

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 580 of 2023

(Arising against the impugned order dated 17th March 2023 passed by the Hon'ble National Company Law Tribunal, Mumbai Bench in I.A. 2152 of 2022 in C.P. (IB) No.1443 of 2020)

IN THE MATTER OF:

Truvisory Insolvency Professionals Pvt. Ltd. (IPE)

1501, Tower No. 4, Spring Grove Towers,
Lokhandwala Township, Kandivali East,
Mumbai-4000101.

...Appellant

Versus

Employees' Provident Fund Organisation

Regional office, Yelahanka No. 2, Maaruthi Complex, 1st
'A' Main, HIG 'A Sector' Yelahanka New Town,
Bangalore – 560064.

...Respondent No.1

Employees' Provident Fund Organisation,
Regional Office, V.K. Complex,
Fort Road, Kannur – 670001

...Respondent No.2

Axis Bank, Khar (W) Branch
Plot No. 326, Matru Smriti,
Main Linking Road, Khar West,
Mumbai – 400052

...Respondent No.3

State Bank of India, Industrial Finance Branch,
Andheri 102, Natraj, 194 Sir MV Road,
Western Eastern Highway, Metro Junction,
Andheri, Mumbai – 400069.

...Respondent No.4

Present:

For Appellant: **Ms. Shivani Rawat, Jojongandha Ray, Tine Abraham
Advocates.**

For Respondents: **Mr. Hitesh Sachar, Ms. Anju Jain, Rabi Karmokar,
Advocates for R-1,2.
Mr. Amrendra Kumar, Ms. Sanidhya Kumar,
Advocates for R-4.**

J U D G M E N T

(11th September, 2024)

INDEVAR PANDEY, MEMBER (TECHNICAL)

This appeal has been filed under section 61(1) of the Insolvency and Bankruptcy Code, 2016 (in short Code) read with rule 11 of the National Company Law Appellate Tribunal Rules, 2016 challenging the impugned order of National Company Law Tribunal, Mumbai Bench, the Adjudicating Authority (in short AA) in I.A. No. 2152 of 2022 in C.P. (IB) No. 1443 of 2020 passed on 17th March, 2023. The AA vide the aforesaid order directed the Appellant/Resolution Professional to: (a) Set aside amounts corresponding to the provident fund contributions of the employees of the Corporate Debtor from the funds available in the attached bank accounts. (b) Furnish an undertaking to the Respondents (EPFO, Kannur, and EPFO-Yelahanka) that the Corporate Debtor shall remit the aforesaid dues upon the Respondents vacating the attachment over the bank accounts of the Corporate Debtor.

2. The brief facts of the case are as follows:

(i) Bombay Rayon Fashions Limited (Corporate Debtor) is a company registered under the Companies Act, 1956, which is engaged in the production of textiles, fabrics, and spinning of linen yarn. On 07 June 2022, the AA admitted an insolvency petition filed by an operational creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short, the Code) against the Corporate Debtor and initiated the Corporate Insolvency Resolution Process (CIRP). Mr. Santanu T. Ray was appointed as the Interim Resolution Professional (IRP). During the first meeting of Committee of

Creditors (in short CoC) held on 26 July 2022, the CoC unanimously approved the replacement of the IRP with Mr. Satish Kumar Gupta. The AA confirmed the appointment of the IRP as RP on 04 August 2022, in I.A. No. 2127 of 2022 in CP (IB) 1443 of 2020.

(ii) On 03 February 2022, Employee Provident Fund Organisation (EPFO) Regional Office Kannur (RespondentNo.2) issued an attachment order on the Corporate Debtor's bank accounts for failure to pay INR 10,15,484/- towards the employer's contribution to the Provident Fund (PF). Subsequently, on 06 June 2022, EPFO Regional Office, Yelahanka, Bangalore (Respondent No.1) issued another attachment order on CD's bank accounts for INR 7,34,37,074/-. A total of 17 bank accounts of the CD were attached by the Respondent No. 1 and Respondent No. 2 collectively. These accounts, were held with Axis Bank, Khar (W) Branch Mumbai (Respondent No. 3) and State Bank of India, Industrial Finance Branch Andheri, Mumbai (Respondent No. 4). As a result, Respondent Nos. 3 and 4 attached the bank accounts of the CD. The communication to the banks (Respondent Nos. 3 and 4) regarding these attachments happened on 13 June 2022, after the commencement of the CIRP and the imposition of the moratorium under Section 14 of the IBC.

(iii) The IRP, upon being unable to access the bank accounts to ensure the Corporate Debtor's continued operation and to pay certain CIRP costs, issued a letter on 1 July 2022 to Respondent Nos. 1 and 2, requesting them to de-attach the bank accounts and withdraw the Attachment Orders. The IRP also advised Respondent Nos. 1 and 2 to submit any outstanding claims

in the prescribed format. A similar request for detachment was made to Respondent Nos. 3 and 4 on 6 July 2022.

(iv) On 13 July 2022, Respondent No. 1 replied to IRP, stating that its attachment order was issued prior to the commencement of the CIRP, and in the absence of a specific order from the AA to withdraw the attachments, it was not inclined to vacate its order. On the same day, Respondent No. 2, in a separate letter to IRP, stated that the Provident Fund (PF) authorities are entitled to satisfy their full claim during CIRP, asserting that the attached accounts were not “establishment accounts” as per Section 16A of the EPF Act and that EPF dues do not fall under Section 53 of the Insolvency and Bankruptcy Code (IBC).

(v) Despite filing their claims before the IRP on 11 July 2022 and 14 July 2022 respectively, and having their claims admitted in full under the "government dues" category, Respondent Nos. 1 and 2 did not withdraw the attachments on the Corporate Debtor's bank accounts. The list of admitted claims published by the Appellant on 13 February 2023 continues to reflect the claims of Respondent Nos. 1 and 2.

(vi) The IRP aggrieved by the refusal of Respondent Nos. 1 and 2 to lift the attachments on the bank accounts of the Corporate Debtor, and facing liquidity challenges in continuing the CIRP, filed a De-Attachment Application before the AA on 4 August 2022 vide I.A. No. 2152 of 2022. The application sought, among other reliefs, the de-attachment of the bank accounts of the Corporate Debtor maintained with Respondent Nos. 3 and 4.

(vii) Following the appointment of the Appellant as the RP on 4 August 2023, the Appellant was informed that the Corporate Debtor's bank

accounts remained inaccessible due to EPFO Attachment Orders, thereby hampering the Appellant's ability to manage the CD as a going concern due to insufficient cash balances. The Appellant identified several other bank accounts that were attached, which had not been included in the initial De-Attachment Application. Consequently, the Appellant filed an additional affidavit on 31 October 2022 before the AA, detailing the other attached bank accounts.

(viii) On 3 November 2022, during a hearing, the AA noted that Respondent Nos. 1 and 2 had not filed responses nor appeared in court. Consequently, the NCLT directed the Appellant to re-serve these respondents, as the court was not inclined to issue ex-parte orders. During a subsequent hearing on 14 December 2022, Respondents were again absent. After hearing the appellants, the AA passed the impugned order ex-parte.

(ix) The AA vide the impugned order held that the attachments made by Respondent Nos. 1 and 2, even if issued before the CIRP's commencement, cannot continue after the imposition of the moratorium. It further held that PF dues do not form part of the Corporate Debtor's estate, and the moratorium does not apply to such statutory dues. However, the funds for the PF contributions must be set aside from the attached bank accounts to satisfy the statutory obligations. The Impugned Order conditionally released the Corporate Debtor's 17 bank accounts, which were attached by the EPFOs Yelahanka and Kannur.

(x) During the pendency of the appeal in this Tribunal the AA passed the order for liquidation of CD 9 November 2023, with M/s. Truvisory Insolvency Professionals Private Limited (IPE) being appointed as the

Liquidator. The Liquidator has now replaced the RP as appellant in the present matter.

Submission of the Appellant:

3. The Appellant (Liquidator) has made following submission on facts:
 - The EPFOs issued attachment orders on 3 February 2022 and 6 June 2022 for the Corporate Debtor's failure to pay provident fund dues amounting to INR 7,34,37,074/- and INR 10,15,484/-, respectively. These orders targeted current and savings accounts, not maintained as PF accounts.
 - Respondent No. 2's attachment order pertains solely to damages and interest after the Corporate Debtor had settled the principal amounts. Despite this, the order incorrectly attached non-PF accounts.
 - Despite serving notices, EPFOs did not appear before the AA. The RP argued that the attached accounts were not PF accounts and that the attachment obstructed the CIRP. The De-Attachment Application was heard ex-parte, and the RP's request for submission of additional documents was denied.
 - The Impugned Order, while partially granting the De-Attachment Application, imposed conditions requiring the RP to set aside PF contributions from the attached accounts, provide an undertaking to remit dues, and handle PF claims as per the EPFOs' demands.
4. The counsel for the Appellant submitted that the CD's statutory creditors include eight Employee Provident Fund (EPF) organisations, including the EPFOs, all of which have filed claims. These claims, including

those of the EPFOs, were fully admitted. The remaining six creditors—EPFO Thane, EPFO Kandivali West Tarapur, EPFO Kandivali West Exleela, EPFO Solapur, EPFO Kolhapur, and EPFO Peenya—are similarly situated. The Appellant contends that the Impugned Order should be overturned as it enforces improper preferential treatment among creditors and is based on incorrect legal interpretation and inadequate consideration of applicable laws.

5. The appellant further submitted that the AA's directions to (a) set aside amounts for PF contributions from the Attached Accounts and require an undertaking to remit these amounts "immediately" to the EPFOs, and (b) prioritize EPFO payments upon lifting the attachment orders, create an unlawful preferential treatment for the EPFOs. This approach prejudices the other six similarly situated creditors and contravenes Section 53 of the Insolvency and Bankruptcy Code, 2016 (Code). It is established that similarly situated creditors must receive fair and equitable treatment. The Impugned Order's preferential treatment towards the EPFOs disrupts this principle, resulting in inequitable treatment of creditors, contrary to the legal framework.

6. The counsel further submitted that Section 36(4)(a)(iii) of the Code excludes provident fund dues from the liquidation estate only if such funds are designated for PF payments. *The Supreme Court's decision in Sundaresh Bhatt reinforces* that this exclusion applies only when specific PF accounts are maintained. Similarly, *the Appellate Tribunal's decision in Jet Aircraft Engineers supports that absent designated PF funds, claims must be addressed under Section 53 of the Code.*

7. The counsel stated that the AA erred by not recognizing that the Attached Accounts were not designated for PF payments and thus did not qualify for exclusion from the liquidation estate. The EPFOs' claims should have been handled per Section 53 of the Code. The AA also overlooked that Respondent No. 2's attachment pertained only to damages and interest after the CD had settled the principal PF liability, and the accounts did not contain PF contributions.

8. The appellant submitted that the Impugned Order misinterprets legal precedents. The reliance on the Jet decision by the AA was misplaced, as it failed to acknowledge that when no PF funds are maintained, claims must be dealt with under Section 53. Similarly, The AA misinterpreted the judgments in Parameshwar Udpa and C.G. Vijay Laxmi, which address different contexts and obligations. The Impugned Order obstructs the liquidation process. Section 35(1)(b) of the Code grants the Liquidator control over all assets, including the Attached Accounts. The order restricts the Liquidator's access to necessary funds, hindering the completion of the liquidation within the statutory timeline, as mandated by Regulation 44(1) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

9. The Counsel stated that the EPFOs' reliance on judgments is misplaced, particularly when arguing for the continuation of attachment orders issued before CIRP initiation. The Tribunal has clarified that such orders cannot continue during the moratorium.

10. In the end the Counsel submitted that the Impugned Order should be set aside due to its erroneous preferential treatment of EPFOs, its

obstructive impact on the liquidation process, and its misinterpretation of relevant legal precedents.

Submission of the Respondents:

11. The Counsel for Respondents 1 and 2 stated that the order of the attachment issued by the Respondent No.1 is dated 06.06.2022 and attachment order issued by Respondent No.2 is dated 03.02.2022. Further, the CIRP commencement date with respect to the CD is 07.06.2022. Therefore, both the attachment orders are prior in time and not during the CIRP.

12. The Counsel for Respondents cited this Appellate Tribunal's Judgment in the case of **Regional Provident Fund Commissioner vs T.V. Balasubramanian Company Appeal (AT) (Insolvency) No. 1521 of 2019 Decided on: 08.06.2020**. By the Judgement Supra passed by three members Bench, whereby it has been specifically held that attachment of the property of the Corporate Debtor by the EPFO before initiation of CIRP is prior to commencement of CIRP, therefore, the same cannot be held to be against the provisions of the Code 2016 especially Section 14. In this regard reliance has been placed upon paras 4, 6, 7 and 13 which are reproduced below:

4. The Corporate Debtor filed MA No. 830 of 2019 through Resolution Professional of the Corporate Debtor to cancel the encumbrance which had been created by way of attachment.

6. The Resolution Professional has filed its counter-affidavit on behalf of the Corporate Debtor, wherein it is stated that creation of the

charge of the security interest effected by the Appellant by registering the deed is in contravention of the Moratorium as contemplated under Section 74(2) read with Section 14 (1) of the Code. Further, the same would result in defeating the interest of the creditors, if the Appellant herein crystallises security interest to his advantage and take the benefit of Section 52 of the Code and thus, violate the distribution under Section 53 in the event of the liquidation of the Corporate Debtor. The aforesaid deed registered on dated 28th March 2019 was made during the CIRP is contrary to the Moratorium declared by the Adjudicating Authority, is in gross violation of Section 14(1) of the Code.

7. It is stated by the Respondent that the Learned Adjudicating Authority while passing the impugned Order duly considered the immovable properties belonging to the Corporate Debtor, which were attached and under the legal custody of Recovery Officer, EPFO and only upon such information proceeded and passed the impugned Order.

13. It is pertinent to mention that the Adjudicating Authority has passed the impugned Order without considering the attachment order dated 04th August, 2017. It is on record that the Recovery Officer in order to realise outstanding dues, attached the immovable properties belonging to the Corporate Debtor, in the exercise of powers vested in him under Section S(B) of the EPF and M.A. Act, 1952, vide order of attachment EPFCP-IE bearing reference No. T.N./VL/6294/Recovery/2017 dated 04th August, 2017. On perusal of this letter (Annexure A-4), it is clear that Authorised officer, Regional officer, Vellore, issued a Recovery Certificate to the Recovery

Officer, Regional Office, Vellore in exercise of powers conferred under Section 8(8) to 8(G) of the Employees Provident Fund and Miscellaneous Act, 1952. Copy of Order of attachment EPFCP-16 is also enclosed with the attachment order passed by the Recovery Officer, Employees Provident Fund Organization. Thus, it is undisputed that the attachment of immovable property of the Corporate Debtor was made by the Recovery Officer EPFO Organization on 04th August 2017 much before the petition under Section 7 of the Code.

13. The counsel stated that the Impugned Order does not create any disparity between similarly situated creditors. the filing of claim by other regional offices of EPFO does not justify the statement of Appellant as it is settled proposition of law that sums due to any Workmen from the above 'funds' are excluded from the 'Liquidation Estate' Legislative intent is clear that any sums' due to any Workmen from aforesaid 'fund' are excluded and cannot be used for 'recovery' in the Liquidation.

14. The counsel placed reliance upon the Judgment of this Tribunal in **C.G. Vijyalaskshmi and Ors. vs Kumar Rajan, RP, Hindustan Newsprint Limited and Ors. [Company Appeal (AT) (CH) (Ins.) No. 29 of 2021]**. In particular, the paras 14,15 & 22 which are reproduced below:

14. Section 36(4) provides that the following shall not be included in the Liquidation Estate Assets and shall not be used for recovery in the Liquidation'. In the instant case, clause (iii) of sub-section 4(a) is relevant which is all sums due to any Workmen/Employee from the 'Provident Fund'. 'Pension Fund' or the 'Gratuity Fund'.

15. Hence, sums due to any Workmen from the above funds are excluded from the 'Liquidation Estate'. Legislative intent is clear that any 'sums' due to any Workmen from aforesaid 'fund' are excluded and cannot be used for "recovery" in the Liquidation.

22. Having regard to the ratio laid down by this Tribunal in 'Jet Aircraft' (Supra) and the Order having been upheld by the Hon'ble Supreme Court in Civil Appeal No. 407 of 2023 the question whether there was 'fund' maintained by the Corporate Debtor or not pales into insignificance."

15. The counsel further stated that Section 36(4)(a)(iii) of the Code states that all sums due to any workman or employee from the provident fund, the pension, and the gratuity fund shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation. The attachment of the accounts occurred prior to the commencement of the moratorium, the initiation of CIRP, and the start of liquidation, ensuring they did not hinder the liquidation process. Section 53(1) of the Code further states that the proceeds from the sale of the liquidation assets shall be distributed according to the order of priority and within such period and in such manner as may be specified under the aforementioned section. Assets which are not included in the liquidation estate, cannot come under the purview of Section 53 (1), which is the case with PF, Gratuity and Pension Funds.

16. The aforesaid decision clearly upholds principles that the provision for dues of PF, Pension and Gratuity of employees has to be made by the Liquidator irrespective of the fact whether a dedicated account/ fund is

available for the same. The claims in this regard would have to be paid out of available funds of the CD.

17. The counsel for the respondent further stated that Hon'ble Supreme Court in the case of ***State of Jharkhand and Ors. vs Jitendra Kumar Srivastava and Ors. /MANU/SC/0801/2013/*** had held the following vide paras 7 & 8 of the Judgment:

“7. It is an accepted position that gratuity and pension are not the bounties. An employee earns these benefits by dint of his long, continuous, faithful and un-blemished service.

8. It is the hard-earned benefit, which accrues to an employee and is in the nature of property. This right to property cannot be taken away without the due process of law as per the provisions of Article 300A of the Constitution of India.”

18. The Counsel for Respondents stated that during the hearing the Hon'ble Tribunal sought explanation with respect to whether any of the attachment order is only for damages and interest. The respondent further submitted that this issue is covered in entirety by the judgment of this very 3-member bench of Hon'ble NCLAT ***Mr. Anuj Bajpai vs Employees Provident Fund Organisation (EPFO) and Ors. /Comp.App.(AT) (Ins.) No. 1141 of 2023 & I.A. No.3979 of 2023/***.

Analysis and findings:

19. We have gone through the record and heard the submission of learned counsels in detail.

20. The operative part of the decision of the AA is reproduced below:

“5. Following the decision in the case of Jet Aircraft Maintenance Engineer's Welfare Association (Supra), we hold that PF dues do not form part of Corporate Debtor's Assets and accordingly need to be excluded therefrom. We do not have any details of amounts lying in the attached bank accounts of the Corporate Debtor as well as the break-up of EPFO demand. In view of this, we direct the Resolution Professional to set aside money equivalent to PF contributions (both employee and employer) of the employee's, whose list is shared by the EPFO, from the balances lying in the attached bank account and give an undertaking to EPFO to remit such dues immediately upon receipt of Employee wise details of PF dues in default from its office. Upon submission of such undertaking by the Resolution Professional, the EPFO department shall issue necessary orders lifting the attachment over Applicant's bank account stated in the prayer quoted as above. Immediately upon vacation of the attachment and receipt of Employee wise details of PF dues, the Resolution Professional shall remit this money to the EPFO department for credit to the account of concerned employees. As regards claim of dues other than dues arising on account of Employer & Employee Contribution towards Provident Fund, the EPFO may file the claim before the Resolution Professional who shall admit claim of such amount after verification under the category of statutory dues.

6. With the above directions, IA-2152/2022 is partly allowed.”

21. The appellant on affidavit has given the details of claims submitted by eight PF authorities. Total amount of claims submitted by all the PF

authorities to the Liquidator is Rs.1,33,28,87,139/-. A table showing the claims submitted and accepted by Liquidator is given below:

EPFO claims admitted by the RP			EPFO claims admitted by the Liquidator	
Name	Amount Claimed (in INR)	Amount (in INR) and Percentage of Claim Admitted	Amount Claimed (in INR)	Amount (in INR) and Percentage of Claim Admitted
EPFO, Kolhapur	3,14,83,492	3,14,83,492 (100%)	3,14,83,492	3,14,83,492 (100%)
EPFO, Kandivali (Exleela)	11,16,919	6,68,614 (59.86%)	11,16,919	6,68,614 (59.86%)
Central Board of Trustees, EPF, Kannur (Respondent No. 2)	8,10,048	8,10,048 (100%)	8,10,048	6,64,243 (82%)
Regional PF Commissioner and Recovery Officer, Bangalore (Respondent No. 1)	23,68,44,933	23,68,44,933 (100%)	23,68,44,933	23,68,44,933 (100%)
Employee Provident Fund Organisation, Regional Office, Peenya	4,59,52,754	4,59,52,754 (100%)	4,59,52,754	4,59,52,754 (100%)
EPFO, Regional Office, Thane	57,46,56,297	18,51,01,405 (32.21%)	57,46,56,297	12,95,87,577 (22.5%)
EPFO, Solapur	20,89,95,071	1,51,81,898 (7.26%)	20,89,95,071	1,51,81,898 (7.26%)
EPF Kandivali, West Mumbai (Tarapur)	23,30,27,625	23,30,27,625 (100%)	23,30,27,625	23,30,27,625 (100%)

22. The appellant has sought quashing of impugned order of AA on the grounds that similarly placed provident funds are being treated differentially. There are six other EPFOs who's claim have not been decided

in the instant order. The preferential treatment given to claims of two EPFOs would be discriminatory and bad in law.

23. The appellant has relied upon the decision of Hon'ble Supreme Court in the case of '**Sunil Kumar Jain & Ors. v. Sundaresh Bhatt and Ors.** [(2022) 7 SCC 540] in particular Paras 53 and 54 of the Judgment which are reproduced below:

“53. Now so far as the dues of the workmen/employees on account of provident fund, gratuity and pension are concerned, they shall be governed by Section 36(4) of the IB Code. Section 36(4)(iii) of the IB 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 IB Code shall not be applicable to such dues, which are to be treated outside the liquidation process and liquidation estate assets under the IB Code. Thus, Section 36(4) of the IB Code has clearly given outright 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 shall have no claim over such dues. Therefore, the concerned workmen/employees shall be entitled to provident fund, gratuity fund and pension fund from such funds which are specifically kept out of liquidation estate assets and as per Section 36(4) of the IB Code, they are not to be used for recovery in the liquidation.

54. In view of the above and for the reasons stated above, it is held as under:

i) that the wages/salaries of the workmen/ employees of the Corporate Debtor for the period during CIRP can be included in the CIRP costs provided it is established and proved that the Interim Resolution Professional/ Resolution Professional managed the operations of the corporate debtor as a going concern during the CIRP and that the concerned workmen/ employees of the corporate debtor actually worked during the CIRP and in such an eventuality, the wages/salaries of those workmen/ employees who actually worked during the CIRP period when the resolution professional managed the operations of the corporate debtor as a going concern, shall be paid treating it and/or considering it as part of CIRP costs and the same shall be payable in full first as per Section 53(1)(a) of the IB Code;

ii) considering Section 36(4) of the IB code and when the provident fund, gratuity fund and pension fund are kept out of the liquidation estate assets, the share of the workmen dues shall be kept outside the liquidation process and the concerned workmen/employees shall have to be paid the same out of such provident fund, gratuity fund and pension fund, if any, available and the Liquidator shall not have any claim over such funds.”

24. The directions of Hon’ble Supreme Court (supra) are contained in para 54(ii) in reference to provident fund, gratuity fund and pension fund. Hon’ble SC has clearly directed that share of workman dues shall be kept outside the liquidation process and the concern workman/employees shall have to be paid the same out of such provident fund, gratuity fund and pension fund, if any available. The appellant relies on the specific word **‘if**

any available', in the Judgment supra and claims that the attached accounts are savings and current accounts of the CD and do not fall in the purview of dedicated provident fund, gratuity fund and pension fund as ordered by the Supreme Court.

25. We find that this issue was analysed and decided by this Tribunal in the **Jet Aircraft Maintenance Engineering Welfare Association V. Ashish Chhawchharia, RP of Jet Airways India Ltd. in CP (IB) No. 2205/B/2019**. The Tribunal has framed questions relating to entitlement of provident fund gratuity etc. in the para 33 of the aforesaid judgment. The relevant questions are as given below:

“II. Whether the workmen and employees are entitled to receive the payment of provident fund, gratuity and other retirement benefits in full since they are not part of the liquidation estate under Section 36(4)(b)(iii) of the Code?

XI. Whether the claim of Regional Provident Fund Commissioner verified to the extent of Rs.24,40,65,594/- arising out of an order dated 17.10.2018 passed under Section 14B of Employees' Provident Funds & Miscellaneous Provisions Act 1952 can be treated as secured debt and the Appellant was entitled to receive the amount as secured creditors?”

26. While discussing the question II above this Appellate Tribunal held in para 68 of the Judgment on the following lines:

“68. The judgment of Hon'ble Supreme Court as relied by learned counsel for the Respondent also in Para 53 clearly held that Section 53(1) of the Code shall not be applicable to such sums, which are to be treated outside the liquidation process and liquidation estate assets

*under the Code. Direction issued by Hon'ble Supreme Court in Para 54(i) was with regard to wages and salary of the workmen/employees of the Corporate Debtor during the CIRP period and under direction (ii) at Para 54, Hon'ble Supreme Court directed in reference to Section 36(4) of the Code that provident fund, gratuity fund and pension fund are kept out of the liquidation estate assets and the share of the workmen dues shall be kept outside the liquidation process. Learned counsel for the Respondent has relied on words "if any, available" occurring in direction (ii). **The above words cannot be read to mean that the workmen and employees are not entitled for provident fund, gratuity fund and pension fund if not available with the Liquidator.***

(Emphasis supplied)

27. After detailed analysis of the relevant Judgments in this regard the Tribunal decided the issues vide Para 71 & 72 with regard to question II above. The relevant paras are extracted below:

"71. In view of the aforesaid discussion, we arrive at following conclusions:

(i) The workmen and employees are entitled for payment of full amount of provident fund and gratuity till the date of commencement of the insolvency which amount is to be paid by the Successful Resolution Applicant consequent to approval of the Resolution Plan in addition to the 24 months workmen dues as the workmen is entitled to under Section 53(1)(b) of the Code. It is made clear that in addition to part amount of provident fund and gratuity as proposed in Resolution Plan to workmen, Successful Resolution Applicant is obliged to make payment of balance unpaid amount of provident fund and gratuity to workmen and employees.

72. Our answer to Question II and III is as follows:

(i) The workmen and employees are entitled to receive the amount of provident fund and gratuity in full since they are not part of the liquidation estate under Section 36(4)(a)(iii).

(ii) The workmen are entitled to receive their dues from the Corporate Debtor for period of 24 months as per provision of Section 53(1)(b) at least to minimum liquidation value envisaged under Section 32(2)(b) read with Section 53(1).

28. The question XI as framed by the Tribunal was answered in following manner in paras 117 to 119, which are reproduced below:

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.

29. It is clear from the discussion above that even if no separate fund is available for provident fund, gratuity fund and pension fund they have to be paid out of existing funds of the CD.

30. The decision of this Tribunal in the aforesaid matter means that in the case of Provident Fund, the employees contribution, employers contribution, the interest if any to be paid by the employer in case of delay in payment

and damages as provided in Sections 11 and Section 7A, 7Q, 14B and 15 (2) of Employees Provident Funds and Miscellaneous Provision Act, 1952 [Act 19 of 1952] are covered under the provisions of Section 36(4)(a)(iii) of the Code and are not part of the liquidation estate and hence are not subject to distribution under Section 53 (1) of the code. The aforesaid decision of the Tribunal was a case of CIRP and its resolution and the payment for PF dues had to be made by successful resolution applicant. However, the ratio is equally applicable in case of liquidation as the principles relating to components of PF dues not forming part of the liquidation estate has been decided in this case.

31. The aforesaid decision of this Tribunal has been upheld by a bench of Hon'ble Supreme Court headed by Hon'ble CJI in the case of **'Jalan Fritsch Consortium v. Regional Provident Fund Commissioner & Anr. (Civil Appeal No 407 of 2023 with Civil Appeal Nos 465-469 of 2023)**.

32. Earlier this Tribunal in the matter of **"Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd. & Ors., Company Appeal (AT) (Ins.) No. 354 of 2019 & Other Appeals"** had decided about priority of PF dues. In this case the Resolution Plan was approved by the Adjudicating Authority. One of the Appeal was filed by the Regional Provident Fund Commissioner. It was submitted in the Appeal that Successful Resolution Applicant was supposed to pay the total provident fund amount, but only part of the amount has been allowed by the Resolution Professional. Section 36(4)(a)(iii) was relied. In Para 40 to 45 while allowing the Company Appeal (AT) (Ins.) No. 1001 of 2019 following was held by this Tribunal:

“40. According to Appellant- ‘Regional Provident Fund Commissioner’, ‘Successful Resolution Applicant’ is supposed to pay the total provident fund amount, but only a part of the amount has been allowed by the ‘Resolution Professional’.

41. It was submitted that the ‘Resolution Plan’ is against the provisions of Section 36(4) (iii) of the ‘I&B Code’ as per which the ‘provident fund’ and ‘gratuity fund’ cannot be included as assets of the ‘Corporate Debtor’.

42. An Affidavit has been filed by ‘Kushal Limited’- (‘Successful Resolution Applicant’) stating that the approved ‘Resolution Plan’ has duly taken care of all the statutory dues amounting to total Rs.5.09 crore. It was further submitted that the principal amount of ‘provident fund’ has been taken into consideration whereas the order of levying of interest by the ‘PF Authority’ post ‘Corporate Insolvency Resolution process’ is not permissible under the law for the time being in force.

43. Further, according to ‘Successful Resolution Applicant’, Section 7Q and 14B of the ‘Employees Provident Funds and Miscellaneous Provision Act, 1952’ cannot be relied upon as the provision of the ‘I&B Code’ has overriding effect on the same in terms of Section 238 of the ‘I&B Code’.

44. However, as no provisions of the ‘Employees Provident Funds and Miscellaneous Provision Act, 1952’ is in conflict with any of the provisions of the ‘I&B Code’ and, on the other hand, in terms of Section 36 (4) (iii), the ‘provident fund’ and the ‘gratuity fund’ are not the assets of the ‘Corporate Debtor’, there being specific provisions, the application of Section 238 of the ‘I&B Code’ does not arise.

45. Therefore, we direct the ‘Successful Resolution Applicant’- 2nd Respondent (‘Kushal Limited’) to release full provident fund and interest thereof in terms of the provisions of the ‘Employees Provident Funds and Miscellaneous Provision Act, 1952’ immediately, as it does not include as an asset of the ‘Corporate Debtor’. The impugned order dated 27th February, 2019 approving the ‘Resolution Plan’ stands modified to the extent above.”

33. The Judgment supra of the three members bench of this Tribunal upheld the contention of RPFO that dues under 7Q namely interest payable by employer and Section 14B relating to recovery of damages by the provident fund authority from the employer in default are covered under Section 36(4)(a)(iii) of the code and do not form part of the liquidation estate. It further held that no provisions of employees fund Provident Fund and Miscellaneous Provision Act, 1952 are in conflict with IBC.

34. Against the above judgment of this Tribunal a Civil Appeal was filed in the Supreme Court which was dismissed.

35. The appellant has also relied upon the Judgment of this Tribunal in ‘Mr. B. Parameshwara Udpa v. Assistant PF Commissioner’ in Company Appeal (AT) (CH) (Ins) No. 231 of 2021. It was held by a two members bench in the instant case that during CIRP, the resolution professional was not obligated to make provisions for PF dues when the corporate debtor had not maintained a designated PF account, and any claims towards PF dues must be made before the resolution professional and dealt with under the waterfall mechanism under the Code. However, subsequently a three members bench of this Tribunal in the matter of **‘Mr. Anuj Bajpai vs**

Employees Provident Fund Organisation (EPFO) and Ors. [Comp. App. (AT) (Ins.) No. 1141 of 2023] has decided to that all dues of EPFO do not fall within the purview of liquidation estate.

36. The brief facts in Mr. Anuj Bajpai matter supra are as follows:

- i. The appeal was filed by Mr. Anuj Bajpai liquidator of Shirt company (India) Pvt. Ltd. (CD) against the order passed by AA where Employees Provident Fund Organization Regional office, Coimbatore and Ors. were respondents.
- ii. The CD was admitted into CIRP vide order of AA dated 26.02.2020 and the respondents had filed their claim before the IRP of Rs.1,24,86,850/-. The CD was subsequently directed to be liquidated and the appellant was appointed as the Liquidator who asked the respondents to file the claim during liquidation period.
- iii. It is the case of the appellant that the CD did not maintain sperate funds with respect to pension fund and provident fund and therefore according to the appellant the claim of the respondent is to be treated under the water fall mechanism as per the Section 53 of the Code.
- iv. EPFO Authorities issued sale proclamation for the assets of the CD and started recovery in terms of provisions of the Employees Provident Fund & Miscellaneous Provision Act, 1952.
- v. The Liquidator issued public notice for auction of a certain property and during such e-auction notice the appellant came to know of the charge created by the respondent on the said property. On the prayer of the appellant the AA allowed him to create a fixed deposit to the extent of Rs. 1,24,86,750/- as claimed by EPFO. The auction sale of

the subject property was conducted and a fixed deposit as directed by AA was created.

37. The operative part of the judgment in para 31 of the impugned order dated 30.06.2023 is 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”

38. In the appeal this Tribunal in the matter framed following issues for decision which were mentioned in para 35 of Mr. Anuj Bajpai supra are as under:

(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.

39. The Appellate Tribunal discussed the provisions of Section 36 of IBC, Section 7A, 7Q and Section 14B of Employees Provident Fund & Miscellaneous Provision Act, 1952. It further observed that the EPF Act itself provides for priority of payments for contribution or other debt 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)

40. The Tribunal observed that the liability accrued before the order of adjudication of insolvency or winding up are to be paid in priority or other claims. In the matter under consideration the claims of EPFO pertains to period prior to CIRP and subsequent to liquidation and the claims were filed by the respondents before the RP after the issue of public notice inviting claims. The Tribunal also noted 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.

41. The Tribunal in Anuj Bajpai matter further referred to the Judgment of Hon’ble Supreme Court in the case of Maharashtra State Cooperative Bank supra in particular paras 67 to 69 which clearly upheld 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.

42. Accordingly, this Tribunal decided that the PF claims of the employees 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). In view of this clear judgement of the Hon'ble Supreme Court of India the contention of the Appellant was not tenable and it has been rejected.

43. We have already seen that this position has been affirmed in the case of Jet Aircraft Maintenance Engineers Welfare Association supra and Tourism Finance Corporation of India Ltd. v. Rainbow Papers Ltd. & Ors., Company Appeal (AT) (Ins.) No. 354 of 2019 and both these decisions have been upheld by the Hon'ble SC.

44. The present matter before us relates to the claim of eight EPFO authorities which are placed in identical situation as in the case of Anuj Bajpai Judgment supra and are further covered by aforesaid Judgments.

45. In view of position explained above, we hold that:

- (i) the claims of all the eight EPFO's are to be treated on par and the entire amount of claim under Section 7A, 7Q and 14B of the EPF Act has to be paid to respective PF authority from the funds available in the attached bank accounts of CD. In case the amount available is not sufficient the same shall be met from disposal of other assets of the CD. Balance left after meeting the claims of the EPFO Authorities shall form part of the liquidation estate.
- (ii) The attachment on the bank accounts of the CD by the respondents is hereby removed and the liquidator along with Respondent 3 & 4 shall

ensure payment of PF dues to respective PF authorities. The liquidator go ahead with the liquidation process of CD thereafter.

46. The appeal is disposed of with the above directions. Pending I.As, if any, are closed. There is no order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Indavar Pandey]
Member (Technical)

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