

Mr. Divyesh Desai Vs Employees Provident Fund Organisation

Court: National Company Law Tribunal, Mumbai Bench Court I

Date of Decision: Feb. 9, 2024

Acts Referred: Indian Penal Code, 1860 â€” Section 406, 409
Insolvency and Bankruptcy Code, 2016 â€” Section 53
Employees' Provident Funds Scheme, 1952 â€” Section 7A, 7Q, 11(2), 14B

Hon'ble Judges: V.G. Bisht, Member (J); Prabhat Kumar, Member (T)

Bench: Division Bench

Advocate: Ankit Lohia, Shraddha Talkar

Final Decision: Allowed

Judgement

Prabhat Kumar, Member (Technical)

1. This Application bearing IA No. 53 Of 2022, is filed by Mr. Divyesh Desai, Liquidator of Nicomet Industries Limited (Applicant), seeking

1.1. This Hon'ble Tribunal be pleased to pass an order taking on record the claim in the manner as adjudicated by the Applicant and as more particularly described in

the present application;

1.2. This Hon'ble Tribunal be pleased to pass an order permitting the modification of list of stakeholders filed with this Hon'ble Tribunal, in light of the admission of

the claim of the Respondent as verified by the Applicant in the manner as explained in the present application:

1.3. Pass any order as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case.

2. That vide order dated December 14, 2018 this Tribunal appointed Mr. Devang Sampat as the Resolution Professional for carrying out the Corporate

Insolvency Resolution Process of the Corporate Debtor. Thereafter, this Tribunal by way of order dated December 16, 2020 initiated the liquidation

process of the Corporate Debtor and Mr. Divyesh Desai (the ""Applicant/Liquidator"") was appointed as the Liquidator of the Corporate Debtor.

Thereafter, on December 24, 2020, The Applicant made a public announcement calling upon stakeholders of the Corporate Debtor to submit or update

their claims latest by or before January 15, 2021.

2.1. Pursuant to public announcement, the Employees Provident Fund Organisation (""Respondent"") filed their claim in the liquidation process of the Corporate

Debtor with the Applicant. During the course of the first meeting of Stakeholders Consultation Committee ("SCC") held on April 5, 2021, the claim filed by the

Respondent towards Provident Fund (PF) dues was discussed. During the course of the second meeting of the SCC of the Corporate Debtor held on May 14, 2021,

the status of claim adjudication was discussed and the Applicant requested further data and information from the Respondent. Thereafter, the Applicant had

addressed an email dated September 6, 2021 to the office of the Respondent thereby informing them that with reference to the claim submitted and information

provided by the Respondent, and on the basis of the books of accounts / other records of the Corporate Debtor as available with the Applicant, the Applicant has

evaluated the claim and an amount of INR 9,87,66,568/- (Rupees Nine Crores Eighty Seven Lakhs Sixty Six Thousand Five Hundred and Sixty Eight Only) is found to

be admissible as more particularly bifurcated and described in the aforesaid email.

2.2. Further, during the course of the fourth meeting of the SCC of the Corporate Debtor held on September 23, 2021, the Applicant informed about the total amount as

found to be admitted in respect of PF dues as claimed by the Respondent.

2.3. Thereafter, the Applicant visited the office of the Respondent on October 4, 2021 and pursuant to the meeting held on the aforesaid date, the Respondent shared

the minutes of the meeting with the Applicant vide email dated October 6, 2021.

2.4. Subsequently, the Applicant by way of an email dated October 7, 2021 pointed out the omissions and mistakes in the minutes of the meeting shared by the

Respondent.

2.5. The Applicant addressed an email dated October 26, 2021 to the Respondent thereby requesting them to share the document providing claim calculation in terms

of Section 7A of the PF Act. Subsequently, The Respondent shared the Microsoft Excel file with the Applicant containing data pertaining to the calculation of dues

in terms of Section 7A of the PF Act and the interest charged thereon.

2.6. Thereafter, the Applicant addressed an email dated November 9, 2021 to the Respondent, thereby stating that the labour charge related liability of INR 475.34

Lakhs was calculated from the balance sheet, and hence, the same must have been taken as annual numbers. The Respondent once again shared the Microsoft Excel

Sheet pertaining to calculation of dues in terms of Section 7A of the PF Act. The Applicant once again addressed an email dated November 10, 2021 stating that the

Applicant needs break- of the amount of INR 475.34 lakhs pertaining to labour charges on monthly basis.

2.7. The Applicant finalized the admissible claim amount as INR 12,97,85,105/- (Rupees Twelve Crores Ninety-Seven Lakhs, Eighty-Five Thousand and One Hundred

and Five Only) and communicated the same to the Respondent vide email dated November 18, 2021. The Respondent addressed an email dated December 17, 2021 to

the Applicant stating that the assessment of claim by the Applicant is not acceptable to the office of the Respondent and the Respondent further requested the

Applicant to consider the claim of the Respondent in entirety viz. INR 20,07,60,746/- and liquidate the said dues immediately.

3. The Respondent No.1 filed affidavit in reply dated February, 2022 stating that an enquiry u/s 7A of the EPF & MP Act 1952 was initiated for the

period from 03/2007 to 07/2011 vide summons no. MH/PF/43283/Enf-VIII/RO/KND/3113 dated 04.02.2013 based on default committed by

establishment and non-compliance of provisions of EPF & MP Act as per various complaints received and EO report. Later on the enquiry was

extended up to 07/2013 vide summons no. MH/43283/Comp-I/RO/KND/1579 dated 26.09.2013 as observed by EO default committed by

establishment again. Further, the enquiry was again extended from 08/2013 to 03/2019 Vide no MH/43383/MH/PF Comp-/RO/KND-418 dated

06/12/2019 based on various complaints received in EPF office from employees of establishment and as per EO report duly verifying the records of

establishment under which it was found the establishment failed to comply the provisions of EPF & MP Act and made default in remittance of PF

contribution of employees, however establishment had deducted PF contribution from employees' salary. In this regard during the default period

complaints u/s 406/409 of IPC were also filed with police authorities. An order u/s 7A vide no. MH/43283/comp-I/CIR-507/RO/KND-II/769 dated

13.12.2019 was passed with assessment of dues for Rs. 10,79,49,882/- for the period 03/2007 to 03/2019. Two order u/s 14B vide dated 13.12.2019

for Rs.4,70,071/- & Rs. 1,06,84,780/- as well as two orders u/s 7Q of the Act dated 13.12.2019 for Rs. 2,21,658/- & Rs. 52,44,363/- for the period

from 04/1996 to 10/2019 were also passed by EPFO Authority.

3.1. During the course of enquiry, it was come to notice that Corporate Insolvency Resolution Process (CIRP) was initiated against the establishment

vide NCLT order dated 14.12.2018 and CA Devang Sampat was appointed as Interim Resolution Professional (IRP) for doing the task of CIRP. The

same process was not informed by establishment representative during enquiry. Accordingly, this office had filed claim in form no. F with IRP on

14.12.2019 for Rs. 12,45,70,754/-(10,79,49,882/-(7A) + Rs. 1,11.54,851/-414B) + Rs. 54,66.021/-(7Q)) and the same was accepted by IRP.

3.2. Later on the establishment was considered for Liquidation by NCLT vide its order dated 16.12.2020 and Liquidation commencement date of

Corporate Debtor was 16.12.2020. A mail dated 29.12.2020 informing to file fresh claim with liquidator by 15.01.2021 has been received from

Liquidator Shri Divyesh Desai. Accordingly, this office has filed claim in Form C with supporting orders/records in favour of dues on 14.01.2021 for

Rs. 20,07,60,746/-(7A dues for Rs.11,45,79,863) 14B(Damages) for Rs. 1,11,54,851 & 70(interest for 08/1996 to 10/2019 for Rs. 54,66,021 & interest

accumulated on 7A dues for said period for Rs. 6.95,60,011/-). The total interest dues is of Rs. 7.50.26.032- (RS 11.45.79,863 Rs. 1.11.54,851 Rs.

7.50,26.032- 20,07,60,746-)

3.3. By various emails, Liquidator called clarification regarding Increase in claim amount. Against which this office has also sent various mails/letters

11.02.2021, 17.02 2021, 25.03.2021. 05 04 2021, 01.06.2021 28.06.2021, 06.07.2021, 29.07.2021 clarifying in claim amount as 1. There was some error

in calculation in 7A dues i.e. Annexure D part, which rectified and issued corrigendum dated 14.01.2021 calculating actual amount for Rs.

11.45.79,863/- instead of Rs. 10,79,49,882/-, 2. Interest calculated on 7A dues for the period 03/2007 to 03/2019 for Rs. 6,95,60,011/-

3.4. Despite of several times clarifications offered by this office. the EPFO claim was not accepted & kept on evaluation by the Liquidator.

3.5. 1st stakeholder's consultation Committee meeting was held on 05.04.2021, therein EPFO participated and clarified its stand and emphasized

on PF dues to be paid on priority over other debt & dues as PF dues is statutory dues and have 1st charge over other debt & due as section 11(2) of

EPF & MP Act. 2nd Stakeholders consultation Committee meeting was held on 14.05 2021, therein also not informed that whether EPFO claim has

been accepted or not except evaluation. Further, 3rd SCC held on 6th July, 2021, 4th SCC on 23rd September, 2021, 5th SCC on 12th November, 2021

& 6th SCC on 30th December, 2021 held. On 6th September, 2021 an email was received from the office of Liquidator evaluating the EPFO dues for

Rs. 9,87,66,568 Hence it was not accepted and scheduled a meeting on 04.10.2021 with Liquidator, which was held on 04.10.2021 in Regional PF

Office Kandivali-East by discussing EPFO Provisions and status of EPF dues in the matter. It was also requested by Liquidator during meeting to

share the dues calculation excel file to cross examination and re- evaluation. Accordingly minutes of meeting held on 04.10.2021 was sent to

Liquidator on 06.10.2021 & excel file was shared to him. Thereafter, an email dated 18.11.2021 has been sent by Liquidator to this office evaluating

EPFO dues for Rs. 12,97,85,105/- by waiving of Labour charges for Rs. 4.75 Crores and interest thereon and considering EPFO as Unsecured

Operational creditor, which is not acceptable. Hence, this office has issued a mail dated 17.12.2021 to Liquidator objecting evaluation of EPFO dues

and informed that the evaluated dues is not acceptable. Further it is also requested to liquidate the EPFO dues in full and on priority basis as PF dues

have last charge over other debts & dues as per section 11(2) of the EPF & MP Act and it has also been upheld by the Hon'ble Supreme Court

of India.

4. Heard the learned Counsel for both sides and perused the materials available on record.

4.1. It is trite law that PF contributions of the employer and employee which are payable to the employee by the PF department do not form part of

liquidation estate and has to be paid to the PF department for onward remission to the concerned employees in priority, of, all, other, debt.

Accordingly, the Liquidator's determination of the claim for a sum of Rs. 10,79,49,882/- being the amount of contribution to the Provident

Fund included in the said demand of the Respondent is correct and that amount shall be considered falling outside the liquidation estate. The remaining

claim of the applicant in so far as it pertains to claim of interest and damages or any other contribution not payable to the employees of the Corporate

Debtor by such fund shall be regarded as operational debt due to the statutory authorities and considered accordingly in terms of Section 53 of the

Code.

4.2. Since, the employer and employee contribution to the provident which is payable by the PF department to the concerned employee is held to be

outside the liquidation estate, the whole of such amount whether for the period of CIRP or prior to it shall be payable priority over all other claims. The

rest of the amounts shall be admitted as unsecured operational debt and be dealt with in accordance with section 53 of the Code.

5. In view of the aforesaid directions, this I.A. 53/2022 is allowed.

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