

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
BENCH-1, HYDERABAD**

IA. No. 1303/2022

in CP (IB) No.745/7/HDB/2018

*Under Regulation 12(2) of the Insolvency and Bankruptcy Board of India
(Insolvency Resolution Process for Corporate Persons) Regulations, 2016
read with Sec.60(5), 87(1) (a) & (c), 88 of IB Code, 2016*

Between

Employees' Provident Fund Organisation,
(Ministry of Labour, Government of India)
Regional Office, Hyderabad-II (Madhapur),
H.No.3-4-763, Bhavishya Nidhi Bhawan,
Barkatpura, Hyderabad – 500 027,
Rep. by its Regional Provident Fund Commissioner,
R.O.-II, Hyderabad.

... Applicant

AND

Kanakadhara Ventures Private Limited
Rep. by its Liquidator Sri Rajesh Chillale

CERTIFIED TO BE TRUE COPY
OF THE ORIGINAL

...Respondent

In the matter of:-
IDBI Bank Limited.,

... Financial Creditor

AND

Kanakadhara Ventures Private Limited
Having its Regd. Office at 8-3-1114/1, Keshava Nagar,
Srinagar Colony, Hyderabad – 500082.

... Corporate Debtor

DATE OF ORDER: 26.02.2024



Coram

Dr. Venkata Ramakrishna Badarinath Nandula, Hon'ble Member (Judicial)
Shri Charan Singh, Hon'ble Member (Technical)

Parties/ Counsels present:

For the Applicant : Mr. B.Harinath Rao, Counsel

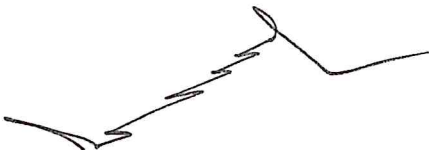
For the Liquidator/Respondent : Mr.G.Kalyan Chakravarthy, Counsel.

PER : BENCH

ORDER

1. This is an application filed by the Applicant/Employees Provident Fund Organisation Under Regulation 12(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 read with Section 60(5), 87(1) (a) & (c), 88 of IB Code, 2016 seeking following reliefs:

- a) To set aside the Rejection Order/ Letter Dated: 29/07/2022 passed by the Liquidator Sri Rajesh Chillale, wherein the Liquidator has rejected the claim made by the Applicant herein in recovering the Provident Fund dues of the bread and butter of the workers of the Corporate Debtor, in the above said CP (IB) No. 745/7/HDB/2018, viz., Kanakadhara Ventures Private Limited, Hyderabad holding that the PF dues need not be paid in priority to all other debts and that the waterfall mechanism, envisaged under section 53 of IBC 2016 shall only be applicable and complied with for the purpose of distribution



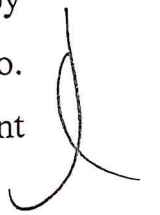
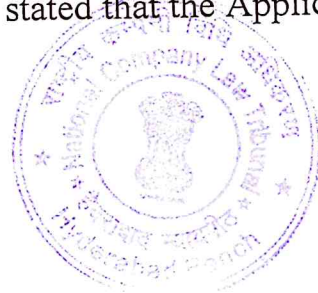
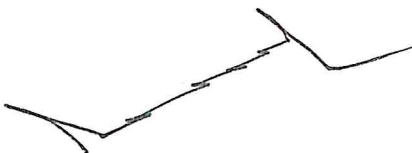
of sale proceeds from the liquidation assets, as illegal, arbitrary and contrary to the social security enactment of Provident Fund Act.

- b) To allow the claim made by the Applicant before the Liquidator Sri. Rajesh Chillale in respect of the recovery of provident fund dues of the Workers of the Corporate Debtor U/Sec.7A, 14B and 7Q of the EPF & MP Act, 1952.
- c) To issue a direction to the Liquidator for releasing the EPF dues submitted vide claim dated 09.09.2021 which is as per Section 36(4) of IBC in which it clearly declares that all dues towards Provident Fund, Pension Fund and Gratuity as Third-Party assets and excludes them from the Liquidation estate of Corporate Debtor. Section 36(4) makes a further declaration that such sums cannot be utilised for recovery of debts of the Corporate Debtor.

The position of the Law that dues under EPF Act are not debts and do not form a part of the waterfall mechanism under Section 53 of IBC is judiciously settled after the judgment of Hon'ble NCLAT Judgment dated 11.03.2022 in CA (AT) 483/2019 in Sikander Singh Jamwal Vs. Vinay Talwar.

2. Gist of the application:

- 2.1 It is averred that the Corporate Debtor M/s. Kanakadhara Ventures Private Limited (which is presently undergoing Liquidation process under the supervision of Liquidator Sri. Rajesh Chillale appointed by this Tribunal) is registered under the EPF Act vide PF Code No. AP/HYD/61895 w.e.f. dated 01.08.2008. It is stated that the Applicant



was seeking the detail of Employees' Provident Fund (EPF) compliance from the Corporate Debtor since 09.09.2021 itself. It means before initiation of CIRP proceedings, EPFO authority has raised the question on the Provident Fund compliance status of Corporate Debtor. As per EPF Act, for determining the pending provident funds dues, quasi-judicial inquiry under section 7A of the Act was being conducted since 08.07.2014 during the assessment inquiry under section 7A, as per the financials of Corporate Debtor, default of EPF dues of Rs.1,45,29,011/- for the period from 01.04.2011 to 31.05.2014 was found and recorded.

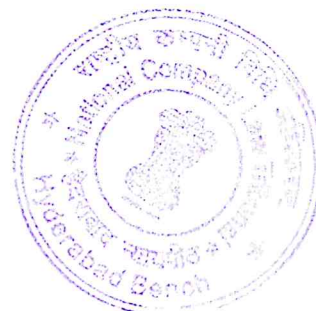
2.2 It is further stated that as per Section 14B and 7Q of EPF Act, EPF dues liability were also computed for Rs.3,25,90,217/-. Accordingly, Appellant had informed the Corporate Debtor and Resolution Professional about the pending provident fund dues and filed claims vide letter dated 09.09.2021. It is stated that the liquidator vide letter and Email dated 29.07.2022 rejected all the claims filed by Applicant, EPFO, Hyderabad authority holding that, the Provident Fund dues need not be paid in priority to all other debts and that the waterfall mechanism envisaged under Section 53 of the IBC, 2016 shall only be applicable and complied with for the purpose of distribution of the sale proceeds from the liquidation assets.

2.3 It is stated that since 09.09.2021, at the time of initiation of CIRP proceeding, Resolution Professional has not communicated even a single letter/email for the EPFO authority. The Resolution Professional has failed to follow the regulations and has not made any communication with the applicant nor sought any clarification from the



Corporate Debtor. It is further stated that on 11.10.2021 the liquidator has forwarded an E-mail stating that, "the PF dues need not be paid in priority to all other debts and that the water fall mechanism envisaged under section 53 of IBC 2016 shall be applicable and completed with for the purpose of distribution of the sale proceeds from the liquidation assets.

- 2.4 It is averred that the Liquidator clarified that there is no separate fund created by Corporate Debtor towards EPF dues and hence the EPFO claim will fall under section 53(1)(e) and further held that there are no separate funds to exclude the PF dues from liquidation estate.
- 2.5 It is stated that in the matter of assessment of arrear dues, the Hon'ble Supreme Court in *S.V.Kondaskar, official Liquidator Vs. VM Deshpande, ITO (AIR 1972 SC 878)* held that there is no provision by which Liquidation Court should be vested with the power to stop assessment proceedings. Further stated that, in case of *Official Liquidator, High Court Vs. Commissioner of Income Tax, West Bengal, AIR 1970 Cal 349*, Court held that no leave of court is necessary for any assessment proceeding.
- 2.6 It is stated that as per EPFO records and findings in the assessment inquiry reveals that, the Corporate Debtor was a habitual defaulter of EPF dues. But still recorded and accepted default on the part of employer, said part of EPF dues was not acknowledged by the Resolution Professional. It is stated that provision under IB Code 2016 does not authorize any authority/ liquidator/ IRP/ COC to waive off the EPF dues which belongs to the poor workers and labourers. The EPF



Act has been strengthened from time to time and statutory safeguards to Provident Fund has been provided through Section 8-B, 10, 11(1), 11(2), 17-B in EPF Act and provision made in IBC in Section 36(4) and Section 155(2).

- 2.7 It is stated recently in the matter of EPF dues, NCLT KOCHI BENCH in case number IA.No.176/KOB/2020, (MA.No.05/KOB/2020 in TIBA/01/KOB/2019 (Under Sections 35(1)(n) & 60(5) of IBC 2016) has delivered the order dated 18.02.2021 therein it has led the emphasis on the EPF dues and held that EPF Contribution, interest under section 7Q and damages payable under section 14 B are statutory dues and not claims, in Para 10 which is reproduced as under:

“...it is clear that the contribution, interest and damages payable are statutory dues and not claims which can be submitted to the Liquidator in Form G.

Hence the EPFO need not file Form G before the Liquidator. It is also seen that the EPFO has got first charge over the Assets of the defaulter and its priority of payment over other debts is as per Section 11 of the EPF & MP Act 1952.”

- 2.8 It is further submitted that the Hon'ble Supreme Court of India in Balbir Kaur Vs Steel Authority of India Ltd reported in (2000) 6 SCC 493 held that **“It is significant to note that the Employees' Provident Fund & Miscellaneous Provisions Act of 1952 is a beneficial piece of legislation and can amply described as a social security statue, the**



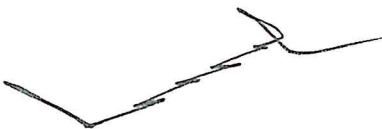
object of which is to ensure better future of the employees on his retirement and for the benefit of the dependents in case of his earlier death.”

2.9 It is further stated that the Hon'ble Supreme Court of India, in *Maharashtra State Co-operative Bank Vs. Assistant PF Commissioner in Civil Appeal No. 6893 of 2009* held that the Provident Fund dues will include not only the dues under Section 7A but also the dues under Section 14B and 7Q. It is further stated that the amounts claimed by the Applicant under 7Q and 14B are the dues to be paid by the Corporate Debtor/ Employer/ establishment to the Applicant herein and the said amounts to be paid to the Applicant herein are termed as statutory dues but not the claims since as stated above the Applicant organization is established in the interest of the workers/employees of the respective establishments.

2.10 It is stated that Section 11(2) of the EPF Act wherein any dues payable to EPFO has been considered to be first charge notwithstanding in any content in any law enforced, to be put in priority to other debts (loans etc.)

Section 11(2) of the EPF Act is produced below:

“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.”



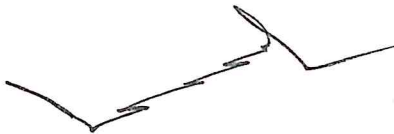
Section 11(2) of the EPF Act was interpreted by the **Division Bench of the Kerala High court** in Recovery Officer and Provident Fund Commr. Vs. Kerala Financial Corpn. [fLR (2002) 3 Ker 4: (2002) 2 KLT 723] Speaking for the Bench, B.N.Srikrishna, J. (as he then was) observed: (KL T pp. 725-26, para 7) Section 11(2) of EPF & MP Act is stated:

"Without prejudice to the provisions of sub-section (1), if any amount is due from an employer, whether in respect of the employees' 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 EPF and MP Act has two facets. First, it declares that the amount due from the employer towards contribution under the EPF and MP 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.

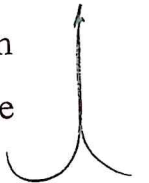
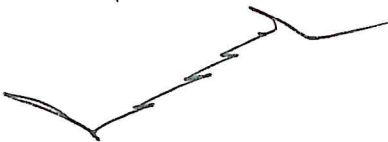
Both these provisions bring out the intention of Parliament to ensure the social benefit as contained in the legislation. There are other provisions in the Act rendering the amounts of provident fund payable immune from attachment of civil court's decree, which also indicate such intention of Parliament."

Hence, by the above said crystal clear provision in the EPF and MP Act, 1952 it is clear that Parliament is intended to protect the employees of an establishment etc. and also the said dues cannot be attached by virtue of civil courts decree or what so ever. Thus, from the above facts it clearly shows that, while rejecting the claims by Resolution Professional, Section 11 of EPF Act has been violated and at the same time, legal provision enshrined in Section 36(4) was also ignored which safeguards the Provident, Pension Funds and Gratuity Funds of employees.



2.11 It is stated that as per Section 36 of IBC Code the provident fund dues to be paid by the Corporate Debtor do not form part of liquidation estate. And similar protection of Provident Fund dues has been provided in the Section 155 (2) of IBC. That on 12-09-2018, the Ld. NCLT, Mumbai Bench delivered a judgment in the case of *Precision Fasteners Ltd. (Through the Liquidator) v. Employees Provident Fund Organisation, M.A. No. 576 and 752 of 2018 in Company Petition No. 1339 of 2017* wherein it was, inter alia, clarified and held that EPF dues of the Corporate Debtor do not form part of the Liquidation Estate under Section 36 of the Code and hence, EPF dues have to be paid in priority over all remaining dues without the application of the waterfall mechanism provided under Section 53 of the Code. Those similar views have also been expressed and confirmed by this Hon'ble Appellate Tribunal in respect of the Resolution Process in the case of '*State Bank of India vs Moser Baer Karmchari Union & Another CA/AT/(Insolvency) No. 396 of 2019*'; and in the case of *Regional Provider Fund Commissioner-I, Ahmedabad vs Ramachandra D. Choudhary, Compar Appeal (AT)(Insolvency) No. 354 of 2019*.

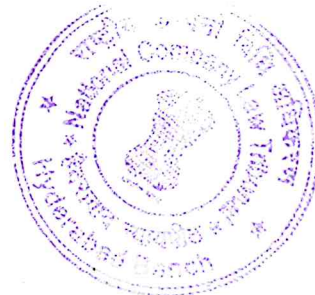
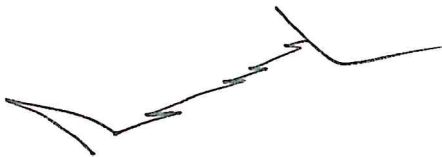
2.12 It is stated that the Liquidation process is still pending and the period of Liquidation process is going to end on 10.11.2022 as such no harm or loss would be cause any stake holders if the relief's sought herein are granted in favour of the Applicant herein in view of the paramount interest of the workers and if the relief's sought are not granted the applicant would suffer irreparable loss more particularly the workmen and employees otherwise it would lead to serious consequences to the



families of the employees/ workers who worked/working in the Corporate Debtor establishment.

3. Respondent/Liquidator of Corporate Debtor filed reply, inter-alia stating that:

- 3.1 It is stated that the Respondent admitted the PF Claims of the applicant in full for Rs.4,71,19,228/-. The Provident Fund amounts being claimed by the applicant herein is only a multiplicity of the same. It is stated that for the reason the claim of the applicant herein could not be admitted by the Liquidator and the Liquidator had duly communicated his decision with the detailed reasons of Rejection of Claim vide his letter and email dated 29.07.2022.
- 3.2 It is stated that in Liquidation, Employees or workmen dues are payable at par with secured lenders dues for the period 24 months prior to Liquidation period and since 2014 there are no employees or workmen working and all the operations are closed since then. It is stated that the amounts claimed by the applicant towards short remittance is Rs.60.33 Lakhs and the remaining balance of Rs.410.95 Lakhs are towards damages and interest.
- 3.3 It is further stated that in relation to the position of law, Hon'ble NCLT Chandigarh Bench declared that, Resolution Professional cannot be directed to make payment of gratuity to the applicant as there is no gratuity fund created by the Corporate Debtor. As regards the salary and leave encashment during the period of CIRP, the same pertains to the amounts payable to an employee for the services rendered during the



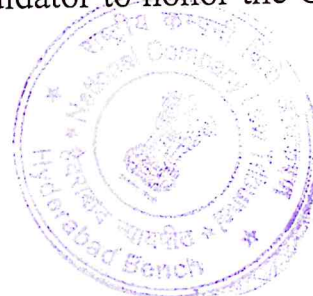
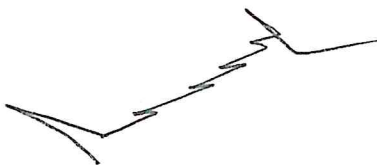
CIRP. It is stated that these expenses clearly fall within the definition of Insolvency Resolution Process cost as defined in Section 5(13)© of IBC, 2016.

(13) “insolvency resolution process costs” means –

(c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;

3.4 It is stated that Section 36 of IBC clearly bars the liquidator from adjudication of these claims. It is stated that in terms of section 36(4)(a)(iii), as all the sums due to any workman or employees from the provident fund, the pension fund and the gratuity fund do not form part of the Liquidation Estate of the Corporate Debtor, the question of distribution of the provident fund or the pension fund or gratuity fund in order of priority and within such period as prescribed under section 53(1), does not arise. Thus, the Liquidator has rejected the claim of the applicant herein the rejection order needs no interference from any corner. It is prayed that the reliefs sought by the applicant are unjust and unlawful and liable to be dismissed.

4. The Counsel for the Applicant filed written submissions by reiterating the pleadings apart from that it is stated that as per the records of the Applicant Office no amount has been received out of the claim amount Rs.4,71,19,228/- and on other hand the Liquidator is Liquidating the Estate and distributing other Creditors, the Applicant herein objected in the COC meetings. Therefore, prayed this Tribunal to allow the application directing the Respondent/Liquidator to honor the Claim as

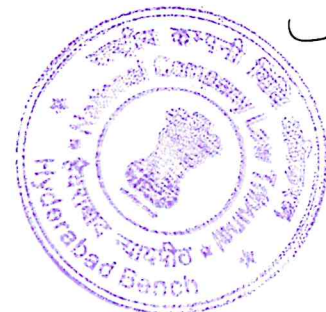
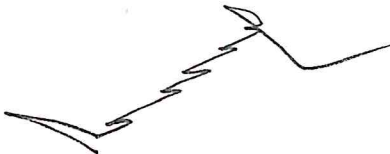


per provisions/ case laws mentioned in the pleadings and also vis-à-vis complying the Section 36(4) of Insolvency and Bankruptcy Code, 2016.

5. The Counsel for the Respondent/Liquidator filed written submissions by reiterating the pleadings apart from that:

5.1 It is stated that the Provident Fund and Gratuity Fund, do not come within the purview of Liquidation estate for the purpose of the distribution of assets under Section 53 of the Code. It is stated that the Pension Fund, Gratuity Fund and the Provident Fund cannot be utilised, attached or distributed by the Liquidator, to satisfy the claims of other creditors. The adjudication of the Provident Fund is not within the realm of the Liquidator under IBC.

5.2 It is stated that the Hon'ble NCLAT in its judgements in Company Appeal (AT) (Insolvency) No. 354 of 2019, dated 19.12.2019 and in Company Appeal (AT) (Insolvency) No. 396 of 2019 dated 19.08.2019 and in Company Appeal (AT) ((Insolvency) No. 1229 of 2019, dated 11.02.2020 held that relying on earlier judgment, has held the liquidator cannot adjudicate the issue as the claims under PF or Gratuity are not forming part of Liquidation Estate. In all the matters the Hon'ble Appellate Tribunal clearly held that the pension fund and the gratuity fund shall not be included in the liquidation estate and cannot be used for the recovery in the liquidation and liquidator has no jurisdiction to interfere in such issues. The finding is also determined and upheld by the Hon'ble Supreme Court in its Judgement reported in 2023 SCC Online 140.



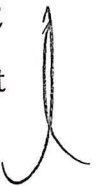
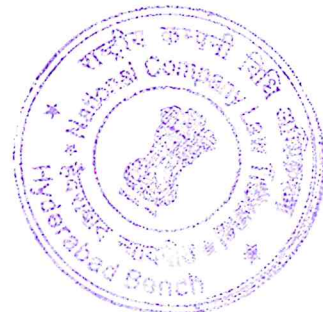
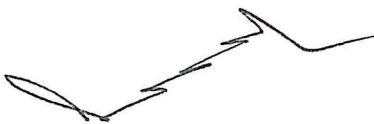
5.3 It is stated that as per section 36(2) of IBC, 2016, provides that the Liquidator shall hold the Liquidation Estate in fiduciary for the benefit of all the creditors. It is stated that the Liquidator cannot be directed to make the payment of PF dues of the workmen because the liquidator has no domain to deal with the properties of the Corporate Debtor, which are not part of the Liquidators Estate. Further when there is no provision maintained by the Corporate Debtor, the liquidator cannot adjudicate or distribute any amount to the department, at this stage and prayed to dismiss the application.

6. In the light of the contest put forth by both the parties the following points emerge for our consideration :

Point 1 : “ Whether prayers sought by applicant are maintainable and thus Tribunal,s interference is warranted with reference to e-mail dated 29.07.2022 issued by liquidator to applicant and whether pleadings of the applicant that EPFO claim has priority over all other claims and waterfall mechanism of section 53 is not applicable to it, is maintainable and as per law ”

7. We have heard learned counsel Mr. B.Harinath Rao, for applicant and Learned Counsel Mr. Kalyan Chakravarthy, for liquidator.

Point 1 : “ Whether prayers sought by applicant are maintainable and thus Tribunal,s interference is warranted with reference to e-mail dated 29.07.2022 issued by liquidator to applicant and whether pleadings of the applicant that



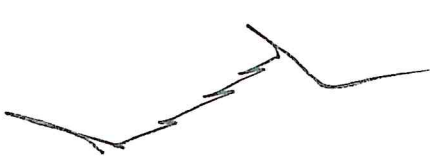
EPFO claim has priority over all other claims and waterfall mechanism of section 53 is not applicable to it, is maintainable and as per law ”.

8. This is an application filed by EPFO with following prayers:

a) *“to set aside the Rejection Order/ Letter Dated: 29/07/2022 passed by the Liquidator Sri Rajesh Chillale, wherein the Liquidator has rejected the claim made by the Applicant herein in recovering the Provident Fund dues -----”*

b) *“ To allow the claim made by the Applicant before the Liquidator Sri. Rajesh Chillale in respect of the recovery of provident fund dues---”* with other ancillary prayers.

9. The learned counsel for the applicant submits that M/s. Kanakadhara Ventures Private Limited (which is presently undergoing Liquidation process under the supervision of Liquidator Sri. Rajesh Chillale appointed by this Tribunal) is registered under the EPF Act vide PF Code No. AP/HYD/61895 w.e.f. dated 01.08.2008. The applicant has filed a claim of Rs 4,71,19,228.00 which includes short remittance of PF of Rs 60,23, 947.00 and other charges of Rs 4,10,95281.00 which includes damages and interest as per Section 14B and Section & 7 Q. The applicant further contended that it wrote a letter dated 22.07.2022 (Page 58 to 64 of application) seeking status of recovery of EPF dues and respondent sent an email dated 20.07.2022 in response to the said letter and liquidator clarified that there is no separate fund created by



CD towards EPF dues and hence the EPFO claim will fall under section 53(1)(e) and further held that there is no separate funds to exclude the PF dues from liquidation estate hence the PF claim priority will be as per 53(1)(e). The applicant vehemently contended that EPFO claim is required to be paid in priority over all other claims and the liquidator has committed a grave error in stating that EPF dues have no priority and will follow as per the waterfall mechanism as envisaged under Section 53(1)(e) of IBC, 2016.

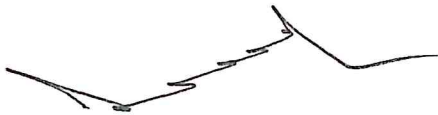
10. The learned counsel for the respondent outrightly rejected the submission made by applicant and submitted that first prayer of the applicant is to set aside the Rejection Order/ Letter Dated 29/07/2022 passed by the Liquidator which is totally false as per facts of the case thus is non maintainable. Respondent submitted that PF Claims of the applicant in full for Rs.4,71,19,228/- has been admitted by the respondent and there is no rejection of claim of applicant as put forth in prayer. The respondent further submitted that because the applicant's claim is admitted that is why applicant is a member of SCC and on behalf of applicant Mr Vivek Ramana Reddy participated in 11th SCC held on 01.09.2022 in which this issue was discussed in detail. The respondent further submitted that even the second prayer which is to allow the claim made by the Applicant before the Liquidator Sri. Rajesh Chillale in respect of the recovery of provident fund dues is also infructuous as claim is already allowed in full. The respondent further submitted that he seeks dismissal of application as both the prayers are



false and non maintainable. The respondent further submitted that the amounts claimed by the applicant towards short remittance is only Rs.60.33 Lakhs and the remaining balance of Rs.410.95 Lakhs are towards damages and interest. The respondent further contended that in Liquidation, Employees or workmen dues are payable at par with secured lenders dues for the period 24 months prior to Liquidation period and in this CD, operations are closed since 2014 and no employees or workmen are working since then. and all the them.

11. Liquidator further submitted that there is no separate fund created by Corporate Debtor towards EPF dues and hence the EPFO claim will fall under section 53(1)(e) and further held that there are no separate funds to exclude the PF dues from liquidation estate. Respondent further stated that as per Section 36 of IBC Code the provident fund dues to be paid by the Corporate Debtor do not form part of liquidation.

Our findings: For the sake of clarity and convenience , we reproduce hereunder scanned copy of the contentious e-mail dated 29.07.2022 issued by liquidator to the sApplicant is as below:



Email

REGIONAL OFFICE HYDERABAD

Re: Kanakadhara Ventures Private Limited - distribution of auction sale proceeds - reg

From : kanakadhara liq <kanakadhara.liq@gmail.com> Fri, Jul 29, 2022 10:57 PM
Subject : Re: Kanakadhara Ventures Private Limited - distribution of auction sale proceeds - reg 1 attachment
To : REGIONAL OFFICE HYDERABAD <ro.hyderabad2@epfindia.gov.in>
Cc : bm1204@unionbankofindia.com, cs8191@pnb.co.in, pallabdasbnb@gmail.com, sr srinivasa <sr.srinivasa@idbi.co.in>, jv limaye <jv.limaye@idbi.co.in>, ashish vatsa <ashish.vatsa@idbi.co.in>, samche@bankofbaroda.com

Dear sir,

I refer to your letter no. TS/HYD/RO-ii/C-517/NCLT/ dated 22.07.2022/222 seeking the status of recovery of EPF dues. the following clarifications are submitted for your kind perusal & necessary records.

1. The CD M/s. Kanakadhara Ventures Private Limited has shut down its operations since 2014.
2. PF department is one of the SCC members & all the meeting notices and minutes of the same were circulated. (Kindly refer to item no. 6 of the 9th SCC meeting minutes wherein the waterfall mechanism was discussed and the dues of PF Dept has been categorized under (Statutory dues for 24 months prior to LCD & Remaining amount towards secured creditors).
3. The case laws referred to in your letter pertains to CD in CIRP period, but now the CD is in Liquidation.
4. a clarification mail vide mail dated 11.10.2021 was already sent the PF department regarding ranking of govt dues under section 53 (copy of which is again attached for your kind reference)

This is for your kind information and necessary records.
rajesh chillale, Liquidator
Kanakadhara Ventures Private Limited

On Tue, Jul 26, 2022 at 11:24 AM REGIONAL OFFICE HYDERABAD <ro.hyderabad2@epfindia.gov.in> wrote:

महोदय/महोदया
Sir/Madam,

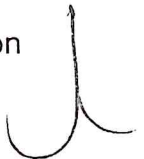
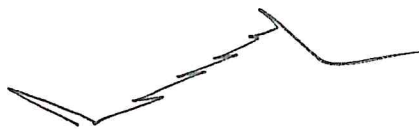
कृपया उपर्युक्त विषय में संलग्नक प्राप्त करें।
Please find attachment on the captioned subject.

सादर/With Regards,
क्षेत्रीय कार्यालय, हैदराबाद-II(माधापुर)/Regional Office, Hyderabad-II (Madhapur)

From: "kanakadhara liq" <kanakadhara.liq@gmail.com>
To: bm1204@unionbankofindia.com, cs8191@pnb.co.in, pallabdasbnb@gmail.com, "sr srinivasa" <sr.srinivasa@idbi.co.in>, "jv limaye" <jv.limaye@idbi.co.in>



12. On perusal of the email *supra*, we find that this e-mail do not advise about rejection of the claim but it is an email providing some clarifications about the claim, therefore both the prayers i.e prayer a) set aside the Rejection Order/ Letter Dated 29/07/2022 and prayer b) to allow the claim made by the Applicant are non existent as on date and can not be considered.
13. We have perused the claim form filed by the applicant and find that the amount claimed by the applicant towards PF short remittance is only Rs.60.33 Lakhs and the remaining balance of Rs.410.95 Lakhs are towards damages and interest. Admittedly, as this amount will not be passed over to PF beneficiaries and the amount being proportionally very high as compared to the short remittance of PF , this Tribunal on 21.12.2023 sought clarification from the counsel of the applicant about calculation and genuineness of these amounts of interest and damages but respondent did not submit the same in spite of giving further adjournments on 09.01.2024, 06.02.2024 and 20.02.2024 .
14. Though the applicant has not sought any prayer in the application in respect of waterfall mechanism in IBC,2016 but in the pleadings and submissions , the applicant has made a point that waterfall mechanism in IBC,2016 is not applicable to EPFO dues and EPFO claim is required to be paid in priority over all other claims whereas the respondent contend that since no separate fund is created for PF dues Section 36 of IBC Code which provides that the provident fund dues to be paid by the Corporate Debtor do not form part of liquidation estate is not applicable. To decide on this issue we place reliance on order of Hon'ble Supreme Court in Moser Baer Karamchari Union

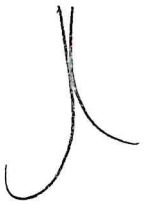
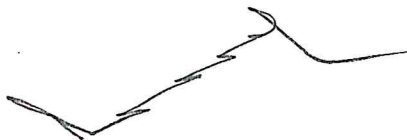


Thr. President Mahesh Chand Sharma Vs. Union of India and Ors. : (2023)
ibclaw.in 59 SC .

15. Hon'ble Supreme Court in this case has made it very clear that overriding preferential payments to workman's dues as provided in Section 326 of the Companies Act, 2013 cannot be made applicable to liquidation of companies as envisaged under the IBC. Hon'ble Supreme Court held that in view of the enactment of IBC and Section 53 of the IBC, it necessitated to amend the Companies Act, 2013 and as per Sub-Section (7) of Section 327 of Companies Act, 2013, Sections 326 and 327 shall not be applicable in the event of liquidation under the IBC. Hon'ble Supreme Court also held that waterfall mechanism in IBC is based on a structured mathematical formula, and every change in the waterfall mechanism is bound to lead to cascading effects on the balance of rights and interests of the secured creditors, operational creditors and even the Central and State Governments. Thus, Hon'ble Apex Court concluded that as sub-section (7) of Section 327 of the Act, 2013 provides that Sections 326 and 327 of the Act, 2013 shall not be applicable in the event of liquidation under the IBC, the distribution of the assets shall have to be made as per Section 53 of the IBC subject to Section 36(4) of the IBC.
16. The concluding para VII of the said order of Hon'ble Supreme Court is reproduced hereunder:

VII. Conclusion

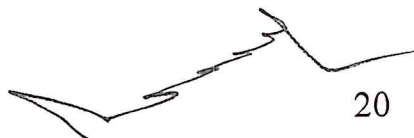
"The Code is based on the organic evolution of law and is a product of an extensive consultative process to meet the requirements of the Code governing liquidation. It introduced a comprehensive and time-bound framework to maximise the value of assets of all persons and balance the interest of the stakeholders. The guiding



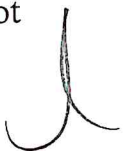
principle for the Code in setting the priority of payments in liquidation was to bring the practices in India in line with global practices. In the waterfall mechanism, after the costs of the insolvency resolution process and liquidation, secured creditors share the highest priority along with a defined period of dues of the workmen. The unpaid dues of the workmen are adequately and significantly protected in line with the objectives sought to be achieved by the Code and in terms of the waterfall mechanism prescribed by Section 53 of the Code. In either case of relinquishment or non-relinquishment of the security by the secured creditor, the interests of workmen are protected under the Code. In fact, the secured creditors are taking significant haircut and workmen are being compensated on an equitable basis in a just and proper manner as per Section 53 of the Code. The Code balances the rights of the secured creditors, who are financial institutions in which the general public has invested money, and also ensures that the economic activity and revival of a viable company is not hindered because it has suffered or fallen into a financial crisis. The Code focuses on bringing additional gains to both the economy and the exchequer through efficiency enhancement and consequent greater value capture. In economic matters, a wider latitude is given to the law-maker and the Court allows for experimentation in such legislations based on practical experiences and other problems seen by the law-makers. In a challenge to such legislation, the Court does not adopt a doctrinaire approach. Some sacrifices have to be always made for the greater good, and unless such sacrifices are prima facie apparent and ex facie harsh and unequitable as to classify as manifestly arbitrary, these would be interfered with by the court. (p17)

- In view of the above and for the reasons stated above and as sub-section (7) of Section 327 of the Act, 2013 provides that Sections 326 and 327 of the Act, 2013 shall not be applicable in the event of liquidation under the IBC, which has been necessitated in view of the enactment of IBC and it applies with respect to the liquidation of a company under the IBC, Section 327(7) of the Act, 2013 cannot be said to be arbitrary and/or violative of Article 21 of the Constitution of India. In case of the liquidation of a company under the IBC, the distribution of the assets shall have to be made as per Section 53 of the IBC subject to Section 36(4) of the IBC, in case of liquidation of company under IBC. (p18)*
- In view of the above and for the reasons stated above, the writ petition(s) lack merits and the same deserve to be dismissed and are accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs. Pending applications, if any, also stand disposed of. (p19)”*

17. Placing reliance on Hon'ble Supreme Court order, *Supra* we decide that applicant's contention that that waterfall mechanism in IBC,2016 is not



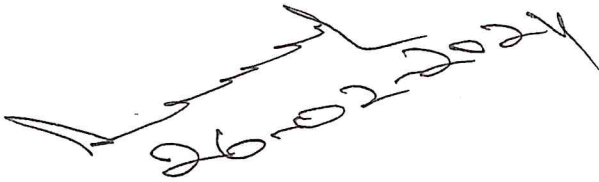




applicable to EPFO dues and EPFO claim is required to be paid in priority over all other claims , is not maintainable and hence rejected.

18. In view of the above facts and case law , we decide that prayers sought by applicant are not maintainable and thus Tribunal's interference is not warranted with reference to e-mail dated 29.07.2022 issued by liquidator to applicant and we also hold that pleadings of the applicant that EPFO claim has priority over all other claims and waterfall mechanism of section 53 is not applicable to it, is not maintainable . Accordingly, the point is decided.

19. In view of the above, this application is liable to be rejected , hence dismissed with no costs.

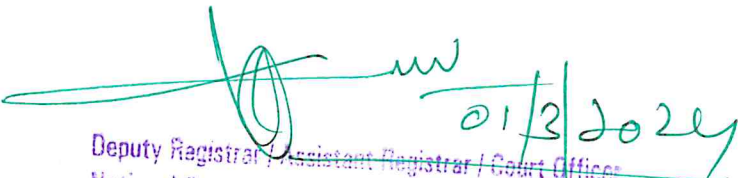


Charan Singh
Member Technical



Dr. Venkata Ramakrishna Badarinath Nandula
Member Judicial

Sridher/pavani



01/3/2024
Deputy Registrar / Assistant Registrar / Court Officer
National Company Law Tribunal, Hyderabad Bench

प्रमाणित प्रति
CERTIFIED TRUE COPY
केस नंबर
CASE NUMBER... cp(IB)no.:745/7/HDB/18
दिनांक पर तारीख
DATE OF JUDGEMENT... 26.2.24
प्रति तैयार किया गया तारीख
COPY MADE READY ON... 1/3/24

