

**THE NATIONAL COMPANY LAW TRIBUNAL  
CHANDIGARH BENCH, CHANDIGARH  
(Exercising powers of Adjudicating Authority under  
the Insolvency and Bankruptcy Code, 2016)**

**IA No. 928/2020  
In  
CP (IB) No.07/Chd/Hry/2017  
(admitted)**

**In the matter of:**

M/s. Recorders and Medicare Systems Pvt. Ltd.

....Petitioner/Operational Creditor

**And in the matter of IA No. 928/2020:-**

**Employees Provident Fund Organisation**  
Through Regional PF Commissioner-II, District Office  
#2043/1, Block-10, Naraingarh Chowk Crossing  
Baldev Nagar, Ambala, Haryana

...Applicant/Resolution Professional

Vs.

**1. M/s Recorders and Medicare Systems Pvt. Ltd.**

Through RMS Employees Welfare Trust  
(Successful Resolution Applicant)  
Plot No. 196, Industrial Area Phase - I  
Panchkula-134113 (Haryana)

...Respondent No. 1

**2. RMS Employees Welfare Trust**

(Successful Resolution Applicant)  
Plot No. 196, Industrial Area Phase - I  
Panchkula-134113 (Haryana)

...Respondent No. 2

**3. Anil Goel**

Supervisor of Monitoring Committee  
M/s Recorders and Medicare Systems Pvt. Ltd.  
E-10 A, Kailash Colony, Greater Kailash- I  
New Delhi (110048)

...Respondent No. 3

**Order delivered on: 07.07.2023**

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)  
HON'BLE MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)**

**Present :**

For the applicant : Mr. Abhishek Chaudhary, Advocate  
For respondents nos.  
1 and 2 : Mr. Krishan Vrind Jain, PCA  
For respondent no. 3 : Mr. G.S. Sarin, Practising Company Secretary

**Per: Subrata Kumar Dash, Member (Technical)**

**ORDER**

This application has been filed by Sh. Nitin Singh, Regional Provident Fund Commissioner -II, for direction to Respondent No. 1, Respondent No. 2, and Respondent No. 3 to implement the orders dated 03.01.2020 passed by the applicant EPFO under Section 14(B) and Section 7(Q) of the Employees Provident Fund Act, 1952 in view of Section 36(4)(a) (iii) of the Insolvency and Bankruptcy Code, 2016, for the exclusion of all sums due to any workmen or employee from Provident Fund, pension funds and the gratuity fund from liquidation estate assets of the corporate debtor.

2. The applicant- Regional Provident Fund Commissioner, inter alia, states the following facts:

- a) That an inquiry was carried out under section 7A under EPF and MP Act against the corporate debtor for not complying with the provisions of the EPF and MP Act by not depositing EPF dues for the period from April 2011 to April 2015. Consequent to this inquiry, an order dated 18.06.2015 was served on the corporate debtor (attached as annexed-1 to the application). It is further stated that there was a subsequent violation of the statutory provisions of the EPF and MP Act, and the EPF contribution for the period from May 2015 to May 2017 was also not deposited. Hence, further proceedings under Section 7(Q) of the Act were initiated. A demand by order dated 11.03.2019 under Section 78 of the act amounting to Rs. 85,22,000/- was raised against which the respondent deposited an amount of Rs.70,72,526/-. It is further stated that by an order dated 17.09.2018 of this Tribunal, the resolution plan submitted by RMS Employees' Trust was approved. In the approved resolution plan, the principal amount of PPF contribution was agreed to be paid by the resolution applicant despite the fact that section 36 (4)(a) (iii) of IBC clearly mandates that all sums due to workmen from Provident fund, the pension fund and gratuity fund have to be kept out of the liquidation estate. The corporate debtor challenged the order of this Tribunal before the Hon'ble NCLAT. The Hon'ble NCLAT passed an order dated 13.05.2019, wherein the findings of this Tribunal with regard to

consideration of matters relating to waiver of government dues, including waiver of MAT liability under Section 115J of the Income Tax Act 1961 by respective Government departments was set aside.

- b) It is submitted that the applicant-RP preparing the Information Memorandum has not taken into consideration the statutory liability of EPF dues, including the amount of damages and interest on delayed payment of EPF dues which forms part of workmen dues. It is further submitted that the corporate debtor's stand that EPF dues come under the ambit of the Para C.4 of minutes of the COC meeting held on 23.03.2018, wherein it is stated that no payment under the resolution plan is envisaged for government dues should be discarded as the EPF dues cannot be considered a part of liquidation estate assets in view of section 36 (4) (a) (iii) of IBC, 2016.
- c) The EPFO passed an order under Section 7 (A) and assessed the amount outstanding Provident fund at Rs.67,49,505/- to be paid by the corporate debtor. It is also stated that prior to the approval of the resolution plan, the corporate debtor has been duly communicated regarding the outstanding EPF dues in time by the EPFO.
- d) The applicant states that the Hon'ble NCLAT in the appeal preferred by the corporate debtor had set aside that part of the order dated 14.09.2018, whereby this Tribunal held that the matter relating to the waiver of Government dues, including waiver of MAT liability under section 115J of Income Tax Act 1961 may be considered by the

respective Government Authorities It is further stated that admittedly such findings were given by the Hon'ble NCLAT in its order dated 30.05.2019, but all sums of EPF dues payable to workmen should not be considered under the ambit of Government dues, i.e., Income Tax MAT Liability, etc., in view of section 36(4) (a) (iii) of IBC code 2016.

- e) The petitioner has placed reliance on the following decisions:
- i. Hon'ble NCLAT in the matter titled Tourism Finance Corporation of India Ltd. Vs. Rainbow Papers Ltd. & ors and in the matters of Regional Provident Fund Commissioner - I, Ahmedabad Vs Ramchandra D. Chaudhary (Company Appeal(AT) (Insolvency) No. 1001 of 2019 vide order dated 19.12.2019.
  - ii. Civil Appeal No. 1920 of 2020 titled Kushal Limited Vs. Regional Provident Fund Commissioner-I, Ahmedabad & Ors., against the order passed by Hon'ble NCLAT in Company Appeal(AT)(Insolvency) No.1001 of 2019, which has been dismissed by Hon'ble Apex Court vide order dated 20.05.2020.
  - iii. Hon'ble NCLAT in the matter titled State Bank of India Versus Anuj Bajpai (Liquidator], Company Appeal (AT) (Insolvency) No. 509 of 2019.
  - iv. Employees Provident Fund Commissioner vs. O.L. of Esskay Pharmaceuticals Ltd 2011 (10) SCC 727.
  - v. Maharashtra State Cooperative Bank Vs. Employees Fund Organization and others (2009(4) SCC (Civil)78).

vi. The Hon'ble principle Bench NCLT, New Delhi in the matter of Alchemist Asset. Reconstruction co. Ltd Vs. Moser Baer India Ltd., (IB)-378(PB)/2017.

vii. Asset Reconstruction Co. Ltd. CP -1339-2017 MA 576-208 MA 752-2018.

3. In their joint reply, respondents No. 1 & 2 filed via Dairy No. 01265/2 dated 17.02.2022, have stated, inter alia, the following:

a) That despite having knowledge of the CIRP of the company and moratorium in place, the Provident Fund Department overlooked the provisions of the Code and failed to file its claim before RP within the timelines prescribed under the Code.

b) It is stated that pursuant to Section 53 of the Code, the Workmen's dues and debt owed to secured financial creditors shall rank equally, and operational creditors cannot be paid an amount less than the amount to be paid in the event of liquidation of the corporate debtor.

c) It is further stated that the company is under financial stress, and as the EPFO had not filed any claim before the Resolution Professional till the approval of the Resolution Plan by this Adjudicating Authority, there is no due in this regard to the applicant. It is mentioned that the Resolution Applicant, in its Resolution Plan, had sought a waiver of operational creditors, including employees' dues, PF, and TDS. The relevant extract from the Resolution Plan is reproduced here below:

*“Provident Fund amount due for the years 2015-2017 shall be paid in monthly installments over a period of 3 years. The EPFO shall*

*not charge any interest and damages on the delayed payment of the dues.*

*EPFO shall withdraw all cases filed against the company/directors and officers of the company.”*

- d) The reliance has been placed on the decision of the Hon'ble NCLAT in the matter of Savan Godicala v. Apalla Siva Kumar, Company Appeal (AT) (Insolvency) No. 1229 of 2019, wherein it is held that

*“Where no fund is created by a company, in violation of the statutory provision of Section 4 of the payment of Gratuity Act, 1972, then in that situation also, the Liquidator cannot be directed to make the payment of gratuity to the employees because the Liquidator has no domain to deal with the properties of the corporate debtor which are not part of the liquidation estate.”*

- e) The reliance has also been placed on the following decisions:

- i. The Hon'ble NCLAT in a judgment in Regional Provident Commissioner Employees Provident Fund Organisation v. Vandana Garg, Company Appeal (AT) (CH) No. 50 of 2021.
- ii. The Hon'ble Supreme Court in the case of The Committee of Creditors of Essar Steel India v. Satish Kumar Gupta.

4. Further, respondent no. 3 has also filed his reply vide Dairy No. 01265/3 dated 03.06.2022, repeating the contentions made by respondent no. 1 and respondent no. 2.

5. We have heard the learned counsels for the parties and have perused the available records.

6. In this connection, a reference is made to the following extract from the decision of the Hon'ble NCLAT, Chennai, in the case of **Central Board of Trustees Vs. Shri Kumar Rajan RP Hindustan Newsprint Ltd**; Company

Appeal (AT) (CH) (Ins) No. 268/2021 dated 21.06.2023, which places reliance on the decision of the Hon'ble NCLAT and the Hon'ble Apex Court on the same issue:

*“This Tribunal in ‘Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia, Resolution Professional of Jet Airways (India) Ltd. & Ors.’ reported in [(2022) SCC OnLine NCLAT 418] dated 21/10/2022 has observed as follows:*

*117. In the appeal filed by the Regional Provident Fund Commissioner, it has been pleaded that the claim was filed by the Appellant for an amount of Rs.24,40,65,594/- towards damages under Section 14B of Employees’ Provident Funds & Miscellaneous Provisions Act 1952, as per the order dated 17.10.2018. It is further mentioned that interest under Section 7Q was also levied of Rs.12,85,92,763/-, which amount was paid by the establishment. The amount which was claimed by the Appellant was fully admitted by the Resolution Professional. List of Creditors mentions the admitted amount of the Appellant. The Appellant has filed his claim in Form B, which Form B is at page 102 to 104 of the Appeal. The Appellant’s claim was not in the nature of workmen dues. The claim was also with regard to damages imposed under Section 14B of the 1952 Act. The Appellant was treated as Operational Creditor by the Resolution Professional, hence, the Appellant was allocated a fixed amount of Rs.15,000/- which was allocated to all Operational Creditors except the workmen.*

*118. Challenge to the Resolution Plan by the Appellant is on the ground that Section 11 of the 1952 Act requires priority over all other dues and further Section 36(4)(a)(iii) excludes provident fund dues from the liquidation estate of the Corporate Debtor. We have already dealt with provisions of Section 36(4)(a)(iii) in foregoing paras of this judgment. Now, we, need to look into Section 11 of 1952 Act. The Section 11 of the 1952 Act provides for priority of payment of contributions over other debts. Learned counsel for the Appellant has relied on judgment of the Hon’ble Supreme Court in “Maharashtra State Cooperative Bank Limited vs. Assistant Provident Fund Commissioner & Others, (2009) 10 SCC 123”. The Hon’ble Supreme Court dealing with Section 11 of 1952 Act laid down following in Para 67:*

*“67. The expression “any amount due from an employer” appearing in sub-section (2) of Section 11 has to be interpreted keeping in view the object of the Act and other provisions contained therein including sub-section (1) of Section 11 and Sections 7A, 7Q, 14B and 15(2) which provide for determination of the dues payable by the employer, liability of the employer to pay interest in case the payment of the amount due is delayed and also pay damages, if there is default in making contribution to the Fund. If any amount payable by the employer becomes due and the same is not paid within the stipulated time, then the employer is required to pay interest in terms of the mandate of Section 7Q. Likewise, default on the employer’s part to pay any contribution to the Fund can visit him with the consequence of levy of damages.”*

*119. The above judgment lays down that any amount due from employer appearing in sub-section (2) of Section 11 also covers the amount determined under Section 14B and there cannot be any quarrel to the preposition as laid down by the Hon’ble Supreme Court in the above case. The priority for payment of debt under Section 11 of the 1952 Act has to be looked into in view of the mechanism which is specifically provided under Section 53(1) of the Code. We have already dealt the provision of Section 36(4)(a)(iii) of the Code and held that provident fund dues are not subject to distribution under Section 53(1) of the Code. The issue is fully covered by three member bench judgment of this Tribunal in “Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd. & Ors.” (Supra). In view of foregoing discussion, we hold that provident fund dues were entitled to be paid in full. In view of the judgment of Supreme Court in “Maharashtra State Cooperative Bank Limited vs. Assistant Provident Fund Commissioner & Others” (Supra), the claim of Appellant was to be satisfied in full, otherwise breach of provision of Section 30(2)(e) would have occurred. We, thus, are inclined to issue direction to the Successful Resolution Applicant to make payment of the admitted claim of the Appellant towards provident fund dues to save the plan from invalidity.”*

*3. In the aforementioned Judgment a clear direction was given to the ‘Successful Resolution Applicant’ to make payment of the admitted Claims towards Provident Fund dues and the same was upheld by the Hon’ble Apex Court in Civil Appeal No. 407/2023, dated 30/01/2023. The Hon’ble Apex Court has laid down that the share of workmen dues shall be kept outside the*

*'Liquidation assets and the concerned workmen / Employees shall have to be paid the same, out of such Provident fund, Gratuity Fund, if any available. The words, 'if any available', cannot be read to mean that the workmen and employees are not entitled for Provident fund, Gratuity Fund, Pension fund, if not available with the Liquidator. As ratio of the Judgement in '**Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia, Resolution Professional of Jet Airways (India) Ltd. & Ors. (Supra)** of this Tribunal was upheld by the Hon'ble Apex Court, this Tribunal is of the earnest view that both Provident Fund and Gratuity Fund is to be paid in full as per the Provisions of 'EPF and NP Act, 1952' and 'Payment of Gratuity Act, 1972''*

7. In view of the same, we allow the prayer of the applicant and direct the respondent to implement the orders dated 03.01.2020 passed by the applicant EPFO under Section 14(B) and Section 7(Q) of the Employees Provident Fund Act, 1952 and also direct for the exclusion of all sums due to any workmen or employee from Provident Fund, pension funds and the gratuity fund from liquidation estate assets of the corporate debtor in view of Section 36(4)(a) (iii) of the Insolvency and Bankruptcy Code, 2016

8. In the result, the application bearing IA No. 928/2020 is allowed and disposed of accordingly.

Sd/-  
**(Subrata Kumar Dash)**  
**Member (Technical)**

Sd/-  
**(Harnam Singh Thakur)**  
**Member (Judicial)**

July 07, 2023  
PB/JGS