IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR.

WRIT PETITION NO.693/2022

PETITIONERS: Substituted as per Court's order dated 01/12/23		~~Murli Industries Limited, Village Naranda, Tq.Korpana-442916, Dist. Chandrapur through its authorized representative Mr.Umesh S/o Madhusudan Kolhatkar, (Head HR & IR) R/o Bapat Nagar, Postal Colony, Chandrapur – Nagpur Road, Chandrapur~~ substituted petitioner Nos.1 to 3 in place of petn.No.1 vide Hon'ble Court's order dated 01/12/2023 as under.
	1)	Dalmia Cement (Bharat) Limited, a Company having its registered office at Dalmia Puram, Dist. Thiruchirappalli, Tammilnadu-621651, through its authorized signatory and General Manager (F & A), Mr. Sitakanta S/o Mahendra Prasad Prusty, aged about – 43 years, r/o Damodarpur, Andalio, Similia, Baleswar, Odisha – 756182.
	2)	Ascension Mercantile Private Limited, an unlisted private company, incorporated under the provisions of Companies Act, 2013 having registered office at 22, Shivam Chambers, S.V. Road, Goregaon, West Mumbai-400062, through its authorized signatory, Mr.Sitakanta S/o Mahendra Prasad Prusty, aged about – 43 years, r/o Damodarpur, Andalio, Similia, Baleswar, Odisha – 756182
	3)	Ascension Multi-Venture Private Limited, an unlisted private company, incorporated under the provisions of Company Act, 2013 having registered office at 22, Shivam Chambers, S.V. Road, Goregaon, West Mumbai-400062, through its authorized signatory, Mr.Sitakanta S/o Mahendra Prasad Prusty, aged about – 43

		years, r/o Damodarpur, Andalio, Similia, Baleswar, Odisha – 756182.
	...VERSUS...	
RESPONDENTS: Deleted as per Court's order dated 12/08/22	1.	~~Union of India, through its Secretary, Ministry of Labour and Employment, Government of India, New Delhi~~
	2.	~~Employees Provident Fund Organization, through Regional Provident Fund commissioner II (CIR-III), 132-A Ridge Road, Tukdoji Squaare, Raghuji Nagar, Nagpur 440009.~~
Amended as per Court's order dated 12/08/22		The Central Board of Trustees, Employees Provident Fund Organization, Bhavishya Nidhi Bhawan, 14, Bhikaji Cama Place, New Delhi – 110 066
Mr. M.G. Bhangde, Sr. Adv. a/b Mr. R.M. Bhangde, Adv.for the petitioners. Mr. R.S. Sundaram, Adv. for the respondent.		

CORAM :	AVINASH G. GHAROTE AND ABHAY J. MANTRI, JJ.
DATE	29.04.2025

JUDGMENT : (PER : AVINASH G. GHAROTE, J.)

1. Heard. Rule. Rule returnable forthwith. Heard finally with the consent of learned counsels for the respective parties.

2. On 10/2/2025, We had heard Mr. Bhangde learned Senior Counsel for the petitioners and had recorded his contentions as under :

2.1. The present petition questions the claim of the Provident Fund Department, to recover PF dues of the employees vis-a-vis the petitioner, which are not part of the resolution plan. Mr. Bhangde, learned Senior Counsel for the petitioners, submits that in respect of the original petitioner company/Murli Industries, one asset reconstruction company had filed Insolvency proceedings for initiation of Insolvency Regulation, in which by an order dated 5.4.2017 passed by the National Company Law Tribunal (NCLT for short hereinafter) in CP No.66/2017 one Mr. Vijaykumar Iyer was appointed as the Interim Resolution Professional (IRP for short hereinafter) (page 31). The said IRP by a public announcement dated 11.4.2017, called upon the creditors of the original petitioner company to submit proof of their claims on or before 19.4.2017 to him (p32). The respondent, by communication dated 4.10.2017 (p38) intimated a claim of Rs. 54,98,118/- with the IRP. By the communication 28.10.2017 (p39), the IRP, intimated, the respondent, to file a proof of claim in the relevant form as provided in the CIRP Regulations copy of which was enclosed as Annexure 2 to the communication. The respondent thereafter, it appears has not filed anything with the IRP. The proceedings went ahead as a result of which a resolution plan came to be submitted to NCLT by the IRP, in which though it was indicated that the EPFO/respondent had by their letter indicated a claim of Rs.54,98,118/- the verifiable amount was nil (pg.162). The resolution plan came to be approved by the order dated 22.7.2019 (pg. 210, para 12). An appeal came to be filed

against this which came to be dismissed on 24.1.2020 (pg. 238), by NCALT. Challenge against the same before Hon'ble Apex Court in Civil Appeal Nos. 3169-3170/2020, came to be dismissed on 20.11.2020 (page 239), Civil Appeal No. 3956/2020 came to be dismissed on 12.2.21 (page 240) and Civil Appeal No.1701-1710/2021 came to be dismissed by the order dated 3.5.2021(page 241).

2.2. A claim by the Income Tax Department regarding statutory dues, came to be challenged by the petitioner, in this Court by way of Writ Petition No. 2948/2021 (Murli Industries Vs. Asstt. Commissioner of Income Tax) with Writ Petition No. 2965/2021 in which by the judgment dated 9.12.2021, it came to be held that the claims which are not a part of the Resolution Plan including recoverable statutory dues, stood extinguished, upon approval of the resolution plan (page 256).

2.3. Mr. Bhangde, learned Senior Counsel for the petitioner submits that since the intimation regarding EPF dues, as made by the respondent by its communication dated 4.10.2017 (pg 39) was not verified and made a part of the resolution plan, it was not permissible now for the respondent to raise a claim, as it stood extinguished. He invites our attention to the provisions of Rule 12(2) of the IB Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016 to contend that a creditor who fails to claim, with proof, within the time stipulated in the public announcement, may submit the claim with proof to the IRP on or before 90th day of insolvency commencement date, which was not done by the respondent. He also invites our attention to Rule 13 which requires the claims made to be verified by the IRP within 7 days from the last date of the receipt of the claims and thereupon maintain a list of the

creditors indicating the amount of their claims admitted, security interest, if any, in respect of such claim and update it. He therefore, submit that once the respondent, fails to submit proof of claims, it is not now open for the respondent to raise the claim against the petitioner, as it stood extinguished.

2.4. Mr. Sundaram, the learned Counsel for the petitioner, seeks a week's time, to address the Court on the above issue. List the petition on 17.2.2025.

3. We have further heard the respective learned Counsels for the parties on 06/03/2025; 07/03/2025, on which dates the following arguments were advanced.

3.1. Mr. Sundaram, learned Counsel for the respondent invites our attention to Section 5 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (for short hereinafter "EPF Act") to contend that the provident fund is a fund of the employees, and therefore, will have to be considered as an 'asset' and not as a 'debt' and therefore, cannot be made a subject matter of the resolution plan, in terms of Section 30 of the Insolvency and Bankruptcy Code, 2016 (for short hereinafter "IB Code").

3.2. He further invites our attention to Section 30(2) Clause – (b), of the IB Code, which provides that the resolution plan should ensure that it does not contravene any of the provisions of the law for the time being in force, in reference to which, he relies upon Section 36 (4) (a) (iv) by which all sums due to any workman or employee from the provident fund, pension fund and the gratuity fund, stand

excluded from the Liquidation Estate Asset and are held not be liable to be used for recovery in the liquidation. He further invites our attention to Section 18 of the IB Code, which lay down the duties of the IRP and specifically explanation – (a) which excludes 'assets' owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment to contend that the amount of provident fund, is an 'asset' owned by the workman, which is held by the company/corporate debtor under trust and therefore, should also not be included in the term 'assets', which would be available to the IRP. He further relies upon the judgment of the National Company Law Appellate Tribunal, Principal Bench, New Delhi in ***Company Appeal (AT) (Insolvency) No.752/2021 (Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia Resolution Professional of Jet Airways (India) Ltd. & Ors. decided on 21/10/2022)*** in which it has been categorically held, in answer to questions framed in para 33 (ii) (iv) and (xi) - (pg.38) that the provident fund is not liable for attachment, in view of the explanation of the term 'assets', as contained in Section 18 of the IB Code (para 76), which judgment also holds in para 69 that the workmen are entitled to the provident fund till the insolvency commencement date. He also points out that challenge to ***Jet Aircraft*** (supra) has been turned down by the Hon'ble Apex Court, in ***Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia and others, 2024 SCC OnLine SC 727***. Reliance is also placed upon ***Sunil Kumar Jain and others Vs. Sundaresh Bhatt and others (2022) 7 SCC 540*** (paras 24 and 25.2) and also on ***Employees Provident Fund Organization Vs. Fanendra Harakchand Munot and another 2023 SCC OnLine SC 1606*** (para 3). He further submits that the originally impugned order for claiming EPF Dues was passed on 04/02/2020

(pg.268), challenge to which, as laid in the present petition by virtue of prayer clause (ii), has been given up, which has been recorded in the order dated 13/09/2024 by this Court, on account of which, the limited challenge now which remains for consideration is the issuance of show-cause notice dated 08/06/2021 and the subsequent communication dated 29/09/2021 as well as the subsequent show cause and demand notices dated 19/01/2023 and 13/07/2023 respectively. It is contended that there are three units of Murli Industries, one the cement unit, the solvent extraction unit and the paper unit. The resolution plan was only in respect of the cement unit, as against which the solvent extraction and paper unit were not the subject to the resolution plan. These are acquired by the petitioner Nos.2 and 3, by virtue of amalgamation, in terms of Section 230 and 231 of the Companies Act, which has been approved by the order dated 05/05/2022 (page 416) and insofar as these units are concerned, since the entire liability to pay the EPF dues to the workers has been taken over by the transferee company in terms of clause 16.1 and 16.3 of the amalgamation scheme (pg.489), the same cannot be questioned in the present petition, by an omnibus prayer in terms of prayer clause (i). It is also contended that right to provident fund, being a statutory right, cannot be extinguished on account of any resolution plan which may be approved by the authority under the IB Code.

3.3. Mr. Bhangde, learned Senior Counsel for the petitioner, in rebuttal, in respect of the decision in ***Fanendra Harakchand Munot*** (supra) by the NCLAT relied upon by the learned counsel for the respondent, invites our attention to para 3 thereof, to contend that in the said case the resolution plan was approved and a claim for the EPF dues was made subsequent thereto, considering which, on account of

the delay, the claim for the Employees Provident Fund (EPF) dues was dismissed, which is also the case in the present matter where the resolution plan has been approved on 22/07/2019 and there is no application by the EPF either before the resolution plan was finalized, for its dues or even thereafter, except for communication dated 10/10/2017 (page 38) by the EPF which claim was never verified on account of non-submission by the EPFO Department of any proof of such claim. He therefore, submits that the judgment in ***Fanendra Harakchand Munot*** (supra) by the NCLAT in fact supports the case of the petitioners.

3.4. Insofar as the appeal, there-against before the Hon'ble Apex Court in ***Fanendra Harakchand Munot*** (supra), by relying upon para 2 of the same, it is contended that the Hon'ble Apex Court has indicated that it is necessary for the employees of the EPFO to take steps to ensure that there is compliance with the timeline provided in the IB Code, failure to do which may lead to further consequences which would be turn to necessity to lodge a claim even for EPFO, timeline as provided under the IB Code. He also relied upon the fact that the appeal has been dismissed, by the Apex Court. Though in para 3 the rights of the EPFO to proceed in accordance with law in view of Section 36 (4) (a) (iii) of the IB Code has been preserved, the said provision according to him is not attracted.

3.5. He further submits that Chapter III of the IB Code speaks about the liquidation process, which starts with Section 33 and ends with Section 54, and contemplates the liquidation of the company and the process how it is to be done and the same would be attracted only where there is no resolution plan approved or in case resolution plan is approved then the same is contravened in terms of

Section 33(3) and 33(4) of the IB Code and not otherwise. It is therefore his contention that the exclusion as contemplated by Section 36(4)(iii) of the IB Code will have to be read and restricted to be applicable only in a case where liquidation proceeding has been initiated under Section 33(1)of the IB Code.

3.6. Section 36 (4)(a)(iii) of the IB Code therefore, according to him would not be applicable where a resolution plan already stands approved and since in the instant case, there is no dispute that the resolution plan already stood approved and challenge before NCLAT came to be decided by Judgment dated 24/01/2020 (page 212), f urther challenge before the Apex Came to be rejected by orders dated 20/11/2020 in Civil Appeal 3169-3170 of 2020 ***Lalchand Maloo vs. Vijay Kumar*** (page 239); 12/02/2021 ***Murlidhar Suganchand Agrawal vs. Vijay Kumar*** Civil Appeal No.3956/2020(page-240); 03/05/2021 ***Prashant vs. Vijay Kumar*** Civil Appeal Nos.1701 – 1710 of 2021 (page 241), the rights of the EPFO, to claim the EPF dues according to him stood extinguished.

3.7. He further contends that the provisions of resolution are in Chapter II of the IB Code from Sections 6 to 32-A of the I & B Code therefore both operate in different fields, on account of which also Section 36(4)(a)(iii) is not applicable, as the same would be applicable only when a liquidator is appointed in terms of 33(1) of the IB Code.

3.8. ***Jet Aircraft*** (supra) relied upon by Mr. Sundaram, learned counsel for respondent, according to Mr. Bhangde learned Senior counsel for the petitioners is not applicable in view of the position that it was rendered in the factual background narrated in para 2 thereof where the question for consideration was whether

approval of the resolution plan was correct or not. According to him, it was not a case where Section 36 of the IB Code fell for consideration.

3.9. He further invites our attention to question XI page 41 therein, to contend that in ***Jet Aircraft*** (supra) a claim was made by EPFO and was verified before the resolution plan for which he relies upon para 117. The amount claimed therein by the EPF, was admitted by the resolution plan, but the claim was rejected. Therefore, in view of the factual background in which the observations have been rendered, the same is not clearly attracted.

3.10. Insofar as Section 18 of the I & B Code is concerned, he invites our attention to ***Jet Aircraft*** (supra), to contend that it would be applicable to the assets owned by the corporate debtor. The exclusion as contemplated by explanation – 'a' to Section 18 of the I & B Code according to him relates to a fund maintained by the Corporate Debtor for payment of Provident Fund, Pension Fund and Gratuity and not in a case where under the normal mode of contribution 80% is given by the employer and the fund is to be transferred to the EPF, by deducting the employees contribution. In this regard he invites our attention Section 73 [Sec.2(c)] of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act, 1952 for short hereinafter), to contend that what was under consideration in para 76 in judgment of ***Jet Aircraft*** (supra) was in relation to the fund maintained by the Corporate Debtor and not otherwise and therefore, has to be read in that context.

3.11. Insofar as ***Sunil Kumar Jain*** (supra) is concerned he invites our attention to para 3.3 in which the facts are narrated, to contend that in this case as the resolution plan was not adopted as a

result of which the resolution professional filed an application for liquidation and it is in this background that the matter has been decided.

3.12. It is also his contention that the matter has been covered what has been held in ***Ghanshyam Mishra*** **(2021) 9 SCC 657**.

3.13. It is also his contention that the challenge to the order dated 04/02/2020, where the liability of EFP dues to the tune of Rs.25 Crore has been determined against Murli Industries, the giving up of any challenge by the same by deletion of the same in the prayer clause (ii) in the present petition, would not have any adverse effect upon the petitioner, as even though the liability to pay the dues stands admitted by the petitioner, however, in view of the contention that it is not included in the resolution plan, the same would not have any effect as the order of recovery of the Provident Fund dues, has now become unexecutable. He therefore, submits that in case, the petition is allowed in terms of prayer clause (i) the deletion of the challenge to order dated 04/02/2020 would not adversely affect the petitioner in any manner whatsoever.

3.14. He further invites our attention to para 2 of the order dated 24/01/2020 passed by NCLAT, New Delhi (pg. 218), to contend that the argument by Mr. Sundaram, learned Counsel for the respondent that the resolution plan was only in respect of Murli Industries and not in respect of its paper and solvent extraction unit, is factually incorrect, as the workers of the paper and solvent extraction unit had filed Company Appeal (Insolvency) No.871-872 of 2019 challenging the approval of the resolution plan on the ground that they would be adversely affected. He further invites our attention to para 30(iii) (page 236) of the same order, which holds by relying

upon ESSAR – holds that claims which were not dealt under the resolution plan would stand extinguished under the provisions of the I & B Code.

3.15. He further invites our attention to the order dated 03/07/2019 (page 170) which approves resolution plan and specifically paras 12, 29, 69 and 72, to contend that the resolution was in respect of Murli Industries as a whole including cement, paper and solvent extraction plant and not in respect cement unit only.

3.16. He further invites our attention to the communication dated 11/09/2020 (pg. 398) by the Chairman of the Managing Committee addressed to the Resolution Professional recognizing the transfer of the ownership, management and control of Murli Industries Ltd. to the petitioner in terms of the resolution plan, to contend that the entire industry had been taken over and not any individual unit of the same.

3.17. He further invites our attention to reply-affidavit dated 11/03/2024 in this regard specifically the averments in para 3 thereof which are in response to the amended para 21-A of the petition, whereby it is not disputed that the petitioner has become the owner and has the management and control of the corporate debtor Murli Industries in pursuance to the orders of the NCLAT.

3.18. He further invites our attention to Section 5 of the EPF Act to contend that the argument by Mr. Sundaram, learned counsel for the respondent that the Provident Fund is not an 'asset', but a 'debt', is not open to the respondents in view of ***Ghanshyam Mishra*** (supra) and ***Fanendra Harakchand Munot*** (supra), as the hon'ble Supreme Court is deemed to have considered this in those cases.

3.19. Section 3(11) of the IB Code which defines 'debt' as a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt, is also relied upon, to contend that the claim to pay Provident Fund dues would be a liability in terms of Section 3(11) of the IB Code, on account of which it is covered by what has been held in ***Ghanshyam Mishra*** (supra). It is therefore contended that the petitioner is entitled to a declaration as claimed in prayer clause (i) and the consequent benefit to follow such declaration.

4. The relevant provisions, which fall for consideration for the sake of ready reference are reproduced as under :

I B Code

3. In this Code, unless the context otherwise requires,—
(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

CHAPTER II
CORPORATE INSOLVENCY RESOLUTION PROCESS

18.Duties of interim resolution professional.– (1) The interim resolution professional shall perform the following duties, namely:—

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—
(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;
(ii) assets that may or may not be in possession of the corporate debtor;
(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;
(vi) assets subject to the determination of ownership by a court or authority;

(g) to perform such other duties as may be specified by the Board.

Explanation.—For the purposes of this sub-section, the term "assets" shall not include the following, namely:—

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;
(b) assets of any Indian or foreign subsidiary of the corporate debtor; and
(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

30. Submission of resolution plan.– (1) A resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—
(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;
(b) provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;
(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;
(d) the implementation and supervision of the resolution plan;
(e) does not contravene any of the provisions of the law for the time being in force;
(f) conforms to such other requirements as may be specified by the Board.
(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).
(4) The committee of creditors may approve a resolution plan by a vote of not less than seventy five per cent. of voting share of the financial creditors.
(5) -------:
(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

CHAPTER III
LIQUIDATION PROCESS

33. Initiation of liquidation.– (1) Where the Adjudicating Authority,—

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, it shall—

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and (iii) require such order to be sent to the authority with which the corporate debtor is registered.
(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

36. Liquidation Estate.– (1) For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor.
(2) The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.
(3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following:—
(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;

(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;

(c) tangible assets, whether movable or immovable;

(d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;

(e) assets subject to the determination of ownership by the court or authority;

(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;

(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;

(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and

(i) all proceeds of liquidation as and when they are realised.

(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:—

(a) assets owned by a third party which are in possession of the corporate debtor, including—
(i) assets held in trust for any third party;
(ii) bailment contracts;
(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;
(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;
(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;
(d) assets of any Indian or foreign subsidiary of the corporate debtor; or
(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

THE EMPLOYEES' PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952

2. Definitions.—In this Act, unless the context otherwise requires,—

(c) "contribution" means a contribution payable in respect of a member under a Scheme 4 or the contribution payable in respect of an employee to whom the Insurance Scheme applies;

5. Employees Provident Fund Schemes.—

(1) The Central Government may, by notification in the Official Gazette, frame a Scheme to be called the Employees Provident Fund Scheme for the establishment of provident funds under this Act for employees or for any class of employees and specify the establishments or class of establishments to which the said Scheme shall apply and there shall be established, as soon as may be after the framing of the Scheme, a Fund in accordance with the provisions of this Act and the Scheme.

(1A) The Fund shall vest in, and be administered by, the Central Board constituted under section 5A.

(1B) --------.

(2) ---------

6. Contributions and matters which may be provided for in Schemes.— The contribution which shall be paid by the employer to the Fund shall be ten per cent of the basic wages, dearness allowance and retaining allowance (if any) for the time being payable to each of the employees (whether employed by him directly or by or through a contractor), and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding ten per cent. of his basic wages, dearness allowance and retaining allowance (if any), subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section:

Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words ten per cent., at both the places where they occur, the words twelve per cent shall be substituted:

Provided further that -------.
Explanation 1.—For the purposes of this section ------.
Explanation 2.—For the purposes of this section, -----.

5. The necessary facts, for the purpose of determination of the controversy in issue, are as under:

5.1. Company Petition No.66 of 2017 was filed under section 7 of the IB Code by the Financial Creditor Edelweiss Asset Reconstruction Company Limited ("EARC" for short hereinafter) against the Corporation Debtor/Murli Industries for initiation of the corporation insolvency resolution process, which was admitted by the NCLT by the order dated 05/04/2017 and Mr.Vijaykumar V. Iyer was appointed as the Interim Resolution Professional (IRP).

5.2. At the same time, 6 winding up petitions being *Company Petition No.8 of 2011; M/s Regent Overseas Pvt.Ltd. v. M/s. Murli Industries Ltd.; Company Petition No.9 of 2011; M/s. Sunmax General Trading LL. Dubai (UAE) v. Murli Industries Limited; Company Petition No.10 of 2011, Cethat Ltd. Tiruchirapalli, Tamilnadu v. M/s. Murli Industries; Company Petition No.3 of 2012, Botliboi Environmental Engineering Ltd., Mumbai v. M/s. Murli Industries Ltd.; Company Petition No.6 of 2012, Prime Pick and Pack Ltd., Jabalpur v. Murli Industries Ltd.; and Company Petition No.10 of 2012, M/s. Ashok Polymers Ltd., Hyderabad v. Murli Industries Ltd.* were pending before the Nagpur Bench of the High Court of Bombay in which, by an order dated 21/03/2017, passed in Company Petition No.9 of 2011, the

Official Liquidator attached to the Court was appointed as the provisional liquidator on M/s.Murli Industries Limited.

5.3. The IRP, by public announcement dated 11/4/2017, called upon the creditors to submit proof of claims on or before 19/4/2017 to him (pg.32), in response to which, the respondent intimated a claim of Rs.54,98,118/- to the IRP (pg.39), whereupon the IRP called upon the respondent to submit proof of claim, in the relevant Form as provided in the CIRP Regulations. The respondent thereafter does not appear to have done anything.

5.4. In the first Committee of Creditors (COC) meeting dated 04/05/2017, the said Mr.Vijaykumar Iyer was confirmed as a Resolution Professional (RP). 180 days of the resolution process was to expire on 02/10/2017, however, an extension of 90 days was allowed by order dated 18/09/2017, extending the last day of CIRP to 31/12/2017. The COC in its 11th meeting dated 20/12/2017, approved the resolution plan dated 20/12/2017, submitted by Dalmia Cement (Bharat) Limited by 100% voting, in view of which, the resolution professional filed MA No.689 of 2017 under section 30(6) of the IB Code read with regulation 39(4) of the CIRP Regulations, on 22/12/2017, seeking approval of the

Tribunal to the resolution plan, which was heard and reserved for orders.

5.5. In view of the initiation of the Corporate Resolution Process against M/s.Murli Industries Ltd., Company Application No.10 of 2017 came to be filed in Company Petition No.6 of 2012 under section 446 of the Companies Act by the resolution professional on behalf of the Corporate Debtor seeking leave to proceed with or continuing with the ongoing corporate insolvency resolution process under the IB Code. Similar applications, were also filed by the RP bearing Company Application Nos.13/2017, 14/2017 and 15/2017 in the connected Company Petitions. Initially, by an order dated 22/03/2018, passed in Company Application No.10 of 2017, in Company Petition No.6 of 2012, the learned Single Judge of this Court, by considering the fact, that the issue involved in CA No.10 of 2017, would have a bearing upon the determination of the resolution process one way or the other, pending before the NCLT, expected that the NCLT would not go ahead with the hearing of the resolution process, till the application was finally disposed of by this Court.

5.6. By common order dated 02/11/2018, while partly allowing the CA No.10 of 2017, leave was granted to continue with the corporate insolvency resolution process to the extent, it is carried out under Chapter II, Part-II of the IB Code and it was also directed, that all the creditors and also the operational creditors including the workers having preferential claims under section 529-A of the Companies Act, 1956 shall be allowed to submit their respective claims, by the resolution professional by suitably extending the last date of submission of claims, after which the resolution professional shall take necessary steps for completion of the resolution process in accordance with law. It was also directed, that in case, the NCLT fails to revive or successfully implement the resolution plan, this Court seized of the winding up petitions would proceed to deal with those petitions in accordance with law and till then the effect of the order dated 21/03/2017, passed by this Court appointing provisional official liquidator was kept in abeyance.

5.7. It is in pursuance to the above order, that proceedings before the NCLT for corporate insolvency resolution of the corporate debtor continued and the resolution professional, published an advertisement on 30/11/2018 in Times of India and Sakal, Nagpur

Editions, extending the time limit for creditors to submit their claims by 13/12/2018, in pursuance to which, 145 new claims for Rs.24.86 Crores were received, which after verification and clarifications, the resolution professional admitted claims to the extent of Rs.10.38 Crores. This was accordingly apprised to the COC, as well as the directors of the suspended board of the Corporate Debtor and Dalmia Cement (Bharat) Ltd., in a meeting convened on 15/01/2019.

5.8. By order dated 03/07/2019, MA No.689 of 2017 came to be allowed, resulting in approval of the resolution plan submitted by the resolution professional in favour of Dalmia Cement (Bharat) Ltd. This order came to be partially modified on 22/07/2019.

5.9. The approval of the resolution plan, by the Adjudicating Authority (NCLT) by the order dated 03/07/2019, in MA No.689 of 2017, as partially modified on 22/07/2019, came to be challenged by way of Company Appeal (AT) Insolvency No.871-872 of 2019, Santosh Vasantrao Walokar v. Vijaykumar V. Iyer (Resolution Professional and another), preferred by the workers of the Paper and Solvent Extraction Units of Murli Industries Ltd. on the ground, that the resolution plan was discriminatory and was threatening the livelihood of 1184 workers

of the Paper and Solvent Extraction Units of Murli Industries Ltd., by not paying outstanding wages and compensation for retrenchment as per the provisions of the Industrial Disputes Act, 1947 and in view of the IB Amendment Act, 2019, their claims were to be treated *pari passu* with the claims of the secured financial creditors of the corporate debtors, in accordance with section 53(1) of the IB Code. Several other persons had also challenged the approval of the resolution plan, before the National Company Law Appellate Tribunal. This challenge before the NCLAT came to be rejected by the common judgment dated 24/01/2020 (Page 212).

5.10. A further challenge to this, before the Hon'ble Apex Court came to be rejected by orders dated 20/11/2020 in Civil Appeal Nos.3169-3170 of 2020 ***Lalchand Maloo vs. Vijay Kumar*** (page 239); 12/02/2021 ***Murlidhar Suganchand Agrawal vs. Vijay Kumar*** Civil Appeal No.3956/2020(page-240); 03/05/2021 ***Prashant vs. Vijay Kumar*** Civil Appeal Nos.1701–1710 of 2021 (page 241).

5.11. Thereafter, an application was filed under sections 230 to 232 of the Companies Act before the NCLT, Mumbai, being CA (CAA) No.101/MB/2021 and CP (CAA) No.219/MB/2021 (Pg.416) seeking

sanction, to a composite scheme of arrangement and amalgamation amongst Murli Industries Ltd. (Corporate Debtor) and the present petitioners in which by the judgment dated 05/05/2022, sanction was awarded with the appointed date fixed as 31/03/2020 to the scheme of arrangement and amalgamation as submitted with the said application. A similar application, being moved before the NCLT, Chennai vide CP/65/CAA/2021 in CA/34/CAA/2021 on account of the fact that Dalmia Cement (Bharat) Ltd. had its registered office at Dalmiapuram Tiruchirappalli, Tamilnadu, the same also came to be allowed by the order dated 10/06/2022 (Pg.446). The composite scheme of arrangement and amalgamation is at record pages 453 to 514.

5.12. Consequent to the above, applications came to be filed in the Company Petitions pending before this Court, which came to be disposed of by the order dated 05/08/2022, in view of the order of amalgamation aforesaid.

5.13. What is also necessary to note, is that the Regional Provident Fund Commissioner-II, Nagpur, by his order dated 04/02/2020 (Pg.264), in proceedings initiated under section 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952

("EPF Act" for short hereinafter), determined a sum of Rs.25,23,74,205/- as the amount due and payable by Murli Industries Ltd. on account of EPF dues for the period 05/2009 to 01/2014 and thereafter issue notice of demand on 08/06/2021 (Pg.269), which along with the interest as accrued thereupon, was the amount intimated to the IRP by the respondent as indicated above.

5.14. It is this order dated 04/02/2020, passed by the Regional Provident Fund Commissioner, which was challenged in the present petition, which challenge has been given up on account of deletion of prayer clauses (ii) and (iii) in that regard, at the request of the counsel for the petitioners as recorded in the order dated 13/09/2024 of this Court. It is in the above factual background, that the relief claimed in prayer clause (i) of the petition, which seeks a declaration, that in view of the approval of the resolution plan, the claim of the EPFO/ respondent against the corporate debtor stands extinguished and no proceedings can be initiated or continued for recovery of alleged provident fund dues, is being pressed. A further claim for quashing and setting aside the show cause notice dated 19/01/2023 and the demand notice dated 13/07/2023 is also made.

6. It is in the above factual background, that the rival contentions are to be considered. Before proceeding ahead, it is necessary to note, that the applicability of the EPF Act, 1952 to the employees of the original petitioner Murli Industries/Corporate Debtor is not disputed. The dispute is limited to the issue, that since the respondent though lodged a claim before the IRP, did not get it verified, on account of which, it was not included in the Resolution Plan and thus the entitlement of the respondent to recover the same, stands extinguished. A plea raised, that the PF dues cannot form part of the resolution plan also needs to be considered.

7. At the outset, the contention of Mr. Bhangde, learned Senior Counsel for the petitioners, that Section 36(4)(a)(iii) of the IB Code, does not apply to insolvency resolution proceedings, needs to be considered. In this context, what is necessary to note, is that section 36(4)(a)(iii) of the IB Code, falls in Chapter III of the IB Code, which relates to the liquidation process, sections 33 to 54 of which, lay down the mode, method and manner, in which liquidation of a corporate debtor, has to be carried out. As against this, the Insolvency Resolution Process, is contained in Chapter II of the IB Code, wherein by virtue of sections 6 to 32-A, the mode, method and manner of the insolvency

resolution process, is laid down. What is also necessary to note, is that section 33, which relates to initiation of liquidation, indicates the parameters, in which, the liquidation process has to be initiated. In terms of section 33(1)(a) if the Adjudicating Authority before the expiry of the insolvency resolution process, or the extended period does not receive a resolution plan, under section 30(6) [Section 33(1)(a)] or the resolution plan is rejected under section 31 for non-compliance of the requirement specified therein [Section 33(1)(b)], or where, the resolution professional, intimates to the Adjudicating Authority, the decision of the Committee of Creditors, to liquidate the Corporate Debtor [Section 33(2)], or where the resolution plan approved by the Adjudicating Authority is contravened [Section 33(3)], the process of liquidation, is to be initiated. It would therefore be apparent, that the initiation of the process of liquidation, is on account of failure of the resolution process, or the contravention of the resolution plan and thus, is a consequent step thereto. It would also be further apparent, that the purpose, object and process of corporate insolvency resolution which is revival of the Corporate Debtor and that of liquidation, which is of liquidating and distribution of its assets, are separate and distinct and therefore, cannot be equated. In that view of the matter, it would be

correct to say, that the provisions of section 36(4) of the IB Code, which fall under Chapter III, which relates to the liquidation process cannot be deemed to be incorporated or available, for the purpose of deciding a plea under Chapter II, the insolvency resolution process. It would therefore, be apparent, that the exclusion of all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund, as provided in section 36(4)(iii) of the IB Code, from the definition of liquidation estate assets, cannot be deemed to be a provision, available under Chapter II of the IB Code. This would indicate to us, that in such a case, the plea of exclusion, of the provident fund, from the scope and ambit, of Chapter II of the IB Code will have to be considered, independently of the provisions of section 36(4)(iii) of the IB Code.

8. Before we proceed ahead, it is also necessary to consider, whether the resolution plan, was in respect of Murli Industries and not in respect of its Paper and Solvent Extraction Units, as contended by Mr.Sundaram, learned counsel for the respondent, or was in respect of the entire Murli Industries, including the Paper and Solvent Extraction Units too. In this context, what is necessary to note, is that the resolution plan prepared by the resolution professional, which is on

record (Pgs.48 to 168) is not disputed, para-3.3 (Pg.51) of which, indicates, that the corporate debtor operated three business segment-(1) Cement Undertaking, (2) Paper Unit and (3) Solvent Extraction Unit. This resolution plan was approved by the COC and submitted to the NCLT for approval, and was approved by the order dated 03/07/2019, and also indicates, that the resolution plan, was in respect of all the three undertakings of Murli Industries-(1) Cement Undertaking, (2) Paper Unit and (3) Solvent Extraction Unit. Para-72 of the said order, (Pg.192) specifically records the intention of the resolution applicant to run the business by reviving the Cement Undertaking as a going concern and selling the Paper and Solvent Extraction Units of the business, as they do not appear to be viable. It is after considering this, that the NCLT has approved the resolution plan, by the judgment dated 03/07/2019, as it stands modified on 22/07/2019, challenge to which, before the NCLAT as well as the Hon'ble Apex Court has been rejected. It would therefore be not correct for Mr.Sundaram, learned counsel for the respondent to contend, that the resolution plan did not include the Paper and Solvent Extraction Units of Murli Industries.

9. We now come to the core issue as to whether the provident fund of an employee, which includes the component of the employer's contribution too, can be a part of a resolution plan.

10. In reference to the above, what is necessary to be considered and determined, is whether the contribution of the Employer in respect of the Provident Fund, under the EPF Act, 1952 is as 'asset', within the meaning of the expression and whether, it was permissible to be included in the Resolution Plan. If the answer is yes, then the entitlement of the respondent to recover it would stand extinguished, as all 'assets', consequent to the finalisation of the Resolution Plan, would then stand beyond the pale of recovery by the respondent.

10.1. What is meant by an 'asset', therefore, assumes significance. The IB Code, which ought to have defined what is meant by an 'asset', for the purposes of the IB Code, as it deals with the expression, extensively, however, does not do so. The Companies Act, also does not define it. The meaning, therefore, of the word 'asset', will have to be determined from what it is perceived to mean in commercial law.

10.2. The word 'Asset', is defined in Black's Law Dictionary (Eighth Edition) as under :

> **"Asset** - 'An item that is owned and has value ; The entries on a balance sheet showing the items of property owned, including cash, inventory, equipment, real estate, accounts receivable, and goodwill; All the property of a person, (except a bankrupt or deceased person) available for paying debts or for distribution."

10.3 While considering the meaning of the word "asset" this is what has been held in ***Maharashtra State Coop. Bank Ltd. v. Provident Fund Commr.,*** **(2009) 10 SCC 123** :

> **"60.** As per *Black's Law Dictionary* (8th Edn.), the word "asset" means, an item that is owned and has value; the entries on a balance sheet showing the items of property owned, including cash, inventory, equipment, real estate, accounts receivable and goodwill; all the property of a person available for paying debts or for distribution. In *Law Lexicon* by P. Ramanatha Aiyar (2nd Edn.), the word "assets" has been described as the property in the hands of an heir, an executor, administrator or trustee which is legally or equitably chargeable with the obligations which such heir, executor, administrator or trustee is, as such, required to discharge. Everything which can be made available for the payment of debts, whether belonging to the estate of a deceased person or not; property in general all that one owns, considered as applicable to the payment of his debts; as, his assets are much greater than his liabilities. In *Velchand Chhaganlal* v. *Mussan* [14 Bom LR 633] it was held that the word "assets" means, a man's property of whatever kind which may be used to satisfy debts or demands existing against him.
>
> 61. As per *Salmond's Jurisprudence*, the word "property" means—in its widest sense, property includes a person's legal rights, of whatever description. A man's property is all that is his in law. This usage however, is obsolete at the present day, though it is common enough in the older books. In a second and narrower sense, property includes not all a person's rights, but only his proprietary as opposed to his personal rights. The former constitutes his estate or property, while the latter constitute his status or personal condition. In this sense a man's land, chattel, shares and the debts due to him are his property; but not his life or liberty or reputation…. In a third application, which is that adopted (here) the terms include not even all proprietary rights but only those which are both proprietary and in rem.

> The law of property is the right of proprietary rights in rem, the law of proprietary rights in personam being distinguished from it as the law of obligations. According to this usage a freehold or leasehold estate in land, or a patent or copyright, is property; *but a debt or the benefit or a contract is not*. Finally, in the narrowest use of the term, it includes nothing more than corporeal property—that is to say, the right of ownership in a material object, or that object itself."

10.4. The IB Code though it deals with assets of the corporate debtor extensively, since as noted above, does not define what the word means, in the context of the provisions of the IB Code, the meaning of the word "assets", therefore will have to be considered what it is generally assumed to be in the commercial field, as the IB Code, relates to commercial aspect. It would also be appropriate to look for the meaning of the word in other Statutes, which consider commercial transactions.

10.5. The Income Tax Act, 1961, also does not define, what is meant by an 'Asset', but defines a 'capital asset', in sec.2(14), which is as under :

> "(*14*) "**capital asset**" means—
> (*a*) property of any kind held by an assessee, whether or not connected with his business or profession;
> (*b*) any securities held by a Foreign Institutional Investor which has invested in such securities in accordance with the regulations made under the Securities and Exchange Board of India Act, 1992 (15 of 1992);
> (*c*) any unit linked insurance policy to which exemption under clause (*10D*) of section 10 does not apply on account of the applicability of the fourth and fifth provisos thereof, but does not include—
> (*i*) -----;

(*ii*) -----, but excludes—

(*a*) jewellery; (*b*) archaeological collections; (*c*) drawings; (*d*) paintings; (*e*) sculptures; or (*f*) any work of art.

We are not here concerned with the Explanation.

(*iii*) ---- ,

(*iv*) ---- ,

(*v*) ---- ,

(*vi*) ----"

10.6. The Wealth Tax Act, defines as 'assets', in sec.2(e) as includes property of every description, movable or immovable, subject to the exceptions as indicated therein.

10.7. The basic concept of an 'asset' would therefore be something, which is owned or controlled by a person, over which he/it has a right of dominion and disposition, be it movable or immovable, tangible or intangible. The concept of the power of disposition on account of its control or possession, is thus inviolate in the word 'asset'. It would also include property of all kinds, which again would relate to the concept of something over which one has dominion or control of disposition.

10.8. The provident fund of an employee is a combination to two components. Employees Contribution, being that amount, which is deducted from the salary/wages payable to an employee, which

deduction is made by the employer. The other component being the contribution to be made by the employer, generally known as the Employer's contribution. Both combined, constitute the provident fund of an employee. Under section 5(1) of the EPF Act, a fund is required to be established after framing of the Employees Provident Fund Scheme, which is to be administered by the Board constituted under section 5A of the EPF Act. In terms of section 6 of the EPF Act, the contribution, which shall be paid by the employer to the Fund shall be 10% (or such other sum, as is prescribed) of the basic wages, dearness allowance and retaining allowance (if any) for the time being payable to each of the employees (whether employed by the employer directly or by or through a contractor), and the employees contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding 10 % (or such other sum, as is prescribed) of his basic wages, dearness allowance and retaining allowance (if any), subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under sec.6, which can increase in terms of the proviso thereto. In case there is any dispute as to the applicability of the provisions of the EPF Act or the contribution of the employer, such a

dispute is to be determined by the authorities as provided under section 7-A of the EPF Act, in the mode and manner as provided thereunder. Section 7-B of the EPF Act provides for a review of the order passed under section 7-A. Section 7-B (5) of the EPF Act, provides for an appeal against an order passed under review as if the order passed under review were the original order passed by the Reviewing Authority under section 7A. Under section 7-I of the EPF Act, an appeal lies to the Tribunal as constituted under section 7-D of the EPF Act.

10.9. It is also necessary to consider, what is the intent and purpose of the EPF Act. This has been considered and spelt out in ***Maharashtra State Coop. Bank Ltd. v. Provident Fund Commr., (2009) 10 SCC 123*** in the following words :

> **"30.** Since the Act is a social welfare legislation intended to protect the interest of a weaker section of the society i.e. the workers employed in factories and other establishments, it is imperative for the courts to give a purposive interpretation to the provisions contained therein keeping in view the Directive Principles of State Policy embodied in Articles 38 and 43 of the Constitution. In this context, we may usefully notice the following observations made by Krishna Iyer, J. in *Organo Chemical Industries* v. *Union of India* [(1979) 4 SCC 573 : 1980 SCC (L&S) 92] : (SCC pp. 587 & 591-92, paras 28 & 40-41)"
>
> > "*28.* The pragmatics of the situation is that if the stream of contributions were frozen by employers' defaults after due deduction from the wages and diversion for their own purposes, the scheme would be damnified by traumatic starvation of the Fund, public frustration from the failure of the project and psychic demoralisation of the miserable beneficiaries when they find their wages deducted and the employer get away with it even after default in his own contribution and malversation of

> the workers' share. 'Damages' have a wider socially semantic connotation than pecuniary loss of interest on non-payment when a social welfare scheme suffers mayhem on account of the injury. Law expands concepts to embrace social needs so as to become functionally effectual.
> *40.* The measure was enacted for the support of a weaker sector viz. the working class during the superannuated winter of their life. The financial reservoir for the distribution of benefits is filled by the employer collecting, by deducting from the workers' wages, completing it with his own equal share and duly making over the gross sums to the Fund. If the employer neglects to remit or diverts the moneys for alien purposes the Fund gets dry and the retirees are denied the meagre support when they most need it. This prospect of destitution demoralises the working class and frustrates the hopes of the community itself. The whole project gets stultified if employers thwart contributory responsibility and this wider fall-out must colour the concept of 'damages' when the court seeks to define its content in the special setting of the Act. For, judicial interpretation must further the purpose of a statute. In a different context and considering a fundamental treaty, the European Court of Human Rights, in the Sunday Times Case, observed:
>
> > The Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty.
>
> *41.* A policy-oriented interpretation, when a welfare legislation falls for determination, especially in the context of a developing country, is sanctioned by principle and precedent and is implicit in Article 37 of the Constitution since the judicial branch is, in a sense, part of the State. So it is reasonable to assign to 'damages' a larger, fulfilling meaning."

10.10. It would thus be apparent that the Provident Fund is in sum and substance the property of an employee, part of which is contributed by such employee and part by the employer. Though part of the provident fund is contributed by the employer, however in terms of sec.6 of the EPF Act, it is on account of a Statutory obligation and though at times, if for any reason, such contribution is not paid by the

employer, that however, cannot mean that the employers contribution to the provident fund, would become the property or asset of the employer, over which he would have control or dominion of disposition, for in such a case it would be held by the employer in trust for the employee as the employers contribution to the provident fund.

10.11. The protection against attachment to the provident fund as envisaged by section 10 of the EPF Act, as indicate, hereinafter, not only supports, but emphasizes the primacy of workers dues over everything else.

11. In the above background, it is necessary to determine the scope, ambit and jurisdiction of the Resolution Plan. The Corporate Insolvency Resolution Process, is contained in Chapter -II of the IB Code. Section 6 of the IB Code, provides for three categories of persons who can initiate corporate insolvency resolution process, namely: (a) Financial Creditor [as defined in section 5(7) of the IB Code], (b) Operational Creditor [as defined in section 5(20) of the IB Code] and (c) the Corporate Debtor itself [as defined in section 3(8) r/w section 3(7) of the IB Code as Chapter -II does not define what a 'Corporate Debtor' is]. It can also be initiated by a Corporate Applicant, as defined in section 5(5) read with section 10 of the IB Code, which includes a

'Corporate Debtor'. The entire purpose and object of Chapter-II of the IB Code is to explore the possibility of revival of the Company, which is unable to pay its debts, so as to save the company from Liquidation. In the process of doing this an Interim Resolution Professional (IRP for short hereinafter) is appointed in terms of section 16 of the IB Code, for management of the affairs of the corporate debtor, in terms of section 17, thereof. While doing this certain duties are imposed upon the IRP, in terms of section 18. Sec. 18(1)(f) and Explanation to section 18(1) of the IB Code, which are already reproduced earlier.

12. What is necessary to note, is that the duties, of the IRP in terms of section 18(1)(f), direct taking control and custody of any asset, over which the corporate debtor has ownership rights as recorded in the balance-sheet of the corporate debtor. This would be indicated, by the expression "**any asset over which the corporate debtor has ownership rights as recorded in the balance-sheet of the corporate debtor**….." as occurring in section 18(1)(f) of the IB Code. This would indicate, that assets or asset over which the corporate debtor, does not have any ownership right cannot be taken control and custody of by the IRP. This also substantiates the position, that the concept of ownership or dominion, by the corporate debtor, over the assets, is a necessary

aspect, for anything to be taken control and custody of by the IRP. This is further reiterated in sub-clause (i), of section 18(1)(f) of the IB Code, which again in relation to the assets, which an IRP, is empowered to take control and custody of, uses the expression, "over which the corporate debtor has ownership rights", though this expression, is in relation to the assets, which may be located in a foreign country. However, the use of the same expression, in section 18(1)(f) of the IB Code, in our considered opinion, with sufficient clarity, indicate, that only those assets, as are recorded in the balance-sheet of the corporate debtor, over which the corporate debtor has ownership rights or has dominion, are susceptible, to be taken control and custody of by the IRP, in exercise of the duties imposed upon him, under section 18(1) of the IB Code, the dominion, being relatable to having a right of disposition. Thus, the use of the expression 'take control and custody of any asset over which the corporate debtor has ownership rights', as occurring in sec.18(1)(f) of the IB Code, would demonstrate that such 'assets', ought to be those over the corporate debtor has right of ownership and disposition [Sec. 18(1)(f) (i)], though they may not be in its possession [Sec.18(1)(f) (ii)], and include tangible assets, whether movable or immovable [Sec.18(1)(f) (iii)], intangible assets including intellectual

property [Sec.18(1)(f)(iv)], securities [Sec.18(1)(f)(v)] and assets subject to the determination of ownership by a Court or authority [Sec.18(1)(f) (vi)]. Thus as indicated above the concept of ownership or dominion of the 'assets', by a corporate debtor, is also incorporated in sec.18(1) of the IB Code for the purpose of the Insolvency Resolution Process.

13. It is further necessary to note, that the Explanation to Sec.18 (1) of the IB Code specifically excludes from the term 'assets', by virtue of clause (a) thereunder, 'assets', owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment. The exclusion clause (a) in the explanation to Sec.18(1) read in conjunction with the language of Sec.18(1)(f) of the IB Code, would make it amply clear that only those 'assets', over which the corporate debtor, can exercise right of ownership or dominion, can be held to be within the scope and ambit of the powers of the IRP and not otherwise.

14. As discussed above the Provident Fund of an employee, which includes both the components (a) employee contribution and (b) employers contribution, cannot be held to be 'assets', over which the corporate debtor can be held to have any rights of ownership or

dominion and would, even in case it is not deposited in the Provident Fund account, by the employer would continue to be property owned by the employee, held in trust by the employer, on behalf of the employee for being deposited in the provident fund account and thus would be outside the scope and ambit of the duties of the IRP as specified in sec.18 of the IB Code.

15. In this context, it is further necessary to consider, that the scheme of Chapter -II, thereafter enjoins upon the IRP to constitute a Committee of Creditors in terms of Sec.21 of the IB Code, who thereafter in terms of Sec.22 is empowered to either continue the IRP or appoint a Resolution Professional (RP for short hereinafter) in his place, who thereafter conducts the corporate insolvency resolution process. The duties of the RP are laid down in sec.25 of the IB Code and include the preservation and protection of the assets of the corporate debtor. The word ‘assets’ as occurring in sec.25(1) and (2)(a) of the IB Code will have to be read in the light of what the IRP in terms of Sec.18, is entitled to take custody and control of, in view of what is stated in the explanation to the same, which as indicated above, excludes ‘assets’, owned by a third party in possession of the corporate debtor held under trust or under contractual arrangement including bailment. This would

indicate that 'assets', owned by a third party in possession of the corporate debtor held under trust would be beyond the scope and ambit of the Resolution Plan, as is required to be prepared by the RP, in terms of Sec.30 of the IB Code for its approval under sec.31 by the Adjudicating Authority.

16. The language of sec.31 of the IB Code also needs to be considered, in the above context and not otherwise, for not doing so, would render the explanation to Sec.18(1) of the IB Code, redundant and otiose. Thus when Sec.31 of the IB Code uses the expression in relation to approval of the RP, which is as under :

> "---- which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan: ",

the same will have to be held, not to include the PF contribution of the employer. This is also for the reason that the expression uses the word 'debt' and 'dues', which will have to be read *ejusdem generis.*

17. That the PF contribution of the employer, is not a 'debt', is apparent from its definition as defined in Sec.3(11) of the IB Code, which defines it to mean a liability or obligation in respect of a claim

which is due from any person and includes a 'financial debt' and 'operational debt', the expression 'financial debt', being defined in Sec.5(8) to mean a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes - money borrowed against payment of interest; amount raised by acceptance under any acceptance credit facility; amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument; amount of any liability in respect of any lease of hire purchase contract; receivables sold or discounted; amount raised under any transaction including forward sale or purchase agreement, having commercial effect on the borrowing. This would indicate that a 'financial debt', would be in relation to a commercial transaction as indicated in clauses (a) to (f) of Sec.5(8) of the IB Code, 'Operational debt', being one as defined in Sec.5(21) of the IB Code to be a claim in respect of the provisions of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any Local Authority. Needless to mention that the Boards Constituted under sec. 5-A and 5-B of the EPF Act, do not fall within any of the three categories as indicated in the

definition of 'Operational Debt', as defined in Sec.5(21) of the IB Code. The Board, constituted under sec.5-A and 5-B of the EPF Act, may be a 'State', within the meaning of Article 12 of the Constitution, however, in so far as the IB Code is concerned it cannot considered to be the Central Government, as it is an independent Statutory Body, created for the purposes of managing, investing and disbursing the provident fund.

18. That the provident fund of an employee, needs to be protected is also spelt out from the provisions of Sec.36(4) of the IB Code, which spells out what shall not be included in the 'liquidation estate assets' and shall not be used for recovery in the liquidation, which includes assets owned by a third party which are in possession of the corporate debtor, including assets held in trust for any third party [Sec.36(4) (a) (i)] ; bailment contracts [Sec.36(4) (a) (ii)] and specifically [Sec.36(4) (a) (iii)] all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund. The language of Sec.36(4) (a) (i) & (ii) is similar to that used in Explanation (a) to Sec.18(1). Though it is correct as contended by Mr. Bhangde, learned Senior Counsel for the petitioners, that Sec.36(4) (a) falls in Chapter-III, which relates to the liquidation process, which can be undertaken only when the RP is contravened as indicated in

sec.33(3) and therefore the provisions of Sec.36(4) would not apply to proceedings under Chapter-II, of the Insolvency Resolution Process, however, one cannot loose sight of the scope and ambit of the Resolution process in Chapter -II, which would then be governed by Explanation (a) to Sec.18(1), which states what is excluded from what is meant by 'assets', for the purpose of the IRP or the RP for that matter.

19. It is also trite that to note that the Resolution Plan to be submitted by the RP, under the provisions of Sec.30(1) of the IB Code, in terms of clause (e) of Sec.30(2) has to ensure that it does not contravene any of the provisions of the law for the time being in force. This to us would indicate that while preparing and submitting a Resolution Plan, the RP, has to ensure that it, is strictly within the four corners of all the laws, which govern the Corporate Debtor, and does not contravene any of them. If that be so, then even if no claim is raised by the PF Department regarding the outstanding PF Dues, it would be a statutory obligation of the RP, while preparing and submitting the Resolution Plan, to ensure that all provident Fund obligations of the corporate debtor are duly addressed and taken care of in the Resolution Plan. It is also necessary to note that under Sec.31(1) only such Resolution Plan as approved by the committee of creditors,

which meets the requirements as referred to in sub-section 2 of sec.30, which includes Sec.30(2)(e), can be approved by the Adjudicating Authority. This is further emphasized by the language of Sec.31(2) which enjoins upon the Adjudicating Authority to reject a Resolution Plan, which does not confirm to the requirements referred to in sec.31(1).

19.1. In this context Sec.10 of the EPF Act assumes significance and needs to be considered, which for the sake of ready reference is quoted as under:

> **"10. Protection against attachment.—**
>
> (*1*) The amount standing to the credit of any member in the Fund or of any exempted employee in a provident fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any court in respect of any debt or liability incurred by the member or the exempted employee, and neither the official assignee appointed under the Presidency-towns Insolvency Act, 1909 (3 of 1909), nor any receiver appointed under the Provincial Insolvency Act, 1920 (5 of 1920), shall be entitled to, or have any claim on, any such amount.
>
> (*2*) Any amount standing to the credit of a member in the Fund or of an exempted employee in a provident fund at the time of his death and payable to his nominee under the Scheme or the rules of the provident fund shall, subject to any deduction authorised by the said Scheme or rules, vest in the nominee and shall be free from any debt or other liability incurred by the deceased or the nominee before the death of the member of the exempted employee 4[and shall also not be liable to attachment under any decree or order of any court.
>
> (*3*) The provisions of sub-section (*1*) and sub-section (*2*) shall, so far as may be, apply in relation to the family pension or any other amount payable under the Pension Scheme and also in relation to any amount payable under the Insurance Scheme] as they apply in relation to any amount payable out of the Fund."

A perusal of the language of Sec.10 of the EPF Act would demonstrate that it protects from attachment, amounts standing to the credit of an employee, of the provident fund, from any decree or order of any Court, even in respect of any debt or liability incurred by the member/employee. Not only this, sec.10, even directs that neither the Official assignee appointed under the Presidency Towns Insolvency Act, nor any received appointed under the Provincial Insolvency Act, shall be entitled to or have any claim on such provident fund amount of an employee, thereby indicating that it is to be preserved sacrosanct, by granting it immunity even in respect of insolvency proceedings, which may be initiated, even against such employee.

19.2. Sec.11 of the EPF Act is also of significance and is reproduced 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—
>
> (*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 provision of this Act or of any provision of the Scheme or the Insurance Scheme; or
>
> (*b*) from the employer in relation to an exempted 2[establishment] in respect of any contribution to the Provident Fund or any Insurance Fund (in

so far it relates to exempted employees), under the rules of the Provident Fund or any Insurance Fund, any contribution payable by him towards the Family Pension Fund under sub-section (*6*) of section 17, damages recoverable under section 14B or any charges payable by him to the appropriate Government under any provision of this Act or under any of the conditions specified under section 17 shall, where the liability thereof 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 5[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.

Explanation.—-------.

(*2*) Without prejudice to the provisions of sub-section (*1*), if any amount is due from an employer 8[whether in respect of the employee's contribution (deducted from the wages of the employee) or the employer's contribution], the amount so due shall be deemed to be the 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."

Sec. 11 of the EPF Act, in fact goes even a step further and even in a case where the employer is adjudicated insolvent, or directed to be wound up, the EPF contribution, which such employer is liable to pay, into the provident fund, where the liability has accrued before the order of adjudication and winding up is made, is deemed to be included among the debts of the employer, which are to be paid in priority, to all other debts in distribution of the property of the insolvent or the assets of the company being wound up, as the case may be and also the employer's contribution towards the EPF is deemed to be first charge on the assets of the establishment and notwithstanding anything contained

in any other law for the time being in force, is to be paid in priority to all other debts. This will have to be necessarily, read in conjunction with section 30(ii)(e) of the IB Code, which mandates, that the resolution plan does not contravene any of the provisions of the law for the time being in force.

19.3. Thus, when even, while liquidating a company, or upon it being declared as insolvent, the provident fund of any employee is to be protected, there is no reason why the same ought not to be done, while ensuring revival of the company, under the provisions of Chapter-II of the IB Code, which is why the Explanation (a) to section 18(1) of the IB Code appears to have been inserted by the legislature.

20. Another aspect to be considered, is that if the employers contribution to the Provident Fund of an employee, is considered to be an 'asset', of the corporate debtor, then even in a case where the employer/corporate debtor has deposited the same in terms of Sec.6 of the EPF Act, in the Provident Fund Account created under Sec.5(1) of the EPF Act, which is to be managed by the Board, it can be claimed to be made part of the Resolution Plan and attached for its implementation, which according to us, is an impermissible position in

law, considering that the employer, has no right of ownership over such contribution.

21. It would thus be apparent that since the employers provident fund contribution, cannot be included in the definition of ‘assets’, in view of Explanation (a) to Sec.18(1) of the IB Code, there would be no obligation upon the provident fund department to lodge a claim for the dues, in that regard with the IRP and get such claim verified so as to be included in the Resolution Plan.

21.1. Rule 12(2) of the IB Board of India (Insolvency Resolution Process for Corporate Person) Regulations, which requires a claim to be made with proof to the IRP on or before 90 days of the Insolvency commencement date, if a person fails to submit it within the time stipulated in the public notice / announcement, and Rule 13, which requires such claims to be verified by the IRP within 7 days from the last date of receipt of claims and to maintain a list of order form, will have to be construed in the context of the language of statutory provisions as contained in Chapter – II and specifically in light of the explanation (a) to Section 18 of the IB Code and in view of what has been held above.

22. What is also necessary to note, is that the adjudication, regarding the liability of the corporate debtor, to pay the EPF dues, by the order dated 04/02/2020 (Pg.264) is no longer in challenge, on account of deletion of a challenge to the same from the prayer clauses in the petition, though it is correct to say that in case the relief as claimed in prayer clause (I) was to be granted, the absence of any challenge would not be germane.

23. It is also necessary to note, that in terms of the scheme of arrangement and amalgamation, prepared under sections 230-232 of the Companies Act, 2013 by the petitioners, which has been sanctioned by the NCLT, Mumbai by the order dated 05/05/2022 (Pg.417), which is ofcourse consequent to the petitioner No.1 having acquired the original corporate debtor under the Insolvency Resolution Process, provides for the cement business of the company to be taken over by Dalmia Cement (Bharat) Limited (Petitioner No.1); the paper business to be taken over by Ascension Mercantile (Petitioner No.2) and the Solvent Extraction business being taken over by Ascension Multiventure (Petitioner No.3). The scheme, which has been sanctioned in relation to the employees, has the following provisions, in relation to the

employees of the de-merged undertakings (taken over by the petitioner No.2) :

"5. EMPLOYEES

5.1 Upon the coming into effect of this Scheme, all employees pertaining to Demerged Undertaking 1 and those employees as the Board of Demerged Company may determine, shall become employees of Resulting Company 1 **("Transferred Employees of Demerged Undertaking 1")** with effect from the Effective Date, on same terms and conditions which, as a result, shall be no less favourable than those on which they are engaged as on the Effective Date, without any interruption of service as a result of Demerger 1 and without any further act, deed or instrument on the part of Demerged Company or the Resulting Company 1. With regard to provident fund, gratuity fund, superannuation fund, leave encashment and any other special scheme or benefits created or existing for the benefit of the Transferred Employees of Demerged Undertaking 1, upon the Scheme becoming effective, shall be continued on the same terms and conditions by the Resulting Company 1 and Resulting Company 1 shall stand substituted for all purposes and intents, whatsoever, relating to the administration or operations of such schemes or funds or in relation to the obligation to make contributions to the said funds, in accordance with the provisions of Applicable Laws. It is hereby clarified that upon the Scheme becoming effective, the aforesaid benefits or schemes shall continue to be provided to the Transferred Employees of Demerged Undertaking 1 for such purpose shall be treated as having been continuous.

5.2 Resulting Company 1 agrees that the services of the Transferred Employees of Demerged Undertaking 1 prior to the transfer, shall be taken into account for the purposes of all benefits to which such employees may be eligible, including in relation to the level of remuneration and contractual and statutory benefits, incentive plans, terminal benefits, gratuity plans, provident plans and other retirement benefits and accordingly, shall be reckoned from the date of their respective appointment in the Demerged Company Resulting Company 1 undertakes to pay the same, as and when payable under Applicable Laws.

5.3 The existing gratuity fund, annuity, staff welfare scheme and any other special scheme or benefits of the Transferred Employees of Demerged Undertaking 1 shall be continued on the same terms and conditions or be transferred to the existing gratuity fund, annuity, staff welfare scheme, etc. being maintained by Resulting Company 1 or as may be created by Resulting Company 1 for such purpose. Pending such transfer, the contributions required to be made in respect of the Transferred Employees of Demerged Undertaking 1 shall continue to be made by Resulting Company 1 to the existing funds maintained by Demerged Company. It is the intent that all the rights, duties, powers and

obligations of Demerged Company in relation to such fund or funds shall become those of Resulting Company 1 without need of any fresh approval from any Appropriate Authority.

5.4 Upon the scheme becoming effective, Demerged Company will transfer / handover to Resulting company 1, copies of employment information of all such Transferred Employees of Demerged Undertaking 1 of Demerged Company, including but not limited to, personnel files (including hiring documents, existing employment contracts, and documents reflecting changes in any employee's position, compensation, or benefits), payroll records, medical documents (including documents relation to past or ongoing leaves of absence, on the job injuries or illness, or fitness for work examinations), disciplinary records, supervisory files relating to its Transferred Employees of Demerged Undertaking 1 and all forms, notifications, orders and contribution / identity cards issued by the concerned authorities relating to benefits transferred pursuant to this sub-clause.

5.5 The contributions made under Applicable Laws in connection with the Transferred Employees of Demerged Undertaking 1, to the gratuity fund / leave encashment and any other special scheme or benefits created, for the period after the Appointed Date shall be deemed to be contributions made by Resulting Company 1.

5.6 Resulting Company 1 shall continue to abide by any agreement(s)/ settlement (s) entered into in respect to the Transferred Employees of Demerged Undertaking 1."

24. Similar provision is in respect of the employees of the de-merged undertaking No.2 (taken over by the petitioner No.3), which is contained in clause 16 (Pg.489) of the Composite Scheme of Arrangement and Amalgamation. Clause 30 (Pg.503) of the Composite Scheme of Arrangement and Amalgamation also contains a similar preposition regarding, clause 30.4 of which provides that the existing provident fund, employees State Insurance Corporation, Superannuation and gratuity fund, staff welfare scheme, employees stock auction plan, incentive if any, of which the employees of the

amalgamating company are members of beneficiaries along with the accumulated contribution therein till the effective date shall with the approval of the concerned authorities be administered by the amalgamated company for the benefit of such employees on the same terms and conditions. It also provides that all benefits and schemes being provided to the transferred employees will be treated as having been continuous and uninterrupted for the purpose of the aforesaid scheme and accordingly, the provident fund, etc. of the said employees of the amalgamating company would be continued to be deposited in the transferred provident fund. It would therefore, be apparent that the service conditions and benefits receivable by the employees of the corporate debtor, have been protected in the Composite Scheme of Arrangement and Amalgamation by the respondents themselves, which would include past benefits, which are receivable by such employees. This being the position, it is not now open for the petitioners, to contend, that they are not responsible, for payment of the Employer's Contribution, to the provident fund, on account of approval of the resolution plan.

24.1. Sec.17-B of the EPF Act, in this context, being material, is reproduced as under:

> 17B. Liability in case of transfer of establishment.—
>
> Where an employer, in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be, in respect of the period up to the date of such transfer:
>
> Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.

Thus, where the transferee companies which are the petitioner Nos. 1 to 3 in the matter, have already taken up the responsibility and obligation, regarding the entitlements of the employees of the original corporate debtor, as indicated in para supra, then in terms of section 17B of the EPF Act, the liability to pay the EPF contribution, would get transferred to them, in terms of the Statute too, since the liability to do so, is jointly that of the original employer as well as that of the transferee jointly and severally, as is indicated by the language of section 17B of the EPF Act.

25. In ***Ghanshyam Mishra*** (supra) what was under consideration as is indicated by a perusal of paras-12 to 17 was a liability on account of bank guarantee against the corporate debtor, workman's wages, statutory dues and other benefits, and a claim for

recovery by the President-Group Head HR, in the case of Ghanshyam Mishra and Sons Pvt.Ltd.; a claim for entry tax in the case of Binani Cement; and a claim for VAT in the case of Monnet Ispat and Energy Ltd. The Hon'ble Apex Court, in para-61, has elucidated the object of the IB Code and has after considering the legal position, has held as under:

> "102.1. That once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan.
>
> 102.2. The 2019 Amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which the I&B Code has come into effect.
>
> 102.3. Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the adjudicating authority grants its approval under Section 31 could be continued.

26. There cannot be any doubt, that what has been held in ***Ghanashyam Mishra*** (supra) is binding on us. What however is to be considered, is whether provident fund dues of an employee, including the employers contribution, can be said to be dues payable under any law for the time being in force and payable to the Central Government,

any State Government or any Local Authority. If the employers contribution does not fall in this category then, it cannot be said that such employers contribution would amount to an ‘operational debt’, as defined in Sec.5(21) of the IB Code. In this context the use of the word ‘and’, between the expression ‘payment of dues arising under law for the time being in force’, and ‘payable to the Central Government, any State Government or any Local Authority’, assumes significance. There cannot be any doubt that payment of the employers provident contribution is on account of the statutory imposition arising under the EPF Act. It is however equally true that the same is not payable to the Central Government, any State Government or any Local Authority, but it is payable in the Fund established under sec.6 of the EPF Act, which is administered by the Board as constituted under the provisions of the EPF Act, which is an independent body. In that view of the matter, the payment of employers contribution of the EPF, cannot be construed to mean payment to the Central Government, any State Government or any Local Authority. If that be so, then such contribution, would not fall within the meaning of ‘operational’, debt’, as defined in sec.5(21) and for this reason also would not be something which could be a claim which has to be included in the Resolution Plan, non inclusion of which

would result in the liability being wiped out in terms of what has been held in ***Ghanashyam Mishra*** (supra). It is also necessary to note, that the question whether the provident fund of an employee could be one which could be included in the definition of 'assets owned by the corporate debtor' in terms of the explanation to Section 18 of the IB Code was never under consideration in ***Ghanshyam Mishra*** (supra).

27. The provident fund of an employee, is his security in life, however small it may be, which the employee is entitled to receive upon severance of his employment. A major portion of the workforce in the Country, depends upon this security and looks forward to it, as a veritable golden pot under the rainbow, entitlement to receive which, is undisputable, as it is his own money. That is the reason why the Legislature, while enacting the IB Code while considering the process of liquidation has kept it out of the purview of being attached and liquidated. As is discussed above, the explanation to Section 18 of the IB Code in Explanation (a), also considers and safeguards that position.

28. Though it is contended by Mr. Bhangde, learned Senior Counsel for the petitioners, that ***Jet Aircraft*** (Supra) was a case in which while approving the resolution plan, the question of payment of provident fund of the employees was raised before the IRP, which was

rejected and therefore according to him is distinguishable on this point and so also question II framed and considered therein, was in respect of the scope and ambit of Section 36(4)(b)(iii) of the IB Code, vis-a-vis the provident fund, gratuity and other benefits, it is also necessary to consider, that while considering Section 18(f) of the IB Code, the Tribunal has though held that the fund maintained for payment of the provident fund, gratuity and other retirement benefits to its workers, is an asset, (which according to us is not a correct position in view of the discussion above), however, it is also necessary to note, that considering the explanation to Section 18(1) of the IB Code, it has been held, that those cannot be taken into control by the IRB by treating them as assets of the corporate debtor while inviting the resolution plan. Though it is also contended by Mr. Bhangde, learned Senior Counsel for the petitioners that what was under consideration in para 76 of ***Jet Aircraft*** (Supra), was in relation to the fund maintained by the corporate debtor and that and therefore, was to be read in that context, we are, however, of the opinion that even this fund, which may be maintained by the corporate debtor, for the purpose of the provident fund, would be a fund, over which the corporate debtor would have no right of

ownership, as the fund held by the corporate debtor in trust for the employees.

29. ***Sunil Kumar Jain v. Sundaresh Bhatt,*** (supra), was a case where while considering a plea regarding entitlement of the dues of the workmen / employees towards PF, gratuity and pension, in the context of Section 36 (4)(iii) of the IB Code, as no resolution plan could be adopted and the corporate debtor, went into liquidation in terms of Chapter III of the IB Code, it has been held that these were excluded from the scope and ambit of liquidation proceedings and therefore is a case, which does not consider explanation to Section 18(1) of the IB Code.

30. ***Fanendra Farakchand Munot*** (supra), in our considered opinion does not dilate upon the subject matter in consideration in the present petition and therefore, is of no assistance, for the purpose of deciding the matter in hand.

31. No doubt, a Company, which is failing, would have the right to be revived, however, can it be said that the attempt at revival, is to be at the cost of the employees security, who have rendered services to the company, which services form the very basis for the existence of

the company, which security they have an account of their provident fund and an attempt to revive such company/industry, should wipe off the provident fund of the employee? This could never have been the intention of the legislature, while enacting the IB Code, which is why the definition of 'operational creditor', as contained Sec.5(21) is restricted to Statutory dues payable to the Central/State Governments and Local Bodies as these can sustain the loss of such dues, however an employee, cannot sustain the loss of his provident fund and any such loss, is bound to have a crushing effect upon the employee.

32. In view of the above discussion, we are of the considered opinion, that the claim of the respondents, cannot be said, to have been wiped out, on account of the resolution plan having been approved by the Committee of Creditors and consequently by the adjudicating authority and would be a claim, which is beyond the scope and ambit of Chapter II of the IB Code, and thus is a claim, which is payable by the petitioners. Since the claim is for a period earlier than the insolvency commencement date, there is no call for issuance of any directions in that regard.

33. In the result, the petition fails and is dismissed.

34. Rule is discharged. No order as to costs.

(ABHAY J. MANTRI, J.) (AVINASH G. GHAROTE, J.)

Kolhe / Khunte / Deshpande