

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

**MA 576& 752/2018
In C.P.(IB)1339(MB)/2017**

Under section 60(5) of the IBC, 2016

Precision Fasteners Ltd.
Through the Liquidator ...Applicant/CD

v/s.

Employees Provident Fund Organization,
Thane -R1
Employees Provident Fund Organization,
Vapi, Gujarat-R2
Employees Provident Fund Organization,
Vashi -R3

.....Respondents

In the matter of
Asset Reconstruction Company (India) Ltd.
....Petitioner

v/s.

Precision Fasteners Ltd
....Corporate Debtor

Order delivered on 12.09.2018

Coram: Hon'ble Shri. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Shri. Ravikumar Duraisamy, Member (Technical)

For the Petitioner : 1. Ms. SupriyaMajumdar, Adv.
i/b Vidhi Partners

For the Respondent : 1. Mr. Ankit Lohia, }
2. Mr. Ashish Parwani, }
3. Mr. RishabhJaisani, }
4. Mr. Vibhoor Kapoor, }
5. GitikaMakhija } Advocates
i/b Rajani Associates

Per B.S.V. Prakash Kumar, Member (Judicial)

COMMON ORDER

Order pronounced on 07.09.2018

It is an MA filed by the Liquidator u/s 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 (the Code) against the Respondents, custodians of Provident Fund, Pension Fund of the Employees of the Corporate Debtor seeking reliefs declaring attachment of movable and immovable properties of the Corporate Debtor, namely units at Kalwa, Silvassa and Mahad, by the respondents under Employees' Provident Funds and Miscellaneous Provisions Act 1952 (in short referred as "EPFAct") as null and void so as to enable the applicant (herein after referred as "liquidator") dispose of these properties alongside of other assets of the corporate debtor as being mandated by this Code. This MA has been filed in CP 1339/2017 admitted under the Code on November 7, 2017 by initiating CIRP against the corporate debtor. For no resolution plan has been approved by the CoC, this corporate debtor has gone into liquidation, wherein the RP of the corporate debtor has been appointed as liquidator.

2. The liquidator submits that he has been appointed as Liquidator of the Corporate Debtor by an order dated 12.03.2018, whereas these respondents are the organizations maintaining EPF and PF of the employees at three places i.e., Thane, Vapi and Vashi of Mumbai. For the Corporate Debtor having defaulted in depositing provident fund of the employees of the corporate debtor since long, PF dues of the workers/employees of the corporate debtor have been determined u/s 7A of EPF Act and then attached the above said assets as well as other assets mentioned in MA 752/2018 under EPF Act.

3. When this Liquidator was continuing as RP, wrote a letter on 05.03.2018 to APFC and Recovery Officer notifying to the respective authorities about the powers of the Resolution Professional and the provisions of the Code, and sought for release of the attachments on the units aforementioned, in the meanwhile, on Liquidation order, the RP has been appointed as Liquidator. On having the respondents filed claims aggregating to ₹16,06,62,939

before the Liquidator, when the Liquidator verified the historical material papers, he has noticed that R1 attached the plots of Kalwa unit, R2 attached some plots of Silvassa Unit and R3 attached movable properties at Plot No. B-5, B-8 & B-10, Mahad MIDC, Tal Birwadi, Near Mahad – Dapoli Road, Mahad (“Mahad Unit”) belonging to the Corporate Debtor.

4. Now the case of this liquidator is that the assets attached by the Respondents are required to be formed part of the liquidation estate, thereby the retention of the attachments by the respondents over the assets of the Corporate Debtor is likely to derail the process of liquidation ordered by this Bench, henceforth to discharge his functions as liquidator, he says, the attachments ordered by the respondents shall be lifted. The counsel appearing on behalf of the Liquidator further submits that dues under EPF Act will not fall within the meaning of the secured debt, therefore, these Respondents cannot be considered as creditors on par with other secured creditors. Though the Liquidator put forward this contention to the Respondents, they have rejected the Liquidator request for releasing the attaching of Kalwa unit by a letter intimating that there is no provision to vacate the attachment without receipt of payment of dues.

5. The Liquidator further submits that Kalwa unit, movables at Mahad Unit and the Silvassa unit have been charged/mortgaged to (i) Asset Reconstruction Co. India Ltd., (ii) Stressed Assets Stabilization Fund (iii) The Army Group Insurance Fund (iv) Life Insurance Corporation of India (v) The Oriental Insurance Co. Ltd. (vi) LIC Mutual Fund (vii) General Insurance Corporation of India (viii) The New India Assurance Co. Ltd. (ix) the Specified Undertaking of the Unit Trust of India (x) UTI Trust Co. Ltd. (xi) National Insurance Co. Ltd. (xii) Standard Chartered Bank and (xiii) Bank of Baroda, therefore this attachment over these assets cannot lie against security already created over the assets at various units of the corporate debtor. In the backdrop of this legal and factual

scenario, since Kalwa Unit, Silvassa unit and movables at Mahad unit have been attached by the respondents, attachments over the assets shall be forthwith lifted, or else these attachments will impair the rights of the secured creditors.

6. The counsel appearing on behalf of the Liquidator submits that section 35(b) (d) of the Code empowers the Liquidator *"to take into his custody and control all the assets, property, effects and actionable claims of the Corporate Debtor and also to take such measures to protect and preserve the assets and properties of the Corporate Debtor as he considers necessary"*.

7. The counsel further submits that u/s 36 of the Code, the Liquidator shall form liquidation estate of the assets mentioned in sub-section 3, in pursuance of this power, as per sub-section 3 (b) of section 36, since the Liquidator is empowered to include encumbered assets as well in the liquidation estate, these respondents ought to be ordered to release the attachments over the assets of the Corporate Debtor.

8. The Counsel further submits as per section 36(4) (a) (iii) of the Code, it only says that all sums of the provident fund, pension fund and the gratuity fund of any workmen or employee which have already credited to those accounts shall not be included in the liquidation estate, and that being so, the Liquidator as per the sub-section shall not claw back the funds already deposited with provident fund or pension fund or gratuity fund. But as to the fund that has remained as arrears to be deposited with Employees Provident Fund Organization (EPFO), the counsel says that it cannot be treated as either provident fund, pension fund or gratuity fund as long as it has not been deposited with EPFO (the respondent organisation), in addition to it, he has further elaborated it saying that EPFO does not become a secured creditor of the Corporate

Debtor, therefore, the attachments sought to be retained by R1-R3 is against the intent of the Code.

9. The Counsel further submits that this Liquidator is bound to comprise the assets of the Corporate Debtor as Liquidation estate and distribute the proceeds of the same among the creditors as specified in section 53 and Regulations thereto, for doing so, the Liquidator has to identify the assets and bring them to the kitty of liquidation estate, in pursuit of the same, the Liquidator filed this MA for lifting the attachments passed by EPFO as per EPF Act.

10. The counsel has further argued that this Code for having overriding effect u/s 238 over all other enactments inconsistent with this Code, and this Code being later enactment to EPF Act, regardless of overriding effect of EPF Act 1952, the Liquidator, as per the power conferred upon him u/s 35 r/w section 36 of the Code, can comprise the assets already attached by EPFO under EPF Act.

11. To fortify the stand taken by the Liquidator, the Counsel of the Liquidator relied upon **Ananta Mills Ltd. vs. City Dy. Collector (1972 Comp Cas 476)** to say that attachment over an asset is only to prevent alienation of the asset but by mere such attachment of the asset, that creditor will not be conferred with any interest in the said asset, in view of this ratio, the Liquidator's counsel submits that the attachments over the secured assets upon which already interest has been created in favour of some other creditors will not alter or nullify the rights of the secured creditors, therefore he says these attachments shall be declared invalid.

12. This counsel further relied upon **Leo Edibles & Fats Ltd. vs. Tax Recovery Officer & Ors. (WP No. 8560 of 2018, order dated 26.07.2018 passed by Hon'ble High Court of Hyderabad)** to say that even if the order of attachments

constitutes an encumbrance on the property, still it will not have the effect of taking it out of the purview of section 36(3)(b) of the Code.

13. The counsel has further relied upon *Innoventive Industries Ltd. vs. ICICI Bank & Ors.* (2017 SCC OnLine SC 1025) to say that one of the important objectives of the Code is to bring Insolvency law in India under a single unified umbrella with object of speeding up of the insolvency process.

14. The Liquidator Counsel relied upon the Order of Hon'ble NCLT, Allahabad Bench on ***Raman Ispat Pvt. Ltd. vs. Executive Engineer, Paschimanchal Vidyut Vitran Nigam Ltd. & District Collector, Muzaffarnagar, U.P. & Tehsildar, Office of Tehsildar Sadar, Muzaffarnagar, U.P. [Com. Appl. No. 88/ALD/2018 in C.P.(IB)23/ALD/2017]*** and order of Hon'ble NCLT, Kolkata Bench on ***Surendra Kumar Joshi vs. REI Agro Ltd. and Mr. Anil Goel, Liquidator vs. Dy. Director, Directorate of Enforcement, Delhi [CA(IB) No. 453/KB/2018 in CP(IB) No. 73/KB/2017]*** to say that this Code having overriding effect upon other enactments, all assets of the Corporate Debtor shall fall within the liquidation estate, but since those orders not being related to Provident Fund issue, they are not applicable to the present case.

15. On this argument advanced by the counsel of Liquidator, the counsel appearing on behalf of R1-R3 submits that EPFO is a statutory body established under the EPF Act, it is a social legislation with an endeavour to protect the weaker sections of the society i.e. workers employed in the factory and other establishments. EPFO is an organisation works under the superintendence of the central board of trustees, a tripartite body headed by Union Minister for Labour as Chairman. It administers the provisions of the EPF Act, and three schemes framed under the

Act viz. Employees Provident Fund Scheme 1952, Employees Deposit linked Insurance Scheme 1976, Employees' Pension Scheme 1995.

16. On hearing the submissions of either side, now the point for consideration is "***whether or not the Provident Fund, Pension Fund due and payable to the workers or employees of the corporate debtor will become part of Liquidation Estate in the light of section 36 of IBC?***"

17. The issue in this case is that the respondents shown in this application are Employees Provident Fund Organization situated at Thane, Vapi and Vashi. As I already stated above that the authorised officers of R1-R3 by virtue of section 7A of EPF Act attached various properties of the Corporate Debtor for it has failed to pay the provident fund deducted from the workmen and its contribution in the proportion as mentioned in the EPF Act for the last 15 years, and this Respondent organisation, despite proceeding against this Corporate Debtor, is unable to realise those sums from this Corporate debtor owing to one or other legal implication, of course, one thing it has achieved all along is attaching various assets of this debtor and preserved its right to realise the dues from tangible assets of the corporate debtor, now another hurdle that has come to this Respondent Organisation is IBC. Let us see whether it is really a hurdle in realising workmen savings in their old age, or a harbinger making their way more clear and more easy to having their dues come to them on its own without pursuit of litigation any more.

18. To know as to whether the dues payable towards the provident fund of the workmen of the company is to be considered as claim falling within the ambit of Liquidation Estate, it is necessary to read the text of section 36 of the Code, which is as follows:

"Liquidation Estate:

36. (1) ***For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor.***

(2) *The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.*

(3) *Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following: —*

- (a) *any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;*
- (b) *assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;*
- (c) *tangible assets, whether movable or immovable;*
- (d) *intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;*
- (e) *assets subject to the determination of ownership by the court or authority;*
- (f) *any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;*
- (g) *any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;*
- (h) *any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and*
- (i) *all proceeds of liquidation as and when they are realised.*

(4) ***The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation: —***

- (a) ***assets owned by a third party which are in possession of the corporate debtor, including—***
 - (i) *assets held in trust for any third party;*
 - (ii) *bailment contracts;*
 - (iii) ***all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;***
 - (iv) *other contractual arrangements which do not stipulate transfer of title but only use of the assets; and*
 - (v) *such other assets as may be notified by the Central Government in consultation with any financial sector regulator;*

- (b) *assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;*
- (c) *personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;*
- (d) *assets of any Indian or foreign subsidiary of the corporate debtor; or*
- (e) *any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor."*

19. On close reading of this section, especially sub-section 4 of the section 36, it could be ascertainable that certain assets shall not be included in the liquidation estate assets and they shall not be used for recovery in the liquidation. Here the legislature has not only included some assets under this head, it has classified those assets into a, b, c, d, e detailing about each of the asset so that there would not be any ambiguity in understanding the kind of asset that has been excluded from the list of liquidation estate assets. If we run through this sub section clause wise, we can know what heads have not been included in the liquidation estate assets and how those assets have been further classified depending on the nature of the asset.

20. If we come to clause (a) of this sub section – 4, it includes five kinds of assets as (i) (ii)(iii) (iv) (v) sub-clauses under the head of assets owned by a third party which are in possession of the Corporate Debtor, let us examine clause by clause to know the implications of each of the clauses and find out the commonality in bringing these five clauses under the head of assets possessed by the debtor without title over it.

21. On examination of sub section 4 (a) (i), it is evident that if any asset is lying in trust with corporate debtor for the benefit of third party, that asset shall be excluded from the liquidation estate, likewise regarding subsection – 4 (a) (ii), in bailment contracts, if goods have been in possession of corporate debtor for a specific

purpose, corporate debtor being bailee not having title over such asset, that asset as per this sub clause shall not be included in the liquidation estate.

22. When it comes to sums due to any workmen or employees from the provident fund, the pension fund and the gratuity fund under sub clause (iii), they shall not be included in the liquidation estate. Similarly, another exhaustive definition has been given to sub clause (iv) saying that contractual arrangements not transferring title to corporate debtor except use of the assets will become an asset not falling within the ambit of liquidation asset, such assets shall not also be included and used for recovery in the liquidation. Lastly in sub-clause (v), any asset notified by the Central Government in consultation with any financial sector regulator shall not be included in the liquidation estate assets.

23. Now we are concerned with sub-clause (iii) of clause (a) of sub-section 4 of Section 36 because this sub-clause deals with dues payable to workmen or employees from the provident fund, the pension fund and the gratuity fund, which is relevant to the issue for consideration before this Bench.

24. In this clause (a) of sub-section 4, the assets belonging to a third party remaining in the possession of the corporate debtor have been included in this clause (a), since it is an inclusive definition, it is obvious that the words used in an inclusive definition denote extension and cannot be treated as restricted in any sense, therefore, it is inappropriate to put a restrictive interpretation upon the terms of wider denotation. (vide **Oswal Fats and Oils Ltd. vs. Additional Commissioner (Administration), Bareilly Division, Bareilly and Ors.**) [MANU/SC/0216/2010 – para 25]

25. Out of these five sub-clauses, regarding (i), (ii) and (iv), these three clauses deal with the assets in the possession of the corporate debtor without any title over such assets, as to sub-clause (iii) and sub-clause (v), it need not be seen as to whether title is vested with the corporate debtor or not, it is an operation of law that says when provident fund is payable to the workmen or employees, such payment dues have to be deemed as an asset of the workmen or the employees, it makes no difference whether it has been maintained in a separate account or not, in view of this deeming fiction, the workmen/employees need not prove that whether any sum (interest) has been explicitly vested with them or not. So is the case when an asset of the corporate debtor is notified by the Central Government in consultation with any financial sector regulator. By including sub-clauses (iii) and (v) along with sub-clauses (i), (ii) and (iv) of clause (a) of sub-section 4, an overarching interest and title has been created in favour of the workmen in respect to provident fund, etc. and in favour of the government in respect to the asset notified treating these two assets under sub-clauses (iii) & (v) as not included in the liquidation estate.

26. On perusal of the historical background of the legislations, it has been elaborately discussed over the interplay in between section 529(A) of Companies Act, 1956 and section 11 of EPF Act, in a judgment in between ***Employees Provident Fund Commissioner vs. O.L. of Esskay Pharmaceuticals Ltd. (2011) 10 SCC 727***, by finally holding that section 11(2) of the EPF Act will have first charge on the assets of the establishment (here in this case the corporate debtor) and will become payable in priority to all other debts. To understand the paramount consideration given to the dues to any workman from the provident fund, it is necessary to insert para 16, 17 and 18 of the case supra, which are as below:

"16. The background in which Amendment Act No.33 of 1988 was passed is discernible from the Statement of Objects and Reasons appended to the

Employees' Provident Funds and Miscellaneous Provisions (Amendment) Bill, 1988, the relevant portions of which are extracted below:

"The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 provides for the institution of Compulsory Provident Fund; Family Pension Fund and Deposit Linked Insurance Fund, for the benefit of the employees in factories and other establishments. The Act is at present applicable to 173 industries and classes of establishments employing twenty or more persons. As on 31-3-1987, about 1.66 lakh establishments with about 1.38 crore subscribers were covered under the Act.

2. The Act was last amended in 1976. The Government had set up a high level Committee in April, 1980 to review the working of the Employees' Provident Funds Organisation and to suggest improvements. The Committee had made a number of recommendations involving amendment of the Act. The Central Board of Trustees, Employees' Provident Fund had also, from time to time, made certain recommendations for amendment of the Act. The Standing Labour Committee had at its meeting held in September, 1986 considered inter alia the question of enhancement of the rate of provident fund contribution and recommended suitable enhancement.

3. Based on the above recommendations, it is proposed to carry on certain amendments in the Act. Some of the more important amendments are:--

(i) to (v) xxxxxxxxxxxxxx

*(vi) a provision is being made for treating the entire amount of arrears of provident fund dues as first charge on the assets of an establishment in the event of its liquidation;
xxxxxxxxxxxxxx"*

17. Section 11, as it stands after the amendment of 1988, reads as under:

"11. Priority of payment of contributions over other debts: - (1) Where any employer is adjudicated insolvent or, being a company, an order for winding up is made, the amount due -

(a) from the employer in relation to an establishment to which any Scheme or the Insurance Scheme applies in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund damages recoverable under section 14B, accumulations required to be transferred under sub-section (2) of section 15 or any charges payable by him under any other provision of this Act or of any provision of the Scheme or the Insurance Scheme; or

(b) from the employer in relation to an exempted establishment in respect of any contribution to the provident fund or any insurance fund (in so far it relates to exempted employees), under the rules of the provident fund or any insurance fund, any contribution payable by him towards the Pension Fund under sub-section (6) of section 17, damages recoverable under section 14B or any charges payable by him to the appropriate

Government under any provision of this Act, or under any of the conditions specified under section 17, shall, where the liability therefore has accrued before the order of adjudication or winding up is made, be deemed to be included among the debts which under section 49 of the Presidency Towns Insolvency Act, 1909 (3 of 1909), or under section 61 of the Provincial Insolvency Act, 1920 (5 of 1920), or under section 530 of the Companies Act, 1956 (1 of 1956), are to be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up, as the case may be.

Explanation. - In this sub-section and in section 17, "insurance fund" means any fund established by an employer under any scheme for providing benefits in the nature of life insurance to employees, whether linked to their deposits in provident fund or not, without payment by the employees of any separate contribution or premium in that behalf.

(2) Without prejudice to the provisions of sub-section (1), if any amount is due from an employer whether in respect of the employee's contribution (deducted from the wages of the employee) or the employer's contribution, the amount so due shall be deemed to be the first charge on the assets of the establishment, and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts."

18. An analysis of Section 11 of the EPF Act shows that it gives statutory priority to the amount payable to the employees over other debts. Section 11(1) relates to an employer who is adjudged insolvent or being a company against whom an order of winding up is made. It lays down that the amount due from the employer in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund, damages recoverable under Section 14B, accumulations required to be transferred under Section 15(2) or any charges payable by him under any other provision of the Act or the Scheme or the Insurance Scheme shall be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up, as the case may be. Section 11(2) contains a non obstante clause and lays down that if any amount is due from an employer whether in respect of the employee's contribution deducted from the wages of the employees or the employer's contribution, the same shall be deemed to be the first charge on the assets of the establishment and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts. To put it differently, sub-section (2) of Section 11 not only declares that the amount due from an employer towards contribution payable under the EPF Act shall be treated as the first charge on the assets of the establishment, but also lays down that notwithstanding anything contained in any other law, such dues shall be paid in priority to all other debts."

27. While saying that EPF dues from an employer shall be treated as the first charge on the assets of the corporate debtor, the same judgement has further elaborated that EPF Act is a social welfare

legislation intended to protect against the weaker section of the society as enshrined in the directive principles of the Constitution of India, which is in para 22 and 23 of the case supra, see below:

"22. The EPF Act is a social welfare legislation intended to protect the interest of a weaker section of the society, i.e. the workers employed in factories and other establishments, who have made significant contribution in economic growth of the country. The workers and other employees provide services of different kinds and ensure continuous production of goods, which are made available to the society at large. Therefore, a legislation made for their benefit must receive a liberal and purposive interpretation keeping in view the Directive Principles of State Policy contained in Articles 38 and 43 of the Constitution. In Organo Chemical Industries v. Union of India (1979) 4 SCC 573, this Court negatived challenge to the constitutionality of Section 14-B of the EPF Act. In the main judgment delivered by him, A.P. Sen, J. referred to the Statement of Objects and Reasons contained in the Bill presented before Parliament, which led to the enactment of Amendment Act No. 40/1973 and observed:

"Each word, phrase or sentence is to be considered in the light of general purpose of the Act itself. A bare mechanical interpretation of the words "devoid of-concept or purpose" will reduce must of legislation to futility. It is a salutary rule, well established, that the intention of the legislature must be found by reading the statute as a whole."

In his concurring judgment, Krishna Iyer, J. observed:

"The measure was enacted for the support of a weaker sector viz. the working class during the superannuated winter of their life. The financial reservoir for the distribution of benefits is filled by the employer collecting, by deducting from the workers' wages, completing it with his own equal share and duly making over the gross sums to the Fund. If the employer neglects to remit or diverts the moneys for alien purposes the Fund gets dry and the retirees are denied the meagre support when they most need it. This prospect of destitution demoralises the working class and frustrates the hopes of the community itself. The whole project gets stultified if employers thwart contributory responsibility and this wider fall-out must colour the concept of 'damages' when the court seeks to define its content in the special setting of the Act. For, judicial interpretation must further the purpose of a statute. In a different context and considering a fundamental treaty, the European Court of Human Rights, in the Sunday Times Case, observed:

The Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty.

A policy-oriented interpretation, when a welfare legislation falls for determination, especially in the context of a developing country, is sanctioned by principle and precedent and is implicit in Article 37 of the Constitution since the judicial branch is, in a sense, part of the State. So it is reasonable to assign to 'damages' a larger, fulfilling meaning."

23. Section 11(2) of the EPF Act was interpreted by the Division Bench of the Kerala High Court in *Recovery Officer and Asstt. Provident Fund Commissioner v. Kerala Financial Corporation*, ILR(2002) 3 Kerala 4. Speaking for the Bench, B.N. Srikrishna, J. (as he then was) observed:

"The F.P.F. and M.P. Act, 1952 is an Act to provide for the institution of Provident Fund, Pension Fund, Deposit Linked Insurance Fund etc. in factories and other establishments, to carry forward the Constitutional mandate of rendering social justice to the working class. It is intended to give social security to industrial workers at the end of their careers. The E.P.F. and M.P. Act requires every employer to deduct certain prescribed amounts from the wages payable to employees along with prescribed contribution by the employer and deposit such contributions in the Provident Fund. The Provident Fund is administered by the Central and Regional Provident Fund Commissioners, who are statutory authorities. What is of importance to us is that section 11 of E.P.F. and M.P. Act, declares the priority of payment of contributions under the Act over other debts. Sub-section (1) of section 11 of E.P.F. and M.P. Act deals with the question of priority where an employer is adjudicated insolvent or being a company subjected to an order of winding up. Sub-section (2) of section 11 deals with other types of priorities and reads as under:

"11(2) Without prejudice to the provisions of sub-section (1), if any amount is due from an employer, whether in respect of the employee's contribution deducted from the wages of the employee or the employer's contribution, the amount so due shall be deemed to be the first charge on the assets of the establishment, and shall, notwithstanding anything contained in any other law, for the time being in force, be paid in priority to all other debts."

Sub-section (2) of section 11 of the E.P.F. and M.P. Act has two facets. First, it declares that the amount due from the employer towards contribution under the E.P.F. and M.P. Act shall be deemed to be a first charge on the assets of the establishment. Second, it also declares that notwithstanding anything contained in any other law for the time being in force, such debt shall be paid in priority to all other debts. Both these provisions bring out the intention of Parliament to ensure the social benefit as contained in the legislation. There are other provisions in the Act rendering the amounts of Provident Fund

payable immune from attachment of Civil Court's decree, which also indicate such intention of Parliament."

28. So, by reading this judgment, it can be easily ascertainable that sums due to any workman or employee from the provident fund, the pension fund and gratuity fund is different from the general term of workmen dues. Under earlier regime of Companies Act, 1956, u/s 529 of the Companies Act, 1956 workmen dues have been said as aggregate of various heads such as wages or salaries, remuneration to approved holidays, all amounts in respect to compensation and sums due to any workman from a provident fund, pension, gratuity, for the sake of clarity let us visit section 529 of Companies Act, 1956.

"529. Application of insolvency rules in winding up of insolvent companies. - (1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to--

- (a) debts provable;
- (b) the valuation of annuities and future and contingent liabilities; and
- (c) the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent:

Provided that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security, --

- (a) the liquidator shall be entitled to represent the workmen and enforce such charge;
- (b) any amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues; and
- (c) so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of section 529A.

529(3). For the purposes of this section, section 529A and section 530,-

(a) "workmen", in relation to a company, means the employees of the company, being workmen within the meaning of the Industrial Disputes Act, 1947 (14 of 1947);

(b) **"workmen's dues", in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely: -**

(i) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman, in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947 (14 of 1947);

(ii) all accrued holiday remuneration becoming payable to any workman, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;

(iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (8 of 1923) rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company;

(iv) **all sums due to any workman from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the workmen, maintained by the company;**

"Workmen's portion"

29. Now this definition has been retained in section 327, 326 of the Companies Act 2013 under the head of overriding preferential payments. When it has come to Insolvency and Bankruptcy Code, a quantum deviation has been given excluding all these sums of dues of any workman from provident fund/pension fund/gratuity fund. Under the earlier regime, when company has been put to wound up, workmen dues were treated as part of section 529A of Companies Act, 1956. Under the old regime to say that provident fund dues will have overriding effect over all other dues including secured and unsecured creditors, Court used to fall back upon EPF Act provisions, but whereas now by exclusion of provident fund

dues to the workmen/employees from the liquidation estate, it has not only extended the earlier law that was in existence but also strengthened the right of workmen regarding PF/Pension/Gratuity fund dues, by altogether excluding this asset from the liquidation estate leaving it to open to the workmen or to the PF authority to realize their provident fund/pension fund/gratuity fund dues without standing in the line of water fall mechanism. In view thereof, if we go by the provisions of law and the judge made law, it is evident that duty is conferred upon the liquidator and this Tribunal to ensure that provident fund dues are excluded from the liquidation estate so as to enable the workmen realize their savings as well as the matching contribution comes from the employer giving priority even above the costs of liquidator because the liquidator is also entitled to realize the costs from the liquidation estate only, whereas the workmen for Provident Fund dues need not remain in the line to realize their PF dues from the liquidation estate. This right in fact emanated from the fundamental right of Right to Life. Directive principles are nothing but supplementation to uphold the fundamental rights of the people of the country. Indeed, Article 43 of the Constitution of India envisages that State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas. I believe that Hon'ble Justice Bhagwati holding in ***Bandhua Mukti Morcha vs. Union of India (1984 AIR 802)*** strengthens this concept, let us look into the words of Honourable Justice Bhagwati, which are as below:

"It is the fundamental right of everyone in this country... to live with human dignity free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of

workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State neither the Central Government nor any State Government-has the right to take any action which will deprive a person of the enjoyment of these basic essentials."

30. I believe that the right of all other creditors over the assets of the company is a property right, whereas workmen dues, more specially PF dues of workmen, are interwoven with Right to Life because the workmen all through their life save some portion of the hard earnings for their later life after retirement, if such sums are being interlinked on par with debts of the creditors of the company, secured or unsecured as the case may be, then it is nothing but diluting most valuable and inalienable right of a person on par with a property right subordinate to right to life. Workmen normally fall back on their earnings after retirement, if realisation of such dues also put in jeopardy, how could they survive and sustain in their old age, they can't do anything in life, life becomes by that time already vestigial, can they rally around courts to realise these sums, I believe it can't be so and law cannot be so, and the law is also not so. May be for this reason alone, EPF Act has been strengthened from time to time, in addition to it, now under IBC, PF/Pension/Gratuity fund dues have been taken out from the spectrum of liquidation estate asset by giving a mandate that the PF/Pension/Gratuity fund dues to the workman/employee shall be treated as an asset of the workman lying in the possession of corporate debtor. So, it is not treated as a claim on par with other creditors, it is in fact treated as an asset of the workmen lying with corporate debtor.

31. As to the argument of the Liquidator counsel saying that the sums due mentioned in sub-clause (iii) of clause (a) of sub-section 4 of section 36 should be regarding the provident fund already

credited to the account of EPFO, the answer is, if at all this deduction from the wages of the workmen as well as contribution from the Corporate Debtor as stated under the respective statute has gone into the account of EPFO, it will not be called as sum in respect to provident fund is due and payable by the Corporate Debtor or the company as the case may be. As long as that fund remained with corporate debtor/the employer and the deductions from the workmen have not been sent to the EPFO, that sum alone will be the sum due from the establishment (in this case the Corporate Debtor). Since the former situation, cannot be called as due and payable by the Corporate Debtor, the later situation alone is to be considered as a situation that has been envisaged under section 36(4)(a)(iii) of the Code. The reason being, when provident fund contribution from the workmen is deducted from the wages of the workmen by the Corporate Debtor, it has to be deemed that the matching contribution has been allocated by the Corporate Debtor. It makes no difference as to whether it has been released from the Corporate Debtor or not, once deduction has been made from the workmen's wages, it is to be deemed as the asset of the workmen and not as an asset of the Corporate Debtor or the company as the case may be. Therefore, we have not found any merit in the argument of the Liquidator counsel canvassing that sub-clause (iii) of clause (a) of subsection 4 of section 36 denotes in respect to the provident fund already released and lying with the EPFO, henceforth, the said argument of the Liquidator counsel is rejected.

32. In addition to the above provision, if we go through EPF Act, we will find that this Act has also overriding effect on all other enactments in section (1) of the Act, likewise, in section 8 of the EPF Act it has been categorically mentioned that these dues could be recovered in the same manner as the arrears of the land revenue, in section 10 of the same Act, it has been further provided that the amounts standing to the credit of any member in the fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any

Court in respect of any debt or liability incurred by the member and neither the official assignee appointed under the presidency terms insolvency act, nor any receiver appointed under the provincial Insolvency Act. When it comes to priority of payment of contributions of other debts, it has been said u/s 11 of EPF Act that the dues towards provident fund/pension fund/gratuity fund has to be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up, as the case may be.

33. Now in alignment with the provisions of EPF Act, in section 36(4)(1)(3), the Code has gone ahead saying that the dues in respect to Provident Fund/Pension Fund/Gratuity Fund shall not be treated as part of the liquidation estate, as long as such dues are not treated as part of liquidation estate, the provisions of IBC will not be applicable for realisation of such dues from the asset of the Corporate Debtor. The intriguing aspect lying in this scenario is that though it is a due payable by the Corporate Debtor, as to Provident Fund/Pension Fund/Gratuity Fund dues are considered, the Code has treated it as an asset of the workmen lying with the Corporate Debtor.

34. In view thereof, the overriding effect of section 238 of this Code will not have any bearing over the asset of the workmen lying in the possession of the Corporate Debtor because that asset is not considered as the part of the liquidation estate, moreover, to apply section 238 over any other law for the time being in force, the other law must be inconsistent with the provisions of the Code, since section 36(4)(a)(iii) has excluded the PF dues of the workmen from the liquidation estate assets treating it as an asset of the workmen lying with the corporate debtor, section 53 is not applicable to say that these dues fall within the ambit of liquidation estate. Therefore, this argument of inconsistency raised by the Liquidator counsel has no merit, hence the same is rejected.

35. Despite Presidency Insolvency Act, Provincial Insolvency Act and Companies Act 1913 were in existence by the time EPF Act 1952 has come into force, an overriding effect was given in the EPF Act over all the above said enactments placing the PF dues in priority over any other dues payable by the Corporate Debtor or the insolvent as the case may be. After Companies Act 1956 came into existence, EPF Act was further amended including applicability of section 11 of EPF Act to the Companies Act 1956 stating that these dues are to be paid in priority to all other debts in distribution of the property of the insolvent or the asset of the company being wound up as the case may be. Since these dues being treated as an asset of the workmen u/s 36(4)(a)(iii) of the Code, for realisation of such debt, EPF Act 1952 is applicable, not IBC 2016.

36. As against the argument of the Liquidator counsel saying that the assets attached by the respondents are the assets secured as security by other creditors as mentioned above therefore the attachments made by the respondents is invalid, we don't find any merit for the reason that it does not matter whether assets are secured or not for realisation of PF dues from the corporate debtor because the charge created over the assets of the corporate debtor by operation of law (EPF Act) will have first charge over any asset of the corporate debtor notwithstanding whether it is secured or unsecured, that being the proposition of law, we hereby reject the argument of the Liquidator counsel saying since the assets are secured, the respondents are not entitled to be treated on par with secured creditors. We have already made it clear that the charge in relation to PF dues will be the first charge in priority to all other debts, including Liquidator costs because the PF dues has been excluded from the liquidation estate.

37. It is further pertinent to mention that Code envisaging in explanation at the end of section 53 saying that the term workmen's dues shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 will not having any bearing

over section 36 (4) (a) (iii) of the Code. Why I have mentioned this aspect is, general meaning of "workmen's dues" has been bodily lifted from section 529 of the Companies Act 1956 to section 326 of the Companies Act 2013, wherein provident fund dues have also been cited as part of the workmen dues. But since the Code in section 36 (4) (a)(iii) of the Code having specifically excluded provident fund from the liquidation estate assets, it is obvious in respect to provident fund dues, they will not become part of workmen dues specified in section 53 (1) (b) (i) of the Code. The term "workmen dues" used in the above sub clause shall not be construed as provident fund dues become part of distribution of assets on pari passu basis along with secured creditors. The reason is comprise of assets by the liquidator is governed by the definition of liquidation estate under section 36 of the Code; therefore the distribution of assets u/s 53 of the Code will be in respect to the assets comprised under section 36, not beyond it.

38. However, since liquidation process should not get obliterated by the attachment taken against the assets of the Corporate Debtor, the only viable answer to this situation is, the liquidator shall pay the dues that are payable under the head of Provident Fund/Pension Fund/Gratuity Fund earmarking it as asset of the workmen and pay off the same to the respondents in priority to the waterfall mechanism made under section 53 of the Code. In view of the law in force, we hereby hold that by virtue of EPF Act and section 34(4)(a)(iii) of the Code, the charge will remain in force against the assets of the corporate debtor until it has been paid off before making any payment to any entity falling under waterfall mechanism devised under section 53 of the Code.

39. As to citation ***Leo Edibles & Fats Ltd. vs. Tax Recovery Officer & Ors. (WP No. 8560 of 2018, order dated 26.07.2018*** passed by Hon'ble High Court of Hyderabad) relied upon by the liquidator counsel to say that even if the order of attachments constitutes an encumbrance on the property, still it will not have

the effect of taking it out of the purview of section 36(3)(b) of the Code, the answer is in section 36 (3) of the Code itself, it has been stated as to what assets could be included in the liquidation estate, but before saying so, the legislature has added a caveat to sub section 3 of section 36 saying that subsection -3 is subject to subsection - 4 of section 36, therefore the ratio decided in the Case supra in respect to sub section 3 (b) of section 36 is not applicable to the issue emanating under subsection – 4 of section 36 of the Code.

40. Regarding Innoventive Industries Ltd. vs. ICICI Bank &Ors. (2017 SCC OnLine SC 1025), the liquidator counsel relied upon to say that one of the important objectives of the Code is to bring Insolvency law in India under a single unified umbrella with object of speeding up of the insolvency process. As to this point, we make it clear that what assets are to be excluded from the liquidation estate being enunciated in this very Code under section 36 (4) itself, there won't be any occasion to misunderstand that something has been weaned out from the liquidation estate. When law itself says under section 36 (4), provident fund dues will not become part of the liquidation estate, where is the question of looking at whether the provident authority filed such claim before the liquidator? Even if a claim is made by provident fund authority before the liquidator, such claim knowingly or unknowingly made by such authority will not be construed as liquidator is provided with special leverage to include that claim as part of the liquidation estate. Indeed, under section 36 (4), it is a mandate upon the liquidator to treat provident fund dues as an asset lying with the corporate debtor and pay off the said dues before comprising the liquidation estate and this objective will be explicit if subsection 3 and subsection 4 of section 36 are read together.

41. Since the Liquidator filed another MA 752 stating that further attachments have been slapped on the assets of the corporate debtor even after initiation of the Corporate Insolvency Resolution

Process (CIRP), it makes no difference whether attachments have been made prior to or subsequent to admission of Company Petition under IB Code, the statutory first charge having remained in force against the assets of the corporate debtor company, we have not seen any merit to differentiate in respect to attachments made prior to filing of the Company Petition and during CIRP period.

42. Therefore, for the reasons stated above, the Petitioner is directed to pay the Provident Fund dues from the liquidation estate before distributing the liquidation estate of the Corporate Debtor to the claimants, to which, since the Liquidator has to sell the asset of the Corporate Debtor, the respondents are directed to allow this Liquidator to sell the assets of the Corporate Debtor and pay off the Provident Fund dues in priority to all other claims payable by the Corporate Debtor in liquidation.

43. Since the liquidator has not disputed the quantum of Provident Fund dues payable to workmen, the liquidator shall pay the Provident Fund dues along with interest accrued, after selling any of the assets of the Corporate Debtor earlier in point of time.

44. With this direction, the attachments made against the assets of the Corporate Debtor are hereby vacated with a direction against the Liquidator as mentioned above.

45. Accordingly, these applications (MA Nos. 576 & 752/2018 in CP No. 1339/2017) are hereby **disposed** of.

SD/-

RAVIKUMAR DURAISAMY
MEMBER (TECHNICAL)

SD/-

B.S.V. PRAKASH KUMAR
MEMBER (JUDICIAL)