

IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 2



ITEM No.301

IA/184(AHM)2021 in CP(IB) 537 of 2018

Proceedings under Section Rule 11 of NCLT, 2016 r.w 36 & 53 IBC
With 326 of Co. Act, 2013

IN THE MATTER OF:

Regional Director, ESIC

.....Applicant

V/s

Manish Kumar Bhagat Liquidator of Gupta Dyeing
& Printing Mills Pvt Ltd

.....Respondent

Order delivered on 28/11/2023

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)

Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.

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DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

CHITRA HANKARE
MEMBER (JUDICIAL)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
(COURT NO.II)**

IA No. 184 / NCLT / AHM / 2022

IN

CP(IB) No. 537 / NCLT / AHM / 2018

[Application under Rule 11 of NCLT Rules, 2016 alongwith Sections 36 & 53 of the IB Code, 2016 & Section 326 of the Companies Act, 2013.]

IN THE MATTER BETWEEN

Regional Director, ESI

... Applicant

Vs.

Mr. Manish Kumar Bhagat
Liquidator of M/s. Gupta Dyeing &
Printing Mills Pvt. Ltd.

...Respondent

Order pronounced on: 28.11.2023

Coram:

**MRS. CHITRA HANKARE
HON'BLE MEMBER (JUDICIAL)**

**DR. VELAMUR G. VENKATA CHALAPATHY
HON'BLE MEMBER (TECHNICAL)**



MEMO OF PARTIES

Regional Director

Employees State Insurance Corporation
Central Government Establishment
Panchdip Bhavan, Ashram Road,
Ahmedabad

... Applicant

Versus

Mr. Manish Kumar Bhagat
Liquidator of M/s. Gupta Dyeing &
Printing Mills Pvt. Ltd.
103-104m Panchdeep Complex
Mithakhali Six Road, Navrangpura
Ahmedabad-380009

... Respondent

Appearance:

For the Applicant: Mr. Sachin Vasavada, Adv.

For the Liquidator: Mr. Vishal Dave, Adv. a.w Mr. Nipun Singhvi

JUGEMENT

1. The application has been filed by the Regional Director, ESIC, Ahmedabad, Gujarat under Rule 11 of NCLT rules,



2016 against the Liquidator of M/s Gupta Dyeing & Printing Mills Pvt Ltd, Navrangpura, Ahmedabad for settling the claim due to the ESIC Fund. The applicant has prayed to pass orders restraining the liquidator from including the ESI contribution in the liquidation estate and to give priority of dues of ESI corporation and give pari passu charge with secured creditors on assets for the dues payable amounting to Rs.1,21,49,393/-.

2. The Corporate Debtor was brought under CIRP based on an application filed under Section 9 of IBC on 06.02.2019 and was taken to liquidation on 19.12.2019. The Liquidator has also filed an application for dissolution of the company on 21.06.2022 which is pending before this Tribunal.
3. Applicant stated that the Corporate Debtor presently under liquidation was registered as Principal Employer under Section 40 of the ESI Act. The Corporate Debtor was allotted the Code number and also got registered all the workers with the Applicant Corporation so that they would get the numerous benefits viz. sickness benefits, accidental benefits, dependent benefits, benefit of Atal Bima yojna, maternity benefits etc. under the benevolent scheme of ESI Act. As per the scheme of ESI Act, the Employer – Corporate Debtor has to act as a trustee as the Corporate Debtor had to deduct the amount of ESI Contribution upon payment made towards labour charges and the said ESI Contribution to be deposited with the Applicant Corporation as per Section 39 of ESI Act. Since the Corporate Debtor failed to



deposit the ESI Contribution into the Applicant Corporation, the Applicant had to initiate appropriate proceedings including Recovery proceedings under the ESI Act.

4. It is submitted by applicant that the authorized officer found that from April 2011 to March 2014, the Corporate Debtor did not deposit the ESI Contribution to the applicant corporation to the tune of Rs.61,23,945/-. So, the Applicant initiated the proceedings u/s. 45A of ESI Act and passed the order and also issued recovery certificate, dated 19.07.2016, against the Corporate Debtor. It is submitted that as per Section 39(5) of ESI Act, the Applicant Corporation also levied statutory interest over unpaid amount of ESI Contribution and is entitled to recover total amount to the tune of Rs.34,34,217/- till the default upto 14.07.2016.
5. Applicant states that the representative of the Applicant appeared before the Learned Liquidator and requested to release the amount towards dues of unpaid amount of ESI Contribution as the ESI Contribution is nothing but the workers dues as this amount could have been used for the numerous benefits in favour of the workers.
6. Applicant states that the Hon'ble Supreme Court of India in its decision in Bharat Heavy Electricals Limited Vs. ESIC, reported in 2008(3) SCC 247 in para 20 held that "*We, with respect to the learned Judges, fail to notice any significant difference in the purport and object of both the provisions. The purport and object of both the statutes, for all intent and*



purport, in our opinion, is the same.....”. Therefore, for all practical purpose the ESI Act and EPF Act are equal benevolent legislation for the interest of workers and therefore whatever interpretation in provisions of EPF Act would be applicable *mutatis mutandis* to the provisions of ESI Act. Applicant state that recently the Hon’ble NCLT and NCLAT in the matter of State Bank of India Vs. Moser Bear workers’ Union, in Company Appeal (AT) (Insolvency) No. 396 of 2019 arising from (IB) 378 (PB)/2017, interpreted the provisions of EPF Act vis-a-vis provisions of IBC and therefore prayed the Tribunal to follow the identical interpretation and same law as interpreted in favour of Provident Fund Department under EPF Act. Applicant states that the Hon’ble NCLAT vide order, dated 19.12.2019, in Appeal filed by EPF Department in Company Appeal (AT) Insolvency 1001 of 2019 held in favour the EPF Department.

7. Applicant further states that as per Section 94 of ESI Act, the applicant corporation has got priority over all the dues. *“94. Contributions, etc., due to Corporation to have priority over other debts. There shall 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) 1[or under any law relating to insolvency in force 2[in the territories which, immediately before the 1st November, 1956, were comprised in a Part B State]], 3[or under section 530 of the Companies*



Act, 1956 (1 of 1956)), in the distribution of the property of the insolvent or in the distribution of the assets of a company being wound up, to be paid in priority to all other debts, the amount due in respect of any contribution or any other amount payable under this Act the liability wherefor accrued before the date of the order of adjudication of the insolvent or the date of the winding up, as the case may be.”

8. Applicant also states that the Hon’ble Supreme Court in the matter between Regional Provident Fund Vs. OL of Esskay limited in liquidation, reported in (2011) 10 SCC 727 interpreted the Section 11 of EPF Act and gave the priority over all other debts to be disbursed under Sections 529 and 530 of Companies Act 1956.
9. The applicant has stated that in view of the settled legal proposition by the Hon’ble Apex Court as well as Hon’ble NCLAT with regard to the priority of the dues of the EPF Act and not to include the dues of EPF Contribution into Liquidation Estate/Assets as per Section 36 of IBC, prayed to give identical treatment to the ESI Contribution as the contribution was held by the corporate debtor as trustee as the corporate debtor ought to have deposited with the ESI Corporation for the various benefits of the workers/employees of the corporate debtor.
10. The respondent in reply has submitted that it is admitted fact (admitted by applicant) that applicant corporation is a statutory corporation hence, the dues of applicant corporation falls under the category of statutory dues and



applicant is entitled to get their dues as per priority mentioned under Section 53 of the Code not as per Section 39(5) of ESI Act because as per Section 238 of the Code it is obvious that the Code will override anything inconsistent contained in any other enactment, including the ESI Act. The liquidator further submitted that Dena Bank vs. Bhikhabhai Prabhudas Parekh and Co. & Ors. (2000) 5 SCC 694 and its progeny, making it clear that Statutory dues, being in the nature of Crown debts, do not take precedence even over secured creditors, who are private persons.

11. Respondent submitted that Hon'ble NCLAT in Pr. Director General of Income Tax (Admn. & TPS) and Ors. v. Synergies Dooray Automative Ltd. and Ors. (Company Appeal (AT) (Insolvency) Nos. 205 of 2017, 309, 559, 671 and 759 of 2018) held that held that *"As the 'Income Tax', 'Value Added Tax' and other statutory dues arising out of the existing law, arises when the Company is operational, we hold such statutory dues has direct nexus with operation of the Company. For the said reason also, we hold that all statutory dues including 'Income Tax', 'Value Added Tax' etc. come within the meaning of 'Operational Debt'.* Therefore, the dues of applicant are statutory dues and falls under the category of operational debt and by virtue of Section 238 of the IB Code, ESIC is entitled to receive their dues as per Section 53 of the IB Code and not as per Section 39(5) of ESI Act.
12. Respondent further submitted that Hon'ble NCLAT in case of State Bank of India v. Moser Baer Karamchari Union in



CA(AT)(Ins) no. 396 of 2019 held that *“while applying Section 53 of the ‘I&B Code’, Section 326 of the Companies Act, 2013 is relevant for the limited purpose of understanding ‘workmen’s dues’ which can be more than provident fund, pension fund and the gratuity fund kept aside and protected under Section 36(4)(iii). On the other hand, the workmen’s dues as mentioned in Section 326(1)(a) is not confined to a period like twenty-four months preceding the liquidation commencement date and, therefore, the Appellant for the purpose of determining the workmen’s dues as mentioned in Section 53(1)(b), cannot derive any advantage of Explanation (iv) of Section 326 of the Companies Act, 2013. This apart, as the provisions of the ‘I&B Code’ have overriding effect in case of consistency in any other law for the time being enforced we hold that Section 53(1)(b) read with Section 36(4) will have overriding effect on Section 326(1)(a), including the Explanation (iv) mentioned below Section 326 of the Companies Act, 2013. Respondent submitted that therefore Section 53 of the Code has overriding effect on Section 326 of the Companies Act, 2013. Hence, the applicant is entitled for getting their dues as per Section 53 of the Code not as per Section 326 of the Companies Act, 2013.*

13. Respondent cited the order of Hon’ble NCLAT in Savan Godiwala Vs Mr. Apalla Siva Kumar (Company Appeal (AT) (Insolvency) No. 1229 of 2019 dated 11.02.2020 in which the Tribunal held that



“In a case, where no fund is created by a company, in violation of the Statutory provision of the Section 4 of the Payment of Gratuity Act, 1972, then in that situation also, the Liquidator cannot be directed to make the payment of gratuity to the employees because the Liquidator has no domain to deal with the properties of the Corporate Debtor, which are not part of the liquidation estate.”

14. Respondent states Section 36(4) says not to include all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund. It talks about only three kind of fund i.e, provident fund, pension fund and gratuity fund it does not include any Insurance Corporation fund and applicant i.e, Employees State Insurance Corporation as mentioned in para 1 of application provides sickness benefits, Bima Yojna, accidental benefits etc. therefore, applicant did not cover under Section 36(4) of the Code. Statutory dues falls under operational debt and should be distributed as per waterfall mechanism provided under Section 53 of the Code.
15. The respondent has submitted that it is wrongful submission made by the applicant and workmen dues are not defined under the Code but as mentioned under Section 53(1) shall adopt the definition from Section 326 of Companies Act, 2013. Therefore, as per Section 326 of the Companies Act workmen dues are dues which are sums dues from the company to its workmen not dues from the company to any statutory body. Hence, applicant dues are



not considered as workmen dues because applicant is not a workman, it is a statutory body. Therefore the dues of the applicant are statutory dues and fall under the category of operational debt not as workmen dues.

16. Respondent clarified that Hon'ble NCLAT in State Bank of India v Moser Baer Karamchari Union observed that the provident fund, the pension fund and the gratuity fund do not come within the meaning of 'liquidation estate' for the purpose of distribution of assets under Section 53. Firstly, it does not talk about Insurance Corporation fund and secondly, it talks about non-inclusion of Provident Fund, the Pension Fund and the Gratuity Fund in liquidation estate as per Section 36(4) of the Code.
17. Respondent submitted that applicant contention that as per Section 94 of the ESI Act the applicant corporation has got priority over all the dues is illegal because Section 238 of the Code provides that IB Code is having overriding effect on any other law for the time being in force. Accordingly, applicant is entitled to receive their dues as per priority provided under Section 53 of the Code to the operational creditor not as per ESI Act. Respondent further submits that applicant wrongfully submitted that the Rule of Ejusdem Generis and Noscitur A Sociis would be applicable while interpreting Section 36(4) of the Code and ESI contribution take colour from provident fund, the pension fund and the gratuity fund. In Section 36(4) of IBC 2016, legislature provides specific words with clear meaning



therefore Rule of Literal interpretation would be applicable and ESI contribution not in any case falls under Section 36(4) of the Code.

18. The applicant in his rejoinder has further stated that the Legislature has also introduced new Section 47 in Social Security Code 2020 in line with the ESI Act 1948 whereby the dues of ESIC has been given priority over all the dues and therefore the dues of ESIC should and ought not to have been considered in liquidation estate.
19. Based on the arguments and documents made available, the tribunal is of the view there has been a default in the payment by the Corporate Debtor before the period of Insolvency on which a claim has been made with interest after due process as per the Act by the ESIC and the liquidator has accepted the claim and it is a liability and responsibility of the Corporate Debtor to have made the contribution for its workers which has not been made.
20. The liquidator had considered the claim of the applicant in terms of provisions of IBC 2016 and also included the applicant as an Operational (Unsecured) Creditor. Applicant also attended various COC meetings during the CIRP. The claim was settled in terms of the IBC provisions treating the applicant as an operational unsecured creditor and proportionately allotted the amount to be disbursed. Therefore, the Appellant for the purpose of determining the workmen's dues as mentioned in Section 53(1)(b) cannot



derive any advantage of explanation (iv) of Section 326 of the Companies Act 2013.

21. The consequences of non-payment of employees contribution from wages deducted in terms of Section 40(4) of the ESI Act, 1948 and when not paid would be the responsibility of the principal employer which amounts to "breach of trust" and is punishable under IPC 406, 409 and also an offence u/s 85 of ESI Act. The liquidator has admitted the claims as per provision of the IBC 2016. The applicant has not proceeded in any manner against the Corporate Debtor, individually for which a provision is available in the ESI Act.
22. Role of Liquidator and powers are defined in Section 35 of the IBC, Liquidation Estate in Section 36 and determination of value of claims in Section 41 of IBC. Section 36(4)(iii) of the IBC does not define the ESIC dues as workmen dues except for PF, Pension Fund and the Gratuity Fund. Secured Creditor is defined in Section 52 of liquidation proceedings in which the ESIC cannot make a claim or status to be included.
23. Insurance is a coverage on the premium paid whether run by private or government institution and offers a service when there is an event which is triggered and cannot be equated with other benefits which are protected under IBC. This applies for both state run and private institution, but there are imbided provisions in the State Insurance which gives it a statutory status for compliance and is on par with



the other authorities who are treated as operational creditors. There is no provision in the statute of ESIC for any charge or special status other than those provided in Section 45A of the ESIC whereby the applicant could have proceeded individually against the defaulter.

24. While treating the claim filed by the applicant the liquidator has arrived at the admissible amount and priority as per the provisions of IBC, 2016.
25. Hence the Tribunal is passing the following order:

ORDERS

The IA 184 of 2021 in CP(IB) 537 of 2018 is dismissed.

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DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

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CHITRA HANKARE
MEMBER (JUDICIAL)