

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT – III**

IA/2428/2021

In

C.P.(IB)/1319(MB)/C-III/2017

*(Under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016.)*

Employees Provident Fund Organization

Regional office II,

*Sanjay Kale Sabhagrih, Pradhikaran, Sector 28,
Akurdi, Pune -411044*

.....Applicant

Vs.

Mr. Rajat Mukherjee,

*Liquidator of Enviro Bulk Handling Systems
Pvt. Ltd.*

.....Respondent

In the matter of

Elecon Engineering Company Limited

.....Operational Creditor

Vs.

Enviro Bulkk Handling Systems Pvt. Ltd.

.....Corporate Debtor

Order Pronounced on: 28.02.2024

CORAM:

**SHRI CHARANJEET SINGH GULATI
HON'BLE MEMBER (T)**

**SMT LAKSHMI GURUNG
HON'BLE MEMBER (J)**

Appearances:

For the Applicant: None

For the Respondent: Adv. Kunal Kanungo a/w Adv. Tanushree Sangavi
and Adv. Aarti Suvarna

ORDER

Per- Ms. Lakshmi Gurung, Member Judicial

1. The present application has been filed by the Employees Provident Fund Organization (“**EPFO/Applicant**”) under Section 60(5) of the Insolvency & Bankruptcy Code, 2016 (“IBC, 2016”) against the Liquidator (“**Respondent**”) of M/s. Enviiro Bulkk Handling Systems Private Limited (“**Corporate Debtor**”), seeking following reliefs: -

- a. That Hon’ble Adjudicating Authority be pleased to direct the Liquidator to accept the entire PF claim and categorize PF Interest and Damages along with PF contributions under Section 36(4)(a)(iii) as out of Liquidation Estate.*
- b. The delay in filing the present appeal if any may be condoned.*
- c. Any other order as this Adjudicating Authority may think just and proper in the facts and circumstances of the case to meet the ends of justice.*

Facts of the case succinctly stated:

2. The Corporate Debtor was admitted to CIRP on 04.12.2017. Subsequently, liquidation order was passed on 27.03.2019, and the Respondent was appointed as liquidator. The claims

were invited from the creditors of the Corporate Debtor with the last date for submission of claims was 26.04.2019.

3. The Applicant submitted its first claim on 20.06.2019 after passing the order under section 7A of Employees Provident Funds and Miscellaneous Provisions Act, 1952 (**“EPF Act”**) for an amount of Rs. 37,15,123/-.
4. An additional claim was filed on 08.09.2020 wherein the Applicant had claimed a consolidated amount of Rs. 43,47,199/- as follows:

	Particulars	Amount
1.	PF contribution u/s 7A assessed on 20.06.2019 for the period from April 2015 to August 2018	37,15,123/-
2.	Interest & Penal Damages u/s and 7Q & 14B	6,32,076/-
	Total	43,47,199/-

5. The Liquidator sought a clarification and break up of claim via letter dated 03.11.2020 and the same was provided by the Applicant via mail dated 05.11.2020.
6. In the meantime, e-auction was conducted on 18.03.2021 and CD was sold as going concern to the successful bidder. The liquidator executed Certificate of Sale dated 08.04.2021

and delivered the assets of the Corporate Debtor to the successful bidder.

7. After the completion of e-auction and receipt of full payment amounting to Rs. 15,30,00,000/-, Respondent also made a public announcement on 01.05.2021 that the Corporate Debtor was successfully sold as a going concern.
8. On 10.05.2021, Respondent released an amount of Rs. 37,15,123/- which was demanded by the Applicant under section 7A of the EPF Act to the Applicant which has been admitted.
9. After the sale of the Corporate Debtor as going concern, the Applicant submitted its revised claim dated 18.06.2021 for an amount of Rs. 38,00,982/-. The said revised claims pertain to the dues of interest under Section 7Q of EPF Act and damages under Section 14B of EPF Act which were provisionally assessed vide Order dated 16.06.2021 by the Authorized Officer Assistant Provident Fund Commissioner, EPFO. Therefore, the total demand by the Applicant was for Rs. 44,33,058/- (balance amount of Rs. 6,32,076/- under section 7Q and 14B in claim dated 08.09.2020 and additional claim of Rs. 38,00,982/-).
10. In response to this, the Liquidator vide letter dated 02.07.2021 rejected the claim of the Applicant dated 18.06.2021 *interalia* stating as follow:
 1. *The claim dated 12.05.2021 ("Second Claim") was filed by you in addition to your First Claim and the same is*

based an ex-parte order wherein you have claimed damages amounting to Rs. 44,33,058/- under Section 7Q and 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

2. *It is stated under Section 33(5) of the Insolvency and Bankruptcy Code, 2016 ("Code") that after the commencement of the Liquidation Process, one cannot initiate or institute any proceeding without prior approval of the Hon'ble National Company Law Tribunal.*
3. *The Second claim has been submitted by you after the sale of the Corporate Debtor as a going concern and even distribution of the sale amount to you as per your First Claim. Hence, the provisions of Code along with the Liquidation Regulations do not permit or empower the Liquidator to entertain or consider such claims which have been (a) submitted much after the prescribed time period, (b) made even after distribution of liquidation proceeds to you.*

11. The Liquidator vide letter dated 13.09.2021, in response to the revised claim, informed the Applicant that their dues under Section 7A of EPF Act stood paid in full.

12. The Liquidator also sent a demand draft of Rs. 12,44,154/- vide DD No. 358579 towards dues under Section 7Q of the EPF Act in full. He further informed the Applicant that the remaining balance amount claimed with respect to the damages under Section 14B of the EPF Act, in the revised claim would be processed as per the provisions of Section 53 of the Code.

Applicant's submission:

13. The jurisdiction to determine the PF dues rests exclusively with statutory authority defined under the Act. Copy of assessment orders for penal damages and interest were already provided to the Liquidator via email dated 08.09.2020 and same constitute sufficient proof of claims.
14. The assessment order dated 20.06.2019 while assessing the PF dues under section 7A specifically mentioned that corporate debtor is further liable to pay damages and interest under EPF&MP Act,1952.
15. The Liquidator has failed to appreciate that entire PF dues are kept out of Liquidation Estate and are well protected under Section 36(4) of IBC. According to the applicant PF dues include PF contributions under section 7A, interest under section 7Q and damages under section 14B of the EPF Act. The Liquidator has remitted only a part of PF dues.
16. The Liquidator failed to appreciate that under the provision of Section 7Q, the interest on the belated contribution is required to be paid up to the date of actual payment. The words actual payment means the date when amount is received in the fund. Section 7Q which provides for interest for belated payment is basically a compensation for payment of interest to the affected employees.

17. The Applicant relied on the judgement of of ***Maharashtra State Coop Bank Ltd V/s Kannad Sahakari Sakhar Karkhana Ltd & Ors. (2014) 14 SCC 456***, wherein, the Hon'ble Supreme Court vide its order dated 01.07.2013 held that dues not only under Section 7A but also interest payable under Section 7Q and damages leviable under Section 14B of the EPF Act are part of "any amount due from an employer" under the Act and therefore should have been released on priority.
18. The Liquidator also failed to appreciate that the scheme mandates that interest declared is required to be credited in the account of the employee till the settlement of the claim. The office claimed the pending dues of Rs 44,33,058/- for penal damages and Interest amount for assessed PF contributions for periods up to August, 2018 via e-mail dated 12.05.2021. The Liquidator was already aware of liability of penal damages and interest due through letters dated 24.09.2019, 29.11.2019 and assessment order dated 20/06/2019 and erred in releasing the partial PF dues.
19. The Liquidator failed to appreciate that u/s section 14B of EPF Act, the damages are to be recovered from the establishment which is part of the "amount due under the Act" as held by the Hon'ble Supreme Court in Maharashtra State Co-operative bank case.

20. The Applicant also relied on ***V-con Integrated Solutions Pvt. Ltd. vs Acharya Techno Solutions (India) Pvt. Ltd (2021) ibclaw.in 640 NCLT*** wherein, NCLT, Kochi Bench held that the contribution, interest and damages payable by the Corporate Debtor under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, are statutory dues and not claims which can be submitted to the Liquidator.
21. Applicant states that as per the provisions of the EPF Act, the workmen/employees right to claim full provident fund with interest and damages will never ever be extinguished as per the principle laid down by Supreme Court in ***Som Prakash Rekhi vs Union of India, (1981) 1 SCC 449***.

Reply by Respondent:

22. The Respondent submitted that after verifying and perusing the documents, he admitted the claim of the Applicant towards dues under Section 7A and 7Q of the EPFO Act for Rs. 49,59,277/- and the same stands released in two instalments of Rs. 37,15,123/- and Rs. 12,44,154/-.
23. The unpaid claim amount pertains to damages under Section 14B of EPFO Act which was imposed by Order dated 16.06.2021, after initiation of CIRP as well as Liquidation Process against the Corporate Debt
24. As per Section 14B of the EPFO Act, there are certain reduction and waiver of the damages provided to the sick

companies. The Central Board is empowered to waive the damages under Section 14B of the EPFO Act. The provisions provide that Board can recommend waiver of damages up to 100 per cent and the same may be allowed. After enforcement of the Code, the provisions of Board for Industrial and Financial Reconstruction and Sick Industrial Companies (Special Provisions) Act, 1985 were repealed and earlier statutory regime for rehabilitation is now substituted by Insolvency Regime as contained in the Code. Thus, when CIRP or Liquidation Process has been initiated against a Corporate Debtor and Resolution plan / sale as a going concern has been approved under the Code, power of Central Board to reduce or waive the damages can be exercised with regard to the damages imposed under Section 14B of the EPFO Act.

25. The claim filed by the Applicant is hopelessly time barred since the Applicant filed the same after the expiration of 783 days. Great prejudice will be caused to the stakeholders of the Corporate Debtor and will set a dangerous precedent if the said Application is allowed. It will encourage all the other creditors who failed to file their claims in time to come before the Hon'ble Tribunal even when the Corporate Debtor has been sold as going concern and also the Final Report along with Form H is also on record.
26. The Respondent submitted that after selling the Corporate Debtor as going concern the Liquidator distributed the money

amongst the stakeholders including the Applicant as the provisions of Section 53 of the Code. The financial creditors of the Corporate Debtor have got 10.22%, the operational creditors 0% but the Applicant's dues amounting to Rs. 49,59,277/- under section 7A and 7Q have been fully paid.

27. In light of the above, the Respondent submitted that the present application is to be dismissed.

Analysis and Findings:

28. We heard the Ld. Counsel for the applicant and the Respondent on 03.01.2024 and 10.10.2023. Perused the record. Since we have heard the appeal on merits, the delay in filing the appeal is condoned.

29. It is noted that the dues claimed by the Applicant under Section 7A and 7Q of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 amounting to Rs. 49,59,277/- have already been released in full i.e. Rs. 37,15,123/- on 10.05.2021 and Rs. 12,44,154/- on 09.09.2021. The controversy in the present case is limited to unpaid dues claimed by the applicant for damages under section 14B of the EPF Act.

30. The Applicant has relied on the decision of Hon'ble Supreme Court in ***Maharashtra State Cooperative Bank case*** (supra) to contend that the damages under section 14B are part of "*any amount due from an employer*" under the EPF Act and therefore should have been released on priority as PF

dues. According to the Applicant the entire PF dues under section 7A, and 14B of the EPF Act are to be kept out of Liquidation Estate as provided under Section 36(4) of IBC and should have been released to the Applicant before distribution of the assets of the Corporate Debtor.

31. Per contra, the submission of the Respondent is that the damages claimed under section 14B of EPF Act was imposed by Order dated 16.06.2021 which was much after initiation of CIRP as well as Liquidation order of the Corporate Debtor, hence are to be paid in accordance with section 53 of IBC.
32. The Respondent further submitted that the Corporate Debtor had been sold as a going concern vide Certificate of Sale dated 08.04.2021. The Applicant submitted its revised claim dated 18.06.2021 for an amount of Rs. 38,00,982/- after the Corporate Debtor had been sold as a going concern under the provisions of Insolvency and Bankruptcy Code, 2016 therefore, it is a fit case where the Central Board can allow waiver of the damages under Section 14B of EPF Act.
33. Considering the rival contentions, the question that arises for our consideration is as follows: -

Whether the penal damages assessed under section 14B of the EPF Act are covered under Section 36(4)(a)(iii) of the IBC, 2016 and are required to be excluded from liquidation estate of the Corporate Debtor in liquidation?

34. Before we proceed to deal with damages under Section 14B damages, it is made clear that since interest u/s 7Q has already been paid by the Liquidator, hence, we are not dealing with it in the present case and the same may be dealt with in any appropriate matter.

35. We refer to section 36(4) of the Code which is reproduced below:

“36(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) Xxxxxxx

(ii) xxxxxxxxx

*(iii) **all sums due to any workman or employee** from the provident fund, the pension fund and the gratuity fund;”*

36. It can be seen from the bare reading of the provisions of Section 36(4)(a)(iii) of IBC, what are to be excluded from the liquidation estate of the Corporate Debtor in liquidation are the assets owned by a third party including all sums due to any workman or employee from the provident fund. In other words, if any amount is owned, by any workman or employee from the provident fund, then such amount ought to be excluded from the liquidation estate of the Corporate Debtor and cannot be used for distribution under section 53 of the

Code. Therefore, the moot question is whether the amount collected by PF Department under section 14B is owned by the identified/ascertained workmen or employee of the Corporate Debtor.

37. During the hearing of the matter on 10.10.2023, we passed the following order:

“I.A. 2428/2021

Heard the matter in part. Arguments not concluded.

Ld. Counsel appearing for the Applicant seeks one more opportunity to seek instructions from the provident fund authority about the distribution of the fund collected under section 14B as damages from the employers and whether distributed to the employees or distributed to the general administrative part. In the meantime, liberty is granted to both the parties to file their written submissions before the next date of hearing.”

38. On 03.01.2024 when this matter was called none appeared for the Applicant. The applicant neither replied to the query of this Court nor has filed any written submission in this regard despite grant of enough opportunities. The Applicant has nowhere in its application or during oral hearings stated that the damages collected from employer under section 14B of the EPF Act are dues owned by the employees and to be paid to them individually. We are conscious of the fact that the EPF Act is a beneficial piece of legislation and provides for social security of the employees/ fund members. Even if damages, under section 14B of EPF Act, collected by PF

authority might be utilized for the overall benefits of the employees in general, from a general/common pool. In other words, damages under section 14B of EPF Act are nothing but Government/statutory dues payable to Provident Fund Department.

39. As the Applicant has failed to establish that the damages under Section 14B of the EPF Act are owned by workmen or the employees as their dues under Provident Fund Act, this Adjudicating Authority comes to an inevitable and inescapable conclusion that damages under section 14B of the EPF Act are not the **“sums due to any workman or employee from the provident fund”** and therefore are not covered under Section 36(4)(a)(iii) of the IBC, 2016. The question is accordingly answered in negative holding that damages under section 14B of EPF Act are not covered under Section 36(4)(a)(iii) of the IBC, 2016 and are not required to be excluded from the liquidation estate of the Corporate Debtor in liquidation.
40. Looking at the facts of the present case from another aspect, it would not be out of context to refer to the judgment of Hon'ble NCLAT in the case of **Regional Provident Fund Commissioner, Vatwa, Employees Provident Fund Organization Vs. Shri Manish Kumar Bhagat Company Appeal (AT) (Insolvency) No. 808 of 2022, decided on 11.10.2023.**

41. In the above case, the issue before Hon'ble NCLAT was whether or not to direct the Successful Resolution Applicant for payment of inter alia damages under Section 14 B of EPF Act. Damages u/s 14B arose on account of assessment on 14.10.2019 for an amount of Rs. 68,54,869/- and on 25.07.2017 for an amount of Rs. 31,16,446/-.

42. The Hon'ble NCLAT held that the damages imposed by order dated 18.10.2019 was subsequent to CIRP imposition of moratorium and held that no direction need to be issued for payment of damages under Section 14 B in following terms.

“10. We thus are of the view that it is not necessary in this proceeding to issue any direction for payment of the damages as imposed by the Order dated 18.10.2019 which was subsequent to CIRP imposition of moratorium. We thus are of the view that no direction need to be issued for payment of damages under Section 14B of Rs. 68,54,869/-.”

43. As far as damages amounting to Rs. 31,16,446/- which was imposed by order dated 25.07.2017, prior to commencement of CIRP moratorium, the Hon'ble NCLAT held as follows:

“14. In the facts of the present case as noted above, we are of the view that Successful Resolution Applicant along with the order of this Tribunal may pray to the Central Board of waive 100 percent damages of Rs. 31,16,446/- imposed by order dated 25.07.2017 under Section 14B which step to be taken by SRA within a period

of one month from today. We grant liberty to both the parties to make an appropriate application in this Appeal, if any, occasion arises for any further order with regard to wavier as recommended herein.”

44. In the present case CIRP commenced on 04.12.2017. The first order of damages under Section 14B of EPF Act was passed on 16.04.2018 and second order of damages was passed on 16.06.2021, both after the commencement of CIRP. As both the orders imposing the damages under Section 14B are post CIRP period, no direction can be given for making payment when the payments have already been made as per the provisions of section 53 of IBC and the dues under section 14B of EPF Act has been treated as statutory dues.
45. Now, we deal with the cases relied upon by the Applicant. In the case of ***Maharashtra State Cooperative*** (supra), the Hon’ble Supreme Court referred to its earlier judgment of ***Maharashtra State Coop. Bank Ltd. V. Provident Fund Commissioner (2009) 10 SCC 123*** and dismissed the SLP. The issue before the Hon’ble Court was in the context of statutory priority to be given to the amount due from employer viz. a viz. all other debt including secured creditors during winding up and not under IBC. Hence, the above judgment is of no avail to the Applicant.
46. The Applicant has further relied upon the judgment of Hon’ble Supreme Court in ***Som Prakash Rekhi Vs. Union of India and Anr. (1981) 1 SCC 449***. This case was in the

context that Regulation 16 of Trust Deed which provided for deduction of PF amount from the pension payable to the employees, which was contrary to the provisions of EPF Act and Pension Fund Scheme. In that context the Hon'ble Supreme Court held that benefits under PF Act cannot be extinguished, in following terms:

“67. We must realise that the pension scheme came into existence prior to the two beneficial statutes and Parliament when enacting these legislations must have clearly intended extra benefits being conferred on employees. Such a consequence will follow only if over and above the normal pension, the benefits of provident fund and gratuity are enjoyed. On the other hand, if consequent on the receipt of these benefits there is a proportionate reduction in the pension, there is no real benefit to the employee because the Management takes away by the left hand what it seems to confer by the right, making the legislation itself left-handed. To hold that on receipt of gratuity and provident fund the pension of the employee may be reduced pro tanto is to frustrate the supplementary character of the benefits. Indeed, that is why by Sections 14 and 14 overriding effect is imparted and reduction in the retiral benefits on account of provident fund and gratuity derived by the employee is frowned upon. We, accordingly, hold that it is not open to the second respondent to deduct from the full pension any sum based upon Regulation 16 read with Regulation 13. If Regulation 16 which now has acquired statutory flavor, having been adapted and

continued by statutory rules, operates contrary to the provisions of the PF Act and the Gratuity Act, it must fail as invalid. We uphold the contention of the petitioner.”

47. There is one more aspect of the present case. The Corporate Debtor has already been sold as a going concern during liquidation process under IBC and the sale proceeds have been distributed to the stakeholders as per the provisions of section 53 of IBC. We have already held that damages under section 14B of the EPF Act are not covered by Section 36(4)(a)(iii) of the IBC, 2016. For all the reasons discussed above, no direction is required to be given to the Respondent.

48. Accordingly, the present application is **dismissed**. No order as to cost.

Sd/-

**CHARANJEET SINGH GULATI
(MEMBER TECHNICAL)**

Sd/-

**LAKSHMI GURUNG
(MEMBER JUDICIAL)**