(3)

IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – I, CHENNAI

IA/818/IB/2020 in CP/1226/IB/2018

(Filed under Section 42 read with Section 60(5)(b) and (c) of the Insolvency and Bankruptcy Code, 2016)

In the matter of ***M/s R.L. Logistics Private Limited***

The Regional Provident Fund Commissioner
Employees Provident Fund Organization
Regional Office
No.37, Royapettah High Road,
Chennai – 600 014

.. .. .. *Applicant*

-Vs-

R.L. Logistics Private Limited
F-1B, Amar Sindur,
No.43, Pantheon Road,
Egmore, Chennai – 600 008
Corporate Debtor through
Arumugham Arumugham,
Resolution Professional
No.1/56, Market Road, Kelambakkam,
Chennai – 603 103

VS Enterprises
No12, Wallace Garden, 2nd Street,
Nungamabakkam,
Chennai – 600 006

.. .. .. *Respondent*

Present:

For Applicant	:	*P.K. Paneer Selvam, Advocate*
For Respondent	:	*K. Moorthy, Advocate*

CORAM :

R. SUCHARITHA, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)

Order Pronounced on ***2nd June 2022***

ORDER

Per: R. SUCHARITHA, MEMBER (JUDICIAL)

The IA/818/IB/2020 is an Application filed by M/s. The Regional Provident Fund Commissioner – II, under Section 42 of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of NCLT Rules, 2016, seeking relief as follows;

(a) *That this Hon'ble Tribunal be pleased to set aside the order of communication of the first respondent dated 29.06.2020 rejecting the revised claim amount of the Applicant for Rs.28,43,387/-;*

(b) *This Honourable Tribunal may be pleased to direct the Respondents to pay off the revised claim amount of Rs.28,43,387/- of the Applicant on first priority from and out of the liquidation assets / estate of the Respondents;*

(c) *This Honourable Tribunal may be pleased to direct the Respondents for payment of costs thereof.*

2. The Corporate Insolvency Resolution Process in respect of the Corporate Debtor viz. M/s. R.L. Logistics Private Limited was initiated by this Tribunal on 27.02.2019. Thereafter, the Corporate Debtor was ordered for Liquidation by this Tribunal vide its order dated 21.10.2019 passed in MA/1069/2019. Subsequent to the same, it is seen that the Applicant herein has submitted a claim in Form – G on 15.11.2019 for a sum of Rs.33,57,638/- and that in the aforesaid claim a sum of Rs.14,55,873/- was towards the PF and allied dues under 7A of the EPF Act assessed provisionally for

the period from 01/2014 to 03/2015. It is seen that the no proceedings under Section 7A was found in the claim form and hence the Liquidator has requested the Applicant to submit the necessary documents by email. Thereafter, it is seen that Applicant has filed a revised claim before the Liquidator on 24.02.2020 for a sum of Rs.28,43,387/-, which is segregated as follows;

(i) Dues towards PF and allied dues under 7A of the insolvency Employees Provident Fund Provision Act 1952 has been assessed for the period from 01/2014 to 03/2015 for Rs.14,55,873/-. The establishment remitted Rs.5,14,251/- and balance **Rs.9,41,622/-.**

(ii) Dues towards PF and allied dues under 7A of the Employees Provident Fund & Miscellaneous Provision Act 1952 has been assessed provisionally for the period from 11/2017 to 03/2018 for **Rs.11,64,080/-.**

(iii) Provisional dues towards Penal Damages and Interest under section 14B & 7Q of the Employees Provident Fund & Miscellaneous Provision Act 1952 for the period 11/2017 to 04/2018 for **Rs.17,899/**

(iv) Penal Damages and Interest under section 14B &7Q of the Employees Provident Fund & Miscellaneous Provision Act 1952 has been levied for the period 12/2014 to 10/2017 for **Rs.3,17,298/-.**

(v) Penal Damages and Interest under section 14B & 7Q of the Employees Provident Fund & Miscellaneous Provision Act 1952 has been levied for the period 08/2014 to 02/2017 for **Rs.4,02,488/-.**

3. The Liquidator vide its email dated 29.06.2020 has rejected the above said claim filed by the Applicant on the following grounds;

a) On verifying your revised claims, you have failed to explain the points as mentioned in my earlier mail and also the above mentioned points.

b) The Order issued U/S 7A for Rs 14,55,873 Dated 7.1.2020 is in violation section 7A(3). & 11(2) of EPF Act and also U/s 33(7),33(5) 35(k) of IBC 2016 (point no 1 of page 2).

c) The order issued U/S 14B & 7Q for Rs 7,37,685 (Rs. 17,899+3,17,298+4,02,488) are in violation of section 14 of IBC 2016 (moratorium period) (point no 3,4,& 5 of page 2)

d) d) No order U/s 7A for the period 11/2017 to 03/2018 was issued on the date CIRP. Hence the Claim amount of Rs.11,64,080 is a premature claim. As such the amount of Rs.11,64,080 is not acceptable.

e) Please refer to the judgement of the High court of Ernakulam WPC 1399 of 2006(N) no payment u/s 140 shall be chargeable for the CD.

f) Regarding the NCLAT company appeal no 354 of 2019 ,the same is applicable for the resolution plan. RL logistics is now under liquidation. Hence the judgement of NCLAT Company Appeal (AT) No. 2019 will only apply in this case.

g) Regarding payment to EPFO, as the Corporate Debtor had failed to create a separate fund for EPF dues, the waterfall mechanism under Section 53 will be followed.

You were given an opportunity to resubmit your claim and you are insisting your claim amount as Rs.28,43,387/-

Under the above circumstances, I, in my capacity as Liquidator of the Corporate Debtor M/s. RL Logistics Private Limited hereby reject your revised claim of Rs.28,43,387/- u/s 40(1) of IBC, 2016. You are at liberty to approach NCLT Chennai for necessary orders in this regard.

Kindly acknowledge receipt of this letter.

4. Aggrieved by the afore extracted email dated 29.06.2020, the Applicant has preferred the present Appeal under Section 42 of IBC, 2016 before this Tribunal on 09.09.2020.

5. Heard the submissions made by the Learned Counsel for the parties. It is seen that the Applicant has filed its revised supplementary claim before the Liquidator on 24.02.2020 for a sum of Rs.28,43,387/-which came to be rejected by the Liquidator on the ground that the order passed by the EPF Authority under Section 7A of the EPF Act, 1952 was violative and beyond jurisdiction. In this context, it is reiterated that in so far as the dues of the Provident Funds are concerned, the same does not form part of the Liquidation Estate and that the Liquidator in these cases, are only put on notice, about the claim of the PF authorities. The liquidator can exercise his rights only over the assets which are forming part of the Liquidation Estate and the Liquidator has no control over the assets that are NOT forming part of the Liquidation estate. In other words, the Liquidator cannot reject the claim of the PF authorities because, the dues to the PF authorities do not form part of the Liquidation Estate and hence does not form part of the waterfall mechanism.

6. In so far as the contention of the Learned Counsel for the Respondent that the claim for Penal damages and Interest under Section 14B and 7Q of the EPF Act, 1952 would be covered under the waterfall mechanism, the same is required to be negated since the Hon'ble NCLAT in the matter of **Regional Provident Fund**

Commissioner Ahmedabad -Vs- Ramachandra D.Choudhry *in Company Appeal (AT)(Insolvency) No.1001 of 2019* while answering the question as to whether PF authorities are entitled to a claim of interest charged by the said authority during the course of CIRP of the corporate debtor, in addition to the principal amount of provident fund due which has been fully taken care of in the approved Resolution Plan, negating the contention of the successful resolution applicant that Sections 7Q and 14B of the EPF & MP Act, 1952 cannot be relied upon, as the provisions of IBC, 2016 has an overriding effect on the same in terms Section 238 of the Code, it was held that no provisions of EPF & MP Act, 1952 and IBC, 2016 are in conflict and on the other hand in terms of Section 36(4)(iii), the provident fund and gratuity funds are not the assets of the corporate debtor, there being specific provisions, the application of Section 238 of the Code will not arise. In the circumstances, the successful resolution applicant was directed to release full provident fund and interest thereof in terms of EPF& MP Act, 1952 and the appeal of PF authorities was thereby allowed.

7. Further, also the Supreme Court in the matter of **Maharashtra State Cooperative Bank Limited –Vs- Provident Fund Commissioner;** *(2009) 10 SCC 123* has held in para 66 to 69 as follows;

"66. Section 11 gives statutory priority to the amount due from the employer vis-à-vis all other debts. Clause (a) of sub-section (1) of Section 11 is applicable to cases where an employer is adjudicated insolvent or, being a company, an order of its winding up is made. In that situation, the amount due 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 Section 15(2) or any other charges payable by him under any other provision of this Act or of any provision of the Scheme or the Insurance Scheme. Clause (b) is applicable to cases where the amount is due from the employer in relation to 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 provident fund or any insurance fund, any contribution payable by him towards the Pension Fund under Section 17(6), damages recoverable under Section 14B or any charges payable by him to the appropriate Government under the Act or under any of the conditions specified in Section 17. This sub-section then lays down that such amount 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. Sub-section (2) lays down that any amount due from the employer whether in respect of the employees' contribution deducted from the wages of the employee or the employer's contribution shall be deemed to be the first charge on the assets of the establishment, and shall be paid in priority to all other debts.

67. The expression "any amount due from an employer" appearing in sub-section (2) of Section 11 has to be interpreted keeping in view the object of the Act and other provisions contained therein including sub-section (1) of Section 11 and Sections 7A, 7Q, 14B and 15(2) which provide for determination of the dues payable by the employer, liability of the employer to pay interest in case the payment of the amount due is delayed and also pay damages, if there is default in making contribution to the Fund. If any amount payable by the employer becomes due and the same is not paid within the stipulated time, then the employer is required to pay interest in terms of the mandate of Section 7Q. Likewise, default on the employer's part to pay any contribution to the Fund can visit him with the consequence of levy of damages.

68. As mentioned earlier, sub-section (2) was inserted in Section 11 by Amendment Act No.40 of 1973 with a view to ensure that payment of provident fund dues of the workers are not defeated by the prior claims of the secured and/or of the

unsecured creditors. While enacting sub-section (2), the legislature was conscious of the fact that in terms of existing Section 11 priority has been given to the amount due from an employer in relation to an establishment to which any scheme or fund is applicable including damages recoverable under Section 14B and accumulations required to be transferred under Section 15(2). The legislature was also aware that in case of delay the employer is statutorily responsible to pay interest in terms of Section 17. Therefore, there is no plausible reason to give a restricted meaning to the expression `any amount due from the employer' and confine it to the amount determined under Section 7A or the contribution payable under Section 8.

69. If interest payable by the employer under Section 7Q and damages leviable under Section 14 are excluded from the ambit of expression "any amount due from an employer", every employer will conveniently refrain from paying contribution to the Fund and other dues and resist the efforts of the concerned authorities to recover the dues as arrears of land revenue by contending that the movable or immovable property of the establishment is subject to other debts. Any such interpretation would frustrate the object of introducing the deeming provision and non obstante clause in Section 11(2). Therefore, it is not possible to agree with the learned senior counsel for the appellant- bank that the amount of interest payable under Section 7Q and damages leviable under Section 14B do not form part of the amount due from an employer for the purpose of Section 11(2) of the Act."

(emphasis supplied)

8. Thus, from the reading of the above judgment, it is made amply clear that any penal damages and interest levied by the PF Authorities under Section 14B & 7Q of the EPF & Miscellaneous Act, 1952 would form part of "any amount due" under Section 11(2) of EPF & Miscellaneous Act, 1952. Under the said circumstances, the contention of the Learned Counsel for the Respondent that the Penal damages and Interest under Section 14B and 7Q of the EPF & Miscellaneous Act 1952 levied by the Applicant, should be covered

under the waterfall mechanism, goes against the well-established position of law.

9. In fine, we are of the view that the PF authorities are entitled to the satisfaction of the full claim in relation to the PF dues including interest. Further, it is to be taken note that the entire amount of Rs.28,43,387/- do not form part of the Liquidation estate.

10. With the above said directions, IA/818/IB/2020 stands **disposed of.**

-Sd-

SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-

R. SUCHARITHA
MEMBER (JUDICIAL)

Raymond