company Liquidator appointed by NCLT in the Corporate Insolvency Resolution Process instituted against M/s. Flora Footwear Private Limited whose registered office is in Nungambakkam, Chennai. Two permanent employees D.Arasalingam and G. Sivakumar of the Company moved an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "I&B Code 2016") as operational creditors before



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the NCLT, Chennai Single Bench, which appointed Anandarajan Balaji as Interim Resolution Professional thereby commencing the Corporate Insolvency Resolution Process to be completed within 180 days from 02.01.2019, the date of the order in CP/1279/IB/2018 filed by the Operational Creditors. Subsequently, the NCLT Division Bench ordered the liquidation of M/s. Flora Footwear Private Limited and appointed the petitioner R.Dharmarajan as the Company Liquidator in MA/856/2019 filed in CP/1279/IB/2018 vide its orders dated 03.09.2019. A Public announcement was made on 16.09.2019 calling upon claims from all stake holders of M/s. Flora Footwear Private Limited. An e-auction of the key assets of the Company was conducted on 16.10.2020 and sale certificate was issued to the successful bidder, one K.S. Varadaraj of Bangalore. According to the petitioner, though there was no claim from the 2nd respondent for the Employees' Provident Fund dues to the tune of Rs.2,87,28,404/- before him, the latter had submitted the claim to the Insolvency Resolution Professional and it was considered. The break up of the claim amount of Rs.2,87,28,404/- was Rs.1,55,45,088/- principal, including the administration charges, Rs.42,95,456/-, the interest and Rs.88,87,860/- damages. The petitioner, as the Liquidator, paid Rs.1,55,45,088/- and Rs.42,95,456/- but requested for waiver of the



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damages of Rs.88,87,860/- as the Company itself was under liquidation and the sale proceeds was inadequate. But the 2nd respondent forwarded the request to the 1st respondent, who is the Competent Authority, who finally decided to reject the request by stating that "request for reduction/waiver of damages can be considered only if an establishment 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 (BIFR) established under Section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985". This decision was communicated to the petitioner vide the impugned order dated 23.03.2022 by the 2nd respondent. Challenging the said orders, the present Writ Petition is filed. The contention of the petitioner is that when BIFR itself is no more in existence and I&B Code, 2016 has become the law of the land, the order smacks of ignorance and non application of mind on the part of the 1st respondent.

3. Mr.T. Ravichandran, learned counsel for the petitioner would contend that the 1st respondent ought to have considered his request for waiver of the damages since that amount would help in settling the dues of employees who have no other alternative to recover their dues. It was



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further contended by him that Section 14 B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the EPF & MP Act") very clearly authorises the 1st respondent to waive the damages and it is not as though they cannot do it. His further contention was that with I&B Code replacing BIFR, the relevant section of the EPF & MP Act is not yet revised/amended to match with the present law governing sick companies and therefore the 1st respondent erred in quoting the portion of that Section 14B of the EPF & MP Act to reject the waiver request. He, therefore, prayed for setting aside the impugned order.

4. Per contra Mr.P.K. Panneer Selvam, learned counsel for the respondents would contend that it was a matter of discretion on the part of the respondents to approve or reject any waiver request. He also argued that when the Employees' Provident Fund dues does not come under the purview of liquidation 'water fall', the question of making a claim does not arise. It was also contended that the Provident Fund dues ought to have been kept aside before deciding upon the distribution of the sale proceeds consequent upon the liquidation of the Company and it was the bounden duty of the Liquidator to do this.



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5. Section 14(B) of the Employees' Provident Fund and

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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 4[or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of 5[any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, 6[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 7[from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:] 8[Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:] 9[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 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme.]

This clearly shows that the portion of this Section of the EPF & MP Act has not been updated yet. The Preamble of the I&B Code, 2016 reads as follows:



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"An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto. BE it enacted by Parliament in the Sixty-seventh Year of the Republic of India."

Pursuant to this, BIFR was dissolved on 01.12.2016 and all proceedings were referred to National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) as per provisions of I&B Code, 2016.

5.1. In the opinion of this Court, the relevant portion of Section 14B of the EPF & MP Act needs to be updated/amended. However, this Court cannot step into the shoes of the 1st respondent to decide on the waiver and it is the prerogative of the 1st respondent. Nevertheless,



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citing an invalid reason exposes the ignorance of the 1st respondent and non application of mind also. Therefore, I opine that the decision of the 1st respondent which was intimated vide the impugned order issued by the 2nd respondent is liable to be set aside. Consequently, the matter shall be referred back to the 1st respondent for a fresh assessment in the light of the provision of I&B Code and also exercising the power for waiver of damages as envisaged in Section 14B of the EPF & MP Act.

6. In the result, the Writ Petition is allowed. No costs. The 1st respondent is directed to consider the waiver proposal afresh. The impugned order dated 23.03.2022 in File No.ZACC/7/C-43(5)/2020-PART(1) of the Employees' Provident Fund Organisation, Zonal Office, Chennai, is quashed.

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Index : yes/no
Speaking /Non speaking Order



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To
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Bhavishya Nidhi Bhawan
14, Bhikaiji Cama Place, New Delhi 110 066.
2. Employees' Provident Fund Organisation
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R.HEMALATHA, J.

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