THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-I

I.A. 622 OF 2023

Under Section 60(5) of Insolvency & Bankruptcy Code, 2016

Employee State Insurance Corporation (ESIC)

…Applicant

Vs.

Liquidator of Facor Steels Limited

In the matter of

C.P.(IB) No. 18/MB/2017

Facor Steels Limited

…Corporate Applicant

Order delivered on: 16.01.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances

For the Applicant	:	Mr. Avinash R. Khanolkar a/w Ms. Surekha Yadav, Advocate
For the Respondent	:	Ms. Shaivi Bhamaria, Advocate

ORDER

Per: V.G. Bisht, Member (Judicial)

1. This application IA 622/2023 is filed by the Employees' State Insurance Corporation (“Applicant”) in the Liquidator proceedings of M/s Facor Steels Limited (“Corporate Debtor”) seeking condonation of delay in filing of claim before Liquidator and the directions to the Liquidator to admit claim of the applicant which has been filed beyond the last the date notified for the submission of claim. The Applicant is seeking condonation of delay in filing the present application as well. The Applicant states that it is preferring the present Application u/s 60(5) of the IBC, 2016 against the rejection of its proof of claim by the Respondent - Liquidator.

2. It is stated that the Applicant body i.e. Employees' State Insurance is a self-financing social security and health insurance scheme for Indian workers and employees engaged by establishments which are covered under the Employees' State Insurance Act, 1948 (hereinafter referred to as "the ESI Act, 1948"). The fund is managed by the Applicant i.e. the Employees State Insurance Corporation under the provisions of the ESI Act, 1948. The Applicant is a statutory body under the Ministry of Labour and Employment, Government of India. The Respondent is the Liquidator of Facor Steels Ltd. and has been appointed by virtue of the Order passed by this Hon'ble Tribunal under the provisions of Insolvency & Bankruptcy Code, 2016 (herein after referred to as "the Code").

3. By an Order dated 26th June, 2018 passed by this Tribunal, the Corporate Debtor was ordered be liquidated. Pursuant to the Order passed by this Tribunal, the present Respondent issued a Public

Notice dated 6th July, 2018 thereby inviting the proof of claims of the stakeholders against Facor Steels Ltd. The last date for submission of such claims by the stakeholders as per the aforesaid Public Notice was 3rd August, 2018.

4. Before adverting to the facts of the present case, the Applicant stated that it operated in the following manner:
   a) ESI Scheme is a "self-financing" health insurance scheme.
   b) Contributions are raised from the insured employees and their employers as a fixed percentage of wages.
   c) The contributions paid by the employees and the employers are deposited in a common pool known as the ESI Fund, which is utilized for meeting the administrative expenses, cash benefits and medical benefits to the insured persons (IP) and their dependents such as running hospitals etc.
   d) It also envisages an integrated need based social insurance scheme that would protect the interest of workers and employees in contingencies such as sickness, maternity, temporary or permanent physical disablement resulting in loss of wages or earning capacity and death due to employment injury. The ESI Act, 1948 also guarantees reasonably good medical care to workers and their immediate dependents.

5. The Applicant in its normal course of functioning had issued various notices recovery certificates under the ESI Act to Facor Steels Ltd. since it had failed to discharge its liabilities under the ESI Act. The Applicant states that multiple opportunities were granted to the Respondent herein for personal hearings, some of which were attended by the Authorised Representative of the Respondent.

6. The Applicant states that it was not aware about the appointment of the Respondent as the Liquidator of Facor Steels Ltd. by this Tribunal and that this Tribunal had directed Facor Steels Ltd. to be liquidated.

7. Thereafter, on 16th September, 2021, the legal department of the Applicant whilst going through orders uploaded on the website www.ibbi.gov.in realized that Facor Steels Ltd. was ordered to be liquidated. The legal department of the Applicant is tasked with ascertaining whether a defaulting Employer such as Facor Steels Ltd. is under the CIRP / Liquidation process under the IBC, 2016. Immediately thereafter, once it was realized that Facor Steels Ltd. was under liquidation, the Assistant Director of the Applicant prepared the claim of the Applicant.

8. The Applicant has received a letter dated 10th December, 2021 from the Respondent rejecting the Applicant's claim being time barred.

9. The Applicant states that it is a statutory body under the Ministry of Labour and Employment, Government of India established under the provisions of section 3 and 4 of the ESI Act, 1948 and as such its dues being Government dues known to Facor Steels Ltd. should already have been recorded and reflected in its books of account for the relevant period.

10. The applicant states that it is an admitted position that the establishment of Facor Steels Ltd. which came under purview of the ESI Act, 1948 is statutorily bound to deposit the contribution under the Act. Under section 40 of the ESI Act, 1948, it is the employer's primary duty to pay not only its contribution but also the employees' contribution. It matters little when the notice was issued to Facor Steels Ltd. to pay the contribution under ESI Act as such a notice is only a reminder to the employer to discharge his statutory

obligation. In the present case, the claims made by the Applicant through its notices albeit after the commencement of the liquidation proceedings were for a prior period. The Respondent is under legal obligation to comply with statutory liabilities. Hence, refusal of the Applicant's claim on technical ground that it was not submitted on or before the last date as mentioned in the public notices is injustice to the Applicant as it will be very easy for a defaulter to evade the statutory liabilities/claim on the ground that it did not submit the proof of claim before the Liquidator. It is the duty and legal obligation on the part the company and the Liquidator to include all statutory liabilities.

11. We have heard the learned Counsel and perused the material available on record.

12. Order of Liquidator rejecting the claim of a creditor is appealable order in terms of Section 42 of the Code, which reads as under –

> "*A creditor may appeal to the Adjudicating Authority against the decision of the liquidator 1[accepting or] rejecting the claims within fourteen days of the receipt of such decision.*"

13. Section 42 does not provide any discretion to this Tribunal to entertain any appeal beyond this Period of 15 days. The Applicant, realising this, has filed this application in terms of Section 60(5) of the Code. Section 60(5) reads as under –

> "*5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—*
>
> > *(a) any application or proceeding by or against the corporate debtor or corporate person;*

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code."

14. The jurisdiction vested in this Tribunal in terms of Section 60(5) of the Code is general in nature. Since, the Code contains specific provision of appeal against the order of Liquidator, this Bench can not invoke its power in the general section of 60(5) of the Code, as is laid down in the maxim ***Generalia specialibus non derogant*** i.e. Specific provisions override the general provision. Accordingly, the present applicant being filed u/s 60(5) of the Code is not maintainable.

15. In view of the foregoing, this IA 622/2023 is dismissed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)