

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

(Exercising powers of Adjudicating Authority under
The Insolvency & Bankruptcy Code, 2016)

I.A NO. 232/2022

Under Section 35 (1) (n) R/W Section 53 &
60 (5) (C) of I & B Code, 2016in

C.P (IB) No.320/BB/2019

u/s 7 of the IBC Code r/w Rule 4 of
Insolvency and Bankruptcy 2016

In the matter of:

Shri Addanki Haresh

Liquidator of Right Engineers and
Equipments India Private Limited,
Bellary Road, Ganganagar,
Bengaluru – 560032

Applicant/Liquidator

Versus

**Recovery Officer,
Employees Provident Fund Organisation**

Regional Office, Electronic City,
Annapurneshwari Complex,
Survey No. 37/1, 6th Main,
Singasandra, Hosur Main Road,
Bengaluru – 560068

Respondent

Order delivered on: 20th July, 2023

Coram: 1. Hon'ble Justice (Retd.) T Krishnavalli, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Parties/Counsels Present:

For the Applicant : Shri Addanki Haresh
For the Respondent No.1 : Shri Saravana.P

Per: Manoj Kumar Dubey, Member (Technical)

ORDER

1. This application is filed on 17.06.2022 by Shri Addanki Haresh the Liquidator of Right Engineers and Equipments India Private Limited, under Section 35 (1) (N) r/w Section 53 and 60 (5) (C) of Insolvency and Bankruptcy Code, 2016 *inter alia* seeking to pass an order/direction whether the amounts claimed and payable by the Respondent PF Organisation under Section 7A and 7Q of EPF and MP Act, 1952 are the sums due to workmen and employees from the provident fund and to be considered in priority over other dues; pass an order whether the amounts towards the damages claimed by the Respondent PF

Organisation under Section 14B of EPF & MP Act 1952 are dues to the Central Government and to be treated u/s 53 (1) (e) (i) of the IBC 2016.

2. It is stated that the Adjudicating Authority initiated CIRP process of the Corporate Debtor on 29.10.2019 and appointed the Applicant Mr. Addanki Haresh as IRP and later he was appointed as RP. Further, the maximum period permitted for completion of CIRP expired was on 26th April 2020 and the same was further extended upto 22nd November 2020. Even though one resolution plan was received during CIRP, but the same was not approved by the Committee of Creditors. Therefore, the RP after discussion with the members of the COC filed an application for liquidation of the Corporate Debtor. Vide order dated 2.12.2020, the Adjudicating Authority initiated Liquidation process of the Corporate Debtor by appointing the Applicant as a Liquidator.
3. The Respondent-Organisation submitted a delayed claim in Form-C under Regulation 17 of the IBBI (Liquidator Process) Regulation 2016 and hence the same was rejected by the Liquidator. Aggrieved by the order of the Liquidator, EPFO appealed to the Hon'ble Adjudicating Authority (AA) and the AA directed the Liquidator to consider the claim. Accordingly, the Liquidator verified and admitted the claim. In addition to the amounts claimed by EPFO in the Form C, the books of accounts of Corporate Debtor reflected certain liabilities towards the Members PF contribution and the Employers PF contribution outstanding for the period prior to the commencement of CIRP. The details of the outstanding amount towards provident claim are as under:

| S. No. | Claim Details | Amount | Remarks |
|--------|--|--------------------|--------------------------------------|
| 1. | Pre-CIRP dues of Member PF Contribution | 9,78,965/- | As per the books of CD at Annexure-7 |
| 2. | Pre-CIRP dues of Company PF Contribution | 10,60,649/- | As per the books of CD at Annexure-7 |
| 3. | Damages u/s 14B and Interest 7Q | 9,08,117 | As per the claim Form C |
| | Total | 29,47,731/- | |

4. Further, for the purpose of liquidating the Corporate Debtor, Liquidator has to form estate of the assets of the CD as per Section 36 of the I & B Code 2016. As per Section 36 4 (a) (iii) of IBC 2016 dedicated funds created internally (plan funds) for PF, Gratuity Pension, Leave encashment etc., will not form

part of liquidation estate. However, in the instant case of the present CD, separate fund has not been created.

5. It is submitted that the NCLT and Hon'ble NCLAT in their orders during last four years have held that the amounts due and payable to any workmen or employees from the provident fund, pension fund and gratuity fund are the assets of the workmen/employees and hence shall not be included in the liquidation estate to be distributed pursuant to the order of priority as set out in Section 53 of the IBC. It may also be observed that dues payable to the workmen includes both the employee and employer contribution to the funds and hence it has been held by the NCLT/NCLAT that the entire arrears towards the provident fund should be liquidated before paying off the other creditors of the Company under liquidation. In certain other cases, it was held by the Appellate Authorities that unfunded Provident Fund and Gratuity Dues i.e., PF amounts for which funds were not kept separately, the claims of PF department need to follow the priority as set out in Section 53 (1) (e).
6. It is stated that the Respondent Organisation made a claim of Rs. 9,08,117/- towards damages, and the books of Corporate Debtor has shown an amount of Rs. 9,78,965/- towards the Member PF Contribution and Rs. 10,60,649/- towards Company PF Contribution. Thus the total amount payable to EPFO is Rs. 29,47,731/-. Further the amount levied as damages u/s 14B of the EPF & MP Act, 1952 amount to Rs. 9,08,117/- by the Respondent Organisation will not be paid to any single workman or employee of the company, these damages will be paid to the department only, therefore these damages will clearly fall under the category of Government dues under section 53 (1) (e) (i) of IBC 2016.
7. It is further submitted that the total admitted secured claims of the Corporate Debtor are around Rs. 17.44 cr. and the total realised amount from the sale of the Corporate Debtor is around Rs. 11.42 cr. Therefore there could be huge haircut of 6.50 Cr (About 34%) in the amount payable to the Secured Creditors who are the back bone of the Corporate Debtor. If the amount is allowed to be paid to the EPFO, there would be further haircut to the Secured Creditors. In view of his submission in the application, the Applicant has also relied on various case laws:

- i. *Sunil Kumar Jain vs. Sundaresh Bhat and others (ABG Shipyard case) (Civil Appeal No. 5910 of 2019) passed by Hon'ble Supreme Court of India;*
- ii. *Precision Fasteners Limited v. Employees' Provident Fund Organisation (M.A No. 576 & 752/2018) in C.P (IB) No. 1339/MB/2017), NCLT, Mumebai Bench dated 12th September 2018*
- iii. *Alchemist Asset Reconstruction Company Limited v. Moser Baer India, (IB) – 378 (PB)/2017) order dated 19.03.2019, NCLT, Principal Bench New Delhi*
- iv. *State Bank of India v. Moser Baer Karamchari Union and Ors (AT) (Insolvency) No. 396 of 2019 by Hon'ble NCLAT dated 19.08.2019;*
- v. *Lanco Infratech Limited in Company Appeal (AT) (Insolvency) No. 1229 of 2019 by Hon'ble NCLAT*
- vi. *The Regional Provident Fund Commissioner-I vs. Karpagam Spinners Private Limited ;*
- vii. *G.Madhusudhan Rao, Liquidator vs. Employee Provident Fund Organisation in I.A No. 639/2021 in CP(IB) No. 173/10/HDB/2017 by NCLT Hyderabad dated 4.05.2022;*

8. The Learned Counsel for the Respondent has filed the reply to the application vide Dy. No. 4973 dated 21.11.2022 contended as follows:

- i. It is stated that the Respondent Organisation is a statutory body established and governed under ministry of Labour and Employment, Government of India and it has to act in accordance with law and procedure vested with power to overlook the implementation of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and scheme framed thereunder and there is no personal grievance or enmity against anyone. The Respondent Organisation under Section 5C of the Act as per the powers vetted by the Central Board of Trustees, Employees Provident Fund Organisation herein after referred as CBT, EPFO. However, CBT, EPFO has to be parties to this appeal. This non-joinder of the CBT, EPFO as parties to this appeal makes in devoid of merits.
- ii. It is submitted that the Corporate Debtor M/s. Right Engineer and Equipment India Private Limited, Jigani Industrial Area, Bangalore is covered establishment under the EPF and MP Act, 1952 having allotted a PF Code PY/BOM/46936. Further submitted that as per order dated 09.11.2021 this AA directed the liquidator to consider the claim of the Respondent Rs.9,08,117/- and subsequently on verification of records, it was noticed that the Corporate Debtor is defaulter of PF dues and the Applicant vide his application 16.06.2022 confirmed that from 7/2018 to 10/2019 the Corporate Debtor shall liable to pay PF dues Rs. 20,39,614/- . In this regard, the authority vide letter dated 27.07.2022 directed the

Liquidator to consider the claim forthwith for release of Rs. 55,02,064/- as per the following:

| S. No. | Order No. and Date | Period | Under Section | Outstanding Dues |
|--------|----------------------------------|-------------|---------------|------------------|
| 1. | Dues u/s 7A /Probable dues of 7A | 07/18-10/19 | 7A | Rs. 20,39,614 |
| 2. | Dues u/s 14B | 04/14-06/18 | 14B | Rs. 5,87,819/- |
| 3. | Dues u/s 14B | 04/14-06/18 | 7Q | Rs. 3,20,298/- |
| 4 | Anticipatory dues u/s 14B | 07/18-10/19 | 14B | Rs. 17,25,901/- |
| 5. | Anticipatory dues u/s 7Q | 07/18-10/19 | 7Q | Rs. 8,28,432/- |
| | Total | | | Rs. 55,02,064/- |

- iii. It is further submitted that the Corporate Debtor establishment is covered under the provisions of the EPF & MP Act, 1952. So for the purposes of liquidating the corporate debtor in relation to the PF dues including interest do not form part of the liquidation estate and also any amount dues levied by the Respondent should not waited under the waterfall mechanism as decided in order of Hon'ble NCLT, Division Bench Chennai on 02nd June 2022.
- iv. It is specifically subjected that the Act and schemes framed thereunder are very specific regarding levy of damages and the quantum of damages to be levied. The Section 14B of the Act empowers to recover the damages for the belated payments by way of penalty such damages not exceeding the amount of arrears as may be specified in the scheme. The provisions of Para 32A of the Employees' Provident Fund Scheme 1952 is extracted in the reply.
- v. It is submitted that the Corporate Debtor/Appellant bound under purview of the said act are bound to pay the contribution as per the provision of Section 6A of the said Act read with Para 38 of the EPF Scheme, 1952 before 15th of the following month to which the dues relates, any belated remittance shall attract damages and interest payable under Section 14B and 7Q of the said act. Further submitted that on the requirements of mens rea for levy of damages on the ground of its penal nature, it is very relevant to mention that the damages levied as penalty under Section 14B is not to be compared with the penalty in other general cases as the damages levied under Section 14B is goingto augment the Trust Fund and not to the general pool of the State as inthe case of other penalties. The

interest levied under Section 7Q is levied only at simple interest whereas the interest credited to the members/employees is at compound interest on monthly running balance. The liability by way of pension is much higher and the ever increasing defaulting nature of various employers is likely to affect the entire scheme if it is continued. The absence of corresponding provision similar to para 32B in EPF scheme 1952 and Para 8B of EDLI Scheme 1976 in employees' Pension Scheme 1995 regarding the waiver/reduction of damages by the Central Board reveals of the concern of the legislature on the depletion of the Pension Fund.

- vi. It is also submitted that there will be heavy burden on the Fund to pay the interest to the members on monthly running balances on the wages of the members of the whole back period months irrespective of the belated remittances made by the Petitioner. The contents of the para are matter of record and verifiable in nature and pertains to Corporate Debtor, notwithstanding the above, it is submitted that the provident fund and allied dues have priority on all other dues. Further based on the assurance of the Liquidator that the penal damages and Interest and Provident Fund dues if any shall be paid upon completion of the Liquidation process. Now, the Liquidator seeking direction the amount claimed and to considered in priority over other dues and also the amount towards the damages claimed are dues to the Central Government and to be treated u/s 53 (1) (e) (i) of IBC 2016. It is clear that the Respondent has adjudicated the inquiry proceeding within frame work of EPF and MP Act and scheme framed thereunder and not override IBC Code 2016. The Learned Counsel for the Respondent has also relied upon the order passed by the co-ordinate Bench NCLT Chennai in I.A No. 818/IB/2020 in CP No. 1226/IB/2018 dated 02.06.2022 in the matter of *the Regional Provident Fund Commissioner vs. R.L Logistics Private Limited* in which the Tribunal relied upon the *Hon'ble Apex Court judgement in the case of Maharashtra State Co-operative Bank Limited vs. Provident Fund Commissioner (2009) 10 SCC 123* and held that:

"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.

9. The Learned Counsel for the Applicant has filed rejoinder vide Dy. No. 5521 dated 19.12.2022 and the same is taken on record.
10. Heard the Learned Counsel for the Applicant and Learned Counsel for the Respondent and carefully perused the records.
11. It is apt to refer the provision of sub-section (4) of Section 36 of the Insolvency and Bankruptcy Code, 2016 and the *said Section reads as under:*

Section 36 - Liquidation Estate

(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)

(ii)

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

(iv)

(v)

(b)”

12. A plain reading of the above provisions makes it clear that the Liquidator is empowered to include only those assets as part of liquidation estate which are defined under the provisions of sub-section (4) of Section 36 of the Code. Therefore, the Applicant/Liquidator cannot include the sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund as part of liquidation estate of the corporate debtor. The Applicant has cited the NCLAT decision in the case of Mr. Savan Godiawala (supra) in which it is held that *“where no statutory funds are created by the Corporate Debtor, then in that situation the liquidator cannot be directed to make the payment of the statutory dues to the employees since the liquidator does not have the domain to deal the properties of the Corporate Debtor, which are not a part of the liquidation estate.”*

13. However, the Hon'ble Apex Court in a recent decision dated 07.02.2023, the matter of *State Bank of India vs. Moser Baer Karamachari Union & Anr.* [(2023) *ibclaw.in* 14 SC]), has upheld the order passed by the NCLT, Principal Bench in *Alchemist Asset Reconstruction Co. Ltd. vs. Moser Baer India Ltd.* (2019) *ibclaw.in* 818 NCLT) whereunder the NCLT vide order dt. 19.03.2019 held that the 'Provident Fund Dues', 'Pension Fund Dues' and 'Gratuity Fund dues' cannot be part of Section 53 of the Code. In so far as the decision of Hon'ble NCLAT in the decision of *Mr. Savan Godiawala (Supra)* the Hon'ble Apex court observed that the Hon'ble NCLAT has passed an order in that case due to ignorance of its earlier order dated 19.08.2019, in the case of *State Bank of India vs. Moser Baer karamachari Union & Anr.* which has been affirmed by the *Hon'ble Apex Court in Civil Appeal No. 258 of 2020 (supra)*. Accordingly, the decision of Hon'ble NCLAT in the case of *Mr. Savan Godiawala (supra)* does not survive.

14. In so far as the damages is concerned, Section 14B of the EPF and MP Act, 1952 deals with powers to recover damages which reads as follows:

“14B. Power to recover damages.—

Where an employer makes default in the payment of any contribution to the Fund 3 [, the 2 [Pension] Fund or the Insurance Fund] or in the transfer of accumulations, accumulations required to be transferred by him under sub-section (2) of section 154[or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of 5[any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, 6[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 7[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 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme.”

15. It is stated that following the decision in I.A No. 264 of 2021, the Liquidator has already admitted the claim submitted by the EPFO. However, the total admitted secured claims of the Corporate Debtor is around Rs. 17.44 Cr and the total realised amount from the sale of the

Corporate Debtor is around Rs. 11.42 Cr., therefore there is a huge hair cut of 6.50 Cr., in the amount payable to the Secured Creditors and when the Secured Creditors are losing 34% of secured amount, it is not justified to pay the damages and penalties to the Respondent Organisation in priority over the amounts payable to the Secured Creditors of the Corporate Debtor.

- 16.** In this connection, it is relevant to refer the earlier orders passed by this Tribunal on 05.01.2023 in *I.A No. 130 of 2022 in CP (IB) No. 122/BB/2017 in the matter of Shri Vijay P Lulla, Liquidator of M/s. Bhuvana Infra Projects Private Limited v/s Axis Bank Limited and Anr.* and also in the case of *Employees Provident Fund Organisation vs Falcon Tyres Limited in I.A No.516 & 404 of 2022 in C.P (IB) No. 14/BB/2017 dated 02.06.2023*. In these orders, reliance was placed on the orders passed by Co-ordinate Bench NCLT, Kochi in *I.A(IBC)/321/KOB/2022 in IBA/21/KOB/2019 dated 02.12.2022* in the matter of *Regional Provident Fund Commissioner-II vs. Jasin Jose, IRP* and order passed by NCLT, Mumbai Bench-II on 29.07.2022 in *I.A No. 1694/2020, I.A No. 1086/2020 and I.A No. 1089 of 2020 in CP (IB) No. 1202/MB/C-II/2017* in the matter of *KSS Petron Vineet K Chaudhary vs. The Regional PF Commissioner*.

Following the ratio of the above referred orders, it is clear that the demand/claim raised prior to the moratorium will not form part of liquidation estate and should be paid in priority; secondly, the claim/demand and penalty raised during moratorium period is not allowable under the provisions of the IBC; and the penal damages claimed under Section 14B of EPF & MP Act, 1952 which is prior to the moratorium period will be treated under Section 53 of IBC, 2016.

- 17.** In view of the facts and circumstances of the law and considering the provisions of the code, we are of the opinion that the dues of workmen or employees from the provident fund do not come within the meaning of 'liquidation estate' for the purpose of distribution of assets under Section 53 of the Code. Accordingly, it is to be paid in priority over other dues. Therefore the Liquidator/Applicant is directed to distribute the amount of Rs.20,39,614/- towards the dues owned by Corporate Debtor to the

Employees Provident Fund Organisation in priority and the damages levied by Respondent Organisation for sum of Rs. 9,08,117/- under Section 14B of the EPF & MP Act 1952 which are dues of Government and will be paid in order of priority under Section 53 of IBC, 2016.

- 18.** In the result, **I.A No. 232 of 2022** in CP (IB) No. 320/BB/2019 is disposed.

Sd/-

(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)

Sd/-

(T.KRISHNAVALLI)
MEMBER (JUDICIAL)