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GETTING PRIORITIES RIGHT

ANALYSIS OF PRIORITY OF PROVIDENT FUND DUES IN RELATION TO A COMPANY UNDERGOING CIRP

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Introduction

The Employees Provident Funds Miscellaneous Provisions Act, 1952 ("**EPF Act**") was enacted as a statute keeping in mind the Directive Principles of State Policy enshrined under Articles 38 and 43 of the Constitution of India to ensure social security for the employees working in an establishment. Whilst the EPF Act has an in-built mechanism to protect the interests of the employees from erring employers failing to pay their relevant contribution, priority of such dues assumes different dimension when the company is undergoing corporate insolvency resolution process ("**CIRP**") under the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

In this paper, we strive to examine the issue of priority of provident fund dues *vis-à-vis* winding- up proceedings governed under the erstwhile Companies Act, 1956 ("**CA 56**") and trace the development of jurisprudence under the IBC, to analyse if, principles applicable to the erstwhile regime could be applied or are being appropriately applied by the National Company Law Tribunals ("**NCLTs**") and National Company Law Appellate Tribunal ("**NCLAT**") in the context of IBC.

Priority of EPF dues for a company undergoing winding up under CA 1956

Sub-section (1) of Section 11 of the EPF Act[1] provides for the priority of payment of contributions in relation to a company for which a *winding up* order has been made while sub-section (2), which was introduced by an amendment in the year 1973 (and subsequently further amended in the year 1988), recognises the priority of provident fund dues in the following manner:

> *"(2) Without prejudice to the provisions of sub-section (1), if any amount is due from an employer whether in respect of the employee's contribution (deducted from the wages of the employee) or the employer's contribution, the amount so due shall be deemed to be the first charge on the assets of the establishment, and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts*."
>
> (emphasis supplied)

Whilst the priority of first charge under Section 11(2) of the EPF Act over other secured creditors dues was recognised by Supreme Court in the case of, *Maharashtra State Co-Operative Bank Limited* v. *Assistant Provident Fund Commissioner*[2], the interplay between the priority of EPF dues *vis-à-vis* the dues of other creditors during winding up found extensive attention of a two judge bench of Supreme Court in the case of, *Employees Provident Fund Commissioner* v. *O.L. of Esskay Pharmaceuticals Limited*[3] ("**Esskay Pharma case**").

In the Esskay Pharma case, the issue before the Supreme Court was, *whether priority given to the*

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[1] **11. Priority of payment of contributions over other debts**.—(*1*)Where any employer is adjudicated insolvent or, being a company, an order for winding up is made, the amount due—

(*a*) from the employer in relation to an establishment to which any Scheme or the Insurance Scheme applies in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund, damages recoverable under section 14B, accumulations required to be transferred under sub-section (*2*) of section 15 or any charges payable by him under any other provision of this Act or of any provision of the Scheme or the Insurance Scheme; or

(*b*) from the employer in relation to an exempted establishment in respect of any contribution to the Provident Fund or any Insurance Fund (in so far it relates to exempted employees), under the rules of the Provident Fund or any Insurance Fund, any contribution payable by him towards the Family Pension Fund under sub-section (*6*) of section 17, damages recoverable under section 14B or any charges payable by him to the appropriate Government under any provision of this Act or under any of the conditions specified under section 17.

shall, where the liability thereof has accrued before the order of adjudication or winding up is made, be deemed to be included among the debts which under section 49 of the Presidency-towns Insolvency Act, 1909 (3 of 1909), or under section 61 of the Provincial Insolvency Act, 1920 (5 of 1920), or under section 530 of the Companies Act, 1956 (1 of 1956), are to be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up, as the case may be.

Explanation.—In this sub-section and in section 17, "insurance fund" means any fund established by an employer under any scheme for providing benefits in the nature of life insurance to employees, whether linked to their deposits in provident fund or not, without payment by the employees of any separate contribution or premium in that behalf.

[2] *Maharashtra State Co-Operative Bank Limited* v. *Assistant Provident Fund Commissioner* [Civil Appeal No.6893 of 2009, decided on October 8, 2009 (Supreme Court)]. Also followed in *Maharashtra State Cooperative Bank Limited* v. *Kannad Sahakari Sakhar Karkhana Limited* [Special Leave to Appeal (Civil) No(s).14772-14773/2010, order dated July 1, 2013 (Supreme Court)].

[3] *Employees Provident Fund Commissioner* v. *O.L. of Esskay Pharmaceuticals Limited* [Civil Appeal No. 9630 of 2011, decided on November 8, 2011 (Supreme Court)].

dues payable by an employer under Section 11 of the EPF Act was subject to Section 529A of the CA 56[4] *in terms of which the workmen's dues and debts due to secured creditors were required to be paid in priority to all other debts*.

After noting that the objective behind introduction of Section 529A in CA 56 by Act No. 35 of 1985 was to ensure that the legitimate dues of workers should rank *pari passu* with those of secured creditors, the Supreme Court undertook a review of the then available jurisprudence dealing with the overriding impact of Section 529A, which contained a *non-obstante clause* but observed that, the propositions laid down in those judgments were of little assistance in deciding the question involving the so-called conflict in the *non-obstante clauses* contained in Section 11(2) of the EPF Act and Section 529A of CA 1956.

In the eventual analysis, the Supreme Court upheld the supremacy of Section 11(2) of the EPF Act and went on to observe that, amendments which were introduced to Section 529, 529A and Section 530, *even though subsequent in point of time*, did not have the effect of diluting the mandate of Section 11(2) of EPF Act. The relevant observations of the Court were as follows:

> *"42. It is also important to bear in mind that even before the insertion of proviso to Sections 529(1), 529(3) and Section 529A and amendment of Section 530(1), all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund established for welfare of the employees were payable in priority to all other debts in a winding up proceedings [Section 530(1)(f)]. Even the wages, salary and other dues payable to the workers and employees were payable in priority to all other debts. What Parliament has done by these amendments is to define the term "workmen's dues" and to place them at par with debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to Section 529(1). However, these amendments, though subsequent in point of time, cannot be interpreted in a manner which would result in diluting the mandate of Section 11 of the EPF Act, sub-section (2) whereof declares that the amount due from an employer shall be the first charge on the assets of the establishment and shall be paid in priority to all other debts. The words "all other debts" used in Section 11(2) would necessarily include the debts due to secured creditors like banks, financial institutions etc. The mere ranking of the dues of workers at par with debts due to secured creditors cannot lead to an inference that Parliament intended to create first charge in favour of the secured creditors and give priority to the debts due to secured creditors over the amount due from the employer under the EPF Act.*
>
> *43. At the cost of repetition, we would emphasize that in terms of Section 530(1), all revenues, taxes, cesses and rates due from the company to the Central or State Government or to a local authority, all wages or salary or any employee, in respect of the services rendered to the company and due for a period not exceeding 4 months all accrued holiday remuneration etc. and all sums due to any employee from provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company are payable in priority to all other debts. This provision existed when Section 11(2) was*

[4] **529A.Overriding preferential payment**.—(1) Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company—
(a) workmen's dues; and
(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of section 529 *pari passu* with such dues, shall be paid in priority to all other debts.
(2) The debts payable under clause (a) and clause (b) of subsection (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

> *inserted in the EPF Act by Act No. 40 of 1973 and any amount due from an employer in respect of the employees' contribution was declared first charge on the assets of the establishment and became payable in priority to all other debts. However, while inserting Section 529A in the Companies Act by Act No. 35 of 1985 Parliament, in its wisdom, did not declare the workmen's dues (this expression includes various dues including provident fund) as first charge. The effect of the amendment made in the Companies Act in 1985 is only to expand the scope of the dues of workmen and place them at par with the debts due to secured creditors and there is no reason to interpret this amendment as giving priority to the debts due to secured creditor over the dues of provident fund payable by an employer. Of course, after the amount due from an employer under the EPF Act is paid, the other dues of the workers will be treated at par with the debts due to secured creditors and payment thereof will be regulated by the provisions contained in Section 529(1) read with Section 529(3), 529A and 530 of the Companies Act*."
>
> (emphasis supplied)

Interestingly, however, the aforesaid judgment was not referred to nor followed by another two judge bench of the Supreme Court in the case of, *EPFO* v. *Government of Andhra Pradesh*[5], where the Supreme Court was required to interpret the priority of provident fund dues in the context of Section 12-A(9) of the Andhra Pradesh Co-operative Societies Act, 1964, which reads as follows:

> "*The proceeds realised from the transfer of assets or assets and liabilities, in whole or in part, of the society concerned, shall be applied in discharge of the liabilities of such society in the following order of priority, namely:*
>
> *(i) all expenses incurred for preservation and protection of the assets;*
>
> *(ii)(a) dues payable to workmen and employees;*
>
> *(b) debts payable to secured creditors according to their rights and priorities inter se;*
>
> *(c) dues payable to provident fund or other authorities which are protected under a statute by a charge on the assets;*
>
> *(iii) debts payable to ordinary creditors;*
>
> *(iv) share capital contributed by the members of the society:*
>
> *Provided further that the debts specified in each of the categories shall rank equally and be paid in full, but in the event of the amount being insufficient to meet such debts, they shall abate in equal proportions and be paid accordingly:*
>
> *Provided also that the question of discharging and liability with regard to a debt specified in a lower category shall arise only if a surplus fund is left after meeting all the liabilities specified in the immediately higher category*."
>
> (emphasis supplied)

[5] *EPFO* v. *Government of Andhra Pradesh* [Civil Appeal No. 3342-43 of 2007, order dated May 12, 2017 (Supreme Court)].

Taking into account the priority of EPF dues in terms of Section 11(2) of EPF Act, the Supreme Court was pleased to hold that such EPF dues, despite having been specifically covered under sub-clause (c) of Section 12-A(9)(ii), would be covered under sub-clause (a), which dealt with dues payable to employees and workmen. What is, however, pertinent to note that, the absolute priority of the EPF dues which was advocated in the Esskay Pharma case, was not followed in this case.

Finally, reference may be made to an order of a Single Bench of Punjab & Haryana High Court, passed in the matter of, *Punjab Wireless System Limited (in liquidation)* v. *Canara Bank*[6], where the Esskay Pharma case was distinguished in the following manner:

> *"Next question is qua the priority of the dues payable to the EPFO. Although the counsel for the EPFO have relied upon the judgment of the Supreme Court rendered in* ***Employees Provident Fund Commissioner (supra)****. However, the Court finds that the said judgment is distinguishable on the facts of the case. In that case, the EPFO dues already stood determined and crystalised by the EPFO Authorities by passing specific orders. Even the properties of the employer were attached. Thereafter, the liquidation order was passed by the Court. Hence, the amount determined by the EPFO Authorities was taken as consolidated amount, which was given priority over the other dues of the secured creditors and the workmen. However, in the present case, there is nothing on record to show that the EPFO Authorities had passed any order before liquidation order, qua recovery of any amount from the company in liquidation. The claims have been submitted after the winding up order was passed. The Chartered Accountant and the Committee have determined the said claims to be payable under Section 530 of the Companies Act, 1956. Being a debt payable under Section 530 of the Companies Act, 1956, the same has to be treated as the employees entitlement of dues from a provident fund maintained for the welfare of the workmen, as defined under Section 529 (3) (b) (iv) of the Companies Act, 1956. Therefore, despite being included in Section 530 (1) (f) of the Companies Act, 1956, such dues has to be taken at par with the secured creditors and the other dues of the workmen, which have been given a preferential treatment under Section 529 (A) of the Companies Act, 1956, vis-a-vis, any other dues. Accordingly, the admitted claim of the EPFO shall stand at par with other workmen dues and the secured creditors, for the purpose of proportionate payments*."
>
> (emphasis supplied)

In other words, the Punjab and Haryana High Court had restricted the applicability of the principle laid down in the Esskay Pharma case to only those cases where the liability under the EPF Act had been crystallised. The Court also noted that, where such dues has not crystallised, the EPF dues would stand at par with other workmen dues and the secured creditors.

Accordingly, if we may summarise the position of priority of dues under the EPF Act *vis-à-vis* distribution under CA 56, we note that, whilst Esskay Pharma case has advocated for a priority of the claims of provident fund department over and above all other dues payable by a company, there are subsequent precedents where the absolute priority principle has not been followed or the case has been distinguished basis whether or not there has been an order crystallising the dues.

[6] *Punjab Wireless System Limited (in liquidation)* v. *Canara Bank* [CA No. 448 of 2009, order dated February 12, 2020 (Punjab & Haryana)].

PRIORITY OF EPF DUES FOR A COMPANY UNDERGOING CIRP UNDER IBC

Before we trace the development of jurisprudence under the IBC regime, we may note the following statutory provisions, which would have a bearing on our understanding of the principles:

> *"**30. Submission of resolution plan.** -*
>
> *[…]*
>
> *(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -*
>
> *(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;*
>
> *(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-*
>
> *(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or*
>
> *(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.*
> *[….]*
>
> ***36. Liquidation estate**. –*
>
> *[…]*
>
> *(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation: -*
>
> *(a) assets owned by a third party which are in possession of the corporate debtor, including –*
>
> *(i) assets held in trust for any third party;*
>
> *(ii) bailment contracts;*
>
> *(iii) all sums due to any workmen or employee from the provident fund, the*
> *pension fund and the gratuity fund;*
>
> *(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and*
>
> *(v) such other assets as may be notified by the Central Government in*

consultation with any financial sector regulator;

[….]

***53. Distribution of assets**. –*

(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period as may be specified, namely: -

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following:

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following: -

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

[…]

***238. Provisions of this Code to override other laws**. -*

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."

Now that the relevant statutory provisions have been extracted, we may trace the development of jurisprudence regarding priority of EPF dues in the context of (a) approval of resolution plan; and (b) in the event of liquidation of the corporate debtor.

Treatment of EPF dues under approved resolution plan

The orders of approval of the resolution plans that were reviewed by us may be categorised as follows:

Where NCLT/ NCLAT has directed full payment of EPF dues

a. Example of such a course could be found in the decision of NCLAT in the case of, *Tourism Finance Corporation of India Limited* v. *Rainbow Papers Limited*[7], wherein the Regional Provident Fund Commissioner had challenged the approval of the resolution plan basis that the plan provided for payment of only the principal amount owed to the department and did not provide for the interest claimed by the department. The Three Judge Bench of NCLAT directed modification to the resolution plan by observing as follows:

> *"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' and, on the other hand, in terms of Section 36 (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' does not arise.*
>
> *45. Therefore, we direct the 'Successful Resolution Applicant'- 2nd Respondent ('Kushal Limited') to release full provident fund and interest thereof in terms of the provisions of the 'Employees Provident Funds and Miscellaneous Provision Act, 1952' immediately, as it does not include as an asset of the 'Corporate Debtor'. The impugned order dated 27th February, 2019 approving the 'Resolution Plan' stands modified to the extent above*."
>
> (emphasis supplied)

An appeal filed against the aforementioned decision was rejected by Supreme Court by observing that there were no grounds to interfere with the impugned order[8].

b. With respect to cases of a more recent origin, the Principal Bench of NCLAT had, in the case of, *Sikander Singh Jamuwal* v. *Vinay Talwar*[9], by relying upon Section 17B of the EPF Act[10], rejected the submission made by the successful resolution applicant against interfering with the commercial wisdom of the committee of creditors, by noting as follows:

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[7] *Tourism Finance Corporation of India Limited* v. *Rainbow Papers Limited* [Company Appeal (AT) (Insolvency) No. 354 of 2019, decision dated December 19, 2019 (NCLAT)].

[8] *Kushal Limited* v. *RPFC-I, Ahmedabad* [Civil Appeal No. 1920 of 2020, order dated May 20, 2020 (Supreme Court)]

[9] *Sikander Singh Jamuwal* v. *Vinay Talwar* [Company Appeal (AT) (Ins)No. 483 of 2019, order dated March 11, 2022 (NCLAT)].

[10] ***17B. Liability in case of transfer of establishment***. – *Where an employer, in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be, in respect of the period up to the date of such transfer: Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.*

> *"It is very much clear vide Section 30(2) (e) that the Resolution Plan does not contravene any of the provisions of the law for the time being in force. The Resolution Professional/Adjudicating Authority is to look at the compliance of the provisions of law. In this context, we have to refer to Section 17-B of the Employees Provident Funds and Miscellaneous Act, 1952 which is depicted below:*
>
> *[…]*
>
> *From the above stated provisions of the PF Act that the Resolution Applicant is also liable to pay the contribution and other sums due from the employer under any provisions of this act as the case may be in respect of the period up to the date of such transfer.*
>
> *All this requires that the explicit provisions of the above said PF Act needs to be complied with. This aspect is justiciable as a duty has been casted on the Resolution Professional/Adjudicating Authority/ on this Tribunal. This is not a commercial wisdom as compliance of law is a must. The aspect of parity for payment of Finance Creditors and Operational creditors are not being looked into by this Tribunal as it is a commercial wisdom of CoC.*
>
> *[…]*
>
> *Hence, We direct the Respondent No.2/Successful Resolution Applicant to release full provident fund dues in terms of the provisions of the Employees Provident Funds and Miscellaneous Provident Fund Act, 1952 immediately by releasing the balance amount of (Rs. 1,35,06,391 full dues – (minus) considered in the Resolution Plan Rs.78,00,000). The impugned order dated 02nd April, 2019 approving the 'Resolution Plan' stands modified to the extent above*."
>
> (emphasis supplied)

Whilst it is debatable whether an application under Section 17B of EPF Act is accurate in the context of change in management under IBC, an appeal against the order was dismissed by the Supreme Court, having found *no merits* in the appeal[11].

Where non-payment of EPF dues in full was not interfered with

a. Example of such a course could be noted in the two judge bench decision of NCLAT, Chennai in the case of, *Regional Provident Commissioner, Employees Provident Fund Organisation, Telangana* v. *Vandana Garg*[12], where the provident fund department had questioned approval of a resolution plan stipulating a hair cut to the provident fund dues. Rejecting the argument that NCLT had failed to consider the priority of EPF dues as well as exclusion of provident fund from the ambit of *liquidation estate* under Section 36(4) of the IBC, NCLAT observed as follows:

> *"27. Further, it is necessary to mention that the question of*

[11] See, *S M Milkose* v. *Sikander Singh Jamuwal* [Civil Appeal No. 6721 of 2022, order dated September 23, 2022 (Supreme Court)].
[12] *Regional Provident Commissioner, Employees Provident Fund Organisation, Telangana* v. *Vandana Garg*, [Company Appeal (AT)(CH)(Ins.) No. 50 of 2021, dated May 12, 2021 (NCLAT)].

applicability of Section 36 (4) (a) (iii) of the Insolvency and Bankruptcy Code 2016 arises at the stage of the formation of Liquidation Estate by the Liquidator. Since the Corporate Debtor has not gone into Liquidation and is currently under Insolvency Resolution, Section 36 of the I&B Code cannot be applied. Moreover, no fund could be excluded from the Liquidation Estate in terms of Section 36 (4) (a)(iii) of the I & B Code 2016."

(emphasis supplied)

b. Further, we have also come across various orders passed by NCLT, allowing resolution plans providing for a haircut in relation to the EPF dues[13].

Treatment of EPF dues during liquidation

We have noted before that, in terms of Section 36(4)(iii) of IBC, *all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund* are excluded from the purview of liquidation estate. We have also extracted herein above the provisions of Section 53 of IBC, which specifies the waterfall mechanism in the event of a liquidation.

Interpreting both the provisions, the Principal Bench of NCLT had, in the case of, *Alchemist Asset Reconstruction Company Limited* v. *Moser Baer India*[14], noted that, as provident fund dues are not treated as a part of the liquidation estate, they could not be recovered in terms of waterfall mechanism specified under Section 53. An appeal against the aforesaid decision was rejected by NCLAT in the case of, *State Bank of India* v. *Moser Baer Karmachari Union*[15], where the Bench had noted that, although the expression '*workmen's dues*', as appearing under Section 53(1)(b) of IBC, read with Section 326 of Companies Act, 2013, includes within its ambit even provident fund dues, for the purpose of distribution, such provident fund dues cannot be treated as part of *workmen's dues*. NCLAT, accordingly, concluded as follows:

"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."

(emphasis supplied)

Similar views have also been endorsed by the Chennai Bench of the NCLAT in the case of, *Central Board of Trustees* v. *Liquidator (Sri. Gorur Narasimhamurthy Venkataraman)*[16], where the following was observed:

"19. The main contention of the 'Appellant' is that Section 53 of the IBC is not applicable in the case of EPF. Since the Employees Provident Fund Act is a special Act and prevails over all other acts and submits that the dues which are payable to the employees cannot be treated as part of the asset of the Corporate Debtor.

[13] See, *EPC Constructions India Limited* [MA 315 of 2019 in CP No.1832/I&BC/MB/MAH/2017, order dated November 25, 2019 (NCLT Mumbai)]; *RPFC* v. *PRC International Hotels Private Limited* [IA 896/IB/2020 in CP/540/IB/2018, order dated December 17, 2021 (NCLT Chennai)].

[14] *Alchemist Asset Reconstruction Company Limited* v. *Moser Baer India*, [(IB-378(PB)/2017), order dated March 19, 2019 (NCLT Principal)].

[15] *State Bank of India* v. *Moser Baer Karmachari Union* [Company Appeal (AT) (Insolvency) No. 396 of 2019, decision dated August 19, 2019 (NCLAT)].

[16] *Central Board of Trustees* v. *Liquidator (Sri. Gorur Narasimhamurthy Venkataraman)* [Company Appeal (AT) (CH) (INS) No. 10 of 2021, decision dated August 16, 2021 (NCLAT Chennai)].

20. There is no dispute with regard to that and we are in agreement with the said position of law. Even Section 36(4(a) (iii)) of I&B Code 2016 states that the following shall not be included in the 'Liquidation Assets' and shall not be used for recovery in the liquidation Sub Section:(4) of Section:36 of IBC reads as "The following shall not be included in the Liquidation Estate assets and shall not be used for recovery in the Liquidation. Sub Clause (iii) of clause (b) of sub-Section (4) of Section 36 reads as under, "All sums due to any Workman or employee from the provident fund, the pension fund and the gratuity fund". From reading of this provision, it is clear that a liquidation estate does not include the sums due to any workman or employee from the Provident Fund etc. […]"

(emphasis supplied)

Reference may also be made to the decisions of the Chennai Bench[17] and Allahabad Bench[18] of NCLT, where, relying upon Section 36(4) of the IBC, the tribunal had held that, realisation of provident fund dues would not be amenable to the waterfall mechanism under Section 53 of the IBC.

However, *contrary views* have also been expressed by different benches of NCLT, wherein the bench had suggested that, realisation of the provident fund dues could be only in accordance with the waterfall mechanism. Reference may be made to the New Delhi Bench IV of NCLT in the case of, *Mr. Pankaj Khetan* v. *EPFO*[19], where the Bench had refused the priority treatment of provident fund dues by observing as follows:

"*17…. The liquidator shall in terms of the waterfall mechanism as laid down under Section 53 of the I & B Code make the payments of the EPF department. Further it is also observed that the Liquidator had through several letters intimated the EPF department about the corporate debtor going into liquidation. The EPF department failed to follow the timelines and belatedly filed claim before the liquidator. The liquidator states that the fund received from the sale of assets had already been disbursed and the claims of EPF department could not be paid even otherwise the PF department being the operational creditor is entitled to get its dues as per the Waterfall under section 53 of the code. Admittedly the liquidator has disbursed the amount as required in the liquidation process and view of nothing left the operational creditor cannot agitate the grievance."*

(emphasis supplied)

Similar view was also taken in the case of, *Regional Provident Fund Commissioner* v. *Karpagam Spinners Private Limited*[20], where the Chennai Bench of NCLT, refused to consider the priority charge of provident fund dues under EPF Act in view of the *non-obstante clause* contained in Section 238 of IBC, which the Bench considered to confer overriding effect over the provisions of EPF Act.

[17] *Mr. Nagalingam Muthiah* v. *Office of the Recovery Officer* [IA No. 31/2021 in MA/868/2019, decision dated April 8, 2021 (NCLT Chennai)] and *RPFC* v. *S. Kannan* [MA 981/2019 in CP/559/IB/2017, decision dated August 2, 2021 (NCLT Chennai)].

[18] *In the matter of LML Limited* [IA No.243/ALD/2021 in CP (IB) No. 55/ALD/2017, decision dated April 6, 2022 (NCLT Alllahabad)].

[19] *Mr. Pankaj Khetan* v. *EPFO*, [I.A. No. 3837/ND/2020 in CP.(IB) 74/ND2018, decided on December 1, 2020 (NCLT New Delhi IV)].

[20] *Regional Provident Fund Commissioner* v. *Karpagam Spinners Private Limited*, [MA/99/2018 in TCP/225 (IB)/2017, decided on January 21, 2019 (NCLT Chennai)].

Observation

Review of the various decisions extracted herein above indicates that the position regarding priority of dues continues to remain muddled and if we may dare say, on account of lack of proper understanding the statutory provisions or application thereof. In the following paragraphs, we intend to examine, (a) whether the exclusion of provident fund dues from the purview of the liquidation estate, which seems to be the single most important factor for the benches to consider special treatment of provident fund dues, has any bearing on the waterfall mechanism specified under Section 53; and (b) the applicability of priority of dues under Section 11(2) of EPF Act in view of the existence of *non-obstante* clause under both Section 53 and Section 238 of IBC.

Effect of exclusion of provident fund dues from purview of liquidation estate

In terms of sub-clause (iv) of Section 36(4)(a) of IBC, all sums due to any workmen or employee *from* the provident fund, the pension fund and the gratuity fund are excluded from the purview of the liquidation estate. What is important to note is that what is excluded from purview of liquidation estate is an amount *which is due from the provident fund,* which cannot be and should not be confused with where certain amounts are *due from the employer*. In fact, the recent decision of the Chennai Bench of NCLAT in the case of, *Mr. B. Parameshwara Udpa* v. *Assistant PF Commissioner*[21], in our view, was correct in observing that the exclusion from the liquidation estate applies only in respect of a separate establishment specific funds, established in terms of Section 16A of the EPF Act[22], when it observed as follows:

> *"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. [….]*
>
> *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*

[21] *Mr. B. Parameshwara Udpa* v. *Assistant PF Commissioner* [Company Appeal (AT) (CH) (Ins) No. 231 of 2021, decision dated September 23, 2022 (NCLAT Chennai)].

[22] **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.
[…]

> *`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. […]*
>
> *[…] 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'."*
>
> (emphasis supplied)

In any event, the purpose of identifying what constitutes a *liquidation estate* is to ascertain the availability of assets that can be sold/ auctioned to realise liquidation proceeds and cannot have any bearing on how the liquidation proceeds realised from the auction of assets comprising the *liquidation estate* can be distributed.

Accordingly, in our respectful submission, all the decisions of NCLT and NCLAT, where the priority and separate treatment of provident fund dues were recognised primarily basis exclusion of such provident fund dues from *liquidation estate* may not be immune from criticism.

Priority of Section 11(2) EPF Act *vis-à-vis* the provisions of IBC

In terms of Section 11(2) of EPF, as explained by the Supreme Court in the Esskay Pharma case, *notwithstanding anything contained in any other law for the time being in force, the provident fund dues would have to be paid in priority to all other debts*.

Whilst one may be tempted to argue that, considering both Section 53 and Section 238 of IBC also contains a *non-obstante clause* and being a subsequent legislation, would prevail over Section 11(2) EPF Act, we may note that the said argument was expressly rejected in the Esskay Pharma case, where the amendment to Section 529A was a subsequent one. The relevant observations of the Court were as follows:

> "*36. The argument of Shri Gaurav Agrawal that the non obstante clause contained in the subsequent legislation, i.e. Section 529A(1) of the Companies Act should prevail over similar clause contained in an earlier legislation, i.e. Section 11(2) of the EPF Act sounds attractive, but if the two provisions are read in the light of the objects sought to be achieved by the legislature by enacting the same, it is not possible to agree with the learned counsel. As noted earlier, the object of the amendment made in the EPF Act by Act No.40 of 1973 was to treat the dues payable by the employer as first charge on the assets of the establishment and to ensure that the same are recovered in priority to other debts. As against this, the amendments made in the Companies Act in 1985 are intended to create a charge pari passu in favour of the workmen on every security available to the secured creditors of the company for recovery of their debts. There is nothing in the language of Section 529A which may give an indication that legislature wanted to create first charge in respect of the workmen's dues, as defined in Sections 529(3)(b) and 529A and debts due to the secured creditors.*
>
> […]
>
> *38. … if two special enactments contain provisions which give overriding effect to the provisions contained therein, then the court is required to*

> *consider the purpose and the policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions*.
>
> […]
>
> *42. It is also important to bear in mind that even before the insertion of proviso to Sections 529(1), 529(3) and Section 529A and amendment of Section 530(1), all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund established for welfare of the employees were payable in priority to all other debts in a winding up proceedings [Section 530(1)(f)]. Even the wages, salary and other dues payable to the workers and employees were payable in priority to all other*
> *debts. What Parliament has done by these amendments is to define the term "workmen's dues" and to place them at par with debts due to secured*
> *creditors to the extent such debts rank under clause (c) of the proviso to Section 529(1). However, these amendments, though subsequent in point of time, cannot be interpreted in a manner which would result in diluting the mandate of Section 11 of the EPF Act, sub-section (2) whereof declares that the amount due from an employer shall be the first charge on the assets of the establishment and shall be paid in priority to all other debts. The words "all other debts" used in Section 11(2) would necessarily include the debts due to secured creditors like banks, financial institutions etc. The mere ranking of the dues of workers at par with debts due to secured creditors cannot lead to an inference that Parliament intended to create first charge in favour of the secured creditors and give priority to the debts due to secured creditors over the amount due from the employer under the EPF Act.*"
>
> (emphasis supplied)

It may accordingly be argued that, applying the same logic used in the *Esskay Pharma case*, the *non-obstante clause* contained in Section 11(2) of EPF Act would override the *non-obstante clauses* of Section 53 and Section 238 of IBC, despite IBC being a subsequent legislation[23].

Interestingly, one may refer to Section 19, contained in Chapter III of *Code on Social Security Code, 2020* (*Employees Provident Fund*), which provides the following regarding the priority of provident fund dues:

> *"19. Notwithstanding anything contained in any other law for the time being in force, any amount due under this Chapter shall be the charge on the assets of the establishment to which it relates and shall be paid in priority in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016."*
> (emphasis supplied)

Accordingly, upon the enforcement of Chapter III of the *Code on Social Security Code, 2020*, which would repeal the EPF Act, the priority of provident fund dues would be determined in terms of the provisions contained in Section 53 of IBC alone.

[23] For the aforesaid principle, reference may also be drawn to the recent decision of single bench of Gujarat High Court in the case of *UCO Bank* v. *EPFO* [SCA No. 754 of 2019, decided on September 30, 2022 (Gujarat)], where the Court had held that Section 11(2) of EPF Act would prevail over Section 26E of SARFAESI Act, which recognised the priority of secured creditor dues over the crown debts.

Parting Thoughts

The issue of priority of provident fund dues in the context of a company undergoing CIRP is a complex one. Whilst there is no dearth of precedents on the issue, the underlying rationale for arriving at such decisions lack clarity or application of judicial principles. It is hoped that, with the enactment of Chapter III of the *Code on Social Security Code, 2020*, the confusions surrounding the issue would be put to rest.

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