Comp.A.Nos.469 and 193 of 2023
in CP.No.151 of 2013 and
CP.No.115 of 20024

KRISHNAN RAMASAMY, J.

COMMON ORDER

1. This Comp.A.No.469 of 2023 is filed to direct the 1st Respondent to remit to the 2nd Respondent a sum of Rs.138.96 lakhs paid by the Applicant to the 1st Respondent on 21.01.2020 as well as any other sums that the 1st Respondent is liable to pay to the 2nd Respondent under law.
2. This Comp.A.No.193 of 2023 is filed to direct the 1st Respondent to pay the balance PF dues to the tune of Rs.1,25,02,816/- to the Applicant.
3. **Comp.A.No.469 of 2023**:- The following paragraphs, discussions and conclusions are pertaining to Comp.A.No.469 of 2023.
4. The case of the Applicant is that one M/s.VTX Industries Limited is the borrower and the Company in Liquidation, represented by the 1st Respondent Official Liquidator and the 2nd Respondent is the Provident Fund Organisation, Coimbatore, Tamil Nadu. The Applicant is the secured creditor, who was assigned with the financial assets of the Borrower Company in Liquidation, by way of three assignment agreements. The Applicant chooses to stand outside the liquidation proceedings and to recover its dues under the provisions of the SARFAESI Act. The Applicant was permitted to proceed against the secured assets under the SARFAESI Act. The Applicant has also realised a portion of the outstanding dues. The

Applicant has made a payment of Rs.138.96 lakhs to the Office of the Official Liquidator on 21.01.2020 towards the payment of Provident Fund dues to the workmen. Since the properties, which were secured and charged in favour of the Applicant, were attached by the 2nd Respondent on 25.05.2022, the Applicant is unable to bring the secured assets for sale. According to the Applicant, since the Applicant being a secured creditor, the dues of the Applicant are to be paid in priority over any other debts. The 2nd Respondent can get the relief from the 1st Respondent. Hence, this application has been filed, seeking the relief as stated above, by the secured creditor.

5. This Court heard Mr.Srinath Sridevan, the learned senior counsel for the Applicant, Ms.B.Ambili, the Deputy Official Liquidator for the 1st Respondent and Mr.C.Kulanthaivel, the learned counsel for the 2nd Respondent, Provident Fund Organisation, Coimbatore.

6. The learned senior counsel for the Applicant would submit that a sum of Rs.138.96 lakhs being the payment towards Employer and Employee Contribution and towards provident fund dues to the workmen, which is supposed to be paid to the 2nd Respondent, Provident Fund Department, Coimbatore, was remitted to the 1st Respondent/Official Liquidator on 21.01.2020 and that unless this amount is settled with regard to the contribution made by the Employer and Employees towards Provident Fund in terms of provisions of Section 11(2) of the Employees' Provident Funds

and Miscellaneous Provisions Act, 1952, their amount being the secured debts will not be disbursed and that since the said amount is not paid by the 1st Respondent to the 2nd Respondent, this application has been filed to direct the 1st Respondent to pay said sum to the 2nd Respondent.

7. The learned senior counsel for the Applicant would further submit that in terms of provisions of Section 11(2) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, only the contribution made by the Employer and Employees towards Provident Fund will get first charge on the assets of the establishment and that therefore, he would contend that this amount has to be paid before the settlement of the dues under Section 529A of the Companies Act, 1956. The learned senior counsel, by referring to Section 11(1)(a) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, would further submit that insofar as the damages and interest are concerned, the said amounts would come under the priority in terms of Section 530 of the Companies Act, 1956. In support of his contentions, the learned senior counsel has relied on the decision of the Honourable Supreme Court reported in **2011 10 SCC 727 (Employees Provident Fund Commissioner Vs. Official Liquidator of Esskay Pharmaceuticals Limited).**

8. On the other hand, the learned counsel for the 2nd Respondent/Provident Fund Organisation has strongly contended that whatever may be the

Employer and Employees Contribution towards Provident Fund, but the damages and interest will get priority over the payment of secured creditors, that is, after the payment of the entire Employer and Employees Contribution towards Provident Fund including the damages and interest only, dues of the secured creditors have to be paid. The learned counsel has relied on the decision of the Honourable Supreme Court reported in **2009 10 SCC 123 (Maharashtra State Cooperative Bank Limited Vs. Assistant Provident Fund Commissioner and others)** in support of his contentions.

9. The Deputy Official Liquidator would submit that upto the date of winding up of the Company, the Employer and Employees contribution towards Provident Fund as well as damages and interest have to be paid on top priority and the same has to be settled by the Applicant, but in this case, since the Applicant, being the secured creditor, have realised the assets and calculating in a particular manner, paid only a portion of the amount, they are not in a position to pay the amount as adjudicated by the Official Liquidator.

10. This Court considered the submissions of the learned counsel on either side and also perused the materials placed on record, including the relevant provisions of law and the various decisions of the High Courts and the Honourable Supreme Court.

11. Now, the issue that arises for consideration is as to “Priority of payment of contributions over other debts”.

12.At the outset, it is pertinent to extract the provisions of Section 11 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, as under:-

> **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-
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> (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 provisions of this Act or of any provision of the Scheme or the Insurance Scheme; or
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> (b) from the Employer in relation to an exempted establishment in respect of of any contribution to the Provident Fund or any insurance fund in so far as it relates to exempted Employees under the rules of the Provident Fund or any insurance fund any contribution payable by him towards the Pension Fund under sub-section (6) of Section 17, damages recoverable under Section 14B or any charges payable by him that the appropriate Government under any provisions of this Act or under any of the conditions specified under Section 17, shall, where the liability therefore 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.
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> **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) [1][Without prejudice to the provisions of sub section (1) if any amount is due from an Employer, [2][whether in respect of the Employee's contribution [deducted from wages of the Employee] or the Employer's contribution], the amount so due shall be deemed to be 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.]"

[1] Inserted by the Act 40 of 1973 (with effect from 01.11.1973).

[2] Substituted by the words and brackets in respect of the employees' contribution (deducted from the wages of the employees) for a period of more than six months (with effect from 01.08.1988)

13.It is also relevant to extract the provisions of Sections 529A and 530 of the Companies Act, 1956, as under:-

"529A: Overriding preferential payments:- (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 sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions."

"**530. Preferential payments:-** (1)In a winding up, [subject to the provisions of section 529-A, there shall be paid] in priority to all other debts-

(a) all revenues, taxes, cesses and rates due from the company to the Central or a State Government or to a local authority at the relevant date as defined in clause (c) of sub-section (8), and having become due and payable within the twelve months next before that date;

(b) all wages or salary (including wages payable for time or piece work and salary earned wholly or in part by way of commission) of any employee, in respect of services rendered to the company and due for a period not exceeding four months within the twelve months next before the relevant date subject to the limit specified in sub-section (2);

(c) all accrued holiday remuneration becoming payable to any employee, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;

(d)unless the company is being wound-up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts due, in respect of contributions payable during the twelve months next before the relevant date, by the company as the employer of any persons, under the Employees' State Insurance Act, 1948 (34 of 1948), or any other law for the time being in force;

(e)unless the company is being wound-up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (8 of 1923), rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any employee of the company;

(f) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees, maintained by the company; and

(g)the expenses of any investigation held in pursuance of section 235 or 237, in so far as they are payable by the company.

(2) The sum to which priority is to be given under clause (b) of sub-section (1), shall not, in the case of any one claimant, [exceed such sum as may be notified by the Central Government in the Official Gazette.

(3) Where any compensation under the Workmen's Compensation Act, 1923 (8 of 1923) is a weekly payment, the amount due in respect thereof shall, for the purposes of clause (e) of sub-section (1), be taken to be the

amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the said Act.

(4)Where any payment has been made to any employee of a company,-

(i)on account of wages or salary; or

(ii)to him, or in the case of his death, to any other person in his right, on account of accrued holiday remuneration, out of money advanced by some person for that purpose, the person by whom the money was advanced shall, in a winding up, have a right of priority in respect of the money so advanced and paid, up to the amount by which the sum in respect of which the employee or other person in his right, would have been entitled to priority in the winding up has been diminished by reason of the payment having been made.

(5)The foregoing debts shall-

(a)rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(6)Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them, and in the case of the debts to which priority is given by clause (d) of sub-section (1), formal proof thereof shall not be required except in so far as may be otherwise prescribed.

(7) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof:

Provided that, in respect of any money paid under any such charge, the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(8)For the purposes of this section-(a)any remuneration in respect of a period of holiday or of absence from work through sickness or other good cause shall be deemed to be wages in respect of services rendered to the company during that period;

(b)the expression "accrued holiday remuneration" includes, in relation to any person, all sums which, by virtue either of his contract of employment or of any enactment (including any order made or direction given under any enactment), are payable on account of the remuneration which would, in the ordinary course, have become payable to him in respect of a period of holiday, had his employment with the company continued until he became entitled to be allowed the holiday;

(bb) the expression "employee" does not include a workman; and

(c) the expression "the relevant date" means-

(i) in the case of a company ordered to be wound-up compulsorily, the date of the appointment (or first appointment) of a provisional Liquidator, or if no such appointment was made, the date of the winding up order, unless in either case the company had commenced to be wound-up voluntarily before that date; and

(ii) in any case where sub-clause (i) does not apply, the date of the passing of the resolution for the voluntary winding up of the company.

(9)This section shall not apply in the case of a winding up where the date referred to in sub-section (5) of section 230 of the Indian Companies Act, 1913 (7 of 1913), occurred before the commencement of this Act, and in such a case, the provisions relating to preferential payments which would have applied if this Act had not been passed, shall be deemed to remain in full force."

14.A reading of the provisions of Section 11 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, would make it clear that any contribution payable to the Fund, damages and any other charges shall have the priority in terms of Section 530 of the Companies Act, 1956. A reading of Section 11(2) would reveal that any contribution made by the Employer as well as the Employees will have the first charge on the assets of the establishment notwithstanding anything contained in any other law for the time being in force be paid in priority to all other debts.

15.Though according to the learned senior counsel for the 2nd Respondent Provident Fund Department and the Deputy Official Liquidator, the Provident Fund includes the contribution made by the Employer and Employees, damages and interest, but on a reading of Sections 11(1)(a) and 11(2) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, it is very clear that only the contribution made by the Employer and Employees will have the first charge on the assets of the establishment. Though it is contended that as per Section 11(1)(a) and (b), any contribution payable to the Fund, damages and any other charges, which includes interest separately are to be paid in priority to all other debts, but under Section 11(2), the Parliament made the legislation only to include the contribution made by the Employer and Employees alone and therefore, the intention of the legislature was not to include damages and interest and any other charges.

16.However, it would be apposite to extract the law laid down by the Honourable Supreme Court in similar issues, in **2009 10 SCC 123 (Maharashtra State Cooperative Bank Limited Vs. Assistant Provident Fund Commissioner**

and others) , as follows:-

"66. Section 11 gives statutory priority to the amount due from the employer vis-à-vis all other debts. Clause (a) of sub-section (1) of Section 11 is applicable to cases where an employer is adjudicated insolvent or, being a company, an order of its winding up is made. In that situation, the amount due 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 14-B, accumulations required to be transferred under Section 15(2) or any other charges payable by him under any other provision of this Act or of any provision of the Scheme or the Insurance Scheme. Clause (b) is applicable to cases where the amount is due from the employer in relation to exempted establishment in respect of any contribution to the provident fund or any insurance fund insofar it relates to exempted employees under the rules of provident fund or any insurance fund, any contribution payable by him towards the Pension Fund under Section 17(6), damages recoverable under Section 14-B or any charges payable by him to the appropriate Government under the Act or under any of the conditions specified in Section 17. This sub-section then lays down that such amount shall be paid in priority to all other debts in the distribution of the property perty of the insolvent or the assets of the company being wound up. Sub-section (2) lays down that any amount due from the employer whether in respect of the employees' contribution deducted from the wages of the employee or the employer's contribution shall be deemed to be the first charge on the assets of the establishment, and shall be paid in priority to all other debts.

67. The expression "any amount due from an employer" appearing in sub-section (2) of Section 11 has to be interpreted keeping in view the object of the Act and other provisions contained therein including sub-section (1) of Section 11 and Sections 7-A, 7-Q, 14-B and 15(2) which provide for determination of the dues payable by the employer, liability of the employer to pay interest in case the payment of the amount due is delayed and also pay damages, if there is default in making contribution to the Fund. If any amount payable by the employer becomes due and the same is not paid within the stipulated time, then the employer is required to pay interest in terms of the mandate of Section 7-Q. Likewise, default on the employer's part to pay any contribution to the Fund can visit him with the consequence

of levy of damages.

68. As mentioned earlier, sub-section (2) was inserted in Section 11 by Amendment Act 40 of 1973 with a view to ensure that payment of provident fund dues of the workers are not defeated by the prior claims of the secured and/or of the unsecured creditors. While enacting sub-section (2), the legislature was conscious of the fact that in terms of existing Section 11 priority has been given to the amount due from an employer in relation to an establishment to which any scheme or fund is applicable including damages recoverable under Section 14-B and accumulations required to be transferred under Section 15(2). The legislature was also aware that in case of delay the employer is statutorily responsible to pay interest in terms of Section 17. Therefore, there is no plausible reason to give a restricted meaning to the expression "any amount due from the employer" and confine it to the amount determined under Section 7-A or the contribution payable under Section 8.

69. If interest payable by the employer under Section 7-Q and damages leviable under Section 14 (sic Section 14-B) are excluded from the ambit of expression "any amount due from an employer", every employer will conveniently refrain from paying contribution to the Fund and other dues and resist the efforts of the authorities concerned to recover the dues as arrears of d land revenue by contending that the movable or immovable property of the establishment is subject to other debts. Any such interpretation would frustrate the object of introducing the deeming provision and non obstante clause in Section 11(2). Therefore, it is not possible to agree with the learned Senior Counsel for the appellant Bank that the amount of interest payable under Section 7-Q and damages leviable under Section 14-B do not form part of the amount due from an employer for the purpose of Section 11(2) of the Act.".

17.A reading of the said decision of the Honourable Supreme Court would make it clear that the words “any amount due” from the Employer referred to in Section 11(2) of the Act would include the contribution made by the Employer and the Employees to the Provident Fund as well as interest and damages. Hence, this Court is of the considered view that in this case, in terms of

Section 11(2), the contribution made by the Employer and Employees towards Provident Fund will have the first charge and the other charges include damages and interest and any other charges as per the law laid down by the Honourable Supreme Court.

18. In **2011 10 SCC 727 (Employees Provident Fund Commissioner Vs. Official Liquidator of Esskay Pharmaceuticals Limited),** in paragraphs 48, 49 and 50, it was held as under:-

> “”48. It is also pertinent to bear in mind that even before the insertion of Section 529(1) proviso, Section 529(3) and 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 the 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 dues” and to place them on a part 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(2) of the EPF Act, 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 on a 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.
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> 49. At the cost of repetition, we would emphasise 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 of any Employee in respect of the services rendered

to the Company and due for a period not exceeding 4 months, al accrued holiday remuneration, etc. and all sums due to any Employee from a 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 inserted in the EPF Act by Act 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 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.

50.The effect of the amendment made in the Companies Act, 1985 is only to expand the scope of the dues of workmen and place them on a 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 the 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 on a par with the debts due to secured creditors and payment thereof will be regulated by the provisions contained in Section 529(1) read with Sections 529(3), 529A and 530 of the Companies Act."

19.A reading of the above said two judgements of the Honourable Supreme Court would make it clear that any amount due from a Employer would include not only the contribution made to the Provident Fund by the Employer and the Employees, but also interest and damages. Thus, judicial propriety and discipline demands this Court to follow the decisions of the Honourable Supreme Court rendered in the above said two judgements

20.In fine, following the law laid down by the Honourable Supreme Court, Comp.A.No.469 of 2023 is disposed of, with a direction to the 1st Respondent to pay the contribution made by the Employer and the

Employees to the Provident Fund as well as damages and interest upto the date of winding up order. No costs.

21. Comp.A.No.193 of 2023:- Since the above order passed in Comp.A.No.469 of 2023, is squarely applicable to the issues involved in this application, Comp.A.No.193 is disposed of in terms of the above said conclusions arrived at by this Court and the above orders passed in Comp.A.No.469 of 2023. No costs.

27.06.2024

Index:Yes/No
Web:Yes/No
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KRISHNAN RAMASAMY, J.

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