

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**COMPANY APPLICATION NO.469 OF 2016
IN
COMPANY PETITION NO.170 OF 1996**

The Central Board of Trustees)....Applicant

IN THE MATTER BETWEEN :

Mr.Jayant Mohanlal Rawal)....Petitioner
V/s.

Official Liquidator of M/s.Fluid Air (India)Ltd.)....Respondent

Ms.Rohini Wagh a/w Ms.Priyanka Tiwari i/by Suresh Kumar for the applicant.

Mr.Naushad Engineer for Official Liquidator.

Mr.Mahendhar Aithe-Company prosecutor for OL present.

CORAM : K.R.SHRIRAM,J

DATE : 18.12.2017

P.C.:-

1 This application is filed by the Central Board of Trustees, Employees Provident Fund Organization, praying for condoning delay of 308 days in filing this application and to quash and set aside an order dated 17.4.2015 passed by the Official Liquidator and to direct the Official Liquidator to pay sum of Rs.40,05,292/- plus Rs.25,87,669/- in addition to sum of Rs.14,17,623/-.

2 The applicant had lodged a claim with the liquidator on the basis that the company in liquidation was indebted to Regional

Provident Fund commissioner in the sum of Rs.19,24,144/- for provident fund dues, damages for the period August-1996 to June-1997 and sum of Rs.20,63,148/- for interest under Section 8G for the period May-1999 to November-2012 of the EPF and MP Act, 1952, totaling to debt of Rs.40,05,292/-.

3 The liquidator after considering the affidavit of proof of debt filed by the applicant herein, allowed sum of Rs.14,17,623/- as preferential claim against the applicant's claim of Rs.40,05,292/- and rejected the balance amount. The liquidator also observed that there is no proof that a formal adjudication order under EPFO Act was passed after providing an opportunity of being heard to the company (in liquidation) before 4.8.1998, which is the date on which the company was wound up. The balance amount of Rs.5,24,521/- being damages and Rs.20,63,148/- being the amount of interest has been disallowed. This is the order which is impugned in this application.

4 The official liquidator has filed an affidavit in reply dated 7.12.2017.

5 It is the case of the applicant that as per section 11 of the EPF Act, the provident fund contribution have priority over other

payments which include the payment by the employer, employees and damages, interest, if any etc. and section 11(2) of EPF Act creates a charge on the property of the establishment in respect of the amount due from the establishment on account of employer contribution or employees' contribution. It is the case of the applicant that the Apex Court has confirmed this position in law in the case of ¹***Maharashtra State Co-operative Bank Ltd. Vs. Asstt. Provident Fund Commissioner.*** The liquidator has denied this claim to the applicant on the basis that the applicant had filed an additional claim of Rs.20,63,148/- towards interest for the period May-1999 to November-2012 and because the winding up order was passed on 4.8.1998, the interest of Rs.20,63,148/- was not admitted. It is also stand of the liquidator that as regards 37% damages prior for the period June-1996 to August-1996, the same was not proved with any formal order passed by the competent Provident Fund Authority under Section 14B of the PF Act and therefore, came to be rejected.

6 Mr.Engineer appearing for Official Liquidator relied upon an unreported judgment of this court in ²***Regional Provident Fund Commissioner, Thane V/s. Official Liquidator, High Court Mumbai***

1 (2009) 10 SCC 123

2 Company Application No.239 of 2014 in Company Petition No.518 of 2005 dated 6.1.2016

of M/s.Zodana Electronic Ltd. in which a controversy under Sections 14B and 7Q of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 on delayed payment of PF dues has been discussed. Paragraph nos.6, 7, 8 & 9 of the judgment read as under :-

“6. Section 14B of the PF Act provides as follows:

Section 14B. Power to recover damages:- Where an employer makes default in the payment of any contribution to the Fund, the Pension fund or the Insurance Fund or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 or sub-section (5) of section 17 or in the payment of any charges payable under any other provision of this Act or of any Scheme or Insurance Scheme or under any of the conditions specified under section 17, the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the scheme.

Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:

Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, (1 of 1986) subject to such terms and condition as may be specified in the Scheme.

The section provides for an adjudication of damages after hearing the employer in the matter. The order passed under Section 14B is subject to an appeal to the Employees'

Provident Funds Appellate Tribunal. The Tribunal has the power to pass any order confirming, modifying or annulling the order appealed against or referring the matter back to the authority for a fresh adjudication. It is only after the order of adjudication of damages becomes final that the question of recovery arises. In the present case, there is no adjudication by the authority under Section 14B. (There is not even an inquiry proposed by the authority in the matter of determining damages under Section 14B.) In the absence of an adjudication, there is no provable debt as of the date of the winding up order in relation to the purported damages which could be estimated in value under Rule 154 of the Companies (Court) Rules. It is not possible to accept the submission of learned Counsel for the Applicant that adjudication under Section 14B is merely a matter of calculation. It is actually like a decree or order of damages arrived at after hearing the parties and subject to a statutory appeal. As provided in Section 529(1), the same rules as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent apply with regard to debts provable in winding up of insolvent companies. It is an established rule of the law of insolvency (see Section 46(1) of the Presidency Towns Insolvency Act) that demands in the nature of unliquidated damages arising otherwise than by reason of breach of contract or breach of trust shall not be provable in insolvency. The liability here is said to arise under a provision of law and is subject to the conditions provided in law. But even if we were to proceed on the footing that the scheme framed by the Company for provident fund forms a contract between itself and its employees and there is a breach of contract on the part of the Company by defaulting in payment of its contributions, there is no debt until the liability on account of such breach is adjudicated and damages are assessed by the adjudicating authority. There is no question of the Official Liquidator himself adjudicating these damages. That jurisdiction rests exclusively with the authorities under the PF Act. Till such adjudication is made, there is no debt provable before the Official Liquidator. The following observations of the Supreme Court in relation to the nature of a claim for unliquidated damages for breach of contract, in the case of Union of India Vs. Raman Iron Foundry³, are instructive in

this behalf :

“ Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6 (e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred. This has always been the law in England and as far back as 1858 we, find it stated by Wightman, J., in *Jones v. Thompson*, (1858) 27 LJQB 234. "Ex parte Charles and several other cases decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed". It was held in this case that a claim for damages does not become a debt even after the jury has returned a verdict in favour of the plaintiff till the judgment is actually delivered. So also in *O'Driscoll V. Manchester Insurance Committee*. (1915) 3 KB 499. Swinfen Eady, L. J., said in reference to cases where the claim was for unliquidated damages "..... in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given. The same view has also been taken consistently by different High Courts in India. We may mention only a few of the decisions, namely, *Jabed Sheikh V. Taher Mallik*, 45 Cal WN 519 = (AIR 1941 Cal 639): *S. Milkha Singh V. M/s. N.K. Gopala Krishna Mudaliar*, AIR 1956 Punj 174 and *Iron and Hardware (India) Co. v. Firm Shamlal and Eros*, AIR 1954 Bom 423, Chagla, C.J., in the last mentioned case, stated the law in these terms:

"In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other Party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant."

This statement in our view represents the correct legal position and has our full concurrence."

7. In sum, there is no case for the Official Liquidator awarding any sum towards damages under Section 14B.

8. For claiming interest on PF dues between the date of the winding up order and the date of actual payment, the Applicant relies on Section 7Q of the PF Act. Section 7Q provides as follows:

"7Q. Interest payable by the employer:- The employer shall be liable to pay simple interest at the rate of twelve per cent per annum or at such

higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment.

Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank.”

There is no difficulty about payability of such interest under Section 7Q; the question is whether such interest is provable in winding up of an insolvent company. Rule 179 of the Companies (Court) Rules contains the only provision for payment of interest after the date of the winding up order. In the first place, such interest is paid only in the event of there being a surplus after payment in full of all claims admitted to proof and secondly, it cannot exceed 4 per cent per annum on the admitted amount of the claim. As held by our Court in IDBI Ltd. Vs. Official Liquidator, High Court of Bombay, Nagpur Bench⁴ and in Re Pal Peugeot Ltd.,⁵ creditors of a company (who would include even workmen to the extent of their dues) cannot claim in winding up interest for the period subsequent to the winding up if there is no surplus and even in the event of surplus, interest of more than 4 per cent per annum. Secured Creditors may pursue their remedy outside winding up. Likewise, workmen can enforce their charge over the property outside winding up to recover their dues. In such a case, the condition of interest being payable only in certain event and subject to a certain extent, may not apply. But if secured creditors or workmen approach the Company Court in its winding up jurisdiction for recovery of their dues, only those claims which are consistent with the provisions of the Companies Act and Companies (Court) Rules can be granted by the Company Court.

9. There is, thus, no merit in the challenge to the adjudication of the Official Liquidator. The Company Application is, accordingly, dismissed. There shall be no order as to costs”.

7 This court has held that only after the order of adjudication of damages becomes final that the question of recovery arises. In the absence of an adjudication, there is no provable debt as of the date of the winding up order in relation to the purported damages which could be estimated in value under Rule 154 of the Companies (Court) Rules. It is not a mere matter of calculation. The court has held that the adjudication by the authority under section 14B is actually like a decree or order of damages arrived at after hearing the parties and subject to a statutory appeal. Even in this case, admittedly there is no adjudication by the authority under Section 14B. Therefore no case for the Official Liquidator awarding any sum towards damages under section 14 B arises.

8 The court has also held that for claiming interest on Provident fund dues between the date of winding up order and date of actual payment, the question is whether such interest is provable in winding up of an insolvent company. The court held that Rule 179 of the Companies (Court) Rules contained the only provision for payment of interest after the date of winding up order. In the first place such interest is paid only in the event of there being a surplus after payment in full of all claims admitted to proof and secondly, it cannot exceed 4% p.a. on the admitted amount of the claim. The

court relying upon a judgment of this court in ³*IDBI Ltd. Vs. Official Liquidator, High Court of Bombay, Nagpur Bench* has held that creditors of a company (who would include even workmen to the extent of their dues) cannot claim any winding up interest for the period subsequent to the winding up if there is no surplus and even in the event of surplus, interest of more than 4% p.a.

9 The same view has been taken by another Judge in another matter by this court i.e.,⁴*Indian Link Chain Manufacturers Limited (in liquidation)*. Paragraph nos.27 & 28 of the said judgment read as under :-

“27. This court in the said judgment has held that since the salaries payable to the employees for the relevant period have been paid in full i.e., without deducting any employees' contribution to the fund, there is no question of paying the Regional Provident Fund Commissioner the component of employees' contribution on behalf of the employees. These amounts have been directed to be received by the employees in winding up and are not claimable separately by the Regional Provident Fund Commissioner. This court has also construed Section 14B of the said EPF Act and has held that only after the order of adjudication of damages becomes final under the said provisions of Section 14B, there was no question of recovery arise. It is held that since there was no adjudication by the Authorities under Section 14B, there was no provable debt as on the date of the winding up order in relation to the purported damages which could be estimated in value under Rule 154 of the Companies

3 2011 (4) ALL MR 770

4 2017 SCC Online Bom.305

(Court) Rules, 1959. It is held that there is no question of the official liquidator himself adjudicating the claim for damages which jurisdiction exclusively rests with the authorities under the provisions of the said EPF Act. This court has accordingly rejected the claim for damages made by the Provident Fund Authorities under Section 14B of the said EPF Act.

28. In so far as the claim for interest between the date of winding up order and the date of actual payment claimed under Section 7Q of the said EPF Act is concerned, this Court after adverting to the judgment of this Court in the case of IDBI Ltd.& Ors. Vs. Official Liquidator, High Court of Bombay, Nagpur Bench, reported in 2011(4) ALL MR 770 and in the matter of Re Pal Peugeot Ltd. in Company Petition No.110 of 2000 decided on 22nd September 2011 has held that the creditors of the company cannot claim interest in winding up for the period subsequent to the winding up if there is no surplus and even if there is surplus, interest cannot exceed 4% p.a. on the admitted amount of the claim. It is held that in so far as the secured creditors are concerned, they may pursue their remedy outside winding up.”

10 Admittedly in this case there is no surplus. In the circumstances, application is rejected with no order as to costs.

(K.R.SHRIRAM,J)