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W.P.Nos.21777 & 22518 of 2023 & W.M.P. Nos. 21117 & 21956 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.11.2023

CORAM :

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

W.P.Nos.21777 & 22518 of 2023 &
W.M.P. Nos. 21117 & 21956 of 2023

Tamilnad Mercantile Bank Ltd.,
Rep. by its Branch Manager,
Erode Branch,
KMP Towers,
41-Theppakulam Street
Erode 638 001

... Petitioner in both W.Ps

Vs.

Recovery Officer,
The Regional Commissioner-II,
Employees' Provident Fund Organisation
District Office, Erode,
Raj Majestic, No.351/5, First Floor,
Cauvery Road, Karungalpalayam,
Erode 638 003
W.P.No.21777/2023

... Respondent in

The Regional Commissioner-II/Recovery Officer,
Employees' Provident Fund Organisation,
Regional Office, Steel Plant Road,
Thalavaipatti, Salem 636 302. ...Respondent in W.P.No.22518/2023

Prayer in W.P.No.21777/2023 : Writ Petition filed under Article 226 of
the Constitution of India praying to issue a Writ of Certiorari calling for



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records relating to the order passed by the respondent in No.CB/SLM/DO-ED/COMP/71634/2023-24/273, dated 13.07.2023 and quash the same.

Prayer in W.P.No.22518/2023 : Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari calling for records relating to the prohibitory Order passed by the respondent in No.CB/RO-SLM/RECY/71634/Erode/2022, dated 27.09.2022, and the consequential order of attachment passed by the respondent in CB/RO-SLM/RECY/71634/Erode/2022, dated 27.09.2022 and quash the same.

In both W.Ps.

For Petitioner : Mr. V.Chandrasekaran
For Respondent : Mr. P.K.Panneer Selvam

COMMON ORDER

Both the petitions are filed challenging the prohibitory orders dated 27.09.2022 and the consequential order of attachment dated 27.09.2022 and also the show cause notice dated 13.07.2023 issued by the respondent, the Regional Commissioner-II, Employees' Provident Fund Organisation, Erode, against the petitioner, Tamil Nadu Mercantile Bank Ltd., Erode Branch, represented by the Branch Manager.



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2. Briefly the facts germane to the case:

2.1. The petitioner Bank is a scheduled Bank with its

registered office in Tuticorin and one of its branches in Erode. One M/s.Sri Textile Erode Private Limited availed credit facilities with the petitioner Bank which turned Non Performing Asset (NPA) on 31.07.2018 constraining the petitioner Bank to initiate recovery proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. In the meanwhile another operational creditor M/s. Yuktha Overseas proceeded under the Insolvency and Bankruptcy Code, 2016. The operational creditor M/s.Yuktha Overseas filed CP/1009/IB/2018 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (herein after referred to as "IBC,2016") against M/s. Sri Textile Erode Private Limited, Erode and the National Company Law Tribunal (NCLT) vide its orders dated 04.10.2018 initiated Corporate Insolvency Resolution Process (CIRP) and an Interim Resolution Professional (IRP) was appointed. This resulted in liquidation process and on 29.04.2018 a Liquidator was appointed who called for claims from all creditors through notification and paper publication. The petitioner Bank had submitted a claim form for Rs.57,45,03,758.90 along with the details of securities available.



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2.2. The Liquidator released Rs.14,34,73,661/- to the

petitioner Bank towards its share for the credit of the loan account of M/s.Sri Textile Erode Private Limited with them. This was from the sale proceeds of one of the properties sold on 27.09.2019 for a sum of Rs.10,42,30,000/- and another property for Rs.4,43,41,500/- sold on 22.10.2020. In the meanwhile the respondent, the Employees' Provident Fund Organisation, issued proceedings dated 27.09.2022 by invoking Section 8(B) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (herein after referred to as "EPF and MP Act") read with Schedule II of the Income Tax Act, 1961, prohibiting and restraining the petitioner Bank from making payments of the said deposit or any part thereof, to any person, whomsoever or otherwise than to the respondent. This was sent along with another order dated 27.09.2022 attaching sums of money or property, which is included in the defaulter's property, now in the custody of the petitioner Bank.

2.3. Both these orders were for the Provident Fund dues of M/s.Sri Textile Erode Private Limited, amounting to Rs.6,09,80,164/-. One more order dated 13.07.2023 in the form of show cause notice was issued to the petitioner Bank as to why provisions of Section 8 B to 8G



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of the EPF and MP Act should not be invoked against the person in charge of the petitioner Bank to realise the dues.

2.4. These two writ petitions are filed challenging these three orders.

3. Mr. V.Chandrasekaran, learned counsel for the petitioner Bank would contend that there is no privity of contract between the Bank and the respondent Employees' Provident Fund Organisation. He has highlighted the point that due procedure in the form of public notice and publication was followed by NCLT and the respondent did not file any claims in response to this public notice. He also contended that based on the Bank's claim for Rs.57,45,03,758.90, they were credited with Rs.10,42,30,000/- and Rs.4,43,41,500/- on two occasions to be credited to the loan account of M/s.Sri Textile Erode Private Limited and the respondent do not have any stake in the said amounts and non recovery of the PF dues from M/s. Sri Textile Erode Private Limited for the period 2016-18 is purely the negligence of the respondent and the petitioner Bank, without any prior information, has been suddenly dragged into the scene with no reasons, whatsoever. It was also his contention that



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Section 53 of the IBC, 2016 clearly makes the dues time barred as it provides for dues of workmen which is within twenty four months before the process of liquidation. It was his further contention that Section 238 of the IBC, 2016 overrides all other laws and therefore Section 8 of the EPF and MP Act is ineffective and cannot be enforced in the light of the provisions of IBC, 2016. He also argued that the prohibitory order would not fall within the definition of "garnishee order". Therefore, he prayed for quashing of the three impugned orders.

4. Per contra, Mr. P.K.Panneer Selvam, learned counsel for the respondent Employees' Provident Fund Organisation contended that the Writ Petition 22518/2023 is itself not maintainable since it was filed challenging the two orders dated 27.09.2022 issued by the Employees' Provident Fund Organisation to the petitioner Bank. According him the Liquidator, who had indulged in the mischief of distributing the assets realised from the sale of securities to the petitioner Bank, ought to have been impleaded in the present petition and therefore also the petition is not maintainable. It was also contended by him that the Liquidator of M/s. Sri Textile Erode Private Limited was in the know of the pending Provident Fund dues of the Corporate Debtor M/s. Sri Textile Erode



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Private Limited and though Section 11(2) of EPF and MP Act establishes the fact that the Provident Fund dues takes priority over other claims, he ignored the claims of the respondent and thereby committed breach of trust. He also argued that his claim was as early as 28.11.2018 whereas the claim of the petitioner Bank was only on 16.05.2020 and yet the Bank received Rs.10,42,30,000/- and Rs.4,43,41,000/- but the respondent did not receive any amount. According to him, the respondent Employees' Provident Fund Organisation was constrained to give a written complaint against the Liquidator on 16.02.2023 to the Insolvency and Bankruptcy Board of India. Earlier the respondent Employees' Provident Fund Organisation had also issued two arrest warrants dated 14.01.2020 and 14.02.2020 against the Liquidator Muthuraju which were stayed by NCLT vide its order dated 10.03.2020, it was contended. His further contention was that Section 36(4)(iii) of IBC 2016 specifically excludes Provident Fund and Pension Fund and Gratuity Fund from the ambit of assets of the Corporate Debtor and therefore the Provident Fund dues of the respondent ought to have been settled first and foremost by the Liquidator. Therefore, he emphasised that the Provident Fund dues have to be paid to the respondent by the petitioner Bank out of the sale proceeds remitted to them by the



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Liquidator as the defaulter Company Sri Textile Erode Private Limited

had maintained accounts with them.

5. A quick glance into the sequence of events leading to the impugned orders.

5.1. On 20.11.2018, a show cause notice is issued to M/s. Sri Textile Erode Private Limited, Erode, advising them to remit Provident Fund dues to the tune of Rs.55,11,322/- for non enrolled (for the period 03/16 to 06/18) employees and Rs.5,54,27,932/- for others (for the period 05/16 to 06/18). This was responded to by the said Company vide its letter dated 28.11.2018 by stating that one of its operational creditors approached NCLT which admitted their application for CIRP and ordered to commence CIRP on 04.10.2018 for a period of 180 days to resolve the issues and hence the Company was under moratorium. A copy of the said letter was also marked to N.Sivakumar, Interim Resolution Professional, appointed by the NCLT. Later on 11.06.2019 the respondent wrote a letter to Muthuraju, Liquidator of M/s.Sri Textile Erode Private Limited stating that the default Provident Fund dues is Rs.40,909/- plus Rs.550/- recovery charges asking him to pay the dues owed by the Corporate Debtor M/s.Sri Textile Erode Pvt. Ltd.



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Subsequently on 20.06.2019, the respondent summoned Muthuraju, Insolvency Professional and Liquidator to their office which was followed by an arrest warrant on 14.01.2020 and again on 14.02.2020, both of which were stayed by the NCLT on 10.03.2020. In the said order the NCLT observed as follows:

"as the Provident Fund authorities are yet to lodge even their claim before the IRP/RP/Liquidator and the violation is prior to the initiation of the CIRP which also discloses that the IRP/RP/Liquidator has not derelicted in doing his duty and if at all for any lapse, the arrest warrant can be executed in relation to the erstwhile Management of the Corporate Debtor and not against the IRP/RP/Liquidator."

5.2. On 07.01.2021, the respondent sent a mail to Muthuraju, Liquidator giving the final figure of Provident Fund dues of Rs.6,09,39,255/-. This mail was also sent to the Corporate Debtor M/s.Sri Textiles Erode Private Limited who in turn on 13.01.2021 replied stating that the process of liquidation is on and it has an overriding effect on other laws and hence expressed their inability to respond. Later on 27.04.2021, the proceedings of the inquiry under Section 7A of EPF & MP Act was sent to Muthuraju, the Liquidator and the Corporate Debtor,



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M/s. Sri Textiles Erode Private Limited. In this proceedings the respondent concluded that the Resolution Professional/Liquidator is considered employer for the purpose of the Act and he has since failed to perform his duties as an employer by not remitting the Provident Fund dues. In the order attached with the proceedings, the respondent has directed the establishment to remit the dues of Rs.6,09,39,255/- within 15 days of the receipt of the order. This was followed by a complaint against the said Muthuraju, Liquidator to the Insolvency and Bankruptcy Board of India. The relevant portion of the complaint reads as "It is an undisputable fact that S.Muthuraju, Resolution Professional was fully aware about the impending dues payable by the Corporate Debtor, ever since the liquidation process had commenced".

5.3. Till this point of time the petitioner Bank was not in picture. The dispute was between the respondent and the RP/Liquidator appointed by the NCLT. This being so the letters in the form of prohibiting order dated 27.09.2022 and attachment order dated 27.09.2022 were issued to the petitioner Bank about which the petitioner Bank had no idea. Both these orders were not responded to by the petitioner Bank, it appears. However, another letter dated 12.05.2023



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was replied by the petitioner Bank on 30.05.2023 in which the Bank had stated that the liquidator while releasing Rs.4,43,41,000/- being the sale proceeds of the second property sold on 22.10.2020 took an undertaking from the Bank that "payment to PF authorities as directed by NCLT in future will be made from the share of distributed amount remitted to the Bank". Therefore, the petitioner Bank in that letter dated 30.05.2023 concluded by stating that the claim has to be decided by the liquidator subject to the approval of NCLT. The third impugned order of the respondent dated 13.07.2023 followed this reply of the petitioner Bank. This order is the one challenged in W.P.No.21777/2023.

6. It is well settled that as far as the dues of the workmen/employees on account of Provident Fund, gratuity or pension are concerned, they shall be governed by Section 36(4) of IBC 2016. Section 36(4) (iii) specifically excludes "all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund" from the ambit of "liquidation estate assets". Therefore, it is clear that Section 53(1) of the IBC, 2016 shall not be applicable to such dues, which are to be treated outside the liquidation process and liquidation estate assets under the IB Code.



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6.1. In Civil Appeal No.5910 of 2019 (*MANU/SC/0499/2022*) in the case of ***Sunil Kumar Jain and Others Vs. Sundaresh Bhatt and Others***, the Apex Court observed thus :

"considering Section 36(4) of the IB code and when the provident fund, gratuity fund and pension fund are kept out of the liquidation estate assets, the share of the workmen dues shall be kept out of the liquidation process and the concerned workmen/employees shall have to be paid the same out of such provident fund, gratuity fund and pension fund, if any, available and the Liquidator shall not have any claim over such funds.

In the instant case, the Liquidator ought to have taken control of the assets as well as liabilities of the Corporate Debtor. He was duly informed of the PF dues by both the Corporate Debtor as well as the respondent Employees' Provident Fund Organisation. Despite this, the argument that no claim was made by the respondent before the Liquidator is not acceptable.

6.2. Nevertheless, now with the Management of the Corporate Debtor being in the hands of the Liquidator, the prohibiting order and



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attachment order dated 27.09.2022 and the subsequent letter dated

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13.07.2023 addressed to the petitioner Bank defies logic. The amounts remitted by the Liquidator is towards liquidation of the loans outstanding against the name of the Corporate Debtor. As rightly pointed out by the petitioner Bank, the three impugned letters smack of abuse of power when the grievance is against the Liquidator. In this context, it is pertinent to point out the provisions of the IB Code which stipulates that the IRP should obtain and review Income Tax and other statutory notices. Similarly, he is also expected to, as soon as possible after his appointment, obtain details of the financial institutions that are maintaining accounts of the CD and inform them of commencement of CIRP of the CD and appointment of IRP. The IRP should also immediately give instructions for stopping payment from the account without the authority of the IRP and also change the details of the signatories of the accounts so as to take control of the account. In fact, it is recommended that where required, a new account may be opened.

7. In such circumstances, the prohibitory orders or attachment order being sent to the petitioner Bank appears out of the rule book. This is not a case where the defaulter is not under liquidation initiated by the



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IBC. This is also a case where the petitioner Bank intimated of the dues.

In my opinion, the orders of the respondent on the hapless Bank Management is erroneous. The respondent ought to have moved an application before the NCLT instead of intimating the petitioner Bank who are not directly in control of the CD.

8. In the result, the Writ Petitions are allowed. The impugned orders of the respondent dated 27.09.2022 and 13.07.2023 are quashed as prayed for by the petitioner Bank. No costs. Consequently connected Writ Miscellaneous Petitions are closed.

21.11.2023

bga

Index : yes/no

Speaking /Non speaking Order

To

1. Recovery Officer,
The Regional Commissioner-II,
Employees' Provident Fund Organisation
District Office, Erode,
Raj Majestic, No.351/5, First Floor,
Cauvery Road, Karungalpalayam,
Erode 638 003

2. The Regional Commissioner-II/Recovery Officer,
Employees' Provident Fund Organisation,



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R.HEMALATHA, J.

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