IN THE NATIONAL COMPANY LAW TRIBUNAL

KOCHI BENCH

KOCHI

IA(IBC)/479/KOB/2022

IN

CP(IB)/08/KOB/2021

(Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of NCLT Rules, 2016)

In the Matter of:

Regional Provident Fund Commissioner, Employees Provident Fund Organization (Ministry of Labour and Employment, Government of India), Regional Office, Bhavishyanidhi Bhavan, Kaloor, Kochi- 682017

… Applicant

-Versus-

1. **M/s. Foodco Delicacies India Private Limited,** Corporate Debtor through Mr. C.S. Ramachandran Thekkumkat Madathil, Insolvency Resolution Professional, XI/46R, Trichattukulam P.O., Cherthala, Alappuzha, Kerala- 688 526.

2. **Mr. C.S. Ramachandran Thekkumkat Madathil,** Insolvency Resolution Professional, C/o T.M. Ramachandran & Associates, Company Secretaries, 1st Floor, Saji Nivas, Opp. RDS Laboratory, Dr. A.R. Menon Road, Naickanal, Thrissur, Kerala- 680 001. Email:- Iamramantm@gmail.com.

… Respondents

-In-

In the matter of:

The Federal Bank Limited;

…Financial Creditor

-Versus-

M/s. Foodco Delicacies India Private Limited

… Corporate Debtor

Coram:

Shri. P. Mohan Raj	:	Member (Judicial)
Shri. Satya Ranjan Prasad	:	Member (Technical)

Parties/Counsel present (through video conference):

For Applicant	:	Mr. John Mani V., Adv.
For Respondents	:	Mr. Sankar P. Panicker, Adv.

Order reserved on: 01.02.2023

Order pronounced on:16.03.2023

O R D E R

The present application is filed by the Regional Provident Fund Commissioner, under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code") read with Rule 11 of NCLT Rules, 2016 seeking the following reliefs: -

i. To set aside the Order of Communication/letter of 2nd Respondent dated 16.09.2022 rejecting the claim of the Applicant.
ii. To direct the 2nd Respondent to include the Applicant as a stakeholder in the finalized list of creditors and pay off the entire claim amount of Rs. 32,72,553/- (Rupees Thirty-Two Lakhs Seventy-Two Thousand Five Hundred and Fifty-Three Only) on first priority from and out of the liquidation assets/estate of the Respondents.
iii. To direct the Respondents for the payment of cost thereof.

2. The facts as narrated in the application and explained by the Applicant are summarized hereunder:

i. The Corporate Debtor M/s. Foodco Delicacies India Private Limited is an establishment covered under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 with the Regional Office, Kochi with EPF Code No.KR/KCH/24464. By virtue of the provisions of Section 6, 6A and 6C read with Paragraph 38 of the EPF Scheme, 1952, Paragraph 3 of the Employee's Pension Scheme, 1995 and Paragraph 8(1) of the Employee Deposit Linked Insurance Scheme, 1976, the employees of the Corporate Debtor/1st Respondent is required to remit the contribution without any default. It is stated that the CIRP proceedings against the Corporate Debtor were initiated by this Adjudicating Authority vide order dated 24.03.2022 and on the appointment of the 2nd Respondent was appointed as Interim Resolution Professional, he made public announcement on 01.04.2022 with regard to the initiation of the Corporate Insolvency Resolution Process (CIRP) seeking claims from the Financial Creditors, employees etc and the last date for submission of the claims was fixed on 15.04.2022.

ii. It is further stated that after public announcement, the Applicant submitted an interim claim of Rs. 16,32,134 on 18.04.2022 before the 2nd Respondent. On 16.06.2022, the 2nd Respondent by its letter, admitted the claim of the Applicant after due verification of documents. Even though the claim of the applicant was admitted by the 2nd Respondent, no amount due to the applicant was released to the Applicant till date.

iii. It is stated that on 12.04.2022, the Applicant issued a summons for hearing under Section 14 B of the EPF & MP Act against the Respondents. It is found that during the period from 31.12.2015 to 12.04.2022, the 1st Respondent made certain remittances and defaulted the rest of the dues. Pursuant to which on 25.04.2022, the Applicant/Authorised Officer issued a Certificate under Section 8 of the

EPF And MP Act informing that Corporate Debtor/1" Respondent has defaulted the remittance and assessed a sum of Rs. 13,959/- on account of levy of damages under Section 14 B and directed to recover the same. Subsequently, dues of the 1st Respondent was assessed at Rs. 7,68,150/- on a notional basis from January 2020 till March 2022.

iv. It is stated that after affording several opportunities to the Respondents, the applicant has directed the respondents to remit a sum of Rs. 17,841/- towards the belated remittance of Provident Fund Contribution for the period from 01.08.2015 to 31.12.2019 under Section 14 B of the EPF &MP Act within 15 days. It was further directed to remit a sum of Rs. 9704/- towards interest for the period from 01.08.2015 to 31.12.2019 under Section 7Q of the EPF& MP Act within 7 days.

v. It is further stated that a notice was issued to the 2nd Respondent for re-determination of statutory dues under EPF & MP Act, EDLS, and EPS directing him to appear on 02.06.2022 for a hearing. But the Respondents failed to appear for the hearing. It is stated that the Applicant after affording several opportunities to the Respondent for making payment directing the respondents to remit a sum of Rs. 6,11,274/- towards the belated remittance of Provident Fund Contribution for the period from 01.04.2017 to 31.12.2019 under Section 14 B of the EPF & MP Act within 15 days. Further directed to remit Rs. 2,89,746/- towards interest for the period from 01.04.2017 to 31.12.2019 under Section 7Q of the EPF& MP Act within 7 days. It is stated that the Applicant by its proceeding dated 23.08.2022 has conducted an enquiry against the 1st Respondent for remittance of dues from 01/2020 to 03/2022 and also in respect of non-remittance of non-enrolled employees for the period from 01/2020 to 03/2022. After hearing the 2nd Respondent IRP and perusal of the material records, it was determined an amount of Rs.9,02,937/- due

towards the EPF contribution of non-enrolled employees which is due exclusive of damages and interest under Section 14B and &7Q of the EPF &MP Act.

vi. It is stated that on 16.09.2022, the 2nd Respondent had issued a letter to the Applicant stating that since the resolution plan is being considered by the Committee of Creditors and the Resolution Plan submitted by a prospective applicant is under finalization, the 2nd Respondent is not in a position to accept the claim of the Applicant. Thereafter on 17.11.2022, the Applicant issued a letter to the 2nd Respondent to release the entire dues amounting to a sum of Rs. 32,72,553/-.

vii. It is further stated that the 1st Respondent defaulted payment of contribution and administrative Charges payable under the EPF & MP Act. Immediately on commencement of CIRP Proceedings, the Applicant submitted an Interim claim before the 2nd Respondent and the same was admitted. Out of which an amount of Rs.16,32,134/- was admitted by the 2nd Respondent and the balance amount of Rs .16,40,619/- was rejected by the 2 Respondent without any authority of law. Therefore, a total amount of Rs. 32,72,553/- is due towards EPFO from the 1st Respondent to the Applicant. Even though the claim of Applicant was admitted by the 2nd Respondent, nothing has been released to the Applicant till date.

viii. It is stated that the dues of the EPFO are statutory dues having the first charge over the Asset/Estate of the Corporate Debtor in terms of Section 11 of the EPF and MP Act.

3. On 13.01.2023, the Respondents filed their reply statement and stated that the CD is currently undergoing CIRP and the EPF department had lodged a claim for the

period from 01.08.2015 to 31.12.2019 in Form F on 18.04.2022 for Rs 16,32,143/- which was duly admitted by the Resolution Professional after verifying the documents such as Recovery certificate dated 01.04.2022 towards dues for the period 04/2017 to 12/2019 for Rs. 6,66,869/-, proceedings under Section 14B (damages) dated 18.12.2015 for Rs. 7,843/- and under Section 7Q(interest) for Rs. 7,843/-, proceedings under Section 14B(damages) dated 07.02.2017 for Rs. 14,898/- and under Section 7Q(interest) for Rs. 7,843/-, penal damages and interest for the period 31.12.2015 to 12.04.2022 for Rs. 17,841 (14B) and Rs. 9704/- (7Q) and Expected damages as per 7Afor the period 04/2017 to 12/2019 for Rs. 6,11,274/- and Rs. 2,89,746/-.

4. It is stated that the 2nd Respondent cannot make any payment to the claim raised during the CIRP period as the same would come under the category of preferential payments. Moreover, as per the Scheme of the IBC 2016, the payment of PF would not come under essential services and hence cannot be paid. It is further stated that the Applicant has issued summons u/s 14B of the EPF and MP Act on 12.04.2022 and a certificate under Section 8 of EPF and MP Act. Thereafter the Applicant has assessed the PF dues on a notional basis. It is stated that these acts of the Applicant have all the ingredients of legal proceedings and therefore, has violated the Moratorium under Section 14 of the Code. It is stated that the Corporate Debtor is undergoing CIRP, and the 2nd Respondent cannot make any payments that will have the colour of preferential payments.

5. It is stated that when the moratorium under Section 14 of the IBC was in place there cannot be any legal proceedings against the company. However, the RP being the officer of court vide his letter RP/FOODCO/57/2022-23 dated June 16, 2022, informed about the admission of their claim which includes damages and penal interest for the period 01.08.2015 to 31.12.2019 and requested to waive further action due to the express bar of any legal proceedings during Moratorium. It is further stated that the Applicant has never submitted any revised claim. The

Respondent has complied with all the provisions of the IBC and the CIRP Regulations. The Respondent could not accept any directions to make payments to any creditors as they would tantamount to preferential transactions. The RP has informed the Applicant about the CIRP and also about the moratorium under Section 14 of the IBC 2016. As there was no legal provision to make any interim payments by the Resolution Professional to the Claimants, neither a revised claim to admit the additional amount claimed was lodged by the Applicant, nor was any direction sought by the applicant from this Adjudicating Authority to admit claims, the RP had no other choice but to reject the claim of Applicant for the payments.

The point for consideration is:

Whether the proceeding initiated against the Respondents during the Moratorium period and order passed there on dated 23.08.2022, is valid? (Annexure A-6 of Application).

6. In this case after admitted the corporate debtor into CIRP on 24.03.2022 the applicant has filed a claim on 16.06.2022, before the second respondent for a sum of Rs.16,32,143/- which was admitted by the second respondent. The said claims are dues determined by the applicant prior to the CIRP. Thereafter the applicant initiated proceeding on 12.04.2022 against the corporate debtor impleading the IRP/second Respondent as a party during the moratorium period and passed an order on 23.08.2022 in utter violation of the section 14 of IBC 2016. The applicant proceeded with legal proceedings against the IRP in spite of the matter brought to his knowledge that the proceeding is barred in view of moratorium under section 14 of IBC. The applicant not showing any respect to the law proceeded with legal proceeding and passed the impugned order. The impugned order passed during the period of moratorium against the provision of section 14 of IBC 2016 is void ab initio. The applicant cannot claim anything on the basis of void order. In fact, the applicant is liable to be prosecuted under section 74(2) of IBC 2016 for wilful violation of section 14 of IBC 2016. The view of ours that no legal

proceeding can be initiated against the respondents by the applicant is supported by the decision of **NCLT-MUMBAI in Vineet K Chaudhary vs The Regional P.F. Commissioner (II) and another I.A.No.1964 of 2020 dated 29.07.2022 held in para 13** as follows:

> *In the case at hand, the proceedings initiated by the Respondent are not mere assessment proceedings as contented by the Respondent. The proceedings are legal proceedings as provided for in the circular dated 14.02.2020 issued by the Respondent, which encompass evidence to be led by parties to reach to a conclusion whether there is any amount which is due or payable under the EPF & MP Act. This is also evident from a reading of provision 7A of the EPF & MP Act, which describes the proceedings under the said section as judicial proceedings within the meaning of Sections 193 and 228, and for the purpose of Section 196, of Indian Penal Code. Further, in case any amount is due or payable, the Respondent in terms of provisions of the EPT & MP Act also imposes penalty and damages. The initiation of proceedings by the Respondent would, therefore, entail imposition of a pecuniary liability on the Corporate Debtor. This is exactly what is prohibited by the Code. The contention of the Respondent, therefore, that the proceedings initiated are mere assessment proceedings and are not barred under Section 14 of the Code, is therefore liable to be rejected.*

In the circumstances, the impugned order dated 23.08.2022 passed during the moratorium period is declared as void.

7. The COC already approved the resolution plan for corporate debtor with 100% voting and application for approval of resolution plan is pending. The applicant's

initial claim is already accepted, the additional claim filed by the applicant is not conceded by the respondent.

8. For the reasons discussed above the plea of applicant is not sustainable, in consequence liable to be Dismissed.

9. In the result Application is **Dismissed.**

10. Registry is directed to communicate this order to the respective parties through email.

11. Certified copy of the order be issued on request of the parties as per the procedure.

12. File be consigned to records.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD Date: 2023.03.16 14:40:28 +05'30'

PANDIAN MOHAN RAJ Digitally signed by PANDIAN MOHAN RAJ Date: 2023.03.16 14:54:40 +05'30'

Satya Ranjan Prasad
Member (Technical)

P. Mohan Raj
Member (Judicial)

Signed on this 16th day of March, 2023.

Rajasree R. Nair.