

COMMON ORDER

Per: Manoj Kumar Dubey, Member (Technical)

I.A. No.275/2023

1. The present application is filed on 13.03.2023 by **Employee's Provident Fund Organisation** (hereinafter called as "**Applicant**") under Section 42 and 60 (5) (c) of Insolvency and Bankruptcy Code, 2016, read with Rule 11 of National Company Law Tribunal Rules, 2016, inter alia seeking the following prayers:

- i. to consider the present I.A to the condone the delay of 388 days i.e., 17.02.2022 to 10.03.2023 of rightful claim;*
- ii. to issue appropriate direction to RP/Liquidator to consider the claims of EPFO Department under Section 36 (4) (a) (iii) and Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 to release the statutory PF dues on priority of the payment over the other debts is as per Section 11 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (EPF and MP Act 1952).*
- iii. to pass such order/direction as it deem fit and proper in the facts and circumstances of the case.*

I.A. No.276/2023

1. The present application is filed on 13.03.2023 by **Employee's Provident Fund Organisation** (hereinafter called as "**Applicant**") under Section 42 and Section 60 (5) (c) of the Insolvency and Bankruptcy Code, 2016, read with Rule 11 of National Company Law Tribunal Rules, 2016 inter alia seeking the following prayers:

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- ii. to issue appropriate direction to RP/Liquidator to consider the claims of EPFO Department under Section 36 (4) (a) (iii) and Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 to release the statutory PF dues on priority of the payment over the*

other debts is as per Section 11 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952.

- iii.** *to pass such order/direction as it deem fit and proper in the facts and circumstances of the case.*
2. Since both the IAs involve same issue having similar prayer, therefore, Common Order is passed.
3. Brief facts in the applications which are relevant to the issue in question, are as follows:
- i.** This Tribunal, vide, order dated 06.01.2022 admitted the petition under section 7 of the IBC, 2016, filed by the Financial Creditor i.e., M/s. Park View Developers Private Limited against M/s. SDU Travels Private Limited and declare moratorium in terms of Section 14 of the IBC, 2016 and appointed Insolvency Resolution Professional. The public announcement was made in various newspapers inviting claim from the Creditors.

Claims submitted as per I.A No.275 of 2023

- ii.** On 12.12.2022 the Applicant informed the Resolution Professional/Respondent and made demand for the payment of statutory dues pertinent to workmen of the Establishment/Corporate Debtor amounting to Rs.42,22,026/- arising out of the assessment order passed by the Regional Provident Fund Commissioner-II dated 04.03.2020 for the period 04/2017 to 06/2019 and the details given below.

Dues	Period	Amount
Damages u/s 14B	04/2017 to 06/2019	27,66,633
Interest u/s7Q	04/2017 to 06/2019	14,55,393
Total		42,22,026

It is submitted that vide email dated 21.12.2022 the Respondent rejected the claim filed by the Applicant with respect to the statutory dues on the ground that the said claim could be filed in prescribed

form against the Corporate Debtor within 90 days of the commencement of the CIRP. Since, 90 days have elapsed from the date of CIRP by the time dues have been filed, therefore the claim is rejected.

Claim submitted as per I.A No.276/2023

- iii. On 03.01.2023 the Applicant filed their dues with the Respondent/Resolution Professional in Form-B amounting to Rs.2,10,063/- arising out of the assessment order passed by the Assistant Provident Fund Commissioner-II dated 28.12.2022 for the period 06/2019 to 07/2022 and the details given below.

Dues	Period	Amount
Damages u/s 14B	06/2019 to 07/2022	99,011
Interest u/s7Q	06/2019 to 07/2022	1,11052
	Total	Rs.2,10,063

It is submitted that vide email dated 03.01.2023 the Respondent rejected the claim filed by the Applicant with respect to the statutory dues on the ground that the said claim could be filed in prescribed form against the Corporate Debtor within 90 days of the commencement of the CIRP. Since, 90 days have elapsed from the date of CIRP by the time dues have been filed, therefore the claim is rejected.

- iv. It is submitted that the rejection of Provident Fund dues is a clear violation of the provision of Section 11 of the EPF and MP Act, 1952 and Section 36 (4), 155 (2) of the IBC, 2016. The Applicant is seeking claims of Provident Fund dues which belongs to employees and workers and will continue on till the worker retires. It is further submitted that keeping the provident fund money of workers by the employers without remitting/contributing the same to the Applicant authority amounts to Criminal Breach of Trust under Section 405 of India Penal Code. Further, it is submitted that the Respondent

while rejecting the claims of the Applicant has failed to secure the rights of labours and failed to honour the statutory provisions of the Employees Provident Funds and Miscellaneous Provisions Act, 1952. The Applicant Counsel also relied on the following judgements:

- i. *Maharashtra State Co-operative Bank Limited vs Kannad Sahkari Sakhar Karkhana*, by Hon'ble Supreme Court of India in SLP (C) No.14772-14773 of 2010 dated 01.07.2013;
- ii. *State Tax Officer vs. Rainbow papers* passed by Hon'ble Supreme Court of India in Civil Appeal No.1661 of 2020;
- iii. *Sunil Kumar Jain and others vs. Sundaresh Bhatt and others* (2022) SCC Online SC 467;
- iv. *Recovery Officer & Assistant Provident Fund Commissioner vs. Kerala Financial Corporation* passed by High Court of Kerala
- v. *Regional Provident Fund Commissioner Ahmedabad vs. Ramachandra D Choudhary*, passed in Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 354 of 2019 dated 19.12.2019;
- vi. *Sikander Singh Jamuwal vs Vinay Talwar* in Company Appeal (AT) (Ins) No.483 of 2019;
- vii. *V-con Integrated Solutions Private Limited vs. Acharya Techno Solutions (India) Private Limited* passed by Hon'ble NCLAT Kochi on 08.02.2021;
- viii. *Regional PF Commissioner vs. Ashish Chhawchharia Resolution Professional for Jet Airways (India) Limited & another* in Company Appeal (AT) (Insolvency) No.987/2022.
- ix. *State Bank of India vs Moser Baer Karamchhari Union 2020* passed by Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No.396 of 2019
- x. *Precision Fasteners Limited vs. Employees Provident Fund Organisation* in M.A No.576 & 752 of 2018 in C.P (IB) No.1339/MB/2017 passed by NCLT Mumbai;
- xi. *Alchemist Asset Reconstruction Company Limited vs. Moser BAER India*, in IB No.378(PB)/2017 by NCLT, Principal Bench New Delhi on 19.03.2019
- xii. *Nagalimgam Muthiah vs Officer of the Recovery Office* in I.A No.31/2021 in MA/868/2019 a/w I.A No.370/2020 in M.A/868/2019 in C.P No.567(IB)/CD/2018;

4. The Respondent/Resolution Professional has filed his objections vide Diary No. 3325 (in I.A No.275/2023) and 3324 (in I.A No.276/2023) dated 23.06.2023 inter alia states as under:

- i. The present application is based on misconceived proposition of law and the objective of IBC, 2016 and EPF and MP Act, 1952 as the Corporate Debtor has already paid all the contribution on part of employer and employees dues under the EPF and MP Act, 1952. It is pertinent to mention that the damages and interest claimed by the EPFO is Government Dues and will not go in the hands of workers.
- ii. The Applicant has claimed that the Provident Fund dues belongs to the employees and workers and will continue till the workers retire. However, in I.A No.275 of 2023 it is noticed that the amount of dues claimed by EPFO are for damages under section 14B of EPF and MP Act, 1952 at Rs.27,66,633/- and Interest at Rs.14,55,393 under Section 7Q of EPF and MP Act, 1952. In I.A No.276 of 2023 it is noticed that the amount of dues claimed by EPFO is Rs.99,011/- under Section 14B of EPF and MP Act, 1952 and Rs.1,11,052/- under Section 7Q of EPF and MP Act, 1952. As per the submission of the Applicant only interest and damages are due to the EPFO and actual Employer's Contribution towards EPFO has already been paid. Hence, it cannot be contended that the damages and interest under Section 7Q under Section 14B of the EPF & MP Act are the dues belonging to the employees and workers as the said damages and interest are the penal action against the Company for not adhering to the EPF and MP Act and the damages and interest levied by the EPFO are in the nature dues due to the Government and is not to be included in the workers dues.
- iii. It is also submitted by the Respondent that the case laws referred by the Applicant to support the grounds have dealt with difference question of law and facts and do not apply to the present case. Further, it is denied by the Respondent that there is any violation of the said acts in the approved Resolution Plan. From the plain reading of Section 36 (4) of the IBC, 2016 it is clear that only the

sum due to workmen and employees from the PF, Pension Fund and Gratuity Fund cannot be included in the liquidation estate of the Corporate Debtor. Adhering to the same, as all the contribution has already paid to the EPFO, the Corporate Debtor has no dues left as workmen and employees dues and only interest and damages are being claimed in the claim by the EPFO which are penal liability and has nothing to do with workmen dues. Hence the approved resolution plan is well complied with the provisions of Section 36 (4) of IBC, 2016 as it did not include the interest and penalty levied by the Government authorities as workmen dues.

- iv.* It is further submitted by the Respondent that it is clear from the proviso to Section 11 of the EPF and MP Act, 1952 that only the amount due from an employer [whether in respect of the employee's contribution (deducted from the wages of the employee) or the employer's contribution] shall be deemed to be the first charge on the assets of the establishment and not the damages and interest under the EPF and MP Act, 1952 as allegedly claimed by the Applicant in all over the present application.
- v.* It is further submitted by the Respondent that the Corporate Debtor is eligible for the waiver of the damages and interest as levied by the EPFO as it was facing the financial hardship at the relevant time. Moreover, the Department/EPFO and this Hon'ble Tribunal has the power to waive off the damages and interest to give some relief to the Creditors of the Corporate Debtor as liquidation value of the assets of the Corporate Debtor is very less and all the Creditors are getting the recovery with a haircut to the tune of 99%. Further, there is a likely-hood that if the said damages and interest as claimed by EPFO is not waived off, the Successful Resolution Applicant might back off from the Resolution Plan and subsequently the Corporate Debtor has to be put in the process of liquidation wherein no Creditor including the EPFO will get any dues recovered as liquidation value of the assets are negligible with respect to the total

amount of claims received and admitted by the Resolution Professional.

- vi. The Respondent with bonafide requesting this Tribunal to waive off the damages and interest levied by the EPFO as the damages and interest do not form part of the workman dues the same should not be included under Section 36 (4) of the IBC, 2016. To prove this point, it is stated that the Parliament has consciously, deliberately and very expressly included the word “*all sums due to any workman and employees from the Provident funds*”. Thus as per literal interpretation of law, this section should not apply to all sums due towards provident funds and thereby has expressly excluded the claims of damages and interest levied by the EPFO. Moreover the Corporate Debtor is an insolvent company going through the process of Corporate Resolution which is similar in nature of Sick Industrial Companies Act, , and is thereby eligible for the waiver of the damages and interest levied on the already debt-ridden company. He also relied on following judgements:

- i. *B Employees Provident Fund Organization v. Sree Chithira Thirunal Public School and others (W.P(C) NO.15032 of 2014 (D)) order dated 04.02.2020*
- ii. *B.S Limited v. Employees Provident Fund Organization (IA No. 868 of 2022 and I.A No.1004/2022 in C.P(I)B No.278/7/HDB/2018) by NCLT Hyderabad.*
- iii. *Shri Vijay P Lulla vs. Axis Bank Limited v. Employee Provident Fund Organtsation in I.A No.130 of 2022 in CP (IB) No. 122/BB/2017 passed by the NCLT Benglauru Bench .*
- iv. *KSS Petron Vineet K Chaudhary vs. The Regional PF Commissioner being I.A No.1694/2020, I.A No.1086/2020 and I.A No.1089/2020 in CP (IB) No. 1202/MB/C-II/2017;*

5. The Learned Counsel for the Applicant has filed rejoinder vide Dy. No. 6237 & 6238 dated 13.12.2023 and the same are taken on record.
6. Heard the Learned Counsel for the Applicant and the Respondent and carefully perused the records.

7. The Learned Counsel for the Applicant has filed the written submissions vide Dy. No.6467 & 6468 dated 21.12.2023 reiterating facts mentioned in the applications and the same are taken on record.
8. The Learned Counsel for the Respondent has filed the written submission vide Dy. No.6452 & 6253 dated 20.12.2023 reiterating facts mentioned in the reply. The same are taken on record.
9. The Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor was initiated vide an order dated 06.01.2022 under Section 7 of the I & B Code, 2016. It is an admitted fact by the Respondent/RP in its reply that the claim of the EPFO was rejected by the RP on ground that the EPFO did not file its claim within the stipulated period. The Applicant has filed the present applications for condonation of delay and to consider its claim. However, no reasons have been given by the Applicant for delay in filing the claim applications.
10. Further, the Resolution Plan of the Successful Resolution Applicant has been already approved by the COC and is pending approval by this Adjudicating Authority. In this regard, it is relevant to refer the judgement passed by the *Hon'ble Apex Court* in the case of *M/s. RPS Infrastructure Limited vs. Mukul Kumar* passed on 11th September 2023. The relevant extract are reproduced below:

“21. The mere fact that the Adjudicating Authority has yet not approved the plan does not imply that the plan can go back and forth, thereby making the CIRP an endless process. This would result in the reopening of the whole issue, particularly as there may be other similar persons who may jump on to the bandwagon. As described above, in Essar Steel, 8 the court cautioned against allowing claims after the resolution plan has been accepted by the COC.”

22. We have thus come to the conclusion that the NCLAT's impugned judgement cannot be faulted to reopen the chapter at the behest of the appellants. We find it difficult to unleash the hydra-headed monster of undecided claims on the resolution applicant.”
11. The above decision of the *Hon'ble Apex Court* squarely applies to the facts of the present case. Any interruption in the CIRP process at this

stage by allowing the present applications might cause unnecessary delay in the CIRP process.

12. Furthermore, in the order passed by the *Hon'ble NCLAT on 12.09.2022 in Company Appeal (AT) (CH) (Ins.) No.334/2022 in the case of The Regional Provident Fund Commissioner and Recovery Officer vs. M/s. Adept Technology Private Limited* in which the Appellate Tribunal upheld the order passed by the *NCLT, Division Bench-I, Chennai on 09th June 2022, in I.A (IBC)/748/CHE/2021 in CP No.1210/IB/2018* in which an application was dismissed stating that if such extraordinary delay is condoned, it shall defeat the very purpose of the IBC enactment, which is a time bound process. Additionally, in the order passed by the co-ordinate Bench NCLT, Ahmedabad on 19.10.2023 in *I.A No.1111 (AHM) 2023 in CP (IB) No.387 of 2020 in the matter of The Assistant Provident Fund Commissioner vs Jaykumar Pesumal Arlani, RP of Decent Laminates Pvt., Ltd.*, in which reliance is placed on the Hon'ble Apex Court judgement as stated supra and held that the claim submitted by the Applicant is at belated stage after the approval of the Resolution Plan was rightly rejected by the RP, therefore, they do not find any merits in the application to interfere at this belated stage for consideration of the claim of the Applicant/EPFO.
13. Additionally, it is contended by the Respondent/RP that the actual employer's contribution towards EPFO on the part of the Corporate Debtor has already been paid and the damages and interest levied by the EPFO are in the nature of the penalty and therefore, the dues due to the Government. It is observed that the amount payable to the workmen or employees has protection under Section 36 (4) (a) (iii) of the IBC 2016, but the same cannot be extended to the interest and damages covered under Sections 7Q and 14B of the Employees Provident Funds and Miscellaneous Provisions Act 1952. The Applicant herein filed a claim under Section 7Q & 14B of EPF & MP Act, these are the amounts payable to the Applicant/Department will not be paid to the workmen or employees hence the interest and damages claimed by the Applicant

comes under Government dues. Moreover, in I.A No.276/2023 the order of the EPFO Department in respect of the claim is passed on 28.12.2022 i.e., during the period of moratorium and the damages and interest against the Corporate Debtor includes the period of moratorium. In this regard, it is relevant to refer the earlier orders passed by this Tribunal or co-ordinate Benches, in which it was held that the damages and interest claimed by the EPFO during moratorium or which includes the moratorium period is not allowable under the provision of the IBC.

14. In view of the facts and circumstances of the case, we are of the considered opinion that the instant applications are liable to be dismissed. Accordingly, **I.A No.275 of 2023 & I.A No.276 of 2023 in C.P (IB) No.12/BB/2021** are hereby **dismissed**.

Sd/-

**(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)**

Sd/-

**(K.BISWAL)
MEMBER (JUDICIAL)**