

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

IA(IBC)/298/KOB/2022

IN

IBA/52/KOB/2019

(Under Section 60(5) of IBC, 2016 read with Rule 11 of NCLT Rules, 2016)

In the matter of:

Prayag Poly. Tech Pvt. Ltd. Vs Propyl Packaging Limited;

MEMO OF PARTIES:

REGIONAL PROVIDENT FUND COMMISSIONER-II (LEGAL) Employees Provident Fund Organization, Regional Office, 36/685/A, BhavishyanidhiBhavan, Kaloor, Kochi – 17;

... Applicant

-Versus-

GEORGE VARKEY, Liquidator, Propyl Packaging Limited, Thrissur, Building No. 110, Ground Floor, Surabhi Nagar, Kakkanad – 682 030.

... Respondent

Coram:

Shri P. Mohan Raj : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

Appearances (through video conferencing)

For Applicant : Mr. Sajeevkumar K Gopal,
Advocate

For Respondent : Mr. Akhil Suresh, Advocate
Mr. George Varkey, Liquidator

Order reserved on: 30.11.2022

Order pronounced on:25.01.2023

ORDER

1. This IA has been filed under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 by Regional Provident Fund commissioner-II (Legal), against the Liquidator of M/s Propyl Packaging Ltd., the Corporate

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Debtor (CD) now under Liquidation, seeking to direct the respondent to consider Annexure A-9 representation and order release of the entire amount due to the EPFO as claimed in the claim petition without limiting the same as it was done in Annexure A-8.

2. Propyl Packaging Limited has been admitted to Corporate Insolvency Resolution process as per the orders of this Tribunal in IBA 52/KOB/2019 on 14.02.2020. The respondent herein was appointed as the Resolution Professional. Based on the paper publication inviting claim from operational creditors, the applicant herein had submitted the claim petition to get the amount due to the EPFO. The applicant has claimed a sum of Rs,7,68,989/-before constitution of the liquidation estate.
3. The Corporate Debtor is an establishment covered under the Employees Provident Fund and Miscellaneous Provisions Act with the regional office, Kochi with EPF Code No.KR/199950. The establishment is in default with the EPF from 11/2014 onwards. The total amount of EPF statutory dues payable by the establishment is Rs.7,68,989/-. This amount includes EPF dues, penal damages under Section 14B of the Act and interest under Section 7Q for the belated remittance of statutory contribution for the period from 1/2014 onwards.
4. The applicant stated that the amount due to the EPFO is an exempted item under the Provisions of the IBC. The said amount should be disbursed in priority of all debts. As per section 36 (4) (a) (ii) of the Insolvency Bankruptcy Code, 2016 due towards provident fund, pension is excluded from the purview of liquidation estate. All sum due to any workmen or employee from the provident fund, pension fund and gratuity fund shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation.

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5. The learned counsel for the applicant relied on the judgement of Hon'ble NCLAT in *Sikkendar Singh Jamwal Vs. Vinay Thalvar* (CA(AT) 483/2019 in its order dated 11.03.2022 and stated that the issue regarding the claim of EPFO and held that dues under the EPF Act are not debts and do not form a part of the water fall mechanism under Section 53 of the IBC. To fortify the argument, it is further stated that the said legal position stands settled by the Judgment of the Hon'ble Supreme Court in C.A.No.5910/2019 dated 19.04.2022, Sunil Kumar Jain Vs. Sundaresh Bhatt. So, in the light of the above provisions of law now settled the applicant is entitled to get the entire amount claimed in the cairn petition submitted before the respondent.
6. It is submitted that the respondent issued a letter dated 09.06.2022 intimating that only an amount of Rs.70,942/- out of the total claim of Rs.7,68,989/-alone is admitted. The respondent was subsequently appointed as Liquidator vide order dated 18.11.2021 in I.A.(IBC) 106/KOB/2021 in IBA 52/KOB/2019. The applicant herein submitted a further representation on 27.06.2022 requesting to sanction the entire amount. In which it was pointed out that the claim forwarded vide letter dated 22.12.2021 was an interim claim and a revised claim in Form G was forwarded along with the letter dated 04.05.2022. Thereafter no further communication was received from the respondent.
7. The Respondent stated that the applicant has already filed a claim in Form G for a sum of Rs. 77,329/- vide its claim dated 22.12.2022. Thereafter, the Liquidator had admitted Rs. 70,942/- out of claim filed by the applicant. Thereafter, the applicant vide Annexure-A-1 filed a Revised Claim before the respondent herein on 28.06.2022 by email for a Sum of Rs. 7,68,989/- which was rejected by the Liquidator vide email dated 14.07.2022. The Respondent further stated that by virtue of Annexure—R 1(b), the respondent has rejected the revised claim filed by the applicant for the fact

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that the claim has been received after 30 days of public notice in Form B i.e., 22.12.2021.

8. The second point raised by the respondent is that the as per section 42 of the Code, any determination made by the Liquidator under 40(2) of the code, ought to be challenged before this Tribunal by way of the Company Appeal within 14 days from the date of such determination and the same application now being filed after a delay of over 70 days is not maintainable.
9. Further, the argument that the Provident Fund, Pension are excluded from the purview of the Section 36(4) (a)(ii) is denied by the learned counsel for the Respondent and stated that dues paid out of the provident fund, pension fund and gratuity fund alone are exempted. This signifies that those 'funds' are outside the liquidation estate. However, dues to the provident fund, pension fund and gratuity fund paid by the liquidator out of liquidation sale proceeds is not exempted.
10. The learned counsel further added that as per Sec. 36 (4) (a)(iii) of the IBC, the amount to be excluded from the Liquidation estate is only those amount that the company retains exclusively for Provident Fund under Section 16A of the Employees Provident Funds and Miscellaneous Provisions act, 1952. Since the Corporate Debtor is not maintaining any Provident Fund under Section 16A, there is nothing to be excluded as contended by the Applicant. It is submitted that the dues to the PF Department is a part of the Liquidation Estate when there is no Fund and the Departments dues will be governed by Section 53 of IBC. To fortify the argument the learned counsel referred to the judgement of Hon'ble NCLAT in *Mr. B. Parameshwara Udpa (RP of M/s EasunReyrolle Limited) v. EPFO Department (Company Appeal (AT) (CH) (Ins.) No. 231 of 2021* and Hon'ble Supreme Court in *Sunil Kumar Jain v. Sundaresh Bhat (CA No. 5910/2019 dated 19.04.2022)*.

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11. Heard submissions and perused documents on record. It is found that the Corporate Debtor is in liquidation vide order dated 18.11.2021 in I.A.(IBC) 106/KOB/2021 in IBA 52/KOB/2019. The applicant herein had filed a claim of Rs. 77,329 in Form G on 22.12.2021. The Liquidator / Respondent herein had admitted Rs. 70,942/- out of the claim filed and later on after the expiry of 30 days from publishing the public notice, the applicant herein filed further for a claim of Rs. 7,68,989/- on 28.06.2022. Therefore, the Liquidator rejected the same vide email dated 14.07.2022 stating that since the last date for filing claim was 22.12.2021, he has no power to admit the claim received after 30 days of issuance of public notice.
12. The amount payable to the employees and workmen does not fall under the Category of Liquidation Estate. Section 36 (4) of IBC, contains an injunction “The following shall not be included in liquidation estate assets and shall not be used for recovery in the liquidation”. A plain reading the above provision indicate that what is excluded from the liquidation estate are sums due to any workmen or employee from the Provident fund, the Pension fund, and the gratuity fund. Thus sums due to any workmen from the above funds are excluded from the liquidation estate. The Supreme Court held in Sunil Kumar Jain -vs- Sundaresh Bhatt 2019 SCC Online 2159 that the shares of workmen dues shall be kept out side the liquidation process and the concerned workmen/employees shall have to be paid the same out of fund available. The corporate debtor having not deposited the statutory dues with EPFO, the said statutory liability has to be discharged by successful Resolution Applicant/Liquidator. The issue is settled in Jet Aircraft Maintenance Engineers Welfare Association-vs- Aahish Chhawchharia Company NCLAT- Company Appeal (Insolvency No. 752 of 2020 dated 21.10.2022; there it is held that the workmen and employees are entitled for payment of full amount of provident fund and gratuity till the date of commencement of the insolvency in addition to the 24 months

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workmen dues as the workmen are entitled to under Section 53 (1) (b) of IBC.

13. In the Circumstances the Employees Provident fund amount is excepted under Section 36 (4) IBC, 2016 hence applicant is entitle to receive entire amount due to EPFO, accordingly the respondent/Liquidatior is directed to pay entire due amount of EPFO to the applicant. In the result application is **Allowed**.
14. The Registry is hereby directed to send e-mail copies of the order forthwith to all the parties and their counsel for information and for taking necessary steps.
15. Certified copy of the order be issued upon compliance with requisite formalities.
16. File be consigned to records.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD
Date: 2023.01.25 12:45:21 +05'30'

Satya Ranjan Prasad
Member (Technical)

PANDIAN MOHAN RAJ Digitally signed by
PANDIAN MOHAN RAJ
Date: 2023.01.25 13:04:00
+05'30'
P. Mohan Raj
Member (Judicial)

Signed on this 25th day of January, 2023.

Supriya. P_S.