(2022) 07 NCLT CK 0052

In the National Company Law Tribunal

Case No : IA 1696 and IA 1085 of 2020 In CP (IB) 1374/MB/C II/2017

Vinit Kumar Chaudhary Liquiditor — APPELLANT

Vs

Regional Pf Commissionar (I) & Anr — RESPONDENT

Date of Decision : 15-07-2022

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 14, 14(1)(a), 14(1)(b), 33(5), 36(4), 52
Indian Penal Code, 1860 — Section 193, 196, 228
Employees' Provident Funds & Miscellaneous Provisions Act, 1952 — Section 7A, 7Q, 14B
Securities and Exchange Board of India Act, 1992 — Section 28
National Company Law Tribunal Rules, 2016 — Rule 11

Citation : (2022) 07 NCLT CK 0052

Hon'ble Judges : P.N. Deshmukh, Member (J);Shyam Babu Gautam Member (T)

Bench : Division Bench

Advocate : Atul Nanda, Sandeep Bajaj, Ravi Rattesar

Final Decision : Disposed Of

Judgement

Shyam Babu Gautam, Member

1. Liquidator of Petron Engineering Construction Limited ("Corporate Debtor"), has preferred the application, being I. A. No. 1696 of 2020, calling into question the legality of order dated 06.03.2020, passed by the Respondent under Section 7 A of EPF & MP Act ("Act"), demanding a payment to the tune of Rs. 34,13,50,998/-. The Liquidator has also called in question orders dated 04.03.2020, passed by Respondent under Section 7Q of EPF & MP Act, 1952 demanding a payment to the tune of Rs. 1,48,15,127/- towards interest component and order dated 04.03.2020, passed under Section 14B of EPF & MP Act, demanding a payment for an amount of Rs. 2,14,51,028/- towards damages and penalty. Pursuant to the above stated orders, the Respondent has issued notices to the Corporate Debtor seeking recovery of the above stated amounts through notice dated 25.06.2020. The notice has been called in question by the

Liquidator in IA No. 1085 of 2020.

2. The fact in brief are that Corporate Insolvency Resolution Process ("CIRP") was initiated against the Corporate Debtor vide order dated 23.03.2018 passed by this Adjudicating Authority and a moratorium was imposed under section 14 of the Code. The Corporate Debtor at the time vide its order dated 06.04.2018 informed the Respondent about the initiation of CIRP and imposition of moratorium against the Corporate Debtor. The Respondent, despite the intimation of moratorium issued summons dated 04.10.2018 under Section 7A of EPF & MP Act 1952 for conducting inquiry on outstanding Provident Fund dues. It has been asserted that the Corporate Debtor pursuant to the summons, on 22.10.2018 appeared before the Commissioner and requested him to keep the proceedings under section 7A of EPF & MP Act, 1952 under abeyance as the CIRP was in operation and moratorium had been imposed. This request was also made as late as 16.12.2019. As the process of CIRP could not succeed, this Adjudicating Authority vide its order dated 23.01.2020 ordered the Liquidation of the Corporate Debtor and appointed the Applicant as the Liquidator for the Corporate Debtor. The said order was uploaded on the website of Hon'ble NCLT on 05.02.2020. Immediately thereafter, Respondent passed the following Determination orders for the period:

a. Order dated 06.03.2020 under Section 7A of the EPF & MP Act, 1952 passed by Respondent No. 1 with a direction to the Corporate Debtor to make a payment of Rs. 34,13,50,998/- towards alleged dues for the period of January 2017 to July 2018, which was extended upto January 2020. (Refer page No. 40 in I. A No. 1696 of 2020)

b. Order dated 04.03.2020 under section 7Q of the EPF & MP Act, 1952 passed by Respondent No. 1 against the Corporator Debtor directing it to make payment towards interest amounting to Rs. 1,48,15,127/- for the period of 01.04.2013 to 18.09.2019. (Refer page no. 55 in I.A No. 1696 of 2020)

c. Order dated 04.03.2020 under section 14-B of the EPF &MP Act 1952 passed by Respondent No. 1 demanding a payment of an amount of Rs. 2,14,51,028/- in lieu of alleged damage and penalty for the period of 01.04.2013 to 18.09.2019. (Refer page No. 57 in I.A No. 1696 of 2020)

3. Thereafter, it appears that the Respondent has filed its claim with the Appellant on 06.03.2020. It has been asserted that the Resolution Professional as well as the Liquidator have carefully perused the books of accounts of the Corporate Debtor. As per the books and records as were made available to the Liquidator, an amount of Rs. 4,15,53,115/- was found due and payable towards the Provident Fund dues in respect of employees/workmen of the Corporate Debtor. This amount has also been admitted by the Liquidator in respect of the claim filed by the EPFO. The Resolution Professional as well as the Liquidator, during the Corporate Insolvency Resolution Process as well as Liquidation Process, as the case maybe, have cleared all statutory dues towards provident

fund etc for the period after initiation of CIRP. However, an amount of Rs. 4,15,53,115/- being P. F. dues for the pre-CIRP period have been admitted and are payable. The corporate debtor made a payment of amount of Rs. 8,19,60,981/- (Rupees Eight Crore Nineteen Lakh Sixty Thousand Nine Hundred and Eighty-One Only) towards the P. F. dues arising during CIRP period. Out of this amount, an amount of Rs. 7,45,52,732/- was paid by the Applicant/ Liquidator. Further, the P.F. dues amounting to Rs. 20,54,381/- arising during the Liquidation Period were also paid by the Applicant/Liquidator in full.

4. It is submitted that not even a single employees P.F dues have been calculated by the Respondents. Therefore, in absence of details of identified workmen and employees, no dues in the first place could exist. It has thereafter been submitted that the Respondents continued to act in flagrant contravention of the Code and issued a Recovery Notice dated 25.06.2020 demanding the payment of an amount of Rs. 34,13,51,098/- (Rupees Thirty-Four Crores Thirteen Lakhs Fifty-one Thousand and Ninety-Eight Only) in pursuance of the order dated 06.03.2020 passed under Section 7A of EPF & MP Act, 1952.

5. It is therefore asserted by the Applicant that the Orders and Recovery Notices have been passed in violation of the provisions of the Code. It has been contended that the Inquiry under section 7A of the EPF & MP Act has been initiated during the moratorium which was not permissible. It has further been contended that although the said orders have been passed during the Liquidation period, on account of embargo under section 33(5) of the Code, no suit or legal proceedings could be initiated against the Corporate Debtor and there being an embargo placed by the Legislature, no orders could have been passed. Reference has been placed upon section 14 and section 33(5) of the Code by the Applicant

6. The Applicant as well as the Respondent have filed their written submissions on the issues involved along with a list of judgments. The Respondent has strenuously, argued, and placed reliance on numerous judgments of National Company Law Tribunal and the Hon'ble Appellate Tribunal to content that the dues of the Respondent are excluded from the Liquidation Estate and are required to be paid in priority. The said proposition has been strenuously disputed by the Applicant, contending that Section 36(4) provides protection to employee and workmen in relation to the dues "from" the Provident Fund, Gratuity Fund and Pension Fund and not from dues which are payable "to" the said funds from the accounts of the Corporate Debtor. I need not to dwell much into this submission, in view of the judgments passed by this Adjudicating Authority, being order dated 12.09.2018 passed in the case of Precision Fasteners Ltd. Through the Liquidator v. EPFO and judgment of the Hon'ble National Company Law Appellate Tribunal, being Sikender Singh jamwal v. Vinay Talwar & Ors and "State Bank of India vs Moser Baer Karamchari Union & Anr" in Company Appeal (AT) (Insolvency) No. 396 of 2019 (decided on 19.08.2019)

7. However, the question fell for consideration before this Learned Adjudicating Authority is the tenability of the orders and the recovery notices which have been

passed by the Respondent, admittedly, after the moratorium was imposed by this Learned Adjudicating Authority.

8. It is seen that the Respondent, was made aware about the moratorium by the Corporate Debtor. However, despite the same, the Respondent appears to have initiated an inquiry under the provisions of the EPF & MP Act and has continued to proceed with the same by passing the orders and notices which are in question.

9. The Respondent in its defence has contended that the proceedings carried on Are assessment proceedings and are not barred under section 14 of the Code. The applicant on the other hand has contended that the orders under challenge have been passed in violation of the moratorium imposed by this Learned Adjudicating Authority vide order dated 23.03.2018. The Applicant has relied upon the judgement of the Hon'ble Supreme Court of India Anand Rao korada Vs. Varsha Fabrics (P) Ltd. And Ors. (AIR 2020 SC 222) where the Hon'ble Supreme Court rejected the orders passed by the Hon'ble High Court of Odisha which had directed for carrying out auction of the assets of the Corporate Debtor during moratorium. Reliance have also been placed on the judgement of the Learned NCLAT in Anju Agarwal v. Bombay Stock Exchange [Company Appeal (AT) (Insolvency) No. 734 of 2018] wherein Section 28 of the "SEBI ACT, 1992" has been held to be inconsistent with Section 14 of the I&B Code". Further, reliance has been placed on Dewan Housing Finance Limited vs SEBI (Appeal No. 206 of 2020), wherein the Learned Securities Appellate Tribunal, Mumbai while quashing the show cause notice and assessment orders which were issued after moratorium, has held that where a moratorium has been declared under section 14 of the Code, the authority which in the instant case is SEBI/AO will have no jurisdiction to institute any proceedings.

10. In addition to the above, it has also been urged by the Applicant that the Resolution Professional as well as the Liquidator have carefully perused the books of Corporate Debtor. As per the books and records as were made available to the Liquidator, an amount of Rs. 4,15,53,115/- was found to be payable towards the Provident Fund dues in respect of employees/workmen. This amount has also been admitted by the Liquidator in respect of the claim filed by the EPFO. The Resolution Professional as well as the Liquidator, during the Corporate Insolvency Resolution Process as well as the Liquidation Process as the case may be, have cleared all statuary dues towards provident fund etc for the period after initiation of CIRP. However, an amount of 4,15,53,115/- being PF dues for the pre-CIRP period have been admitted and are payable. It has also been brought to the notice of this Adjudicating Authority that during the CIRP, Corporate Debtor has made a payment of amount of Rs. 8,19,60,981/- (Rupees Eight Crore Nineteen Lakh Sixty Thousand Nine Hundred and Eighty-One Only) towards the P.F dues arising during CIRP period. Out of this amount, an amount of Rs. 7,45,52,732/- was paid by the Resolution Professional and the remaining amount of Rs. 74,08,249/-was paid by the Applicant/Liquidator. Further, the P. F dues

amounting to Rs. 20,54,381/- arising during the Liquidation Period were also paid by the Applicant/Liquidator in full. It has further been contended that as on date no such claims are made by the P.F Authorities, however, in case the applicant gets any claim from the above named authority the same shall be deal with in accordance with the provisions of the Code and the law enunciated by the Courts.

11. It has also been asserted that the Respondent has failed to provide details of the employees/workmen in respect of whom the alleged Provident Fund dues are being claimed. It is further averred that in absence of details of identified workmen and employees, no dues in the first place could exist. It has further been contended by the Applicant that only dues from the Provident Fund, Gratuity Fund and Pension Fund are payable and not the dues to the said funds.

12. In view of the above-mentioned issues raised, the issue which demands consideration is whether the Orders and Notices issued by the Respondent are in breach of the moratorium imposed by the Adjudicating Authority and whether the same could be passed during the Liquidation period.

13. The purpose of imposition of a moratorium has been expounded by the Hon’ble Supreme Court in the case of P. Mohanraj and Others vs. Shah Borthers Ispat Pvt. Ltd, wherein the Hon’ble Supreme Court has held that the moratorium is imposed to shield the Corporate Debtor from pecuniary attacks to enable it to get a breathing space so that it can continue as a going concern to ultimately rehabilitate itself. The observations of the Hon’ble Supreme Court are as under:

“While Section 14(1) (a) refers to monetary liabilities of the corporate debtor, Section 14(1) (b) refers to the corporate debtor’s assets, and together, these two clauses form a scheme which shields the corporate debtor from pecuniary attacks against it in the moratorium period so that the corporate debtor gets breathing space to continue as a going concern in order to ultimately rehabilitate itself. Any crack in this shield is bound to have adverse consequences, given the object of Section 14, and cannot, by any process of interpretation, be allowed to occur.”

14. A plain reading of section 14 of the Code shows that there is a complete prohibition imposed by the legislature on the institution of suits or continuation of proceedings against the Corporate Debtor including execution of any judgment, decree, or order in any court of law, tribunal, arbitration panel or other authority. Section 14 of the Code does not differentiate between any proceedings, whether they are assessment, quasi-judicial or judicial in nature. In fact, a moratorium is imposed on all proceedings irrespective of the nature. The object as succinctly put by the Hon’ble Supreme Court is clearly to shield the Corporate Debtor from all pecuniary attacks.

15. Similarly, during the Liquidation Period, Section 33(5) of the Code bars initiation of any suit or legal proceedings. The relevant extract of Section 33(5) of the Code is reproduced hereinbelow:

“33. Initiation of liquidation. –

(5) Subject to section 52, when a liquidation order has been imposed, no suit or other legal proceeding shall be instituted by or against the corporate debtor

16. In the instance case, the Respondent, despite being aware of the initiation of moratorium has proceeded to initiate proceedings under Section 7 A of the EPF & MP Act. The said proceedings, as per the contention of the Respondent are assessment proceedings. In this regard, we may refer to Section 7 A of the EPF & MP Act to note the nature of eh proceedings. The proceedings are clearly legal in nature and are judicial proceedings within the meaning of Section 193 and 228 of the Indian Penal Code. The relevant excerpt is as under:

“[7A. Determination of moneys 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 (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);

(2) The officer conducting the inquiry under sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), for trying a suit in respect of the following matters, namely:- (a) enforcing the attendance of any person or examining him on oath; (b) requiring the discovery and production of documents; (C) receiving evidence on affidavit; (d) issuing commissions for the examination of witnesses; and any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code (45 of 1860).”

17. The Circular dated 14.02.2020 issued by the Respondent itself suggests and states that proceedings initiated under Section 7 A of the EPF & MP Act, 1952 are legal in nature and the proceedings under the same must be done in an extremely cautious manner. The extract is as under:

“2. The minimum standard of evidence for commencement of any legal proceeding is existence of a prima facie case and the same applies to proceedings under Section 7A as well. Any enquiry or legal proceeding initiated without a prima facie case is of the nature of fishing and roving inquiry and the same is impermissible in law. Such inquiries are a nullity in the eyes of law and are non-est ab-initio. Therefore, the Assessing Officers shall record reasons in file, on the basis of evidence available on record, regarding existence of a prima-facie case is default, or of an applicability dispute, before initiating process u/s

7A.”

18. Therefore, proceedings initiated by the Respondent are not mere assessment proceedings as contended by the Respondent. The proceedings are legal proceedings as provided for in the circular dated 14.02.2020 issued by the Respondent, which encompass evidence to be led by parties to reach to a conclusion whether there is any amount which is due or payable under the EPF & MP Act. This is also evident from a reading of provision 7 A of the EPF & MP Act, which describes the proceedings under the said section as Judicial Proceedings within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code.

19. Further, in case any amount is due or payable, the Respondent, in terms of the provisions of the EPF & MP Act also imposes penalty and damages. The initiation of proceedings by the Respondent would therefore entail imposition of a pecuniary liability on the Corporate Debtor. This is exactly what is prohibited by the Code. The contention of the Respondent therefore, that the proceedings initiated are mere assessment proceedings and are no barred under the provisions of section 14 of the Code, is therefore liable to be rejected. This contention is also liable to be rejected for another reason, the claims during Corporate Insolvency Resolution Period are required to be filed within 14 days from the date of appointment of the interim resolution professional, in terms of Public Announcement issued under Regulation 6 of the IBBI (Insolvency Resolution Process. Thus, the claims as on the Insolvency commencement date or 14days thereafter are required to be filed. It is for this reason the Code provides for a stop on all proceedings to enable the Resolution Professional to collate all claims. A claim which is not alive on the Insolvency Commencement Date, therefore cannot indirectly be permitted to be ascertained. This, if permitted, will lead to numerous proceedings being initiated against the Corporate Debtor which will frustrate the object of the Code and the completion of the Corporate Insolvency Resolution Process in a time bound manner.

20. Further, the said proceedings, as rightly pointed out by the Applicant also barred during the Liquidation Period. In this regard, as is observed under section 33(5) of the Code, no suit or legal proceedings can be initiated by or against the Corporate Debtor. The only exception is provided to the Corporate Debtor itself to initiate proceedings with the permission of the Adjudicating Authority. Once there is an embargo put on the initiation of any legal proceedings initiated by the Respondent are clearly barred under the law, therefore, the enquiry itself was vitiated having been initiated in violation of the moratorium imposed and also against the spirit of Section 33(5) of the Code.

21. The Respondent has also contended that the dues being claimed by the Respondent are social welfare dues and the actions have been taken for the benefit of the employees and workmen. However, as rightly pointed out by the Applicant, the orders do not provide the details of the employees their P.F numbers, name of workers to whom these dues will be paid and workmen

against whom such dues are being claimed. The dues are required to be relatable to employees and workmen. This is also clear from section 36 of the Code, which protects the social welfare dues of the employees and workmen of the Corporate Debtor and places any amount which is due to any workmen, employee from the provident fund, pension fund and gratuity fund outside the liquidation estate. The said amounts are therefore required to be relatable to employees and workmen, which is also clearly absent in the present case. The contention of the Applicant that the orders have been passed in haste without identifying even the name of any employee or workmen, prima-facie, appears to be correct and bad in law.

22. Having said so, we are mindful that the benefits such as provident fund, pension fund and gratuity fund are required to be protected and prioritised which is also the intent of the Code. It therefore goes without saying that the setting aside of the orders passed by the Respondent will not come in the way of the respective employees or workmen to file their respective claims, if any, with the Applicant under the provisions of the Code in respect of provident fund, pension fund and gratuity fund.

23. In the present case, the Applicant (Liquidator) has contended that he has admitted certain claims in relation to the dues relating to the provident fund. The Applicant is required to make payments of the admitted dues in priority as has already been held in various cases by the Adjudicating Authority and the Appellate Tribunal. The Applicant (Liquidator) is duty bound, as per the Law laid down to ascertain and prioritise the payments of the social welfare dues.

24. In view thereof, without expressing any opinion on the merits of the Orders passed by the Respondent, the orders being in violation of the moratorium imposed are liable to be set aside. Consequently, the recovery notices are also set aside.

