

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH

Company Appeal (AT) (CH) (Ins) No. 231 of 2021

[Arising out of Order dated 20.04.2021 passed by the Adjudicating Authority/National Company Law Tribunal, Division Bench-I, Chennai in IA/1273/IB/2020 in IBA/1045/2019 & IBA/1169/2019]

IN THE MATTER OF:

Mr. B. Parameshwara Udpa
Resolution Professional of
M/s. Easun Reyrolle Limited,
H. No. 827/7, 8th A. Main, 4th Block,
BEL Layout, Vidyananyapuram,
Bangalore-560097
Email: beepeeyou@gmail.com

...Appellant

Versus

1. Assistant PF Commissioner,
Employees' Provident Fund Organization,
Regional Office, Bommasandra II,
"Bhavishyanidhi Bhavan"
Annapoomeshwari Complex,
No. 37/1, 6th Main, Singasandra,
Bangalore-560068.
Email: ro.bms2@epfindia.com

...Respondent No. 1

2. Assistant PF Commissioner
Employees Provident Fund Organization,
Regional Office, Bangalore,
(Koramangala),
"Bhavishyanidhi Bhavan"
Annapoomeshwari Complex,
No. 37/1, 6th Main, Singasandra,
Bangalore-560068.
Email: ro.bms2@epfindia.com

...Respondent No. 2

Present:

For Appellant : Mr. B. Dhanaraj, Advocate

For Respondent : Mr. M.S. Viswanathan, Advocate for R1 & R2.

J U D G M E N T
(Virtual Mode)
(23.09.2022)

NARESH SALECHA, MEMBER (TECHNICAL)

The Present `Appeal' is filed against the `impugned order' dated 20.04.2021, passed in IA/1273/IB/2020 in IBA/1045/2019 & IBA/1169/2019 by the `Adjudicating Authority' (National Company Law Tribunal, Division Bench-I, Chennai), whereby, the `Adjudicating Authority' rejected the said `Petition' under the `Insolvency & Bankruptcy Code, 2016' (in short **I & B Code, 2016**).

Brief Facts:

2. That the present `Appeal' is filed by the `Appellant' under Section 61(1) of I & B Code, 2016 aggrieved by the `Order' dated 20.04.2021, passed by the (`Adjudicating Authority'), `National Company Law Tribunal', Division Bench - I, Chennai, in IA/1273/IB/2020 in IBA/1045/2019 & IBA/1169/2019 `disposing of' with the directions to the `Appellant'.

3. The `Adjudicating Authority', by virtue of its `Common Order' dated 05.05.2020 made in IBA/1045/2019 and IBA/1169/2019 initiated the `Corporate Insolvency Resolution Process' ("**CIRP**") against M/s. Easun Reyrolle Limited (hereinafter referred to as "Corporate Debtor"). The `Committee of Creditors' ("**CoC**") in their `1st CoC Meeting' appointed the `Appellant' as the `Interim Resolution Professional' ("**IRP**") of the `Corporate Debtor', who was later confirmed as `Resolution Professional' ("**RP**").

4. During examination of the Accounts of the `Corporate Debtor', the

'Interim Resolution Professional' came across the 'Orders of Attachment' dated 04.06.2018, 20.07.2018 and 23.08.2019 issued by the 'Respondents' attaching the 'Bank Account No. 30198329762' of the 'Corporate Debtor' maintained with the State Bank of India, Mookandapalli Branch, which followed by the 'Show Cause Notices' dated 13.07.2018, 30.08.2018 and 01.10.2018 addressed to the State Bank of India for non-compliance of the 'Attachment Order'. The State Bank of India replied vide its letters dated 01.10.2018 and 07.08.2020 claiming priority over all debts and government dues and further stated that in terms of Section 18(f) of I & B Code, 2016, the 'Resolution Professional' has ownership over all the 'Assets' of the 'Corporate Debtor', till the conclusion of 'Corporate Insolvency Resolution Process' and hence, 'State Bank of India' is bound to allow operations / withdrawals, if any, done by the 'Resolution Professional' in the account, for which the 'Attachment Orders' are served.

5. The Respondent No. 2 addressed an email dated 30.09.2020 to the Appellant enclosing the Letter of Demand dated 23.09.2020 for a sum of Rs.9,60,729/-for the period of default.

6. The Appellant filed an Application IA/1273/2020 before the 'Adjudicating Authority' seeking removal of 'Orders of Attachment' of the 'Bank Account' of the 'Corporate Debtor'.

7. The 'Adjudicating Authority' by its 'Order' dated 20.04.2021 disposed of the Application IA/1273/IB/2020 with a direction to the Appellant to make adequate provisions in relation to the amount stated in the 'Orders of attachments' as due towards PF dues and subject to making adequate

provisions to their satisfaction, before Respondents can remove the 'Orders of Attachment' of the 'Bank Accounts' of the 'Corporate Debtor'.

8. The Appellant has alleged that the 'impugned order' is contrary to the Section 14 of the I & B Code, 2016.

9. It is pleaded that the 'Adjudicating Authority' has not taken into account that the 'Provident Fund' referred to Section 36(4)(a)(iii) applies to 'Provident Fund Accounts' in terms of Section 16-A of the 'Employees Provident Fund', Miscellaneous Provisions Act, 1952. The 'Adjudicating Authority' failed to remove attachment of bank account of the 'Corporate Debtor' due to the 'Orders' of the Respondents.

10. Hence, the present 'Appeal'.

Appellant's Submissions:

11. The Learned Counsel for the Appellant gave facts of the case and assailed the 'impugned order' which is beyond the jurisdiction of the 'Adjudicating Authority'. The Learned Counsel for the Appellant further states that as per settled law the 'Adjudicating Authority' should have removed 'EPFO' attachments of the bank account of the 'Corporate Debtor' after start of the 'Moratorium'.

12. The Learned Counsel for the Appellant cited the decision of this 'Tribunal', dated 11.02.2020, passed in Company Appeal (AT) (Insolvency) No.1229 of 2019 in the matter of **Mr. Savan Godiwala, Liquidator of Lanco Infratech Ltd., vs. Mr. Apalla Siva Kumar**. The Learned Counsel for the Appellant pointed out that the facts of the case are similar to the present 'Appeal'. The Order of this 'Tribunal' gave clear verdict that where

no fund is created by a Company, the `Liquidator' should not have been directed to make provision for payment of Gratuity to the Workmen. In the present case, therefore as per ratio of this Tribunal in **Godiwala Case**, the `Corporate Debtor' has not created any specific fund for the purpose of Provident Fund, the direction to the Resolution Professional to make adequate provisions towards the demand of the Respondents is not sustainable and need to be set aside.

13. The Learned Counsel for the Appellant summed up saying that the law is very clear that if there is no specific fund for 'Provident Fund', then the Provident Fund' outstanding dues cannot be put in `Liquidation' estate. The Learned Counsel for the Appellant further pointed out the 'Respondent' was required to file its `Claim' and lift the `Attachment Order' on bank account of the 'Corporate Debtor'. The Learned Counsel for the Appellant brought out that `Attachment Order' on bank account of the 'Corporate Debtor' adversely affected payment to workmen. The Learned Counsel for the `Appellant', therefore urged to this `Tribunal' to set aside the 'impugned order' of the 'Adjudicating Authority'.

Respondent's Submissions:

14. The Learned Counsel for the Respondent stated that there are no illegalities in order of the 'Adjudicating Authority'. The Learned Counsel for the Respondent pointed out that the attachment of 'Corporate Debtor's Bank account is prior to the initiation of 'Corporate Insolvency Resolution Process' and as such are

not hit by Section 14 of I & B Code, 2016 and not covered in 'Moratorium'.

15. The Learned Counsel for the Respondent stated that these are the outstanding dues of employees and the 'Adjudicating Authority' correctly gave 'impugned order'.

16. The Learned Counsel for the Respondent cited judgment of this 'Tribunal' in the matter of **Regional Provident Fund Commissioner-I, Ahmedabad Vs. Ramchandra D. Choudhary**, reported in 2019 SCC OnLine NCLAT 910 through a common order has held that:

"44.However, as no provisions of the 'Employees Provident Funds and Miscellaneous Provision Act, 1952' is in conflict with any of the provisions of the 'I& B Code, 2016' and, on the other hand ,in terms of Section36(4)(iii), the 'provident fund' and the 'gratuity fund' are not the assets of the 'Corporate Debtor', there being specific provisions, the application of Section 238 of the I & B Code, 2016 does not arise. "

17. The Learned Counsel for the Respondent further cited ratio given in the **Varrsana Ispat Limited vs Deputy Director, Directorate of Enforcement**, where this Tribunal vide order Company Appeal (AT)(Insolvency)No.493 of 2018 had observed and held that:

"13.In so far as penalty is concerned, offence of money-laundering is punishable with rigorous

*imprisonment which is not less than three years and has nothing to do with the 'Corporate Debtor'. It will be applicable to the individual which may include the Ex-Directors and Shareholders of the 'Corporate Debtor' and they cannot be given protection from the 'Prevention of Money Laundering Act, 2002' and such individual cannot take any advantage of Section 14 of the 'I & B Code'. **This apart, we find that the attachments were made by the Deputy Director of Directorate of Enforcement much prior to initiation of the 'Corporate Insolvency Resolution Process', therefore, the 'Resolution Professional' cannot derive any advantage out of Section 14.**"*

18. The Learned Counsel for the Respondent elaborated the principle that the 'Order of Attachment' made prior to the 'Corporate Insolvency Resolution Process' of the Corporate Debtor is valid and should not be subjected to Section 14 of I & B Code, 2016.

Concluding his arguments, the Learned Counsel for the Respondents submitted that the 'Appeal' may be dismissed

Discussions / Findings

19. Heard the Learned Counsel Counsels for the Appellant and the Respondents and also perused record made available to us. Several issues have been raised in the 'Appeal', which are required to be deliberated upon before coming to final conclusion.

(i) Whether an 'Attachment Order' on 'Bank Account' of the 'Corporate Debtor' imposed before the initiation of 'Corporate Insolvency Resolution

Process', can continue during 'Moratorium' under Section 14 of the I & B Code, 2016?

(ii) Whether, the Resolution Professional is duty bound to make adequate provisions for 'Provident Fund' to make adequate provisions for 'Provident Fund' even though the 'Corporate Debtor' did not have separate 'Provident Fund Account'.

(iii) Whether the 'Adjudicating Authority' can direct 'Resolution Professional' to make provisions for 'Provident Fund' without receiving claims for the same by the concerned Authority?

Issue No. (i) Whether an attachment on Bank account of 'Corporate Debtor' imposed before initiation of 'Corporate Insolvency Resolution Process', can continue during moratorium under Section 14 of the I & B Code, 2016?

(a) The 'Corporate Debtor' did not have a 'Separate Employees Provident Fund' as provided for in Section 16-A of the 'Employees Provident Fund' and 'Miscellaneous Provisions Act, 1952'. The 'Provident Fund' referred to Section 36(4)(a)(iii) of the I & B Code, 2016 applies to 'Provident Fund Accounts', maintained as per Section 16-A of the 'Employees Provident Fund' & 'Miscellaneous Provisions Act, 1952'. The Exclusion from the 'Liquidation Estate Assets' as well as from Recovery in 'Liquidation', as stipulated in Section 36(4)(a)(iii) of I & B Code, 2016, applies in respect of sums due to any workman or employee from the 'Provident Fund', when the 'Corporate Debtor' has

maintained an 'Establishment Fund' in terms of Section 16-A of the 'Employees Provident Fund', 'Miscellaneous Provisions Act, 1952'.

(b) We have gone through the Citations as quoted both by the 'Appellant' and the 'Respondents' as discussed in the preceding paragraphs.

(c) This 'Tribunal' also note carefully the contention of the Learned Counsel for the Appellant that both the cases cited by the Learned Counsel for the Respondents are in different context and circumstances and therefore cannot be equated to the present 'Appeal'. The Appellant points out that the 1st case is in respect of a dispute raised by the 'Successful Resolution Applicant', as against the 'Regional Provident Fund Claim' and the 2nd case pertains the Encumbrance created by the 'Employees Provident Fund Organisation' by attaching the properties of the 'Corporate Debtor' with the Sub Registrar Office. The facts in both the cases do not apply to the facts of the present case in 'Appeal' and hence, the said Citations of the 'Respondents' cannot be relied on.

(d) This 'Tribunal' note that the facts of *Mr. Savan Godiwala (Supra)* case are similar to the present case, wherein the 'Adjudicating Authority' had directed the 'Liquidator' to pay 'Gratuity' to the 'Employees' and shall not avoid liability on the ground that the 'Corporate Debtor' did not have separate funds for payment of Gratuity. The Order records clearly therein that where no fund is created by a Company, the 'Liquidator' should not have been directed to make provision for payment of Gratuity to the Workmen.

(e) We would like to refer to Section 14 of the I & B Code, 2016 which

reads as under :-

“Part-II Insolvency Resolution and Liquidation for Corporate Persons

Chapter-II Corporate Insolvency Resolution Process

Section 14: Moratorium.

**14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—*

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

1[Explanation.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the

Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

1[(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.]

2[(3) The provisions of sub-section (1) shall not apply to —

3[(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;]

(b) a surety in a contract of guarantee to a corporate debtor.]

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”

- (f) From the above, 14(1)(a), it is clear that continuation of pending suits or proceedings against the ‘Corporate Debtor’ including Execution of any Judgment, decree or order in any ‘Court of Law’, ‘Tribunal’, ‘Arbitration Panel’ or other ‘Authority’ will temporarily cease to operate during ‘Moratorium’. The purpose of the Section 14 is to ensure that no depletion of ‘Assets’ of the ‘Corporate Debtor’ takes place during the ‘Corporate Insolvency Resolution Process’ and the ‘Corporate Debtor’ is allowed to continue as a going concern in order to maximise the value for all the ‘Stakeholders’. If we read Section 14(1)(a), it can be inferred that there shall be complete embargo to continue any proceeding against the ‘Corporate Debtor’ by any ‘Authority’ till the ‘Corporate Insolvency Resolution Process’ is completed and ‘Moratorium’ is lifted by the ‘Adjudicating Authority’ or it result into ‘Liquidation’ on failure of the ‘Corporate Insolvency Resolution Process’. As such, the order of ‘Moratorium’ shall give relief to the ‘Corporate Debtor’ from any such continuation during calm period.

This ought to cover attachments of Bank Accounts by any Authority including 'EPFO' and it is required to be lifted to allow the 'Corporate Debtor' a fair chance of revival and to ensure that the 'Prospective Resolution Applicants' come forward to submit the 'Resolution Plan'. It may also be inferred from the circumstances and intent of legislation that, in this particular cases the fact that the 'Attachment' was ordered prior to the initiation of the 'Corporate Insolvency Resolution Process' should not impact the outcome of lifting such 'Attachment' during 'Moratorium'.

(g) Thus, it can be presumed that 'Attachment of Bank Account' of the 'Corporate Debtor' by 'EPFO' cannot be continued when 'Moratorium' is declared under I & B Code, 2016 and proceedings are required to be kept in abeyance till lifting of moratorium. Liberty can, however, be given to the respondent to continue/ initiate proceedings against the 'Corporate Debtor' after disposal of the proceedings and lifting of the 'Moratorium' and completion of the 'Corporate Insolvency Resolution Process'.

(h) This 'Tribunal' consciously takes note of the fact that there is no exact precedent. However, there are several cited judgments for similar circumstances but in different context.

This 'Tribunal' also take note of Section 238 of I & B Code, 2016

"Section 238: *Provisions of this Code to override other laws.*

**238. The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith*

contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

(i) Section 238 of the Code, is a non `obstante clause’ and state that `notwithstanding anything inconsistent therewith in any other law for the time being in force or any instrument having affect by virtue of any other law, the provisions of the code shall have full effect. This has been given as an overriding effect towards the provisions or act by ensuring that provision of the I & B Code, 2016 to be continued into force even they were inconsistent with any other law. I & B Code, 2016 is a comprehensive code, with a primary aim to simplify and expedite `Insolvency Proceedings’ and is primarily in nature of beneficial commercial legislation, with an aim to put the ‘Corporate Debtor’ back on its feet. It protects interest and right of all `Stakeholders’, which also include `EPFO’.

(j) Section 36(4) of I & B Code 2016 mentions:

“36(4). The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation-

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

[emphasis supplied]

(k) It is therefore evident that amount deducted for `Provident Fund’, purely belongs to an `Employee’ and not to be treated as an `Asset’ of the ‘Corporate Debtor’ and cannot be touched by an `Interim Resolution Professional’/`Resolution Professional’/ `Liquidator’ as the

case may be. However, it is important to note that the 'Provident Fund', is to be of 'Establishment Fund' kept separately by the company and then only this proviso will be applicable. If, even wrongly and in violation of the laws of the land, the company fails to establish such 'Provident Fund', then 'Interim Resolution Professional/Resolution Professional/Liquidator' is not expected to provide for same, except under Section 53 of the I & B Code, 2016.

- (1) This 'Tribunal' notes that in the present case, there was no specific fund towards 'Provident Fund'. It is reiterated that during 'Moratorium' all proceedings and embargo are deemed to have been lifted. Therefore, it can be concluded that 'Resolution Professional' is right in seeking lifting of 'Attachment Orders' on 'Bank Account' of 'Corporate Debtor' and the 'Adjudicating Authority' should have done accordingly. In view of this, we are not in agreement with the stand taken by the 'Adjudicating Authority' in the 'impugned order' on this issue.

Issue No. (ii) Whether, Resolution Professional is duty bound to make adequate provisions for 'Provident Fund' even though the Corporate Debtor did not have separate PF account.

- (a) The 'Corporate Debtor' did not have a Separate Employees Provident Fund as provided for in Section 16-A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952. The Provident Fund referred to Section 36(4)(a)(iii) I & B Code, 2016 applies to Provident Fund Accounts maintained as per Section 16-A of the Employees Provident Fund & Miscellaneous Provisions Act, 1952. The Exclusion

from the Liquidation Estate Assets as well as from Recovery in Liquidation, as stipulated in Section 36(4)(a)(iii) of I&B Code, 2016, applies in respect of sums due to any workman or employee from the Provident Fund, when the Corporate Debtor has maintained an Establishment fund in terms of Section 16-A of the Employees Provident Fund, Miscellaneous Provisions Act, 1952.

“16A. *Authorising certain employers to maintain provident fund accounts.—*

(1) The Central Government may, on an application made to it in this behalf by the employer and the majority of employees in relation to an establishment employing one hundred or more persons, authorise the employer, by an order in writing, to maintain a provident fund account in relation to the establishment, subject to such terms and conditions as may be specified in the Scheme: Provided that no authorisation shall be made under this sub-section if the employer of such establishment had committed any default in the payment of provident fund contribution or had committed any other offence under this Act during the three years immediately preceding the date of such authorisation.

(2) Where an establishment is authorised to maintain a provident fund account under sub-section (1), the employer in relation to such establishment shall maintain such account, submit such return, deposit the contribution in such manner, provide for such facilities for inspection, pay such administrative charges, and abide by such other terms and conditions, as may be specified in the Scheme.

(3) Any authorisation made under this section may be cancelled by the Central Government by order in writing if the employer fails to comply with any of the terms and conditions of the authorisation or where he commits any offence under any provision of this Act: Provided that before cancelling the authorisation, the Central Government shall give the employer a reasonable opportunity of being heard.]

“Section 36(4)(a)(iii) of the I & B Code 2016

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

This `Tribunal` vide order dated 11.02.2020 passed in Company Appeal (AT) (Insolvency) No.1229 of 2019 in the matter of **Mr. Savan Godiwala, Liquidator of Lanco Infratech Ltd., vs. Mr. Apalla Siva Kumar** has dealt on similar case where issue was regarding payment of gratuity as against payment of provident fund in the present `Appeal`. The facts of the case are similar to the present `Appeal`. This `Tribunal` gave clear verdict that where no fund is created by a Company, the `Liquidator` should not have been directed to make provision for payment of Gratuity to the Workmen. In the present case, therefore as per ratio of this `Tribunal` in `**Godiwala Case**`, the `Corporate Debtor` has not created any specific fund for the purpose of `Provident Fund` and therefore the direction to the Resolution Professional to make adequate provisions towards the demand of the Respondents is not correct. The relevant portion of the quoted judgment are reproduced as under:-

*“In case of **State Bank of India v Moser Baer Karamchari Union and Another** ,2019 SCC OnLine NCLAT 447 this Appellate Tribunal has held that:*

“—16. In terms of sub-section(4)(a)(iii) of Section 36, as all sums due to any workman or employees from the provident fund, the pension fund and the gratuity fund, do not form part of the liquidation estate/ liquidation assets of the ‘Corporate Debtor’, the question of distribution of the provident fund or the pension fund or the gratuity fund in order of priority and within such period as prescribed under Section 53(1), does not arise.

20. There is a difference between the distribution of assets and preference/priority of workmen's dues as mentioned under Section 53(1)(b) of the ‘I&B Code’ and Section 326(1) (a) of the Companies Act, 2013. It has also been noticed that Section 53(1) (b) (i) which relates to distribution of assets, workmen's dues is confined to a period of twenty-four months preceding the liquidation commencement date.

21. While applying Section 53 of the I&B Code’, Section 326 of the Companies Act, 2013 is relevant for the limited purpose of understanding ‘workmen's dues’ which can be more than provident fund, pension fund and the gratuity fund kept aside and protected under Section 36(4) (iii).

22. On the other hand, the workmen's dues as mentioned in Section 326(1) (a) is not confined to a period like twenty-four months preceding the liquidation commencement date and, therefore, the Appellant for

the purpose of determining the workmen's dues as mentioned in Section 53(1) (b), cannot derive any advantage of Explanation (iv) of Section 326 of the Companies Act, 2013.

23.*This apart, as the provisions of the I&B Code' have overriding effect in case of consistency in any other law for the time being enforced, we hold that Section 53(1) (b) read with Section 36(4) will have overriding effect on Section 326(1) (a), including the Explanation(iv) mentioned below Section 326 of the Companies Act, 2013.*

24.*Once the liquidation estate/ assets of the 'Corporate Debtor' under Section 36(1) read with Section 36 (3), do not include all sum due to any workman and employees from the provident fund, the pension fund and the gratuity fund, for the purpose of distribution of assets under Section 53, the provident fund, the pension fund and the gratuity fund cannot be included.*

25.*The Adjudicating Authority having come to such finding that the aforesaid funds i.e., the provident fund, the pension fund and the gratuity fund do not come within the meaning of 'liquidation estate' for the purpose of distribution of assets under Section 53, we find no ground to interfere with the impugned order dated 19.03. 2019.*

Thus, it is the settled position of law, that the provident fund, the pension fund and the gratuity fund, do not come within the purview of 'liquidation estate' for the purpose of distribution of assets under Section 53 of the Code. Based on this, the only inference which can be drawn is that

*Pension Fund, Gratuity Fund and Provident Fund cannot be utilised, attached or distributed by the liquidator, to satisfy the claim of other creditors. Sec36(2) of the I B Code 2016 provides that **the Liquidator shall hold the Liquidation Estate in fiduciary for the benefit of all the Creditors.** The Liquidator has no domain to deal with any other property of the corporate debtor, which is not the part of the Liquidation Estate.*

In a case, where no fund is created by a company, in violation of the Statutory provision of the Sec4 of the Payment of Gratuity Act, 1972, then in that situation also, the Liquidator cannot be directed to make the payment of gratuity to the employees because the Liquidator has no domain to deal with the properties of the Corporate Debtor, which are not part of the liquidation estate.

.....Therefore, this Appellate Tribunal is of the considered opinion that the Adjudicating Authority erred in directing the Liquidator to make provision for payment of Gratuity to workers, as per their entitlement. Thus, Appeal is allowed and the impugned direction to Liquidator to make provision for payment of Gratuity, without their being a separate fund in this regard, is set aside.”

Therefore, taking benefit of the ratio of above discussions in ‘Godiwala Case’, this ‘Tribunal’ answers the aforesaid issue in the negative. Therefore, the ‘Resolution Professional’ is not duty bound to make adequate provisions for ‘Provident Fund’ when the ‘Corporate Debtor’ did not have separate ‘Provident Fund Account’. It is again reiterated that the ‘Resolution

Professional' has to deal with the 'Claims', if any, on this 'account', in terms of Section 53 of the I & B Code 2016, if warranted, and provided as per 'Law'.

Issue No. (iii) Whether the 'Adjudicating Authority' can direct RP to make provisions for PF funds without receiving claims for the same by concerned authority?

(a) Admittedly, the Respondents had not filed their 'Claims', within the 'prescribed time' with the 'Resolution Professional' and seeks to enforce their 'Claim(s)', merely on the basis of 'Orders of Attachment', passed much prior to the period of commencement of the 'Corporate Insolvency Resolution Process'.

(b) According to IBBI (Resolution Process for Corporate Persons) Regulation, 2016, Regulation 6 requires 'Resolution Professional to make a 'Public Announcement', within three days of his appointment and ask for the 'Claims' within 14 days of such 'Public Announcement'. Regulation 7 provides for 'Claims' by the 'Operational Creditor' and Regulation 8 provides for 'Claims' by the 'Financial Creditor', Regulation 9 provides for 'Claims' by the 'Workmen and Employee', etc. Further, in terms of Regulation 13, the 'Resolution Professional' is mandated to verify the 'Claim' and subsequently determine the amount of 'Claim' as per Regulation. 14. It is therefore, necessary that any person having 'Claim' over the 'Corporate Debtor' has to prefer 'Claim' as stipulated in such regulations.

(c) This Tribunal do not agree with the 'Adjudicating Authority' who gave such directions to the 'Resolution Professional'.

20. Therefore, this 'Tribunal' is of the considered opinion that the 'Adjudicating Authority' erred in giving directions as contained in the 'impugned order' dated 20.04.2021. 'Appeal' is therefore 'allowed' and the 'impugned order' is hereby set aside by this 'Tribunal'. However, 'Liberty' is granted to the 'Respondents' to 'initiate proceedings / continue' against the 'Corporate Debtor' after completion of the 'Corporate Insolvency Resolution Process' and lifting of the 'Moratorium', if required, and in the manner known to 'Law' and in accordance with 'Law'. No costs.

The connected pending 'Interlocutory Applications', if any, are Closed.

[Justice M. Venugopal]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

Simran