

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 1141 of 2023 & I.A. No. 3979 of 2023

(Arising out of the Order dated 30.06.2023 passed by the National Company Law Tribunal, Mumbai Bench, Court - IV in I.A. 2229 of 2022 in C.P (IB) No. 2534 of 2019)

IN THE MATTER OF:

Mr. Anuj Bajpai

Liquidator of Corporate Debtor
708, 7th Floor, Raheja Centre, Nariman Point,
Mumbai – 400021.

Email : cirpshirt@gmail.com

Anuj19603@yahoo.co.in

...Appellant

Versus

**1. Employee Provident Fund Organisation,
Regional Office, Coimbatore**

Regional Office, Bhavishya Nidhi Bhavan,
Dr. Balasundaram Road, Coimbatore – 641018
Email: acc.cbe@epfindia.gov.in

...Respondent No. 1

**2. Regional Provident Fund Commissioner – II &
Recovery Officer, Regional Office, Coimbatore**

Regional Office, Bhavishya Nidhi Bhavan,
Dr. Balasundaram Road, Coimbatore – 641018
Email: ro.coimbatore@epfindia.gov.in

...Respondent No. 2

3. Enforcement Officer, Recovery

Regional Office, Bhavishya Nidhi Bhavan,
Dr. Balasundaram Road, Coimbatore - 641018
Email: comp.rocbe@epfindia.gov.in

...Respondent No. 3

Present

For Appellant:

Mr. Rahul Gaikwad along with Ms. Nikita
Abhyankar & Ms. Stuti Vatsa, Advocates.

For Respondents :

Mr. Saurabh Kansal & Mr. Raghav Vij, for R-1.

J U D G E M E N T

(10.07.2024)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present Appeal has been filed by Mr. Anuj Bajpai, Liquidator of Shirt Company (India) Pvt. Ltd. (in short **Corporate Debtor**) against the Impugned Order dated 30.06.2023 passed by the National Company Law Tribunal, Mumbai Bench, Court - IV (in short '**Adjudicating Authority**') in I.A. 2229 of 2022 in C.P (IB) No. 2534 of 2019 under Section 61(2) of the Insolvency & Bankruptcy Code, 2016 (in short '**Code**').

2. Heard the Counsel for the Parties and perused the records made available including the cited judgements.

3. The Corporate Debtor was admitted into Corporate Insolvency Resolution Process (in short '**CIRP**') vide order of the Adjudicating Authority dated 26.02.2020 and the Respondents had filed their claims before the Interim Resolution Professional (in short '**IRP**') of Rs. 1,24,86,750/-. The Corporate Debtor was subsequently directed to be liquidated vide the Adjudicating Authority's order dated 22.12.2021 and the Appellant was appointed as the Liquidator, who asked the Respondents to file the claims during liquidation period.

4. It is the case of the Appellant that the Erstwhile Management of the Corporate Debtor did not maintain separate funds w.r.t. pension fund and

provident fund and therefore according to the Appellant the claims of the Respondents as to be treated under the waterfall mechanism as per Section 53 of the Code.

5. Section 53 of the Code is reads as under :-

*“53. **Distribution of assets.**—(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely:—*

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following:—

(i) workmen’s dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:—

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the

period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.—For the purpose of this section—

(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) the term “workmen’s dues” shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 (18 of 2013).

(Emphasis Supplied)

6. It has been brought out that the Respondent No. 2 vide order dated 20.06.2022 directed the Respondent No. 1 to issue sale proclamations for the assets of the Corporate Debtor and started recovery in terms of provision of the

Employees Provident Funds & Miscellaneous Provisions Act, 1952 (in short '**EPF Act**').

7. Aggrieved by this, the Appellant preferred I.A. No. 2229 of 2022 before the Adjudicating Authority and during hearing the Appellant issued public notice for auction of a certain property and during such e-Auction Notice, the Appellant came to know charge created by the Respondents on the said property. The Appellant, therefore, again preferred an I.A. before the Adjudicating Authority against such charges created by the Respondents and the Adjudicating Authority gave interim relief to the Appellant which was pronounced in open court during hearing on 13.12.2022 and directed the Appellant to create a fixed deposit to the extend of Rs. 1,24,86,750/- as claimed by the Respondents and directed Sub-Registrar Office to register the Sale Certificate and/ or sale document as a result of e-Auction.

8. The Appellant submitted that subsequently, the auction sale of the subject property was conducted on 15.12.2022 pursuant to which the Appellant created a Fixed Deposit as directed by the Adjudicating Authority. The Appellant stated that the amount of Rs. 1.24 crores claimed by the EPFO Department was erroneously recorded in a separate Application, being I.A. No. 2753 of 2022 which has no. bearing to I.A. No. 2229 of 2022 and upon each other. In view thereof, the Applicant preferred another Application being I.A. No. 136 of 2023 seeking rectification of the Order dated 13.12.2022. The said I.A. No. 136 of 2023

was heard and reserved for Orders on 22.02 2023, i.e., on the same day as the day of hearing on I.A. No. 2229 of 2022. Subsequently, the Adjudicating Authority pronounced the Order on 30.06.2022 wherein it was pronounced that I.A. No. 136 of 2022 for rectification of the Adjudicating Authority's, earlier order dated 13.12.2022 was allowed and that I.A. No. 2229 of 2022 was partly allowed.

9. We note that the Appellant has sought the following relief in I.A. No. 2229 of 2022 in C.P (IB) No. 2534 of 2019.

- a) to allow the present Application.
- b) to restrain the Respondent No. 2 from continuing and/or conducting proceedings in the matter of EPFO vs M/s Together Textile Mills Pvt. Ltd. numbered as CB/CBE/34159 in the files of the Respondent No. 2.
- c) to declare that the Orders passed by the Respondents in the matter of EPFO vs M/s Together Textile Mills Pvt. Ltd. numbered as CB/CBE/34159 in the files of the Respondent No. 2 are not binding on the Applicant.
- d) to declare that the claim of the Respondents shall be treated as per the waterfall mechanism envisaged under Section 53 of the Code;
- e) to direct the Respondents to lift the attachment levied by the Respondents on the assets of the Corporate Debtor with immediate effect;
- f) In an alternative to prayer clause e, to pass an Order thereby releasing the attachment imposed on the assets of the Corporate Debtor;

g) to restrain the Respondents from attaching and conducting sale of the assets of the Corporate Debtor;”

10. The Adjudicating Authority after examining various issues partly allowed the I.A. No. 2229 of 2022. In this regard, we note that para 31 of the Impugned Order dated 30.06.2023 captures the disposal of I.A. No. 2229 of 2022 which reads as under :-

*“Accordingly, the present IA. No. 2229 of 2022 is **Partly allowed** to the extent that separate recovery proceedings against the Corporate Debtor shall not be continued any further and the attachment imposed by the Respondents over the assets of the Corporate Debtor shall stand discharged considering the fact that an amount of Rs. 1,24,86,750/- equivalent to the claimed amount on account of EPF has already been secured in the shape Fixed Deposit bearing an Account No. 41518465189 maintained with State Bank of India”*

11. Aggrieved by the same, the Appellant has preferred the present appeal.

12. It is the case of the Appellant that the Adjudicating Authority failed to examine the different components of the claims filed by the Respondents and has treated everything as contribution, which is in violation of waterfall mechanism as stipulated under Section 53 of the Code.

13. It is further the case of the Appellant that the EPF Act is a welfare law for workers whereas the Code is for the resolution of the Corporate Debtor and maximisation of value of the assets of the Corporate Debtor. In this respect, the

Appellant submitted that in terms of Section 7A of EPF Act, only amount accrued towards contribution is meant for the benefit of workers and, employees of the Corporate Debtor, whereas the Impugned Order wrongly treats all other claims in addition to contribution including interest, damage, provisional costs and charges, etc., as part of contribution which is not in the spirit of the Code.

14. The Appellant pointed out that there is a specific provision stipulated in Para 59 of the Employee Provident Fund Scheme, 1952 (in short '**EPF Scheme**'). At this stage, we take into consideration Para 59 of the EPF Scheme which reads as under :-

"59. Member's Account

(1) All account shall be opened in the office of the Fund in the name of each member in which it shall be credited:

(a) his contributions,

(b) the contributions made by the employer in respect of him,
and

(c) Interest as provided in paragraph 60."

(Emphasis Supplied)

15. The Appellant elaborated that para 59 of the EPF Scheme and PF Act makes clear that only contribution under Section 7A of the EPF Act along with interest thereon is payable to the members and therefore all remaining components of the claims made by the Respondents do not fall within the purview as far as payment to the workers/ employees are concerned.

16. The Appellant submitted that the damages and provisional costs and charges are purely for the purpose for the benefits of the Respondents and therefore should have been discarded by the Adjudicating Authority.

17. The Appellant elaborated further that interest claimed under Section 7Q of the EPF Act cannot be given priority and cannot be covered under Section 36(4) of the Code.

18. The Appellant also pleaded that damages as provided under Section 14B of the EPF Act being statutory dues can only form as part of waterfall mechanism under Section 53 of the Code.

19. The Appellant reiterated that the Code is meant for maximisation of the value of the Corporate Debtor and not for enrichment of the EPFO and therefore, to that extent, the Impugned Order asking the Appellant to pay the entire claims of the Respondents is not in accordance with law and therefore requested this Appellate Tribunal to set aside the Impugned Order.

20. Per contra, the Respondents denied all the averments made by the Appellant.

21. It is the case of the Respondents that priority of PF dues are required to be considered as a whole and not to be divided amongst several components as pleaded by the Appellant.

22. It is further the case of the Respondents that the interest under Section 7Q and damages under Section 14B are levied after following statutory procedures

and are imposed due to delayed remittances of dues by the employers and are considered for overall welfare measures for the workers.

23. The Respondent submitted that the Corporate Debtor failed to remit all dues in time and therefore in terms of EPF Act, the Respondents correctly levied the charges.

24. The Respondent also submitted that in case the Appellant is aggrieved by any undue amount levied by the EPF Authority, the Appellant need to approach Central Government Industrial Tribunal or High Court and not before this Appellate Tribunal as the Adjudicating Authority or this Appellate Tribunal under the Code are not meant to decide quantum of the amount of dues under EPF Act for which appropriate alternatives remedies have been provided under other statutes in the law.

25. The Respondent pleaded that the EPF is purely to protect the rights of the workmen and employee and it is responsibility of the Corporate Debtor to maintain separate funds for the same.

26. The Respondents submitted that the specific powers have been provided in the EPF Act which entitles the EPFO Authority to recover the contribution and also levy the interest and damages in case of failure on the part of the Corporate Debtor to remit PF dues in time.

27. The Respondents submitted that in the present case the Corporate Debtor failed to remit the amount and therefore, the Respondents were compelled to seek

contribution in addition to interest and damages. The Respondents emphasised that these dues are rights of the workers which cannot be treated as assets of the Corporate Debtor and therefore stand in priority of payment as per statutory scheme provided in EPF Act and do not fall in the waterfall mechanism as provided under Section 53 of the Code.

28. The Respondent cited the judgement of Hon'ble Supreme Court of India in the case of *Maharashtra State Cooperative Bank Vs. Assistant Provident Fund Commissioner & Ors.* [(2009) 10 SCC 123], where it was held that default on employer's part to make payments of any contribution will make such a Corporate Debtor liable with consequences of levy of damages.

29. The Respondents pleaded that their claim are squarely covered by the said judgment therefore, the appeal is without any merit.

30. The Respondents submitted that the contribution, interest and damages, etc., are statutory dues on behalf of the workers and not claims which can be submitted to the liquidator in Form 'G'.

31. The Respondents challenged the locus of the Appellant to file the present appeal and stated that the liquidator being a neutral party has no locus to do so and in this regard the Respondents cited the judgement of Hon'ble Supreme Court of India in the case of *Regen Power Tech Private Limited Vs. Giriraj Enterprises & Anr.* [Civil Appeal No. 5985-6001 of 2023], where it was held that the

Appellant as Resolution Professional do not have any locus to challenge the order of the Adjudicating Authority or the Appellate Tribunal.

32. The Respondent submitted that Section 36 (4) (iii) of the Code stipulated that all sums due to any workmen or employee shall not be included in the liquidation estate and shall not be used for recovery in the liquidation and thus it becomes clear that the assets of liquidation can be used by the liquidator only after settling the dues of the provident fund.

33. The Respondents submitted that they have filed their claims before the Resolution Professional without any delay for Rs. 1,24,86,750/- on 26.02.2020 to protect the interest of the workers and employers of the Corporate Debtor.

34. Concluding their arguments, the Respondents requested this Appellate Tribunal to dismiss this appeal.

Findings

35. From the above facts, the following issues need to be decided to decide the present appeal :-

- (i) Whether, provident fund dues are to be decided and distributed in accordance with Section 36(4)(iii) of the Code or in accordance with Section 53 of the Code.
- (ii) Treatment of the various components of claims of the EPFO (the Respondent herein) i.e., contribution under Section 7A, interest under Section 7Q

and damages under Section 14 of the EPF Act and whether all these will constitute as PF dues in terms of EPF Act.

(iii) What constitute the part of liquidation estate and what does not constitute part of liquidation estate in terms of the Section 36 of the Code especially, w.r.t. Provident Fund dues.

All these points are interlinked and interdependent, hence these **to** be discussed in the conjoint manner in the following discussions.

36. At this stage, it would be desirable to look into the relevant definition of liquidation estate. Section 36(1) of the Code describes liquidation estate as those assets which are mentioned in sub- section 3 of Section 36 in relation to the Corporate Debtor.

Sub-Section 3 of Section 36 describes the various assets to be part of liquidation estate which have been mention in Section 36(3)(a) to (i). Section 36(4), however, describes the assets which shall not be included in liquidation estate and cannot be used for recovery in the liquidation. These has been defined in Section 36(4)(a) to (e).

37. For the present case the applicable provision is contained in Section 36(4)(a)(iii) which states that of any due to any workmen or employee from the provident fund, pension fund and the gratuity fund, owned by 3rd party which are in possession of the Corporate Debtor shall not be included as the liquidation estate.

38. The exact wording of above discussed definition is as under :-

“36 Liquidation Estate : (1) For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor.

36(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) assets held in trust for any third party;

(ii) bailment contracts;

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

****”*

(Emphasis Supplied)

39. From above, it becomes clear that the sum due to any workmen or employee from provident fund, pension fund and gratuity fund are not to form the assets of liquidation estate.

40. Since the various section of EPF Act have also been pleaded by the Appellant as well as the Respondents during their hearing and in their submissions, it would be desirable to look into relevant sections which reads as under :-

“Section 7A in The Employees’ Provident Funds And Miscellaneous Provisions Act, 1952

7A. Determination of moneys due from employers.—

(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 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.****

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.]

**Section 14B in The Employees' Provident Funds And
Miscellaneous Provisions Act, 1952**

14B. Power to recover damages.—

Where an employer makes default in the payment of any contribution to the Fund, the [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:”

(Emphasis Supplied)

41. From above, it is noted that the EPFO Authorities have been given powers to determine the amount due from the employer under the provisions of the EPF Act, or the pension scheme or insurance scheme as the case may be under Section 7A of the EPF Act.

42. We observe that liquidator has challenged the classification of Rs. 1,24,86,750/- as assets not forming part of liquidation assets in terms of Section 36(4)(iii) of the Code by the Adjudicating Authority and pleaded that

these should be covered under waterfall mechanism under Section 53 of the Code. However, during the pleadings, it has been submitted by the Appellant that only contribution under Section 7(1) should have been treated as dues payable to the workers and employees i.e., 34,47,599/- under Section 36(4) of the Code. and remaining amount should have been treated as other claims to be dealt in accordance with Section 53 Code.

43. At this stage, it would be desirable to examine the various claims submitted by the Respondents in February, 2020 to the Resolution Professional the summarise position of such claims reads as under :

<i>Sr. No.</i>	<i>Relevant Section of EPFO Act</i>	<i>Particulars</i>	<i>Amount (in Rs.)</i>
1.	7A	<i>Contribution (Determination of moneys due from employer)</i>	34,47,599/-
2.	7Q	<i>Interest payable by employer (including provisional Rs. 10,11,868/-)</i>	28,64,318
3.	14B	<i>Power to recover damages (including provisional damages of Rs. 21,08,056/-)</i>	61,38,551/-
4.		<i>Provisional cost and charges</i>	36,282/-
5.		<i>Total</i>	1,24,86,750/-

44. From above table, it is noted that there are four components of claims i.e., contribution of Rs. 34,47,599/- under Section 7A; Rs. 28,64,318/- as interest component as per Section 7Q; Rs. 61,38,551/- as damages under Section 14B of the EPF Act and residual Rs. 36,282/- as provisional costs and charges. Section 7Q of the EPF Act stipulates that the employer shall be liable to pay simple

interest @ 12% p.a. or as specified on any amount due from the employer under EPF Act, from the date of which amount becomes due until date of its actual payment.

45. From section 14B of the EPF Act, we note that the EPFO Authorities have been given powers to recover damages in case of employer's defaults in payment of any contribution to the fund. There is no pre-conceived formula regarding what damages should be fixed under Section 14B of the EPF Act and the same has been left to the discretion of the EPFO Authority to determine the damages in facts of each case.

Thus it becomes clear that the EPFO Authorities have powers to levy damages. It is also significant to note that damages is in relation to non- payment or delayed payment of contribution under Section 7A of the EPF Act by the employer (the Corporate Debtor herein) therefore, the damages in a sense is to be treated as extended part of the contribution.

46. We note that the EPF Act itself provides the priority of payments of contributions or other debts under Section 11 which reads as under :-

“Section 11 in Employees Provident Funds Miscellaneous Provisions Act, 1952

11. Priority of payment of contributions over other debts

(1)Where any employer is adjudicated insolvent or, being a company, an order for winding up is made, the amount due-

(a) from the employer in relation to [an establishment] to which any [Scheme or the insurance Scheme] applies in respect of any contribution payable to the Fund [or, as the case may be, the Insurance Fund], damages recoverable under section 14B, accumulations required to be transferred under sub-section (2) of section 15 or any charges payable by him under any other provision of this Act or of any provision of the [Scheme or the Insurance Scheme]; or

(b) from the employer in relation to an exempted [establishment] in respect of any contribution to the provident fund or any insurance fund (in so far as it relates to exempted employees), under the rules of [the provident fund or any insurance fund] [any contribution payable by him towards the [Pension] Fund under sub-section (6) of section 17,] damages recoverable under section 14B or any charges payable by him to the appropriate Government under any provision of this Act under any of the conditions specified under section 17, shall where the liability therefor has accrued before the order of adjudication or winding up is made, be deemed to be included] among the debts which under section 49 of the Presidency Towns Insolvency Act, 1909, or under section 61 of the Provincial Insolvency Act, 1920, or under [section 530 of the Companies Act, 1956], are to be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up, as the case may be.

[Explanation: In this sub-section and in section 17, "insurance fund" means any fund established by an employer under any Scheme for providing benefits in the nature of life insurance to employees, whether linked to their deposits in provident fund or not, without payment by the employees of any separate contribution or premium in that behalf.]

[(2) Without prejudice to the provisions of sub-section (1), if any amount is due from an employer, [whether in respect of the employee's contribution (deducted from the wages of the employee) or the employer's contribution], the amount so due shall be deemed to be the first charge on the assets of the establishment, and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts.]”

(Emphasis Supplied)

47. The liability accrued before the order of adjudication of insolvency or winding up are to be paid in priority over other claims.

48. In the present appeal, the claims pertain to the period prior to CIRP and subsequent liquidation and the claims were filed by the Respondents before the Resolution Professional after issue of public notice inviting claims and the Respondents filed the claim of Rs. 1,24,86,750/-.

49. It is significant to note that an amendment was made in the EPF Act via amendment Act, 33 of 1988 w.r.f. 01.08.1988 which describes that without prejudice to the provision of sub-section 1 of Section 11 of the EPF Act, “if any

amount is due from an employer” amount so due shall be due to be first charge on the assets of the establishment.

50. In this regard, we would like to refer to the judgement of the Hon’ble Supreme Court of India in case ***Maharashtra State Cooperative Bank (Supra)*** which gives clear ratio as laid down by the Hon’ble Supreme Court of India in Para 67 to 69. These paras reads as under :-

“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 7-A, 7-Q, 14-B 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 7-Q. Likewise, default on the employer's part to pay any contribution to the Fund can visit him with the consequence of levy of damages.

68. As mentioned earlier, sub-section (2) was inserted in Section 11 by Amendment Act 40 of 1973 with a view to ensure that payment of provident fund dues of the workers are not defeated by the prior claims of the secured and/or of the unsecured creditors. While enacting sub-section (2), the

legislature was conscious of the fact that in terms of existing Section 11 priority has been given to the amount due from an employer in relation to an establishment to which any scheme or fund is applicable including damages recoverable under Section 14-B and accumulations required to be transferred under Section 15(2). The legislature was also aware that in case of delay the employer is statutorily responsible to pay interest in terms of Section 17. Therefore, **there is no plausible reason to give a restricted meaning to the expression “any amount due from the employer” and confine it to the amount determined under Section 7-A or the contribution payable under Section 8.**

69. If interest payable by the employer under Section 7-Q and damages leviable under Section 14 (sic Section 14-B) are excluded from the ambit of expression “any amount due from an employer”, every employer will conveniently refrain from paying contribution to the Fund and other dues and resist the efforts of the authorities concerned to recover the dues as arrears of land revenue by contending that the movable or immovable property of the establishment is subject to other debts. Any such interpretation would frustrate the object of introducing the deeming provision and non obstante clause in Section 11(2). Therefore, it is not possible to agree with the learned Senior Counsel for the appellant Bank that the amount of interest payable under Section 7-Q and damages leviable under Section 14-B do not form part of the amount due from an employer for the purpose of Section 11(2) of the Act.”

(Emphasis Supplied)

51. The Hon'ble Supreme Court laid down that there is no reason to give restrictive meaning of expression "any amount due from the employer" and confine to only amount determine under Section 7A of the EPF Act. The Hon'ble Supreme Court further held that interest payable by the employee under Section 7Q and the damages levied under Section 14B of the EPF Act will also be covered as dues from the employers for the purpose of Section 11(2) of the EPF Act.

52. We note that in the present appeal the amount which has been claimed by the employer are covered under Section 7A, 7Q and 14B of the EPF Act and therefore are fully governed by the judgement *Maharashtra State Cooperative Bank (Supra)*.

53. In view of this clear judgement of the Hon'ble Supreme Court of India the contention of the Appellant are not tenable and stand rejected.

54. We also note that the Hon'ble Supreme Court of India in *Sunil Kumar Jain v. Sundaresh Bhatt* [(2022) 7 SCC 540] held that the dues of the gratuity and pension shall be governed by Section 36(4) of the Code. It is reiterated that Section 36(4)(ii) of the Code specifically excludes "all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund", from the ambit of liquidation estate assets. Therefore, Section 53(1) of the Code cannot be made applicable to such dues, which are to be treated outside the liquidation estate assets under the Code. Section 36(4) of the Code has clearly

gives protection to workmen's dues under provident fund, gratuity fund and pension fund which are not to be treated as liquidation estate assets and the liquidator cannot claim over such dues.

55. We also note that this Appellate Tribunal's order in case of *Jet Aircraft Maintenance Engineer's Welfare Association [(2023) SCC OnLine NCLAT 2363]* was upheld by the Supreme Court and where it was held that PF and ESI funds are not part of Corporate Debtor estate and do not belong to the Corporate Debtor and therefore could not fall under liquidation estate. This also does not support the case of the Appellant

56. This Appellate Tribunal in the case of *State Bank of India v. Moser Baer Karamchari Union, [(2019) SCC OnLine NCLAT 447]* also examined the question of whether gratuity fund, provident fund and pension fund should be included as part of liquidation estate by including the same for payments under the waterfall mechanism under Section 53 of the Code. In this case, the Liquidator denied payment of the said funds in a preferential manner and had included the same for payment under the waterfall mechanism prescribed under Section 53 of the Code whereas the workers union claimed dues cannot be part of the waterfall mechanism under Section 53 of the Code. This Appellate Tribunal decided that Section 36(4)(a)(iii) of the Code cover all sums due to any workmen or employee from provident fund and the gratuity fund and the same should not be included in liquidation estate and further held that the liquidation estate/ assets of the

corporate debtor under Section 36(1) read with Section 36 (3) of the Code, do not include sums due to any workman and employees from the provident fund, the pension fund and the gratuity fund, for the purpose of distribution of assets under Section 53 of the Code. It was decided that the dues are to be paid to the workmen/employees on priority, without reference to or waiting for distribution of liquidation assets as per the waterfall mechanism under Section 53 of the Code.

57. In view of detailed discussion we do not find any merit in the appeal. The appeal deserved to be dismissed and stand dismissed. No Costs. Interlocutory Application(s), if any, are Closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indavar Pandey]
Member (Technical)

Sim