
(2023) 06 NCLT CK 0025

In the National Company Law Tribunal

Case No : I.A. No.516 of 2022 & I.A. No.404 of 2022 in C.P. (IB) No.14/BB/2017

Shri Shivadutt Bannanje Vs

Date of Decision : 02-06-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 36(3), 36(4), 36(4)(a)(iii), 42, 53, 60, 60(5), 60(5)(c)
Employees' Provident Funds & Miscellaneous Provisions Act, 1952 — Section 7A, 7Q, 11, 14B
National Company Law Tribunals, 2016 — Rule 11

Citation : (2023) 06 NCLT CK 0025

Hon'ble Judges : T. Krishnavalli, Member (J); Manoj Kumar Dubey, Member (T)

Bench : Division Bench

Advocate : Raghuram Cadambi, Saravana P.

Final Decision : Disposed Of

Judgement

T. Krishnavalli, Member (Judicial)

I.A. No.516 of 2022

1. The instant Application has been filed by Shri Shivadutt Bannanje, Liquidator of M/s. Falcon Tyres Ltd. (in Liquidation) under Section 60, r/w Rule 11 of the NCLT Rules, 2016 inter alia seeking to pass appropriate direction to the Applicant for the distribution of the second tranche of the liquidation proceeds amounting to Rs.32,00,00,000/-, in view of the provident fund dues and gratuity dues owed by the Corporate Debtor.

2. Brief facts of the case, as mentioned in the Application which are relevant to the issue in question, are as follows:

i. It is stated that this Adjudicating Authority through its order dated 30.12.2019, ordered the liquidation of the Corporate Debtor, and appointed Mr. Shivadutt Bannanje as a Liquidator of the Corporate Debtor. In discharge of his obligations, a public announcement in Form B of Schedule II was published in the newspapers on 01.01.2020, calling upon the various stakeholders of the

Corporate Debtor to submit their claims or update their claims submitted during the CIRP in respect of the Corporate Debtor on or before 29.01.2020.

ii. Since the Applicant failed to receive any bid in response to the first three e-auctions for the sale of the assets of the Corporate Debtor, the fourth e-auction was conducted on 24.02.2022. On successful conclusion of the fourth e-auction, a sum of Rs.1,22,67,30,411/- was received from the successful bidders inclusive of interest.

iii. On a claim received by the Employees Provident Fund Organisation ('EPFO') vide I.A. No.317 of 2021, this Adjudicating Authority vide order dated 16.03.2022 condoned the delay. Following this, the Liquidator admitted the claim of the EPFO to the extent of Rs.20,58,09,617/- vide e-mail dated 06.07.2022.

iv. Further, it was computed by the Applicant that the Corporate Debtor owed an amount of Rs.11,08,17,495/- towards the gratuity dues to the workmen and employees of the Corporate Debtor. It is submitted that no separate fund was maintained by the Corporate Debtor for Provident fund as well as gratuity.

v. The Applicant proceeded to divide the amount of liquidation proceeds to be distributed amongst the various stakeholders of the Corporate Debtor in the following tranches:

a. An initial tranche of Rs.77,46,15,835/- to be disbursed by the Applicant to the Stakeholders entitled to receive payments under Section 53 of the Code, in proportion to the admitted claims of the respective stakeholders.

b. A second tranche of approximately Rs.32,00,00,000/- comprising of (i) Rs.20,58,09,617/- towards the dues owed by the Corporate Debtor to the Employees Provident Fund Organization, Mysore as well as (ii) Rs.11,08,17,495/- as gratuity dues owed by the Corporate Debtor to its workmen to be kept as a reserve by the Applicant to be utilized in payment fund dues as well as gratuity dues, subject to the directions, if any, received from this Bench.

vi. The Applicant has already distributed the initial tranche of Rs.77,46,15,835/- among various stakeholders in accordance with the Regulations. However, in view of the conflicting position of law, the second tranche of Rs.32 crore has been kept as a reserve by the Applicant, which is to be distributed for the dues of EPFO and gratuity as stated above. For the conflicting position of law, the Applicant has relied upon the following decisions:

- Sikandar Singh Jamuwal vs. Vinay Talwar and Ors. [Company Appeal (AT) (Ins) No.483 of 2019];
- V-Con Integrated Solutions Pvt. Ltd. vs. Acharya Techno Solutions (India) Pvt. Ltd. (I.A./176/KOB/2020 in TIBA/01/KOB/2019);
- Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd. & Ors. [Company Appeal (AT)(Insolvency)No.354 of 2019];

· Regional Provident Fund Commissioner vs. R.L. Logistics Pvt. Ltd. (IA/818/IB/2020 in CP/1226/IB/2018).

· Mr. Savan Godiawala, Liquidator of Lanco Infratech Ltd. vs. Mr. Apalla Siva Kumar (2020 ibclaw.in 191 NCLAT) wherein it was held that “where no statutory funds are created by the Corporate Debtor, then in that situation the Liquidator cannot be directed to make the payment of the statutory dues to the employees since the Liquidator does not have the domain to deal the properties of the Corporate Debtor, which are not a part of the liquidation assets.”

vii. Therefore, the Applicant has filed an Application seeking the directions from the Bench regarding the distribution of the amount of Rs.32 crore for payment towards EPFO and gratuity dues owed by the Corporate Debtor and seeking clarification whether it ought to be distributed to the EPFO and the workers of the Corporate Debtor excluding it from the liquidation stake or it should be distributed as per priority laid down under Section 53 of the Code.

3. Heard the learned Counsel for the Applicant/Liquidator. We have carefully perused the pleadings of the Party and extant provisions of the Code, and the Regulations made thereunder.

4. It is apt to refer the provisions of sub-section (4) of Section 36 of the Code, which is as under:

“(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)

(ii)

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

(iv)

(v)

(b)”

5. The Liquidator is empowered to include only those assets as part of liquidation estate which are defined under the provisions of sub-section (3) of Section 36 of the Code. From the above, it is clear that the Applicant-Liquidator cannot include the sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund, as part of the Liquidation Estate of the Corporate Debtor. The Applicant has cited the NCLAT decision in the case of Mr. Savan Godiawala (supra) in which it is held that “where no statutory funds are created by the Corporate Debtor, then in that situation the liquidator cannot be directed

to make the payment of the statutory dues to the employees since the Liquidator does not have the domain to deal the properties of the Corporate Debtor, which are not a part of the Liquidation Estate.”

6. However, the Hon’ble Apex Court in a recent decision dated 07.02.2023, in the matter of State Bank of India vs. Moser Baer Karamachari Union & Anr. [(2023) ibclaw.in 14 SC], has upheld the order passed by the NCLT, Principal Bench in Alchemist Asset Reconstruction Co. Ltd. Vs. Moser Baer India Ltd. [(2019) ibclaw.in 818 NCLT] whereunder the NCLT vide order dt.19.03.2019 held that the ‘Provident Fund Dues’, ‘Pension Fund Dues’ and ‘Gratuity Fund Dues’ cannot be part of Section 53 of the Code. In so far as the decision of Hon’ble NCLAT in the decision of Mr. Savan Godiawala (supra), the Hon’ble Apex Court observed that the Hon’ble NCLAT has passed an order in that case due to ignorance of its earlier order dated 19.08.2019, in the case of State Bank of India vs. Moser Baer Karamachari Union & Anr. which has been affirmed by the Hon’ble Apex Court in Civil Appeal No.258 of 2020 (supra). Accordingly, the decision of Hon’ble NCLAT in the case of Mr. Savan Godiawala (supra) does not survive.

7. In view of the foregoing discussion and considering the provisions of the Code, we are of the opinion that the dues of provident fund to be paid to EPFO, Mysuru and the dues of workmen and employees of gratuity fund owed by the Corporate Debtor do not come within the meaning of ‘liquidation estate’ for the purpose of distribution of assets under Section 53 of the Code. Accordingly, the Liquidator is directed to distribute the 2nd Tranche of liquidation proceeds amounting to Rs.20,58,09,617/- towards the dues owed by the Corporate Debtor to the Employees Provident Fund Organisation, Mysore and an amount of Rs.11,08,17,495/- as gratuity dues owed by the Corporate Debtor to its employees/workmen, as per the details given above.

8. Accordingly I.A. No.516 of 2022 is disposed of.

I.A. No.404 of 2022

1. The instant Application has been filed on 27.09.2022 by Employees Provident Fund Organisation (‘Applicant’) under Section 42 & 60(5)(c) of the IBC, 2016 R/w Rule 11 of the NCLT Rules, 2016 inter alia seeking to allow the condonation of 933 days of delay (i.e., dated 29.01.2020 to 22.07.2022) of rightful claim and to issue appropriate direction to Liquidator to consider the claims of EPFO Department under Section 36(4)(a)(iii) and Section 60(5) to release the statutory PF dues on priority of the payment over the other debts is as per Section 11 of EPF & MP Act, 1952.

2. Brief facts of the case, as mentioned in the Application which are relevant to the issue in question, are as follows:

i. M/s. Falcon Tyres Ltd. a covered establishment under the EPF and MP Act, 1952 having allotted a PF Code KN/6707 w.e.f. 01.09.1978. The Respondent has become a defaulter in payment of EPF & aligned dues. The Applicant being a

competent authority as initiated to conduct an enquiry for PF contribution dues as follows:

Sl.

No.

Period of default by the Corporate Debtor

U/s of EPF & MP Act

Total liable to pay Applicant

1.

From January 2014

to September 2020

U/s 7Q

Rs.4,13,97,070/-

2.

From February 2015

to September 2020

U/s 14B

Rs.3,74,81,897/-

3.

From January 2014

to September 2020

U/s 7Q

Rs.3,11,56,343/-

4.

From February 2015

to September 2020

U/s 7Q

Rs.2,30,75,349/-

5.

From October 2020, to 08.06.2022

U/s 14B

Rs.84,10,977/-

6.

From October 2020 to 08.06.2022

U/s 7Q

Rs.76,15,499/-

7.

Valuation charge towards property

Rs.4,04,700/-

Total

Rs.14,95,41,835/-

ii. In this regard revised claims dated 31.05.2022 and Form: C raised before the Respondent and same was admitted and confirmed by the Respondent through emails. The Respondent is now the employer of the Company under the Act and had the responsibility to pay their statutory dues. The Liquidator can take control of the 'Liquidation Assets' only after liquidating the entire dues payable by the Corporate Debtor under the Provisions of the Act. The Applicant had being aggrieved by the reply dated 22.07.2022 of the Respondent had intend to prefer this interlocutory application before this Adjudicating Authority to be treated as claims raised by the Applicant is third party assets (not as debts) and they fall outside the liquidation claims of the Corporate Debtor. The Applicant being a competent authority has initiated and passing an orders and forwarded the claim Forms as desired by the Liquidator on various dates as detailed below:

Sl.

No.

Date

Form Type

Amount (Rs.)

Claim filed before

1.

26.11.2018

Form B

7,94,25,778/-

Sri

Savan

Godiawala

2.

13.10.2020

Form B

21,29,36,137/-

Sri Savan

Godiawala

3.

14.10.2020

Form 66

21,29,36,137/-

Sri Shivadutt Bannanje

4.

10.06.2022

Form C

22,89,67,613/-

Sri Shivadutt Bannanje

iii. The Applicant forwarded its claim to the Liquidator in Form B dated 10.06.2022 including the later demands raised for provident fund assessment passed under Sections 7A, 14B & 7Q of the EPF and MP Act, 1952 to which the Respondent/Liquidator has given an untenable reply. Accordingly, the Applicant has filed this Application to allow condonation of 933 days of delay (i.e. dated 29.01.2022 to 22.07.2022) of rightful claim and issue direction to the Liquidator to consider the claims of EPFO Department U/s 36(4)(a)(iii) and Section 60(5) to release the statutory PF dues on priority of the payment over the other debts as per Section 11 of EPF & MP Act, 1952.

3. The Liquidator in his written submissions filed on 17.02.2023 has explained that in compliance to the Adjudicating Authority's order dated 16.03.2022 in I.A. No.317 of 2021, the claim of the Applicant was admitted by the Liquidator to the tune of Rs.20,58,09,617/-. This amount was considering the demand of the EPFO dues as well as the demand raised by the EPFO vide orders under various Sections 7A, 14B & 7Q of the EPF and MP Act, 1952 for interest and damages till the liquidation commencement date of 30.12.2019. However, on 20.07.2022, the Applicant issued another demand letter for an amount of Rs.22,89,67,613/- including interest and damages up to period of 08.06.2022 i.e., nearly two and

a half years after liquidation commencement date which was 30.12.2019, which was not accepted by the Liquidator.

4. Heard the learned Counsels for the parties. We have carefully perused the pleadings of the parties and extant provisions of the Code, and the Regulations made thereunder.

5. We have considered of the submissions of the Applicant/EPFO on the above subject. Following the decision in IA No.317/2021 vide order dated 16.03.2022, the Liquidator has already considered and admitted the amount of Rs.20,58,09,617/- of the EPFO up to the liquidation commencement date i.e., 30.12.2019. The additional demand raised by the EPFO is not admissible and allowable in view of the following decisions:

- Regional Provident Fund Commissioner –II, Employees Provident Fund Organization, Regional Office vs. Jasin Jose vide order dated 02.12.2022 in I.A. (I.B.C)/321/KOB/2022 in I.B.A/21/KOB/2019, in which it was held that the claim of Applicant for interest and penal damages post liquidation commencement date is not allowable; and the Liquidator in his written submissions has relied upon this order;

- Similar decision was rendered by this Adjudicating Authority vide order dated 05.01.2023 in the matter of Shri Vijay P Lulla vs. Axis Bank Ltd. & Anr. in I.A. No.130 of 2022 in C.P.(IB)No.122/BB/2017 in which reliance was placed by this Bench on the decision of NCLT Mumbai Bench in KSS Petron Vineet K Chaudhary vs. the Regional PF Commissioner bearing I.A. No.1694/2022, I.A. No.1086/2020 and I.A. No.1089 of 2020 in C.P.(IB)No.1202/MB/C-II/2017

6. Moreover, vide order passed today in I.A. No.516 of 2022 in C.P. (IB)No.14/BB/2017 it has already been held that an amount of Rs.20,58,09,617/- which was admitted by the Liquidator towards the EPFO dues up to the liquidation commencement date will be paid to the EPFO.

7. Accordingly, I.A. No.404 of 2022 is dismissed.