THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

I.A. 2705 OF 2021

Under Section 42 of Insolvency & Bankruptcy Code, 2016

Employees Provident Fund Organisation

… **Applicant**

Vs.

Shri Jitendra Kumar Jain

The Resolution Professional

…Respondent

In the matter of

C.P.(IB) No. 1055/MB/2017

Roofit Industries Limited

… **Corporate Applicant**

Order delivered on: 12.03.2024

Coram:

Shri Prabhat Kumar Hon'ble Member (Technical)	**Justice Shri V.G. Bisht** Hon'ble Member (Judicial)

Appearances:

For the Applicant : Ms. Shraddha Talkar, Advocate

For the Liquidator : Mr. Aniket Dighe, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Company Appeal bearing IA No. 2705 of 2021, is filed by Employee Provident Fund Organisation in the Corporate Insolvency Resolution Process (CIRP) of M/s Roofit Industries Limited (Corporate Debtor) seeking direction to the Liquidator to admit claim of the Appellant for an amount of Rs. 59,70,826/- as per Form C dated 22.2.2018 and such claim be considered as priority over other dues of the Corporate Debtor.

2. The corporate insolvency resolution process was initiated upon the Application under Section 10 of Insolvency and Bankruptcy Code, 2016 and Rule 7 of Insolvency and Bankruptcy (Application to Adjudicating Authority, Rules 2016) vide an order dated 27/06/2016 passed in the C.P. No. 1055/1 & BP/NCLT/MAH/2017. Thereafter, vide Order dated 22.1.2018, in MA 701 in CP No. 1055/1 & BP/NCLT/MAH/2017, this Tribunal allowed the Application for liquidation under Section 33 of the Code and the Resolution Professional was continued as the Liquidator of the Corporate Debtor.

   2.1. Thereafter a Public Announcement dated 27.1.2018 under Regulation 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation 2016 was initiated, and in response thereto, the Applicant submitted its claim in Form C on 16.2.2018 claiming an amount of Rs. 59,70,826/-.

   2.2. Vide Email dated 12.4.2018 issued by the Liquidator to the EPFO Applicant herein, the Liquidator confirmed that the claim of Rs. 59,70,826/- has been admitted in full. Vide Letter dated 14.11.2018 the Applicant herein has requested to the

Liquidator to pay off the Provident Fund dues in priority to all other claims payable by the Corporate Debtor in view of the order dated 12.9.2018 passed in MA 576 & 752/2018 in CP (IB) 1339 (MB)/2017 wherein this Tribunal stated that the charge in relation to PF dues will be first charge in priority to all other debts including Liquidator costs because the PF dues has been excluded from the liquidation Estate.

2.3. However, the Ld. Liquidator was pleased to reject the contentions raised by the EPFO Applicant and vide Email dated 14.11.2018 issued by the Liquidator to EPFO the Liquidator stated that the above said Order is not Applicable to the Corporate Debtor i.e. Roofit Industries Ltd. Vide Email dated 11th September, 2020 the Liquidator further informed the EPFO that the claim of the EPFO cannot be considered in priority as per the Order dated 11.2.2020 passed in Company Appeal (AT) Insolvency No. 1229 of 2019 in the matter of Mr. Savan Godiwala v/s Mr. Apalla Siva Kumar. NCLAT, New Delhi.

2.4. The Applicant itself is a Central Government Authority and the EMPLOYMENT PROVIDENT FUND ORGANIZATION governed by their own separate Act. The Applicant is entitled to claim the dues as provided under the EMPLOYMENT PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT 1952.

2.5. Section 11 (2) of the EPF and MP Act contains a Non Obstante clause laying down that if any amount is due from an employer whether in respect of the employees' 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 of the EPF and MP Act, as it stands now, has two facets. First, it declares the amount due from the employer shall be deemed to be the First Charge on the assets of the establishment. Second, it also claims 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. This double armour of power has always facilitated the recovery of provident fund arrears more effectively than the recovery of arrears in any other act.

2.6. The dues of Provident Fund are towards the employees of the Corporate Debtor and the same has to be paid by the Applicant to the concerned employees. Further dues under section 14-B of the EPF Act are damages and acts as a penalty to recover the loss of interest and other benefits due to delay in payment of the PF dues by the Corporate Debtor.

2.7. There are several judgements of Supreme Court and other courts considering that the dues of the Employees have to be considered in priority and cannot be ignored. The claim of Provident Fund is also dues towards Employees and have to be paid in priority over other dues. Some of the relevant judgements are reproduced below:-

(i) Judgement passed by Hon'ble Supreme Court in CA No.9630 of 2011 arising out of SLP (Civil) No.9642 of 2011 in the matter of EPF Commissioner v/s O.L. of Esskay Pharmaceuticals Ltd.

(ii) Judgement passed by Hon'ble Gujrat High Court in Special Civil Application No. 19075 of 2007.

(iii) Judgement passed by Hon'ble High Court of Karnataka in Petition No.79 of 1980 between SM Holding Finance Pvt. Ltd. v/s Mysore Machinary Manufacturers Ltd.

(iv) Judgement passed by Hon'ble NCLT, New Delhi in the matter of State Bank of India v/s Moser Baer Karmachari Union & Anr.

(v) Judgement passed by NCLT New Delhi Principal Bench in the matter of Alchemist Asset Reconstruction Co. Ltd. V/s Moser Baer India Limited.

2.8. Even in the sequence of payments to be made out of the assets of the Corporate Debtor has to be appropriately made such that the claim of employees have to be met first and thereafter all other dues have to be considered.

2.9. Section 36(4) of the IBC is reproduced below:-

"...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 sum due to any workman or employee from the Provident Fund, Pension Fund and the gratuity fund

(iv) Other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

3. Heard learned Counsel and perused the material on record.

3.1. The issue that Provident fund dues in relation to employer and employee contribution do not form part of Liquidation estate of the Corporate Debtor is no longer res-integra. It is settled law that the amounts of dues payable to employees in relation to contribution to the Provident Fund do not form part of the Liquidation Estate, hence is to be excluded from the assets of the Corporate Debtor and the due claimed on account of damages and interest thereon are in nature of Operational Debt payable to statutory authority.

3.2. The appellant has claimed dues on account of principal contribution, damages and interest on these two components. In so far as principal contribution is concerned the same no longer forms part of Liquidation estate, hence the Liquidator is directed to exclude this amount from the Liquidation estate and deal with the same in priority over all other claims. In so far as damage and interest are concerned, these dues are not payable to the employees, but the same are contributions to the general fund of Provident Fund Organisation and have statutory force.

3.3. Accordingly, we direct the Liquidator to admit the dues on account of contribution to Provident fund (both employer and employee) and exclude the corresponding amount from the Liquidation estate to be dealt with in priority of all other claims. We further direct the Liquidator to admit the dues on account of damages and interest as Operational Debt payable to Statutory Authorities and deal with the same accordingly in terms of section 53 of the Code.

4. In view of the above, this IA 2705 of 2021 is partly allowed.

Sd/-	**Sd/-**
Prabhat Kumar	**Justice V.G. Bisht**
Member (Technical)	Member (Judicial)