

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

COMPANY APPEAL 10 OF 2023

Under Section 42 of Insolvency &
Bankruptcy Code, 2016

Employees Provident Fund Organisation
... **Appellant**

Vs.

Mr. Vijay Kumar Iyer
The Resolution Professional
... **Respondents**

INVP No.54 OF 2023

**Edelweiss Assets Reconstruction
Company Limited**
... **Applicant**

In the matter of

In the matter of

C.P.(IB) No. 292/MB/2017

Edelweiss Assets Reconstruction
Company Limited

... **Financial Creditor**

Vs.

Bharti Defence and Infrastructure Limited
... **Corporate Debtor**

THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

Company Appeal 10 OF 2023
INVP.A. 54 OF 2023
In
CP (IB)292/MB-1/2017

Order delivered on: 12.03.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances:

For the Intervenor	:	Mr. Rohit Gupta a/w Mr. Shreyansh Desai, Advocate
For the Liquidator	:	Mr. Naman Kamdar, Advocate
For the Respondent	:	Mr. Akshay Doctor, Advocate
For the EPFO	:	None

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Company Appeal bearing IA No. 10 of 2023, is filed by through Employee Provident Fund Organisation in the Corporate Insolvency Resolution Process (CIRP) of M/s Bharati Defence and Infrastructure Private Limited (Corporate Debtor) seeking direction to Mr. Vijay Kumar V. Iyer, the Resolution Professional (Respondent) to accept the claim in respect of entire PF claim and categorize PF Interest and Damages along with PF contributions under Section 36(4)(a)(iii) of IBC as out of Liquidation Estate.
2. That M/s Bharti Defence and Infrastructures Limited bearing PF code no. MH/21069, MH/100507 and MH/103864 was unable to service its debt.

THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

Company Appeal 10 OF 2023
INVP.A. 54 OF 2023
In
CP (IB)292/MB-1/2017

2.1.M/s Bharti Defence and Infrastructures Limited has been covered under EPF & MP Act, 1952 vide PF code No MH/21069 with effect from 1 February 1979. With applicability of EPF & MP Act, 1952 to the Principal employer, PF Code No MH 100507 was allotted to M/s Bharati defense and Infrastructures Limited(Contractor) for reporting compliance of Contractual Employees. A separate PF Code No MH/103864 was allotted to M/s Dabhol Marine Services who was engaged with M/s Bharti Defence and Infrastructures Limited for providing Security services.

2.2.Applicant states that the corporate debtor M/s Bharti Defence and Infrastructures Limited defaulted in payment of Provident Fund, Pension and Insurance contributions under Section 6 of EPF & MP Act, 1952 (henceforth the Act). In the instant case, the Corporate Debtor failed to credit employees PF contribution amount to the fund. Therefore, at no fault of employees, they were denied their valuable right protected under the Employees' Provident Funds and Miscellaneous Provisions Act. The debt owed to the Provident Fund Commissioner is the debt owned by the employees. Therefore, the claim filed by Commissioner represents the claim of the employees and workmen in respect of their claim for provident fund.

2.3.That this Tribunal was pleased to admit the application filed by M/s. Edelweiss Asset Reconstruction Company Ltd (the Financial creditor) under section 7 of the IBC Code, for

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

**Company Appeal 10 OF 2023
INVP.A. 54 OF 2023
In
CP (IB)292/MB-1/2017**

initiation of Corporate Insolvency Resolution Process ("CIRP") of the Corporate Debtor vide its order dated 6th June 2017 (i.e. the "Insolvency Commencement Date" or "ICD") in application bearing No. CP No. 292/1 & BP/NCLT/MAH/2017. The public announcement as per Insolvency and Bankruptcy Code was issued on 12th June 2017 calling for submission of claims with IRP on or before 20th June 2017.

- 2.4. Pursuant to this the EPFO Regional office Kolhapur filed Provisional Claim of Rs 8,94,35,596/- by way of Affidavit with Shri Dhinal Shah (IRP) on 19.07.2017 and also RO Kolhapur had informed IRP that this claim was only provisional claim and Final claim will be filed shortly. Accordingly, on 30th Oct 2017 EPFO Regional office Kolhapur has filed claim of Rs. 36,75,86,820/- towards dues, damages and Interest with IRP.
- 2.5. Later on the said establishment has gone under liquidation and Shri Vijaykumar V. Iyer has been appointed as liquidator. The public announcement as per Insolvency and Bankruptcy Code (In Liquidation) was issued on 19.01.2019 calling for submission of claims by 13.02.2019. Pursuant to this the RO Kolhapur filed Claim dated 08.02.2019 for Rs. 36,75,86,820/-.
- 2.6. The Claim is filed in stipulated time limit however after filing the claim message was received from Liquidator Office to file the claim in prescribed form (ie Form C) hence on 15 Feb 2019 RO Kolhapur has filed claim in Form C (Copy of claim enclosed herewith) 15.02.2019, which included as PF Contributions of employees as assessed under Section 7 A of the Act and Interest u/s 7Q and damages U/s 14B.

THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

Company Appeal 10 OF 2023
INVP.A. 54 OF 2023
In
CP (IB)292/MB-1/2017

- 2.7. This office has filed supplementary claim of Rs.16,81,937/- on 14.01.2020 to the liquidator towards Damages and Interest in respect of M/s Dabhol Marine Services bearing PF Code No PU/KOL/103864 which is security contractor of M/s Bharti Defence and Infrastructures Limited and being principal employer unpaid dues were charged on M/s Bharti Defence and Infrastructures Limited.
- 2.8. Subsequently Damages and Interest of Rs 39,32,590/- were assessed for the period 05/2014 to 02/2019 in respect of M/s Bharti Defence and Infrastructures Limited and same was included in the total dues. Accordingly RO Kolhapur has filed final claim of Rs.37,37,01,347/- with the Liquidator on 31.12.2020, which included as PF Contributions of employees as assessed under Section 7 A of the Act and Interest u/s 7Q and damages U/s.14B
- 2.9. There was no any communication from the liquidator about claim status, this office has filed reminder letter to the Liquidator on 06.06.2022 for updating the status of the claim.
- 2.10. In response to the said letter, the liquidator has sent an email dated 05.07.2022 along with letter, stating that that he was unable to accept the Claim. However the email was sent on old email address of Kolhapur Office i.e. sro.kolhapur@epfindia.gov.in which was not in use & as such it never came to notice of RO, Kolhapur till July 2022, when liquidator sent a copy of it. Further The Liquidator has not accepted the claim of appellants.
- 2.11. On the contrary from IBBI website it is learnt that the liquidator has given auction Notification for the Sale of properties of M/s

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

**Company Appeal 10 OF 2023
INVP.A. 54 OF 2023
In
CP (IB)292/MB-1/2017**

Bharti Defence and Infrastructure Ltd. Despite auctioning the property of the defaulting establishment the Respondent has not cleared the P.F dues of Rs 37,37,01347/-. In this context no information was provided to the Applicants office relating to the sell proceeds received from auction & its disbursement. The statutory use of the applicant have been incurred in the following manner

NAME OF STATUTORY AUTHORITY	Regional Provident Fund Commissioner -I (Recovery Officer) Employees Provident Fund Organization Regional Office, Kolhapur								
ADDRESS OF STATUTORY AUTHORITY FOR CORRESPONDENCE	Employees' Provident Fund Organization, Regional Office, Kolhapur, Tarabai Park, Kolhapur416003								
TOTAL AMOUNT OF CLAIM, INCLUDING ANY INTEREST, AS AT LIQUIDATION COMMENCEMENT DATE AND DETAILS OF NATURE OF CLAIM	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 70%;">1. PF Code No. PUKOL/21069 -</td> <td style="text-align: right;">Rs. 36,62,09,952/-</td> </tr> <tr> <td>2. PF Code No. PUKOL/100507 -</td> <td style="text-align: right;">Rs. 18,76,868/-</td> </tr> <tr> <td>3. PF Code No. PUKOL/103864 -</td> <td style="text-align: right;">Rs. 16,81,937/-</td> </tr> <tr> <td>4. PE Code No. PUKOL/21069. -</td> <td style="text-align: right;">Rs. 39,33,590/-</td> </tr> </table> <p>TOTAL CLAIMRs. Rs. 37,37,01347/- (Rs. THIRTY SEVEN CRORES, THIRTY SEVEN LAKHS ONE THOUSAND AND THREE HUNDRED FORTY SEVEN ONLY)</p>	1. PF Code No. PUKOL/21069 -	Rs. 36,62,09,952/-	2. PF Code No. PUKOL/100507 -	Rs. 18,76,868/-	3. PF Code No. PUKOL/103864 -	Rs. 16,81,937/-	4. PE Code No. PUKOL/21069. -	Rs. 39,33,590/-
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2. PF Code No. PUKOL/100507 -	Rs. 18,76,868/-								
3. PF Code No. PUKOL/103864 -	Rs. 16,81,937/-								
4. PE Code No. PUKOL/21069. -	Rs. 39,33,590/-								
DETAILS OF HOW AND WHEN DEBT INCURRED	<ul style="list-style-type: none"> • Copy of 14B order dt- 06/04/2016 • Copy of 14B order dt- 25/07/2017 • Copy of 14B & 7Q order dt-21/08/2017 • Copy of 7Q order dt- 25/07/2017 • Copy of 7A order dt-21/09/2017 • Copy of Short payment as per system generated for the year 2017-18 in respect of MH/21069(Bharati Defense and Infra.) • Copy of Short payment as per system generated for the year 2017-18 in respect of MH/100507 (Contractor) 								

2.12. That the proceedings concerning ascertainment of dues of to the Provident fund was undergoing when the proceedings of the Corporate Debtor got admitted. The total crystallized dues of the Department against the corporate debtor are of Rs. 37,37,01,347/-
13 The liquidator has ignored the statutory does. Once liquidator process commences and liquidator is appointed, all the power of board of Directors vests with the liquidator. Along with power,

THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

Company Appeal 10 OF 2023
INVP.A. 54 OF 2023
In
CP (IB)292/MB-1/2017

duties also cast upon the Liquidator. All the pending matter with various statutory authority are to be complied as per provision of the act.

- 2.13. Without prejudice to the above, appellant state that, statutory dues do not require to file claim before IRP. (As per para 39) Regulation 12 of the 2016 regulation deal with the time period of a claim along with proof, as stipulated in the public announcement under section 15 of the IBC. The time period is, however, not mandatory but only directory. In support of claim Cited Hon'ble Supreme court order dated 06.09.2022 in case of "Rainbow paper Ltd".
- 2.14. As per Section 11(2) of the EPF Act, EPFO dues have first charge over 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 assets. In such case EPFO should have been categorized under secured creditors. In Para 57 of the Hon'ble Supreme Court's order in the case of "State Tax Officer vs. Rainbow Papers Limited", the Hon'ble Supreme Court has observed that Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Government Authority. Hence, as per the provisions of Section 53 of the IBC, the claims of Government Authorities are to be treated at par with workmen's dues for the period of twenty-four months preceding the liquidation commencement date.

THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

Company Appeal 10 OF 2023
INVP.A. 54 OF 2023
In
CP (IB)292/MB-1/2017

3. The Original Applicant Edelweiss Assets Reconstruction Company Limited has filed an Intervention Petition No. 54/2023 in Company Appeal No. 10 of 2023 filed by Employee Provident Fund Organisation in the Liquidation proceedings of Bharati Defence and Infrastructure Limited (Corporate Debtor) under Section 42 of The Insolvency and Bankruptcy Code, 2016 ("Code"), praying for hearing before the claim of the Appellant is directed to be categorized as a Secured claim thereby affecting the share of the Applicant and other stakeholders in distribution of the sale proceeds.

3.1. The Applicant is one of the Financial Creditor of M/s. Bharti Defence and Infrastructure Limited., (In Liqn). The Applicant was also a member of Committee of Creditor and is now classified as a Stakeholder of the Company In Liquidation.

3.2. On 19.01.2019, Public announcement on 19.01.2019 as per the provisions Insolvency and Bankruptcy Code, 2016 thereby calling upon the stakeholders to lodge their claims by 13.02.2019.

3.3. On 15.02.2019, The Appellant has once again lodged its claim in Form C not only beyond the stipulated period but also without seeking condonation of delay.

3.4. On 14.01.2020, Supplementary claim was filed by the Appellant and on 31.12.2020 a final claim was filed by the Appellant which included Damages, Interest, PF contributions of employees as assessed for the period of 05/2014 to 02/2019. Appellant's claim was not lodged in the prescribed format. Thereafter, though the Appellant claims to have lodged its revised claim, supplementary claim and final claim, all of such

were not filed within the period stipulated in the public announcement.

- 3.5. Appellant does not have suo moto power to condone the delay, the claims of the Appellant were not considered in liquidation by the Respondent and the Respondent has proceeded with liquidation of the assets of the Corporate Debtor (In Liqn) by putting up the same for sale by public auction.
 - 3.6. Applicant state that having failed to lodge the claim in stipulated time and seek condonation of delay and / or leave to lodge claim, the Appellant has filed the aforesaid Appeal seeking an order and direction against the Respondent to accept the claim of the Appellant and categorize the Provident Fund Interest and Damages along with Provident Fund contributions under the provisions of Section 36(4)(a) (i) of the Insolvency and Bankruptcy Code.
 - 3.7. The Applicant being one of the major stakeholder in Liquidation of the Corporate Debtor, its claim will be vitally affected given the fact that the Appellant purports that its claim be categorized as a secured claim. The Appellant is very well aware about this fact since as on date the list of stakeholders is uploaded on the website of the Corporate Debtor.
4. Heard learned Counsel and perused the material on record.
 - 4.1. The Intervenor Edelweiss Assets Reconstruction Company Limited was also heard in the matter.
 - 4.2. The issue that Provident fund dues in relation to employer and employee contribution do not form part of Liquidation estate of the Corporate Debtor is no longer res-integra. It is settled law that the amount of dues payable to employees in relation

to contribution to the Provident Fund do not form part of the Liquidation Estate, hence is to be excluded from the assets of the Corporate Debtor and the due claimed on account of damages and interest thereon are in nature of Operational Debt payable to statutory authority.

4.3. The appellant has claimed dues on account of principal contribution, damages and interest on these two components. In so far as principal contribution is concerned the same no longer forms part of Liquidation estate, hence the Liquidator is directed to exclude this amount from the Liquidation estate and deal with the same in priority over all other claims. In so far as damage and interest are concerned, these dues are not payable to the employees, but the same are contributions to the general fund of Provident Fund Organisation and have statutory force.

4.4. Since, the appellant has filed the appeal before us, but has not sought the condonation of delay in relation to their claim for interest and damages, we are of considered view that the liquidation process, being a claim based process which is to be concluded in time bound manner, the belated claims ought not to be allowed. However, the claim forming part of Employer and Employee contribution ought to have been reflecting in the books of Corporate Debtor and this part has been held to be outside the Liquidation Estate, we are of considered view that the amount of Provident fund contribution be admitted and the amount equivalent thereto be excluded from the Liquidation estate, even though the claim in respect of such amounts may have been filed beyond the permissible date.

THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

Company Appeal 10 OF 2023
INVP.A. 54 OF 2023
In
CP (IB)292/MB-1/2017

- 4.5. Accordingly, we direct the Liquidator to admit the dues on account of contribution to Provident fund (both employer and employee) and exclude the corresponding amount from the Liquidation estate to be dealt with in priority of all other claims. Further, the Liquidator is directed to admit claims on account of damages and interest as Operational Debt payable to Statutory Authorities, if such claims were received within the prescribed time and deal with the same accordingly in terms of section 53 of the Code.
5. In view of the above, this Company Appeal 10 of 2023 is partly allowed and Intervention 54 of 2023 is allowed. Both matters are disposed of accordingly.

Sd/-
Prabhat Kumar
Member (Technical)

Sd/-
Justice V.G. Bisht
Member (Judicial)