

(2023) 01 NCLT CK 0054

In the National Company Law Tribunal

Case No : IA Nos.1431 Of 2022 in CP (IB) No.315/Chd/Hry/2019

**?Employees Provident Fund Organisation Vs Darshan Singh Anand
Resolution Professional ?**

Date of Decision : 23-01-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 30(2)(e), 36(4)(a)(iii), 60(5), 238
Employees' Provident Funds & Miscellaneous Provisions Act, 1952 — Section 7A, 7(2),
7Q, 14B, 17B

Citation : (2023) 01 NCLT CK 0054

Hon'ble Judges : Harnam Singh Thakur, Member (J);Subrata Kumar Dash,
Member (T)

Bench : Division Bench

Advocate : Ashish Chaudhary, G.S. Sarin

Final Decision : Disposed Of

Judgement

Subrata Kumar Dash, Member (Technical)

1. The present application has been filed by EPFO through Regional Provident Fund Commissioner, Jodhpur seeking direction against the corporate debtor to implement the order dated 13.01.2022 and order dated 19.01.2022 passed under Section 7A of EPF and MP Act, 1952 and the order dated 30.11.2021 and 13.09.2021 passed under Section 14B and Section 7Q of EPF and MP Act, 1952 and letter dated 11.02.2022 of Damages leviable under Section 14B and interest chargeable under Section 7 (2) of the EPF Act, 1952 in view of Section 36 (4) (a) (iii) of Insolvency and Bankruptcy Code, 2016.

2. It is submitted that the appellant initiated the enquiry against the corporate debtor for not complying with the EPF Act by not depositing the dues for the period 09/2015 to 03/2018. After valuation the EPF dues from the employer under Section 7A of the Act, whereby amounting to Rs. 1,29,49,496/-, were assessed to be paid by the corporate debtor under different heads. Further, the applicant initiated proceedings under the Act against the corporate debtor for deficiency in making payment during the period 04/2018 to 07/2018, an amount

of Rs. 31,33,265/- has been assessed to be paid by the corporate debtor vide order date 29.01.2022. Further, vide order dated 30.11.2021, dues during the period from 04/2019 to 09/2021 have been assessed amounting to Rs. 77,25,551/- on account of damages under Section 14B to be deposited by the corporate debtor. Also, an amount of Rs. 3,09,786/- on account of interest under Section 7Q is to be paid by the corporate debtor.

3. It is further submitted by the applicant that EPF dues during the period 05/2017 to 03/2019 amounting to Rs. 1,08,90,367/- under Section 14B and Rs. 52,37,583/- under Section 7Q assessed vide order dated 13.09.2021 under the Act. The applicant has assessed the short remitted dues of Rs. 11,20,937/- vide letter dated 09.02.2022. The applicant submitted the claim of EPF dues with the IRP on 11.02.2022 in the prescribed format along with proof of claim and the latest calculation dated 11.09.2022 of the EPF dues, whereby the total amount of Rs. 9,28,86,993/- been claimed by the applicant.

4. It is averred by the applicant that respondent No. 1 vide email dated 01.04.2022 has admitted the claim of Rs. 1,60,82,761/- instead of the entire amount of claim raised by the applicant. In view of the above facts, the applicant is praying for a direction to the respondent to deposit the amount of EPF dues determined under Section 7A, 14B and Section 7 (2) of EPF and MP Act, 1952.

5. Notice of the present application issued to respondent vide order dated 16.11.2022. Pursuant to the notice, the reply has been filed by the respondent vide diary no. 02412/01 dated 30.12.2022, wherein the respondent has denied the submissions made by the applicant. It is averred by the respondent that the corporate debtor has not been in operation since September 2020, and the workers had been laid off on 29.01.2021, therefore, there are no dues towards applicant EPFO to be payable for the period since the commencement of CIRP i.e., 02.02.2022.

6. It is further submitted by the respondent that EPFO lodged a claim in Form B on 11.02.2022, amounting to Rs. 9,28,86,993/- with the Resolution Professional. Therefore, against the total submitted claim amounting to Rs. 9,28,86,913/-, an amount of Rs. 5,01,92,604/- was admitted finally and the portion of damages claimed for Rs. 4,26,94,389/- was not admitted, being the contingent claim and on account of the moratorium on any proceedings against the corporate debtor.

7. It is averred by the despondent that Resoltuio Plan so received provides for the payment of Rs. 5,01,92,604/- in full as per the claim admitted by the Resolution Professional to be paid within 90 days from the date of approval of the Resolution Plan by the Adjudicating Authority. The damages assessed by the applicant are not due and are just for the present application, and the respondent has already admitted the just and equitable dues and EPF as actually due under the statutory dues.

8. We have heard the learned counsel for the applicant & respondent and have perused the records carefully.

9. Before adjudicating on the matter, the relevant Sections of the EPF and MP Act, 1952 are extracted below for the sake of clarity:-

Section 7A of the EPF & MP Act, 1952

"Section 7A in The Employees' Provident Funds and Miscellaneous Provisions Act, 1952

1[7A. Determination of money due from employers.—

2[(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 3[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.]"

Section 7Q of the EPF & MP Act, 1952

"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 a 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 8F of EPF & MP Act, 1952

"8F. Other modes of recovery.—

(1) Notwithstanding the issue of a certificate to the Recovery Officer under section 8B, the Central Provident Fund Commissioner or any other officer authorised by the Central Board may recover the amount by any one or more of the modes provided in this section.

(2) If any amount is due from any person to any employer who is in arrears, the Central Provident Fund Commissioner or any other officer authorised by the Central Board in this behalf may require such person to deduct from the said amount the arrears due from such employer under this Act and such person shall comply with any such requisition and shall pay the sum so deducted to the credit of the Central Provident Fund Commissioner or the officer so authorised, as the case may be: Provided that nothing in this sub-section shall apply to any part of the amount exempt from attachment in execution of a decree of a civil court under section 60 of the Code of Civil Procedure, 1908 (5 of 1908).

(3) (i) The Central Provident Fund Commissioner or any other officer authorised by the Central Board in this behalf may, at any time or from time to time, by notice in writing, require any person from whom money is due or may become due to the employer or, as the case may be, the establishment or any person who holds or may subsequently hold money for or on account of the employer or as the case may be, the establishment, to pay to the Central Provident Fund Commissioner either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due from the employer in respect of arrears or the whole of the money when it is equal to or less than that amount.

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(4) The Central Provident Fund Commissioner or the officer authorised by the Central Board in this behalf may apply to the court in whose custody there is money belonging to the employer for payment to him of the entire amount of such money, or if it is more than the amount due, an amount sufficient to discharge the amount due.

(5) The Central Provident Fund Commissioner or any officer not below the rank of Assistant Provident Fund Commissioner may, if so authorised by the Central Government by general or special order, recover any arrears of amount due from an employer or, as the case may be, from the establishment by distraint and sale of his or its movable property in the manner laid down in the Third Schedule to the Income-tax Act, 1961 (43 to 1961).]"

Section 14B of the EPF & MP Act, 1952

"14B. Power to recover damages.—Where an employer makes default in the payment of any contribution to the Fund 46 [, the 47 [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 4[or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of 5[any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, 6[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 7[from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:] 8[Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:] 9[Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme.]"

10. The issue at hand is whether the amount of Rs. 9,28,86,993/- including the demands arising out of proceedings under the EPF and MP Act 1952 are recoverable from the corporate debtor. We have carefully gone through the copy of the orders and calculation under Section 14B & 7Q of EPF & MP Act, 1952, attached as Annexure A-11 of the application and the revised claim dated 11.02.2022 submitted to Resolution Professional for an amount of Rs. 9,28,86,993/-. This amount also includes damages under Section 14B and interest under Section 7Q of the Act.

11. We are conscious of the decision of the Hon'ble NCLAT on the same issues in the case of Sikander Singh Jamuwal versus Vinay Talwar and Others, Company Appeal (AT)(Ins) No.483 of 2019; Case Citation: (2022) iblaw.in 221, NCLAT, the relevant part of which reads as follows:

"It is very much clear vide Section 30(2)(e) that the Resolution Plan does not contravene any of the provisions of the law for the time being in force. The Resolution Professional/Adjudicating Authority is to look at the compliance of the provisions of law. In this context, we have to refer to Section 17B of the Employees Provident Funds and Miscellaneous Act, 1952 which is depicted below:

"[17B. Liability in case of transfer of establishment.--Where an employer, in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme or [the [Pension] Scheme or the Insurance Scheme], as the case may be, in respect of the period up to the date of such transfer: Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.]"

12. Since no provisions of the above said Act are in conflict with any of the provisions of the I & B Code, the applicability of even Section 238 of the I & B Code does not arise. PF dues are not the assets of the CD as amply made clear by the provisions of Section 36(4)(a)(iii) of the I & B Code, 2016

13. In this context, the following judgments are also referred to:

i. The judgment of this Tribunal (3 Members Bench - comprising of Hon'ble Chairperson & two Members) in C.A. (AT)(Ins) No. 354 of 2019, decided on 19th August 2019 Tourism Finance Corporation of India Ltd. Vs. Rainbow Papers Ltd. & Ors. given below:

"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. The appeal preferred by the 'Regional Provident Fund Commissioner' is allowed with aforesaid observations and directions. No costs."

It is also noted that the Judgement of the Hon'ble NCLAT in the case of Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd.(supra) has been affirmed by the Hon'ble Supreme Court Civil Appeal No. 1920 of 2020 decided on 20-05-2020(2020) ibclaw.in 145 SC.

(emphasis supplied)

14. In short, it is a settled issue that when it comes to non-payment of the EPF arrears by the Corporate Debtor, the issue is one of "compliance of Law". As clarified in the extracts above, all the dues raised by the EPFO under various sections, including interests and penalties are to be paid by the new establishment under Section 17B of the Employees Provident Funds and Miscellaneous Act, 1952. In the event of any grievance on the part of the corporate debtor with regard to PF arrear demand, there is a provision in the EPF & MP Act, 1952 for appeal against the demand raised by the EPFO Authorities.

15. Furthermore, under Section 30(2)(e) of the Resolution Plan, in order to be legitimate, the resolution plan cannot contravene any of the provisions of any law in force. Thus, in the present context, it is incumbent on the RP/SRA to ensure that Section 17B of the EPF and MP Act, 1952 are complied with. As mentioned, Section 17B lays down that in case of a transfer of Establishment, the person to whom the establishment is transferred is liable to pay the contributions and other sums due from the employer under any provision of the EPF and MP Act, 1952.

16. In the present application, the liability under the EPF and MP Act, 1952 pertains to the period 09/2015 to 03/2018, 04/2018 to 07/2018, 04/2019 to 09/2021 & 05/2017 to 03/2019 respectively i.e., prior to the CIRP period. It is also noted that the operations of the corporate debtor have been closed since September 2020. The Resolution Plan of the Successful Resolution Applicant has been approved by the CoC and is pending approval of this Adjudicating Authority. In the circumstances, the liabilities to pay the impugned demand of the applicant falls squarely on the Successful Resolution Applicant.

17. In case of any dispute, the Resolution Applicant/Successful Resolution Applicant may avail all the appellate proceedings provided in the EPF and MP Act, 1952 for redressal of their grievances. The payment of the dues of the applicant, therefore, be paid as per the provision of the EPF and MP Act, 1952 by the Successful Resolution Applicant. The Successful Resolution Applicant is, thus, directed to make necessary payments under the provisions of EPF and MP Act,

1952 after the approval of the Resolution Plan by this Adjudicating Authority.

18. In the circumstances, IA No.1431/2022 is allowed subject to the above observations and stands disposed of accordingly.