IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH
I.A/176/KOB/2020
In
MA/05/KOB/2020 in TIBA/01/KOB/2019

(Under Sections 35(1)(n) & 60(5) of IBC 2016)

Order delivered on 18th day of February, 2021

Coram:

Hon'ble Shri Ashok Kumar Borah, Member (Judicial)

In the matter of

V-Con Integrated Solutions Pvt. Ltd …Applicant/Operational Creditor

Versus

1. Acharya Techno Solutions (India) Pvt. Ltd. …Respondents/Corporate Debtor
2. The Commissioner, EPFO, Regional Office, Pattom, Trivandrum
   (**Impleaded vide order dated 14.12.2020 in MA/197/KOB/2020)**

   (Through the Liquidator Shri Shawn Jeff Christopher, Liquidator)

Parties/Counsel present (through video conference)

For the Liquidator	:	Liquidator in person
For the Respondent	:	Mr.A.Rajasimhan, Advocate

ORDER

This IA/176/KOB/2020 has been filed by the Liquidator in the matter of Achariya Techno Solutions(India) Pvt Ltd under Sections 35 (1) (n) and 60 (5) of Insolvency and Bankruptcy Code 2016 [hereinafter referred to as 'I&B Code,2016'] seeking the following relief:

- To issue appropriate directions for dealing with the claim of EPFO department, under Section 35 (1) (n) and 60 (5) of I&B Code,2016 to discharge the duties of the Liquidator.

2. This Tribunal vide order dated 19.02.2020 in MA/05/KOB/2020 ordered liquidation of M/s. Achariya Techno Solutions (India) Pvt Ltd [Corporate Debtor] under Section 33(2) of I&B Code,2016. The Resolution Professional Shri. Shawn Jeff Christopher appointed as Liquidator of the Corporate Debtor under Section 34 of I&B Code,2016.

3. When the commencement of Liquidation process was notified to all concerned authorities, on 06.05.2020 the EPFO sent letter to the Liquidator stating that the dues under Employees Provident Funds and Miscellaneous Provisions Act, 1952 do not form part of the Liquidation Estate under Section 36 (4) (a) (iii) of the I&B Code,2016. Upon verification by the Liquidator, it was found that Corporate Debtor was not maintaining any kind of funds earmarked for Provident Fund payments. Therefore, the Liquidator sent a letter dated 03.06.2020 to the EPFO requesting to submit their claims in Form G and another letter on 24.07.2020 requesting to provide proof to substantiate their claim. However, no intimation has been received till date.

4. The Liquidator further stated that he has received claims of Provident Fund dues from the employees of the Corporate Debtor along with their salary dues, which amounts to ₹73,83,186/-. Besides that, the Liquidator has also received claims from the Operational Creditor ₹1,97,86,039, Unsecured Financial Creditors of ₹1,00,56,824.57 and statutory Authorities (without EPF dues) amounting to ₹1,08,49,474/-.

5. When the application was filed the Liquidator did not make the EPFO authorities as party to the application. Hence, the Liquidator was directed file an IA making EPFO as a party in this IA. Hence, the Liquidator filed MA/197/KOB/2020 to implead the EPFO as additional Respondent in this IA. That MA was allowed wide order dated 14.12.2020 and the Commissioner, EPFO was impleaded as 2nd Respondent and he was directed to file a counter to this application.

6. In the reply statement the 2nd Respondent stated that EPFO is a statutory body and the contribution, interest and damages payable under Section 7A, 7Q and 14 B of the Employees Provident Funds and Miscellaneous Provisions Act,1952[hereinafter referred to as the 'EPF &MP Act 1952'] are statutory dues and not claims which can be submitted to the Liquidator in Form G.

7. It is further stated that Section 53 of the I&B Code 2016 is not applicable to the recovery of dues which do not form part of the Liquidation Estate under the I&B Code 2016, by virtue of Section 36 (4) (a) (iii). They have referred to the decision of the Hon'ble Supreme Court in the matter ***Kushal Ltd V. Regional Provident Fund Commissioner -1, and others [Civil Appeal No. 1920 of 2020]*** to buttress their contentions.

8. It is also stated 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. Thus the defaulted contribution statutorily due up to the month of June 2018 alone has to be determined under Section 7 A of EPF &MP Act 1952. Therefore, only after the actual payment or recovery of the defaulted contribution, the quantum of interest and penal damages under Section 7 Q and 14 B of the EPF &MP Act,1952 respectively can be ascertained. The defaulted statement has already been communicated to the Liquidator in Annexure III and V. Hence the Respondent prayed for dismissal of the Application.

9. I have heard the Learned Liquidator and had gone through the documents produced by the Liquidator and the reply of Respondent. I have also gone through the provisions under Section 7A, 7Q and 14 B of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 relied on by the Respondent, which is quoted as under: -

> ***7A. Determination of moneys due from employers. —2***
>
> *[(1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order,— (a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and (b) determine the amount due from any employer under any provision of this Act, the Scheme or the 3 [Pension] Scheme or the Insurance Scheme, as the case may be, and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary];*
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> *(2) The officer conducting the inquiry under sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), for trying a suit in respect of the following matters, namely:— (a) enforcing the attendance of any person or examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavit; (d) issuing commissions for the examination of witnesses; and any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code (45 of 1860).*

*(3) No order 4 *** shall be made under sub-section (1), unless [the employer concerned] is given a reasonable opportunity of representing his case.*

[(3A) Where the employer, employee or any other person required to attend the inquiry under sub-section (1) fails to attend such inquiry without assigning any valid reason or fails to produce any document or to file any report or return when called upon to do so, the officer conducting the inquiry may decide the applicability of the Act or determine the amount due from any employer, as the case may be, on the basis of the evidence adduced during such inquiry and other documents available on record.] 7

[(4) Where an order under sub-section (1) is passed against an employer ex parte, he may, within three months from the date of communication of such order, apply to the officer for setting aside such order and if he satisfies the officer that the show cause notice was not duly served or that he was prevented by any sufficient cause from appearing when the inquiry was held, the officer shall make an order setting aside his earlier order and shall appoint a date for proceeding with the inquiry: Provided that no such order shall be set aside merely on the ground that there has been an irregularity in the service of the show cause notice if the officer is satisfied that the employer had notice of the date of hearing and had sufficient time to appear before the officer.

7Q. Interest payable by the employer. —

The employer shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment: Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank.]

14B. Power to recover damages. —

Where an employer makes default in the payment of any contribution to the Fund [Pension] Fund or the Insurance Fund] or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 [or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of [any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, [the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf] may recover [from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:]

[Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard]:

[Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, subject to such terms and conditions as may be specified in the Scheme.]

10. From a reading of the above Sections, 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.

11. . In view of the above, the Liquidator is directed to consider the Claims of EPFO made by them vide Annexure A III dated 6th May 2020 and Annexure V dated 12th June 2020 in which the amount due from M/s. Achariya Techno Solutions Private Limited with P.F Code No. KR/TVM/1188107 for the period up to June 2018 has been indicated, while determining the amount payable to the stakeholders in this matter.

12 With the above direction IA/176/KOB/2020 is disposed of.

Dated this the 18th day of February 2021

Sd/-

(Ashok Kumar Borah)
Member (Judicial)