

**IN NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH, COURT- III**

**Company Appeal (IB)/ 35/MB/ C-III/2023**

**In**

**C.P. (IB) No. 3806 of 2018**

*(Under section 42 of the Insolvency and  
Bankruptcy Code, 2016.)*

**Regional Provident Fund Commissioner  
-II (Legal), Regional Office, Pune- II**  
Employees Provident Fund Organisation,  
Sector -28, Commercial Complex, Sanjay  
Kale Sabhagruh, Pradhikaran Akurdi,  
Pune- 411044.

**...Appellant**

**Vs.**

**Mr. Milind B. Kasodekar,**  
A liquidator of the M/s. Asmi Metal  
Products Pvt Ltd,  
Third Floor, Satyagiri Apartments, 77 Vijay  
Nagar Colony, 2147 Sadashiv Peth.  
Pune- 411030

**...Respondent**

*In the matter of*

**ISMT LIMITED**

**...Petitioner**

**Vs.**

**ASMI METAL PRODUCTS PVT LTD**

**...Corporate Debtor**

**Order Pronounced on: 16.07.2024**

*Coram:*

**SMT. LAKSHMI GURUNG, MEMBER (JUDICIAL)  
SHRI CHARANJEET SINGH GULATI, MEMBER (TECHNICAL)**

*Appearance:*

**For Appellant**

Adv. Payoja Gandhi

**For Respondent/  
Liquidator**

Adv. Avinash R Khanolkar a/w Adv. Surekha  
Yadav

*Per: Coram*

1. REGIONAL PROVIDENT FUND COMMISSIONER-II (LEGAL), REGIONAL OFFICE, PUNE-II (**'Appellant' /'Employees Provident Fund Organisation' / 'EPFO'**) has filed this Appeal under Section 42 of the Insolvency and Bankruptcy Code, 2016 ('IBC' / 'Code') against the decision of Liquidator (**'Respondent'**) of M/s. ASMI METAL PRODUCTS PVT LTD ('Corporate Debtor'), seeking the following reliefs:

- a. *"Allow the present Appeal;*
- b. *Condone the delay of approximately 210 days in filing this appeal against rejection of claim of EPF dues by the Respondent;*
- c. *Direct the Respondent to withdraw his letter dated October 17, 2022 and release the full amount of Rs. 5,96,946/- (Indian Rupees Five Lakhs Ninety-Six Thousand Nine Hundred and Forty-Six only) outstanding and payable towards the EPF dues of the Corporate Debtor to the Applicant forthwith;"*

2. **Relevant Facts of the Case:**

2.1. It is the case of the Appellant that the EPFO office had passed an order dated 10.09.2015 in the matter of delayed payment of EPF dues by Corporate Debtor imposing damages under Section 14B of the EPF Act of an amount of Rs. 11,83,997/- and interest under Section 7Q of the EPF Act of an amount of Rs. 6,28,974/-, cumulatively amounting to Rs. 18,12,971/-, out of which Rs. 12,20,976/- has already been recovered from the Corporate Debtor.

2.2. The Particulars of amounts recovered and outstanding under order dated 10.09.2015 passed by RPF-C-II, Regional Office, Pune as follows:

A. Amounts Recovered till date

<b>S.N.</b>	<b>Section of EPF Act</b>	<b>Date of Recovery</b>	<b>Amount (Rs.)</b>
1	7Q	16.10.2015	50,000
2	14B	03.04.2016	5,90,550

3	14B	03.11.2018	1,452
4	7Q	03.11.2018	5,78,974
TOTAL			12,20,976

B. Amounts Outstanding and yet to be recovered from the Corporate Debtor.

S.N.	Section of EPF Act	Amount (Rs.)
1	14B	5,91,996
2	Recovery Cost	4,950
TOTAL		5,96,946

- 2.3. This Tribunal vide order dated 14.10.2019 admitted the M/S. ASMI METAL PRODUCTS PVT LTD (**Corporate Debtor**) into CIRP and the Respondent was appointed as the Interim Resolution Professional (**IRP**) of the Corporate Debtor.
- 2.4. This Tribunal passed a Liquidation order dated 21.09.2020 under Section 33 (2) of the Code and appointed the Respondent as the Liquidator.
- 2.5. The Liquidator has considered the above dues of Rs. 5,96,946/- as statutory dues to Government during liquidation.
- 2.6. The contention of the Appellant is that EPF dues are third-party assets i.e. assets of workers lying with the Corporate Debtor and hence are to be kept out of the liquidation estate as prescribed under Section 36(4)(a)(ii) of the Code. Further, it was stated by the EPFO that the liquidator cannot categorise EPF dues as amounts payable to an Operational Creditor or towards government dues since these are social security dues of workers maintained and disbursed by a specialized statutory institution established under special legislation framed by the Parliament.

2.7. However, the Respondent sent a letter dated 17.10.2022 stating that a sum of Rs. 1,00,00,000/- (Rupees One Crore) has been received from the sale of the liquidation asset and as the claim of the secured financial creditor is more than the realized value, therefore no priority can be given to the EPF dues claimed by the EPFO under Section 53 of the Code.

### 3. **Submissions of Appellant**

3.1. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (**EPF Act**) is welfare legislation and provides for social security benefits of employees and workmen. Section 11 (2) of the EPF Act states that dues under the EPF Act shall be deemed to have first charge on the assets of the Corporate Debtor and shall be paid in priority to all other debts.

3.2. As per Section 36(4)(a)(iii) of the Code, the EPF dues are not the assets of the Corporate Debtor but the earned benefits of the employees as a result of their long, continuous and faithful services rendered to the Corporate Debtor. Therefore, EPF dues should be paid in priority to all other debts. Section 36(4)(a)(iii) of the Code specifically provides that the sums due to any employees from the provident fund, the pension fund, gratuity fund are not assets of the Corporate Debtor and must be paid prior to making any payment to any entity falling under the waterfall mechanism under section 53 of the Code.

3.3. The Respondent while rejecting the claim of the Appellant has placed reliance on a judgment dated 23.09.2022 of the National Company Law Tribunal ('**NCLAT**'), Chennai bench in the matter of **Easun Reyrolle Limited v. Assistant Commissioner, Employees Provident Fund Organisation** which relied on the judgement dated 11.02.2020 of Hon'ble NCLAT, New Delhi passed in the matter of **Mr. Savan**

**Godiwala, Liquidator of Lanco Infratech Ltd. V. Mr. Apalla Siva Kumar** wherein it was held that if no provident fund is created by the Corporate Debtor, the Liquidator cannot be directed to make payments towards outstanding provident fund dues from the liquidation proceeds. It is pertinent to note that the judgment of the Hon'ble NCLAT, New Delhi bench dated 11.02.2020 passed in the matter of **Mr. Savan Godiwala, Liquidator of Lanco Infratech Ltd v. Mr. Apalla Siva Kumar** has been set aside by the division bench of the Hon'ble Supreme Court in **Civil Appeal no. 2520 of 2020** vide its order dated 07.02.2023. Therefore, now it is trite law that the Liquidator cannot avoid making payments towards outstanding EPF dues in the event of liquidation of the Corporate Debtor on the ground that no specific provision towards dues of provident fund of workmen/ employees was made by the Corporate Debtor.

- 3.4. In the letter dated 13.01.2021, the Appellant has stated that, the priority of PF dues operates against all other debts including secured and unsecured creditors as has been affirmed by the case of Hon'ble Supreme Court in **Maharashtra State Cooperative Bank Limited V. Assistant Provident Fund Commissioner and another, 2009**
- 3.5. The Appellant states that EPFO manages the disbursement of pension, gratuity and other benefits payable to employees. The dues claimed by EPFO serve as a security for their retirement. The Appellant faced difficulty in finding an advocate in Mumbai and coordinating with the regional office to facilitate the filing of this Appeal. The claim of the EPFO is interwoven with the Right to Life of the Employees of the Corporate Debtor. Therefore, the Appellant prays for condonation of the delay of approximately 210 days in filing this Appeal under Section 42 of the Code against rejection of its claim by the Respondent dues.

4. This Tribunal vide order dated 01.02.2024 directed the Appellant to submit details of the amount due under Section 14B and Section 7Q of the EPF Act. In compliance with the order 01.02.2024, the Appellant undertook and has filed an Additional Affidavit dated 12.03.2024, wherein the Appellant stated that the EPFO's Claim was filed on 13.01.2021 of Rs. 5,96,946/- is pertaining to the dues claimed under Section 14B of the EPF Act for the delayed remittances made by the Corporate Debtor for the period from March 2004 to March 2010.
5. During the course of the hearing dated 22.04.2024, the counsel for the EPFO/ Appellant has relied on the judgement of **Regional Provident Fund Commissioner, Vatwa, Employees Provident Fund Organization Vs. Shri Manish Kumar Bhagat Company Appeal (AT) (Insolvency) No. 808 of 2022, decided on 11.10.2023.**
6. The Liquidator had not filed reply but during the hearing, the Liquidator relied on the judgment in the case of **Shri Addanki Haresh Vs. Recovery Officer, Employees Provident Fund Organisation in IA No. 232/2022 in C.P. (IB) No. 320/BB/2019** dated 20.07.2023.

### **FINDINGS**

7. We have heard the Id. Counsel on both sides and perused the record.
8. The Appellant prayed for condonation of the delay of approximately 210 days in filing the present Appeal as EPFO faced difficulty finding an advocate in Mumbai and coordinating with the regional office to facilitate the filing of this Appeal. Keeping in view that, concerned EPFO office is located in Pune and there cannot be any reason for deliberate or intentional delay on the part of Government department, we hereby condone the delay in filing the Appeal.

9. The issue involved in this application is whether the damages of Rs. 5,91,996/- under Section 14B and Rs. 4,950/- as recovery cost can be directed to be released to EPFO in priority to the Secured Financial Creditors.
10. According to the Appellant the balance dues of Rs. Rs. 5,96,946/- under section 14B of the EPF Act are to be kept out of Liquidation Estate as provided under Section 36(4)(a)(iii) of IBC and should have been released to the Appellant before distribution of the assets of the Corporate Debtor.
11. All the issues raised by the Appellant in this appeal were earlier also raised in ***Elecon Engineering Company Limited Vs. Enviuro Bulkk Handling Systems Pvt. Ltd.*** in ***I.A. no. 2428 of 2024*** . All these issues have been dealt with in detail including the judgments relied upon by the Appellant. While rejecting the contentions of the appellant, this Tribunal has taken a view that damages under section 14B of the EPF Act are not covered under section 36(4)(a)(iii) of the IBC in following terms:

39. *“As the Applicant has failed to establish that the damages under Section 14B of the EPF Act are owned by workmen or the employees as their dues under Provident Fund Act, this Adjudicating Authority comes to an inevitable and inescapable conclusion that damages under section 14B of the EPF Act are not the **“sums due to any workman or employee from the provident fund”** and therefore are not covered under Section 36(4)(a)(iii) of the IBC, 2016. The question is accordingly answered in negative holding that damages under section 14B of EPF Act are not covered under Section 36(4)(a)(iii) of the IBC, 2016 and are not required to be excluded from the liquidation estate of the Corporate Debtor in liquidation.”*

The order in the aforesaid case has been upheld by the Hon’ble NCLAT in ***Comp. App. (AT) (ins) No. 804 of 2024.***

12. Further, the Coordinate NCLT Kochi Bench in IA (IBC)/127/KOB/2023 in IBA/258/CB/2019 had decided on 02.08.2023, In re **M/s. Regional Provident Fund Commissioner (Compliance), Employee Provident Fund Vs. M/s. Excel Glass Limited** (Under Liquidation) and another, held that –

“17. The amount payable to the workmen or employee has protection under section 36(4)(a)(iii) of IBC 2016, but the same cannot be extended to the interest and damages covered under sections 7Q and 14B of the Employees Provident Funds and Miscellaneous Provisions Act 1952, The applicant here claims a sum of Rs.19,05,030/- towards penalty and damages under sections 7Q and 14B of EPF Act 1952 these are the **amount payable to the applicant department/organization, will not be paid to the workmen or employees** hence this interest and damages comes under Government dues as defined under section 53 (1) (e) (i) of IBC 2016. The NCLT-Bengaluru in **Shri Addanki Haresh Liquidator vs Recovery Officer, Employees Provident Fund organization, I.A.No.232 of 2022 in C.P.(IB) No.320/BB/2019 dated 20.07.2023, (2023) ibclaw.in 385** held that the damages levied by Respondent Organization under Section 14B of the EPF & MP Act 1952 which are dues of Government and will be paid in order of priority under Section 53 of IBC, 2016. In our case entire claim amount of Rs.19,05,030/- is covered under sections 7Q & 14B of the Employees Provident Funds and Miscellaneous Provisions Act 1952, payable to the organization hence section 36(4)(a)(iii) of IBC 2016 is not applicable, the same cannot be excluded from the liquidation estate.”

13. The Liquidator/ Respondent has relied upon the judgment of Hon'ble National Company Law Tribunal, Bengaluru Bench, in the case of **Shri Addanki Haresh vs Recovery Officer, Employees Provident Fund organization, I.A.No.232 of 2022 in C.P.(IB) No.320/BB/2019** dated 20.07.2023, which held that-

“the damages levied by Respondent Organization under Section 14B of the EPF & MP Act 1952 which are dues of Government and will be paid in order of priority under Section 53 of IBC, 2016. In our case entire claim amount of Rs.19,05,030/- is covered under sections 7Q & 14B of the Employees Provident Funds and Miscellaneous Provisions Act 1952, payable to the organization hence section



*36(4)(a)(iii) of IBC 2016 is not applicable, the same cannot be excluded from the liquidation estate.”*

14. In view of discussion above and cases decided by this bench and other coordinate benches, we have no hesitation to hold that dues under Section 14B of EPF Act being damages, are Government dues and is to be paid as per the Section 53 of the Insolvency and Bankruptcy Code, 2016, and do not fall under section 36(4)(a)(iii) of the Code.
15. The Liquidator has sent a letter dated 17.10.2022 to EPFO stating that the only asset in the Liquidation Estate of the Corporate Debtor has been sold and Rs. 1,00,00,000/- (Rupees One Crore) has been realised from such sale. It is further stated in the said letter that *“considering the claim amount of Secured Financial Creditor is much more than the realised value of asset, no other claim would be eligible for payment as per the waterfall mechanism provided in Section 53 of the Insolvency and Bankruptcy Code, 2016. Hence, nil amount is payable towards your claim.”* In view of the above letter of the Respondent, no other claim can be considered for payment.

The Appellant has further relied upon the judgement of Hon'ble NCLAT in Regional **Provident Fund Commissioner, Vatwa, Employees Provident Fund Organization Vs. Shri Manish Kumar Bhagat Company Appeal (AT) (Insolvency) No. 808 of 2022, decided on 11.10.2023**, the issue with the Hon'ble NCLAT was whether or not to direct the Successful Resolution Applicant for payment of inter alia damages under Section 14 B of EPF Act. Damages u/s 14B arose on account of assessment on 14.10.2019 for an amount of Rs. 68,54,869/- and 25.07.2017 for an amount of Rs. 31,16,446/-. The Hon'ble NCLAT held that the damages imposed by order dated 18.10.2019 was subsequent to CIRP imposition of moratorium and held that no direction need to be issued for payment of damages under Section 14B. As far as damages amounting to Rs. 31,16,446/- which was imposed by order dated 25.07.2017, prior to

the commencement of the CIRP moratorium, the Hon'ble NCLAT directed the Successful Resolution Applicant (**SRA**) to pray to the Central Board to waive 100% damages of Rs. 31,16,446/- imposed by order dated 25.07.2017 under Section 14B within a period of one month.

16. In the above case, as regards the damages under Section 14B imposed prior to initiation of CIRP, Hon'ble NCLAT directed the SRA to apply to the Central Board for waiver the said damages. However, in the present case, the Liquidation order was passed under Section 33 (2) of IBC and therefore, there is no Successful Resolution Applicant in this case. Accordingly, any direction to pray to Central Board to waive portion of unrecovered damages of Rs. 5,91,996/- cannot be given. It is however, note-worthy that the Hon'ble NCLAT has not given any direction to SRA to pay for the outstanding damages. Accordingly, no such direction can be given in this case too.
17. In the light of the facts and circumstances of the cases and discussion herein above, damages of Rs. 5,91,996/- imposed by order 10.09.2015 and Section 14B and Rs. 4,950/- as recovery cost cannot be directed to be released towards EPFO.
18. Accordingly, Company Appeal/ 35/ MB-III/ 2023 is **partly allowed** and **disposed of**.

Sd/-

**CHARANJEET SINGH GULATI**  
**MEMBER (TECHNICAL)**  
(Saayli, LRA)

Sd/-

**LAKSHMI GURUNG**  
**MEMBER (JUDICIAL)**