

## Employees and Workmen Benefits under the IBC



*The Insolvency and Bankruptcy Code, 2016 (IBC) focuses on resolving financially stressed corporate debtors in a time-bound, market-led, and incentive-compliant manner thereby promoting entrepreneurship, credit availability, and balancing interests of various stakeholders. During the IBC processes – CIRP and Liquidation- employees and workmen play crucial role but face significant challenges related to their dues such as salary, gratuity, provident fund, and pension fund etc. In the present article, the author, through hypothetical scenarios, has elaborated various approaches to deal with employees' dues in the light of relevant judgements passed by the Supreme Court, NCLAT and NCLTs. Besides various suggestions for effectively dealing with dues of employees, the author has also made recommendations for amendments in the pertinent laws to incorporate jurisprudence developing around the issue for better clarity to stakeholders. **Read on to know more...***



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The Insolvency and Bankruptcy Code, 2016 (IBC) is the comprehensive legislation governing insolvency resolution in India for both corporate and individual entities. Enacted on December 01, 2016, for corporate insolvency and later covered personal guarantors to corporate debtors on December 1, 2019, the IBC replaced outdated laws and aimed to establish a coherent framework. It emphasizes the freedom to start, operate, and exit businesses. The IBC focuses on resolving financially stressed corporate debtors in a time-bound, market-led, and incentive-compliant manner thereby promoting entrepreneurship, credit availability, and balancing interests of various stakeholders. This legal reform has shifted power from debtors to creditors, enhancing fiscal and credit discipline.

As per data in Newsletter- September 2023 of the Insolvency and Bankruptcy Board of India (IBBI), out of 7,058 admitted Corporate Insolvency Resolution Process (CIRP) cases, 808 resulted in approval of resolution plans, 2,249 ended in liquidation orders, and 2,001 are ongoing, while the rest were closed via section 12A appeals or withdrawals.

As of September 2023, creditors have recovered ₹3.16 lakh crore through approved resolution plans.

Additionally, over 26,000 applications with a total default of ₹9.33 lakh crore were withdrawn before entering the resolution process.<sup>1</sup>

The IBC doesn't define the word "Employee" but defines the "Workman" as the one who draws wages not exceeding ₹10,000 and works in Non-Managerial Capacities.<sup>2</sup>

**As per the IBC, a workman is one who draws wages not exceeding ₹10,000 and works in Non-Managerial Capacities.**

Following benefits are applicable to the employees and to workman while in service or after termination subject to applicable laws and the contract.

- a) Basic Salary
- b) Dearness Allowance
- c) Allowances (Transport, Medical etc.)
- d) Leave Encashment
- e) Bonus
- f) Retrenchment Compensation
- g) Gratuity
- h) Provident Fund
- i) Pension Fund

In the insolvency process, employees and workmen face significant challenges during two distinct stages: CIRP and Liquidation. These stages involve various scenarios, which are contingent upon the specific circumstances of each case.

To elucidate, we can examine hypothetical examples that exemplify the different situations that can arise within each scenario.

#### A. CIRP Stage

**Scenario – 1:** Employees are continuing after the Insolvency Commencement Date (ICD) and supporting Interim Resolution Professional (IRP) /Resolution Professional (RP) to run the Corporate Debtor (CD) as a going concern.

All employees who are working and supporting IRP/RP to run the CD as a going concern are entitled to get their benefits and the nature of the cost is detailed below.

#### (a) Monthly Salary (Break up depends on the contract)

- i. **Dues prior to CIRP** – To be submitted to IRP/RP in the form of a claim.
- ii. **During CIRP** – It is a CIRP cost and should be paid by IRP/RP as and when funds are available subject to approval of the CoC.

If dues are not paid to employees owing to insufficient funds, the same will be treated as unpaid CIRP cost and will be paid on priority (in cases of approved Resolution Plan or in Liquidation) subject to approval of the Committee of Creditors (CoC).

#### (b) Gratuity

Irrespective of the status of employees' continuity in the organization, all the employees who are eligible to receive gratuity as per the Gratuity Act 1972 are entitled to receive the gratuity as per the timelines provided in the Gratuity Act 1972.

This scenario comes into the picture when an employee was working during CIRP and was terminated due to death/ Superannuation/ Retirement/Resignation/ or disablement due to accident or disease subject to the continuous service.

In the matter of *Savan Godiwala, the Liquidator of Lanco Infratech Limited vs. Apalla Siva Kumar*, the Supreme Court on February 07, 2023, has upheld the NCLT judgement that "even if no fund is kept, the liquidator must make adequate provisions for paying gratuities to the applicants in accordance with their eligibility. The Liquidator cannot avoid the obligation to pay gratuities to the employees on the grounds that the CD did not maintain separate funds". Thus, it is not an asset of the CD and therefore IRP/RP has to release the dues as and when it is due and payable irrespective of the fact that whether CD has been maintaining a separate Fund or not.

<sup>1</sup>. <https://ibbi.gov.in/uploads/whatsnew/b4ce3516920836e9ff9b1e816137bf97.pdf>

<sup>2</sup>. [https://ddashboard.legislative.gov.in/sites/default/files/A1947-14\\_0.pdf](https://ddashboard.legislative.gov.in/sites/default/files/A1947-14_0.pdf)  
Please refer to Section 2(s) of the Act for the detailed definition

If gratuity is not paid due to insufficient funds with CD or Insurer, then the same will be paid on priority (in cases of approved Resolution Plan or Liquidation). The NCLAT in the matter of *Sikander Singh Jamuwal vs. Vinay Talwar & Ors*, ordered the Successful Resolution Applicant to release full provident fund dues in terms of the provisions of the Employees Provident Funds and Miscellaneous Provident Fund Act, 1952 immediately by releasing the balance amount. The same was upheld by the Supreme Court on September 23, 2022, while dismissing the appeal against this order of the NCLAT. Subsequently, the Resolution Plan was modified to incorporate the same.

**“The Supreme Court, in the case of *IDBI Bank limited vs. Lanco Infratech Ltd.* (2023) upheld the judgement of NCLT Hyderabad that the Liquidator to pay gratuity with interest for the delayed payment.”**

The Supreme Court in its verdict dated February 07, 2023, upheld the judgement of NCLT Hyderabad in the case of *IDBI Bank limited vs. Lanco Infratech Ltd.* wherein the tribunal has ordered the Liquidator to pay gratuity with interest for the delayed payment. Thus, the interest as per the Gratuity Act 1972 is required to be paid on delayed payments.

### (c) Provident & Pension Fund

- i. **Dues prior CIRP** – To be submitted to IRP/RP in the form of a claim.
- ii. **During CIRP** – CD has to deposit the PF contribution mandatorily.

If the contributions were not deposited due to any reason, then the total dues including interest and damages as per the Employees' Provident Fund Organization (EPFO) Act shall be paid in full and on priority (in cases of approved Resolution Plan or in Liquidation). Further, in the matter of *Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd. & Ors*, National Company law Appellate Tribunal (NCLAT) has ruled, “However, as no provisions of the ‘Employees Provident Funds and Miscellaneous Provision Act, 1952’ is in conflict with any of the provisions of the IBC, 2016 and, on the other hand, in terms of Section 36 (4) (iii), the ‘Provident Fund’ and

the ‘Gratuity Fund’ are not the assets of the ‘Corporate Debtor’, there being specific provisions, the application of Section 238 of the ‘IBC’ does not arise”. The same was upheld by the Supreme Court on May 22, 2020.

In instances where the NCLAT aligns with and is subsequently upheld by the Supreme Court, emphasizing the absence of conflict between the IBC and the EPFO Act, a crucial resolution surface. The prescribed approach entails the prioritized settlement of all dues, meticulously calculated in accordance with the EPFO Act, excluding interest and damages. This prioritization ensures the exclusion of said amounts from the Liquidation Estate.

However, a notable challenge emerges in the form of conflicting judicial opinions on the matter of interest and damages. To address and alleviate the prevailing uncertainties, a proposed solution takes the form of a legislative amendment to the pertinent laws. This strategic amendment aims to provide clarity and coherence, ultimately streamlining the resolution process and harmonizing the treatment of interest and damages in the context of EPFO-related obligations within the framework of insolvency proceedings.

**Scenario – 2:** Employees are continuing after the ICD and have not supported IRP/RP to run the CD as a going concern due to various reasons.

### (a) Monthly Salary (Break up depends on the contract)

- i. **Dues prior CIRP** – To be submitted to IRP/RP in the form of a claim.
- ii. **During CIRP** – Since employees have not supported IRP/RP to run the CD as a going concern these dues cannot be treated as CIRP cost and will not be considered in Resolution Plan. Claims of employees before CIRP shall be considered.<sup>3</sup>
- iii. Wages during CIRP can be treated under Section 53 (1) (b) & 53(1) (c) in case of Liquidation<sup>4</sup> subject to conditions.

<sup>3</sup> *Sunil Kumar Jain & Ors. vs. Sundaresh Bhatt & Ors.* – (2022) SCC OnLine SC 467

<sup>4</sup> [https://nclt.gov.in/gen\\_pdf.php?filepath=/Efile\\_Document/nclt\\_doc/casedoc/3607130003472019/04/Order-Challenge/04\\_order-Challenge\\_004\\_167202861418035411863a921c605cd4.pdf](https://nclt.gov.in/gen_pdf.php?filepath=/Efile_Document/nclt_doc/casedoc/3607130003472019/04/Order-Challenge/04_order-Challenge_004_167202861418035411863a921c605cd4.pdf)



**“If employees have not supported IRP/RP to run the CD as a going concern monthly salary cannot be treated as CIRP cost and will not be considered in the Resolution Plan.”**

- (b) Gratuity, Provident & Pension Fund– Same as Scenario 1.

**Scenario – 3:** Employees resigned before the ICD.

- (a) **Monthly Salary** (Break up depends on the contract)
- Dues** – To be submitted to IRP/RP in the form of a claim.
- (b) **Gratuity, Provident & Pension Fund**
- All of the above dues are to be submitted as part of the claim to IRP/RP.
  - These funds do not belong to the CD. Hence, IRP/RP should pay at the earliest.
  - If these funds were not paid due to insufficient funds, the same shall be paid (Including interest/damages as applicable) in full by the Successful Resolution Applicant or Liquidator as the case may be.

## B. Liquidation Stage

As per Section 33(7) – Liquidation Order is deemed to be ‘Notice of Discharge’ to officials and employees/workmen of the CD.

**Scenario – 1:** Employees were continuing after the Liquidation Commencement Date (LCD) and supported the Liquidator to run the CD’s business.

- (a) **Monthly Salary** (Break up depends on the contract)
- Dues prior CIRP** – Can be submitted to the Liquidator in the form of a claim<sup>5</sup>.
  - During CIRP** – It is a CIRP cost and should be paid by IRP/RP in full as and when funds are available.
  - During Liquidation** – Dues after discharge order by Liquidator will be considered. It is a liquidation cost and will be paid in full depending on the availability of funds with the CD.

If any amounts due during CIRP or Liquidation and are not paid by IRP/RP/Liquidator in full, the same shall be



treated as CIRP/Liquidation cost and will be paid in full and as a priority during the distribution of assets by the Liquidator.

## (b) Gratuity, Provident and Pension Funds

Due to their exclusion from the liquidation estate under Section 36(4)(b)(iii), the workers and employees are entitled to the full amount of the provident fund and gratuity<sup>6</sup>.

Hence, CD has to release the dues accordingly.

**Scenario – 2:** Employees were not continuing after the LCD due to the deemed notice of discharge.

This can be dealt with as explained in CIRP stage.

**“Thus, from the above analysis we can conclude that in any case scenario -- Gratuity, Provident and Pension Fund are to be paid in full be it in the CIRP or Liquidation stage.”**

Thus, from the above analysis we can conclude that in any case scenario – Gratuity, Provident and Pension Fund (Including Interest<sup>7</sup> /Damages etc. as applicable) are to be paid in full be it in the CIRP or Liquidation stage (Irrespective of the fact that a separate Fund was maintained or not by the CD).

<sup>5</sup> Liquidator has to consider the claim submitted by employees during CIRP, if any. Employees don't need to submit the claim again unless there is a change in the claim amount.

<sup>6</sup> Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia RP of Jet Airways (India) Ltd. & Ors. – NCLAT New Delhi

<sup>7</sup> [https://nclt.gov.in/gen\\_pdf.php?filepath=/Efile\\_Document/ncltdoc/casedoc/3607130000012017/04/Order-Challenge/04\\_order-Challenge\\_004\\_1689155516160091155064ae77bc848d4.pdf](https://nclt.gov.in/gen_pdf.php?filepath=/Efile_Document/ncltdoc/casedoc/3607130000012017/04/Order-Challenge/04_order-Challenge_004_1689155516160091155064ae77bc848d4.pdf)

**CASE LAWS (Related to Employee Benefits):**

Sl No	Name	Date of Judgement	Forum	Summary
1	<i>Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia &amp; Ors.</i>	October 21, 2022	NCLAT, New Delhi	i. Till ICD, Employees and Workmen are entitled to receive payment of the entire provident fund and gratuity. ii. In accordance with the provisions of Section 53(1)(b) and at least the minimum liquidation value specified under Section 32(2)(b) read with Section 53(1), the Workmen are entitled to receive their dues from the CD for a period of 24 months.
		January 30, 2023	Supreme Court	i. The Supreme Court upheld the order of NCLAT dated December 02, 2022, and dismissed the appeal against it.
2	<i>State Bank of India Vs. Moser Baer Karamchari Union &amp; Anr</i>	August 19, 2019	NCLAT, New Delhi 3 Member Bench	NCLAT did not find a reason to interfere with the contested order dated March 19, 2019, as NCLT has determined that the funds—the provident fund, the pension fund, and the gratuity fund—do not fall under the definition of “liquidation estate” for asset distribution under Section 53.
		February 07, 2023	Supreme Court	The Hon’ble Supreme Court dismissed the appeal as no cogent reason was found by the court to entertain the appeal.
3	<i>Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd. &amp; Ors</i>	December 19, 2019	NCLAT, New Delhi 3 Member Bench	As it did not include as an asset of the “Corporate Debtor,” NCLAT orders the “Successful Resolution Applicant” to release the full provident fund & interest thereof in accordance with the provisions of the EPF Act, 1952 immediately.
		May 22, 2020	Supreme Court	Hon’ble Supreme Court dismissed the appeal against NCLAT order as no merit was found in the appeal
4	<i>Mr Savan Godiwala, the liquidator of Lanco Infratech Limited vs. Apalla Siva Kumar</i>	August 20, 2019	NCLT Hyderabad	Even if no fund is kept, the liquidator must make adequate provisions for paying gratuities to the applicants in accordance with their eligibility. The liquidator cannot avoid the obligation to pay gratuities to the employees on the grounds that the “Corporate Debtor” did not maintain separate funds
		February 14, 2020	NCLAT New Delhi	Due to the liquidator’s lack of authority to handle the corporate debtor’s assets, which are not included in the liquidation estate, the liquidator cannot be ordered to provide gratuities to the employees.
		February 07, 2023	Supreme Court	Hon’ble Supreme Court quashed and set aside the order passed by the learned NCLAT and the order passed by the National Company Law Tribunal was restored” - Civil Appeal No. 2520 of 2020.
5	<i>Sikander Singh Jamuwal vs. Vinay Talwar &amp; Ors</i>	March 11, 2022	NCLAT New Delhi	NCLAT has ordered the Successful Resolution Applicant to release full provident fund dues in terms of the provisions of the Employees Provident Funds and Miscellaneous Provident Fund Act, 1952 immediately by releasing the balance amount.  The impugned order dated 02nd April, 2019 approving the ‘Resolution Plan’ by the NCLT stands modified to the extent above
		September 23, 2022	Supreme Court	Hon’ble Supreme Court did not find merit in the appeal after hearing from the appellant’s learned counsel. As a result, the Civil Appeal is dismissed. Nonetheless, liberty is given to the appellant that he may seek that the difference in the provident fund be deposited at a later date in front of the appropriate forum.

6	<i>Nitin Gupta Vs. Applied Electro Magnetics Pvt. Ltd</i>	March 17, 2022	NCLAT New Delhi	<p>NCLAT is of the view that with a small adjustment to the sums suggested to be paid to the Workman and Employees in respect to their dues, including provident fund, the approved resolution plan conforms with the rules of the IBC. The amounts are:</p> <ul style="list-style-type: none"> <li>The additional payment of ₹0.8834 crores to be distributed among the workers according to their proportionate shares</li> <li>The provident fund payment should be paid in compliance with the NCLAT's judgment in the matter of Sikander Singh Jamuwal Vs. Vinay Talwar &amp; Ors</li> </ul>
7	<i>Sunil Kumar Jain vs Sundaresh Bhatt,</i>	April 19, 2022	Supreme Court	<p>Section 36(4) of the IB code states that when provident funds, gratuity funds, and pension funds are kept separate from the assets of the liquidation estate, the share of labor dues must be kept out of the liquidation process. The relevant workmen and employees must be paid the appropriate amount from any available provident funds, gratuity funds, and pension funds; the liquidator will not be entitled to any of these funds.</p> <p>Also NCLAT New Delhi clarified on the words “If any, available” in Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia RP of Jet Airways (India) Ltd. &amp; Or as – The aforementioned language cannot be interpreted to imply that workers and employees are not eligible for pension, gratuity, or provident funds if the funds are not available with the liquidator.”</p>
8	<i>C.G. Vijayalakshmi Vs. Shri Kumar Rajan, RP Hindustan Newsprint Ltd</i>	February 14, 2023	NCLAT Chennai	<p>The court said that - As per the principles outlined in the Jet Aircraft Maintenance Engineers Welfare Association (Supra), the successful resolution applicant will be directed to pay any unpaid provident fund and gratuity fund as well as any outstanding debts to workers or employees until the date of CIRP, after deducting the amount already paid toward provident fund in the resolution plan.</p>

The following instances touch upon various aspects of the IBC in India, specifically highlighting the importance of employees' dues in the resolution process.

- i. **Precision Fasteners Ltd vs. EPFO:** The Adjudicating Authority (AA) recognizes that creditors have a property right over the assets of the CD. However, it also noted that workmen's dues are closely connected with the right to life and should be prioritized over the rights of creditors. This observation underscores the significance of employees' dues and their priority in the insolvency resolution process.
- ii. **IIM-A Report:** It indicates that the average employee costs increased significantly in the three years following the resolution of firms under the IBC. This suggests a higher employment intensity in resolved firms during the post-resolution phase, along with an overall increase in employment across all companies. This data reflects the positive

impact of IBC resolutions on employees. (reference required)

- iii. **EPFO Annual Report 2023-24:** It highlights that a substantial amount of ₹1,773.61 crores in 2546 cases falls under the “Not Immediate Realizable (NIR) Category” due to establishments being in liquidation<sup>8</sup>. (reference required)
- iv. **ESI Dues:** A sum of ₹284 crores and ₹156 crores was categorized under immediate not recoverable, due to establishments under Liquidation and cases in respect of Factories/Estts. Registered with BIFR/NCLT but rehabilitation scheme yet to be sanctioned<sup>9</sup>.

It is essential to emphasize that, as per established jurisprudence, all outstanding payments owed to the

<sup>8</sup> [https://www.epfindia.gov.in/site\\_docs/Annual\\_Report/Annual\\_Report\\_2022-23.pdf](https://www.epfindia.gov.in/site_docs/Annual_Report/Annual_Report_2022-23.pdf)

<sup>9</sup> [https://labour.gov.in/sites/default/files/ar\\_2022\\_23\\_english.pdf](https://labour.gov.in/sites/default/files/ar_2022_23_english.pdf)

three categories - Gratuity, Provident, and Pension Fund - must be promptly disbursed by the IRP/RP or Liquidator. Regrettably, due to a lack of clarity among the stakeholders, the owed amounts have yet to reach the intended beneficiaries.

**“IBBI may consider revising relevant regulations to address the evolving jurisprudence and eliminate any confusion among practitioners by providing necessary clarifications and amendments.”**

The new labour codes when implemented are expected to bring much-needed clarity in the distinction between employees and workmen, reducing confusion in the labour landscape. Furthermore, it is essential to note that these labour codes will also play a significant role in the context of the IBC. They will provide a structured framework for addressing labour-related matters during insolvency proceedings, ensuring that the interests of employees and workmen are safeguarded while also facilitating the resolution of financial distress for businesses. This interplay between the labour codes and the IBC signifies a balanced approach that aims to protect the rights of both labour and capital, contributing to a more stable and equitable business environment in India.

## Conclusion

- a) Gratuity, Provident and Pension Fund including interest and damages as applicable to be paid by the CD irrespective of the fact that a separate fund was maintained or not. For these funds, relevant authorities can submit a claim form as “Other Creditor” and can revise based on the outcome of subsequent enquiry proceedings as only recovery proceedings are prohibited under the moratorium.
- b) Information about the application for CIRP can be shared with Provident Fund, Gratuity Fund and Pension Fund authorities to capture the dues/status of the fund(s) in the admission order. Once the claims are verified by IRP/RP, the shortfall, if any shall be contributed by CoC as soon as it is constituted.
- c) IBBI may consider revising relevant regulations to address the evolving jurisprudence and eliminate any confusion among practitioners by providing necessary clarifications and amendments.

