

(202) 07 NCLT CK 0008

National Company Law Tribunal, Mumbai Bench Court II

Case No: IA 1694/2020, IA 1086/2020 and IA 1089/2020 IN CP (IB) 1202/MB/C-II/2017

Vineet K Chaudhary

APPELLANT

Vs

Regional P.F Commissioner (II),
Assistant P.F Commissioner And
Recovery Officer

RESPONDENT

Date of Decision: July 29, 2022

Acts Referred:

- Insolvency and Bankruptcy Code, 2016 - Section 14, 14(1)(a), 14(1)(b), 33(5), 36, 36(4), 60(5)
- Indian Penal Code, 1860 - Section 193, 196, 228
- National Company Law Tribunal Rules, 2016 - Rule 11
- Employees' Provident Funds And Miscellaneous Provisions Act, 1952 - Section 7A, 7Q, 11, 14B, 147B
- Securities and Exchange Board of India Act, 1992 - Section 28(2)
- Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Regulation 6

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

Bench: Division Bench

Advocate: Sandeep Bajaj

Final Decision: Disposed Of

Judgement

P. N. Deshmukh, Member Judicial

1. Liquidator of KSS Petron Private Limited (â€œCorporate Debtorâ€) has preferred the application, being I.A. No. 1649 of 2020, calling into

question the legality of Order dated 28.06.2019, passed by the Respondent under Section 7A of EPF & MP Act (â€œActâ€), demanding a payment to

the tune of Rs. 14,40,58,888/-. The liquidator has also called in question orders dated 05.07.2019, passed by the Respondent under Section 7Q of EPF

& MP Act, 1952 demanding a payment to the tune of Rs. 6,43,84,526/- towards interest component and order dated 05.07.2019, passed under Section

147B of EPF & MP Act, demanding a payment for an amount of Rs. 13,02,25,964/- 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 notices dated 28.06.2020

and 07.07.2020. Both the notices have been called in question by the Liquidator vide its I.A No. 1086 of 2020 and I.A No. 1089 of 2020 respectively.

2. The brief facts are that the Corporate Insolvency Resolution Process(“CIRP”) initiated against the Corporate debtor vide order dated

01.08.2017 passed by this Adjudicating Authority and a moratorium was imposed under section 14 of the Code. Thereafter, pursuant to a public

announcement issued by the Resolution Professional, Respondent submitted its Claim before the then Resolution Professional on 22.06.2018 for an

amount Rs. 47,25,682/-(Rupees Forty-Seven Lakh Twenty-Five Thousand Six Hundred and Eighty Two Only) R[efer Pg. 45/I.A No. 1694 of

2020] for the period March 2012-October 2015 and June 2015 to March 2017. The claim of the Respondents was duly admitted by the then

Resolution Professional under the List of Creditors of Corporate Debtor. [Refer pg. 65/I.A No. 1694/2020.]

3. Subsequently, it is revealed that Respondent, initiated inquiry under section 7A of the EPF & MP Act based on a report prepared By Enforcement

Officer. The inquiry has been initiated vide notice dated 30.01.2019 for the period 04/2015 to 12/2018. The Resolution Professional, it appears has

informed the Respondent about the pendency of the Corporate Insolvency Resolution Process and the imposition of moratorium under section 14 of

the Code. However, despite the said intimation, Respondent has continued its proceedings and issued summons on 04.06.2019 and 02.07.2019 under

section 7 A and 14B of the EPF & MP Act, 1952 [Refer Pg. 81/I.A. No. 1694 of 2020] and thereafter passed orders dated 28.06.2019 passed by

this Learned Adjudicating Authority, the Corporate Debtor was directed to be Liquidated. After the order of Liquidation, the Respondent has also

issued notices dated 28.06.2020 and 07.07.2020 seeking recovery of the amounts mentioned in the Orders.

4. The Liquidator/Applicant has called into question Orders dated 05.07.2019 passed under Section 7A of EPF & MP Act (â€œActâ€) demanding a

payment to the tune of Rs. 14,40,58,888/- and orders dated 05.07.2019 passed under Section 7Q of EPF & MP Act, 1952 demanding a payment to the

tune of Rs. 6,43,84,526/- towards interest component and Order dated 05.07.2019, passed under Section 14B of EPF & MP Act, demanding a

payment for an amount of Rs. 13,02,25,964/- towards damages and penalty (â€œOrdersâ€). The Applicant has also challenged notices seeking

recovery of the above stated amounts through notices dated 28.06.2020 and 07.07.2020 based on two primary grounds:

a. Orders and Notices under challenge have been passed in violation of the moratorium imposed under section 14 of the Code.

b. The inquiry under section 7A has no basis and is a roving and fishing inquiry as there is no outstanding liability of the Provident Fund dues and the Orders are even otherwise vague and have been passed without any material particulars.

5. The Respondent on the other hand has countered the challenge made by the Liquidator based on the following submission:

a. The determination of the amounts of Provident Fund dues are assessment proceedings and are not barred under section 14 of the Code. It is only on completion of

the said assessment proceedings that a claim can be filed under the provisions of the Code.

b. The dues of the Respondent are required to be paid in priority over all dues provided under section 11 of the EPF & MP Act as the said dues are excluded from the

Liquidation Estate under section 36 of the Code.

6. The Applicant as well as the Respondent have filed their written submissions on the issues involved along with a list of judgments. The Respondents

has vehemently, argued, and placed reliance on numerous judgments of National Company Law Tribunal and the Honâ€™ble Appellate Tribunal to

contend 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. We need not to venture much into this submission, in view of the Judgements 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 Tribunal, being Sikendar Singh Jamwal v. Vinay Talwar & Ors and State Bank of India vs Moser Baer Karamchari Union & Anⁱⁿ Company

Appeal (AT) (Insolvency No. 396 of 2019 decided on 19.08.2019).

7. However, the question which requires consideration is the legality of impugned orders and the recovery notices issued by the Respondent and if

they are issued in breach of moratorium period admittedly, during the time when moratorium was imposed by Adjudicating Authority.

8. It is seen that the Respondent, itself, on 22.06.2018, has filed a claim before the Resolution Professional amounting to the tune of Rs. 47,25,682/-

(Rupees Forty-Seven lakh Twenty-Five Thousand Six Hundred and Eighty-Two Only) for a period from March 2012-October 2015 and June 2015 to

March 2017. This claim of the Respondents has been admitted by the then Resolution Professional. Admittedly, the Respondent was aware of the

imposition of moratorium. 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, however, no judgments have been placed by the Respondent on this issue to support his submission. The Applicant on the other hand has

contended that the orders under challenge have been passed in violation of the moratorium imposed by the Adjudicating Authority vide order dated

01.08.2017. The Applicant has relied upon the judgment of the Hon^{ble} Supreme Court of India A nand Rao Korada Vs. Varsha Fabrics (P)

Ltd. And Ors. AIR 2020 SC 222) where the Honâ€™ble Supreme Court rejected the orders passed by the Honâ€™ble High Court of Odisha which

had directed for carrying out auction of assets of the Corporate Debtor during moratorium. Reliance has also been placed on the judgment of the

Learned NCLAT in Anju Agarwal v. Bombay Stock Exchange (Company Appeal (AT) (Insolvency) No. 734 of 2018) wherein Section 28 A of the

â€™SEBI ACT, 1992â€™ has been held to be inconsistent with Section 14 of the I&B Codeâ€™. 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 as on the date no claims have been submitted by the EPF authorities claiming

any dues under the EPF & MP Act and in case, any such claims are made, the Applicant shall deal with said claims in accordance with the provisions

of the Code and the law enunciated by the Courts. It has also been contended that Respondent has failed to provide details of the employees P.F

numbers and names of the workmen in respect of whom the alleged provident Fund dues are being claimed. It also has been 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.

11. The purpose of imposition of a moratorium has been expounded by the Honâ€™ble Supreme Court in the case of P. Mohanraj and Others vs.

Shah Brothers Ispat Pvt. Ltd, wherein the Honâ€™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 Honâ€™ble Supreme Court are as follow: -

“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.”

12. A plain reading of section 14 of the Code shows that there is 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.

13. In the case at hand, the proceedings initiated by the Respondent are not mere assessment proceedings as contented 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 7A 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 Indian Penal Code.

14. Further, in case any amount is due or payable, the Respondent, in terms of 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 not barred under section 14 of the Code, is therefore liable to be rejected.

15. 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 14 days 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 timely manner.

16. The Respondent has also contended that the dues 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 or names of these 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 the name of any employee or workman, appears to be correct.

17. Having said so, we are mindful that the benefits such as provident fund and gratuity fund are required to be protected and prioritized 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 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 dues toward

provident fund, pension fund and gratuity fund. The Applicant is duty bound, as per the Law laid down to ascertain and prioritise the payments of the social welfare dues.

18. 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 dated 28.06.2020 and 07.07.2020 are also set aside. Accordingly,

IA No. 1694/2020, IA No. 1086/2020 and IA No. 1089/2020 are disposed of as allowed in above terms.