

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**OFFICIAL LIQUIDATOR'S REPORT NO. 38 OF 2022
IN
COMPANY PETITION NO. 488 OF 2015**

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In the matter of the Companies Act, I of 1956
And

In the matter of Elder Pharmaceuticals Limited (In Liquidation)

Puspasen C. Jhaveri

...Petitioner

Mr. Jehangir Jejeebhoy, for the Official Liquidator.

Ms. Jane Cox, a/w Rohini Thyagarajan, for the Workmen.

CORAM: N. J. JAMADAR, J.

RESERVED ON : 17th AUGUST, 2022

PRONOUNCED ON: 9th NOVEMBER, 2022

ORDER:-

1. The Official Liquidator has taken out this report seeking,
inter alia, the following directions:

(a) In view of para (11) of this report, whether this Hon'ble Court be pleased to permit Official Liquidator to proceed with the adjudication of claims of workers and employees on the basis as submitted by JMT Associates & Chartered Accountants, Panel Chartered Accountant in para (11) of their letter dated 21.03.2022, which is annexed as Exhibit-H.

(b) In view of para (12) of this report, whether this Hon'ble Court be pleased to condone the delay of 432 claims as per the list annexed in Exhibit-I."

2. By an order dated 19th September, 2016 in Company Petition No.488 of 2015 and connected Company Petition, the

liquidator came to be appointed as the provisional liquidator of Elder Pharmaceuticals Limited, the company (In liquidation). By a subsequent order dated 4th December, 2017, the Official Liquidator came to be appointed as the liquidator of the Company (in liquidation) with the usual powers.

3. Thereupon, pursuant to an order dated 19th October, 2020 in OLR/47/2020, the Official Liquidator invited claims from the workers/creditors in accordance with Rule 148 of the Companies (Court) Rules, 1959. In response thereto, Official Liquidator has received in all 8,634 claims from the claimants, the particulars of which are tabulated below:

Sr. No.	Claimants	Total Claims	Amount (In Rupees)
1.	Worker	365	41,77,54,234.00
2.	Employees	863	98,67,54,312.00
3.	Government Dues	6	116,93,86,075.00
4.	FD Holders	7059	80,57,22,267.00
5.	Creditors	320	296,25,43,729.00
6.	Others	21	7,38,24,693.00
	TOTAL	8634	641,59,85,310.00

4. In pursuance of the directions of the Court, the Official Liquidator has been taking assistance of JMT Associates and Chartered Accountants (“JMT Associates”) in assessing and adjudicating the claims of the claimants. A number of meetings

were held. Post deliberations therein, JMT Associates has devised and suggested the following basis of classification of workers and employees vide letter dated 21st March, 2022 (Exhibit-G).

“11. Our process of adjudication has following basis which covers all components of claims received from workers:

- i. Category of Workers: During the verification, it was observed that many claimants having designation of supervisor/manager were mentioned them as worker, however they have been classified under employee category and their claims will be at par with other claims u/s 530 of Companies Act, 1956 unless the concerned claimant places on record that he/she was performing duties of worker as defined under definition of workmen under section 2 of Industrial Dispute Act, 1947 to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for the hire or reward in the Industry. Further worker who were part of The Maharashtra Labour Welfare Fund (MLWF) deduction and not having managerial/supervisory category were classified as worker u/s 529A of the Companies Act, 1956.
- ii. Basic: Basic of wages of Worker is considered from their pay slips or master data sheet extracted from hard disk seized by the OL.
- iii. HRA, LTA, Service and Other allowance: Allowances which are part of total earning of the claimants, were considered from pay slips submitted by the claimants or master data sheet extracted from hard disk seized by the OL.
- iv. Other Reimbursements: In absence of relevant policy documents and adequate supporting documents, reimbursements of expenses were not considered.
- v. Deductions (viz. PF, PT, IT, ESIC, Credit Society, LIP and MLWS): the company has not disbursed salaries to workers/employees since long therefore the deductions pertaining to deduction of PF, PT, IT, ESIC, Credit Society, LIP and MLWF were not paid to respective department. As the claims will be adjudicated at gross earning and no deduction will be reduced from Gross earning as deduction.
- vi. Period of Claims: In absence of last date of payment of salaries by the company, we have considered first date of claim period on which major workers has claimed i.e. 1st January, 2015 has been considered.

Further, last date of claims were considered as date of winding up as per Winding order issued by the Hon'ble Court or claims made by employees/workers which ever is earlier. Further affidavit will be called at the time of adjudication from the workers stating that they have not joined/hired/drawing salary up to windup date from any other Company.

- vii. Bonus/Exgrasia: As the Bonus is not a part of wages as per definition of wages under Industrial Dispute Act, 1947 and cannot be given priority under Section 529 of Companies Act, 1956 as Overriding Preferential Payments. Therefore Bonus/Exgrasia @ 8.33% as per Bonus Act, 1965 may be considered in Section 530 of Companies Act, 1956 up to limit prescribed and rest as unsecured creditors after preferential payments.
- viii. Gratuity: As the Gratuity is payable to every worker under Payment of Gratuity Act, 1972 according gratuity @ 15 days for every completed years of service up to the date of winding up order subject to affidavit to be submitted by claimant as stated in sub-clause vi above.
- ix. Leave Encashment: In absence of relevant leave records, the claims under leave encashment cannot be verified. Therefore the claims under this head are not considered.
- x. Retrenchment Compensation: As the Retrenchment Compensation is payable if any worker's service terminated "for any reason whatsoever", but excludes termination by way of punishment inflicted pursuant to disciplinary action, voluntary retirement, retirement on reaching the age of superannuation if the contract of employment contained such stipulation, non-renewal of the contract of employment and continued ill-health under Industrial Dispute Act, 1947. Accordingly, retrenchment @ 15 days for every completed years of service up to the date of winding up order or any other date as per sub-clause vi above has been claimed.
- xi. Notice pay, Interest, Incentives, Increments, Salaries after winding up date and any other claims: In absence of clause under the appointment/increment letter and/or policy documents of the Company, Notice Pay, Interest, Incentives, Increments, Salaries after wind up date and other claims of workers were rejected."

5. The Official Liquidator further asserts that 432 claims are received after due date, mostly from the holders of the fixed

deposits with the Company (in Liquidation). Thus the Official Liquidator seeks direction to proceed with the adjudication of the claim of workers and employees on the aforesaid basis, as suggested by JMT Associates, and condonation of delay in lodging claims by 432 claimants.

6. An affidavit-in-reply is filed on behalf of the workmen. Mr. P. V. S. A. Prasad, the applicant in IAL/26515/2021, filed on behalf of the sales representatives of the company in liquidation, has sworn the affidavit. The workmen principally object to subparagraph (v) of the basis of adjudication as suggested by JMT Associates (Exhibit-G) to the OLR, which reads as under:

“v. Deductions (viz. PF, PT, IT, ESIC, Credit Society, LIP and MLWS): the company has not disbursed salaries to workers/employees since long therefore the deductions pertaining to deduction of PF, PT, IT, ESIC, Credit Society, LIP and MLWF were not paid to respective department. As the claims will be adjudicated at gross earning and no deduction will be reduced from Gross earning as deduction.”

7. The workmen assert that the aforesaid stipulation is in teeth of Section 11 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (“the EPF Act, 1952”), which provides that any amount due from any employer with respect to provident fund contributions shall be deemed to be the first charge on the assets of the establishment notwithstanding anything contained in any law for the time being in force. The workmen thus assert that provident fund deductions by way of

employees contribution must be made from their gross wages for all employees (both workman and non-workman category) and transferred by the Official Liquidator along with statutory interest thereon as per the EPF Act, 1952. Therefore the Official Liquidator be directed to incorporate the aforesaid stipulation in the proposed basis for adjudication of the claims.

8. Another affidavit-in-reply is filed by Basab Roychowdhury, the applicant no.1 in IAL/26515/2021. The classification of claimants as “workmen” and “employees” for the purpose of adjudication of claims under Section 529 of the Companies Act, 1956 as proposed by the Official Liquidator in the basis of adjudication (Exhibit-G) is stated to be not in conformity with the governing provisions.

9. The deponent affirms a large number of medical representatives of the company in liquidation were discharging the work of promoting for sale the products of the company in liquidation in several States across the country. In 1976, the Parliament enacted the Sales Promotion Employees (Conditions of Service) Act, 1976 to extend the benefits of the Industrial Dispute Act, 1947 (“the Act, 1947”) to medical representatives and other sale promotion employees. In the case of *H. R. Adhyantaya vs. Sandoz (India) Ltd.*¹ the Supreme Court held

1 AIR 1994 SC 2608.

that though the said Act of 1976 extended the provisions of the Industrial Disputes Act, 1947 to medical representatives, they do not fall within the definition of “workman” within the meaning of Section 2(s) of the Act, 1947. The deponent affirms, to overcome the aforesaid judgment of the Supreme Court, several State Legislatures amended Section 2(s) of the Act, 1947 to include persons employed to perform sales promotion work, thereby expressly bringing medical representatives within the definition of “workman” under Section 2(s) of the Act, 1947. A list of 12 States, who have amended Section 2(s) of the Act, 1947 is annexed to the affidavit along with true copies of the gazette notifications of the various State Amendment Acts.

10. It was contended that the medical representatives, who were last employed by the company in liquidation in the States where the definition of workman under Section 2(s) of the Act, 1947 stood so amended must be treated “workmen” within the meaning of Section 529(3)(a) of the Companies Act, 1956 and their claims deserve to be classified as those of “workmen” having overriding preference in payment under Section 529A of the Companies Act, 1956.

11. It is further contended that for the purpose of payment of provident fund, the employees of the company in liquidation,

whether or not they fall within the meaning of definition of workman under Section 2(s) of the Act, 1947, are entitled to be paid their provident fund dues until the date of the winding up in priority over all other claims. Therefore, the Official Liquidator be directed to suitably incorporate the aforesaid stipulations in the basis for adjudication as proposed.

12. An affidavit-in-rejoinder is filed on behalf of the Official Liquidator. It is averred that the controversy sought to be raised by the workmen as regards the deduction of employees contribution towards provident fund from their gross wages is no longer *res integra*. It is settled by a judgment of this Court in the case of *Engineering Workers Association vs. Official Liquidator, High Court, Bombay*², wherein it has been ruled in clear and explicit terms that the Official Liquidator is not liable to make any contribution towards employees provident fund as the employer – employee relationship does not exist.

13. I have heard Mr. Jejeebhoy, the learned Counsel for the Official Liquidator and Ms. Cox, the learned Counsel for the Workmen. With the assistance of the learned Counsel, I have perused the documents and material on record.

22007(2) Bom 445.

14. Ms. Cox submitted that the aforesaid stipulation in Clause (v) that “as the claims will be adjudicated at gross earning and no deduction will be reduced from the gross earning as deduction towards provident fund” has the potentiality of causing grave prejudice to the workmen. The said stipulation is also in clear conflict with the provisions of Section 11 of the EPF Act, 1952, which postulates priority in payment of contribution over other debts. Laying emphasis on Sub-section (2) of Section 11 which contains a non-obstante clause, Ms. Cox would urge that the workmen have a vested right to be paid in priority over all other debts so far as the provident fund dues are concerned. Ms. Cox placed reliance on a judgment of the Supreme Court in the case of *Employees Provident Fund Commissioner vs. Official Liquidator of Esskay Pharmaceuticals Limited*³ to lend support to the aforesaid submission. In the said case, the following question arose for consideration.

“Whether priority given to the dues payable by an employer under Section 11 of the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952 is subject to Section 529A of the Companies Act, 1956 in terms of which the workmen’s dues and debts due to secured creditors are required to be paid in priority to all other debts?”

15. The Supreme Court on an analysis of the provisions contained in Section 11 of the EPF Act, 1952, post its

3(2011) 10 Supreme Court Cases 727.

amendment in the year 1998, the provisions of the Companies Act, especially Section 529A and 530, and after adverting to the pronouncement of the Supreme Court in the case of *Maharashtra State Cooperative Bank Ltd. vs. Provident Fund Commissioner*⁴ and others cases, *inter alia*, enunciated the law as under:

“33. The ratio for the last mentioned judgment is that by virtue of the non obstante clause contained in Section 11(2) of the EPF Act, any amount due from an employer shall be deemed to be first charge on the assets of the establishment and is payable in priority to all other debts including the debts due to a bank, which falls in the category of secured creditor.

42. The argument of Shri Gaurav Agrawal that the non obstante clause contained in the subsequent legislation, i.e. Section 529A(1) of the Companies Act should prevail over similar clause contained in an earlier legislation, i.e. Section 11(2) of the EPF Act sounds attractive, but if the two provisions are read in the light of the objects sought to be achieved by the legislature by enacting the same, it is not possible to agree with the learned counsel. As noted earlier, the object of the amendment made in the EPF Act by Act No.40 of 1973 was to treat the dues payable by the employer as first charge on the assets of the establishment and to ensure that the same are recovered in priority to other debts. As against this, the amendments made in the Companies Act in 1985 are intended to create a charge *pari passu* in favour of the workmen on every security available to the secured creditors of the company for recovery of their debts. There is nothing in the language of Section 529A which may give an indication that legislature wanted to create first charge in respect of the workmen's dues, as defined in Sections 529(3) (b) and 529A and debts due to the secured creditors.

48. It is also important to bear in mind that even before the insertion of proviso to Sections 529(1), 529(3) and Section 529A and amendment of Section 530(1), all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund established for welfare of the employees were payable in priority to all other debts in a winding up proceedings [Section 530(1)(f)]. Even the wages, salary and other dues payable to the workers and employees were payable in priority to all other debts. What Parliament

42009 (10) SCC 123.

has done by these amendments is to define the term "workmen's dues" and to place them at par with debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to Section 529(1). However, these amendments, though subsequent in point of time, cannot be interpreted in a manner which would result in diluting the mandate of Section 11 of the EPF Act, sub-section (2) whereof declares that the amount due from an employer shall be the first charge on the assets of the establishment and shall be paid in priority to all other debts. The words "all other debts" used in Section 11(2) would necessarily include the debts due to secured creditors like banks, financial institutions etc. The mere ranking of the dues of workers at par with debts due to secured creditors cannot lead to an inference that Parliament intended to create first charge in favour of the secured creditors and give priority to the debts due to secured creditors over the amount due from the employer under the EPF Act.

49. At the cost of repetition, we would emphasize that in terms of Section 530(1), all revenues, taxes, cesses and rates due from the company to the Central or State Government or to a local authority, all wages or salary or any employee, in respect of the services rendered to the company and due for a period not exceeding 4 months all accrued holiday remuneration etc. and all sums due to any employee from provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company are payable in priority to all other debts. This provision existed when Section 11(2) was inserted in the EPF Act by Act No. 40 of 1973 and any amount due from an employer in respect of the employees' contribution was declared first charge on the assets of the establishment and became payable in priority to all other debts. However, while inserting Section 529A in the Companies Act by Act No.35 of 1985 Parliament, in its wisdom, did not declare the workmen's dues (this expression includes various dues including provident fund) as first charge.

50. The effect of the amendment made in the Companies Act in 1985 is only to expand the scope of the dues of workmen and place them at par with the debts due to secured creditors and there is no reason to interpret this amendment as giving priority to the debts due to secured creditor over the dues of provident fund payable by an employer. Of course, after the amount due from an employer under the EPF Act is paid, the other dues of the workers will be treated at par with the debts due to secured creditors and payment thereof will be regulated by the provisions contained in Section 529(1) read with Section 529(3), 529A and 530 of the Companies Act."

16. In opposition to this, Mr. Jejeebhoy, the learned Counsel for the Official Liquidator, laid emphasis on the fact that there is no obligation on the Official Liquidator to deduct the provident fund contribution and credit the same to the Provident Fund Commissioner. It was urged that the judgment of this Court in the case of *Engineering Workers Association* (supra) puts the controversy at rest. With regard to the claim for provident fund contribution, the learned Single Judge expounded the duty of the Official Liquidator in the following words:

“36. As far as Provident Fund is concerned, in my view, if that fund is maintained by the company, then the liquidator cannot deny his liability to pay sums accumulated in the same. In other words, it is workmens’ dues and it is the duty of the liquidator to move the Provident Fund authorities if the fund is transferred to them for management and administration and assist the workmen in recovery of all contributions. The liquidator cannot leave the matter to the workmen or the applicant in this case. Even if the Provident Fund Commissioner has not moved any application in the prescribed form, the liquidator in the facts and circumstances of this case, must follow up the matter with the Provident Fund authorities and see to it that the amounts due and payable are deposited with him and ultimately paid to the workmen.

37. To enable the liquidator to move the Provident Fund Authorities, he is at liberty to seek such directions as are necessary from this Court. In any event, he must initiate steps for recovery of Provident Fund dues in case they are not deposited with him already, within a period of six weeks from today.

38. Ms. Buch contends that the employee as well as employer’s share constitutes the Provident Fund. Her submission is that the liquidator must make good the contribution in the fund as far as employer is concerned, as the employee-employer relationship continued till the winding-up order was passed. This is not a case of running industry which liquidator is expected to run and manage.

39. It is not possible to accept this contention for more than one reason. Firstly, under the term "workmen’s dues"

what is covered is the sums due from a Provident Fund or the pension fund or any other fund for the welfare of the workers maintained by the company. The sums due from this fund may be the contributions of both employer and employee, accumulated therein. That means accumulated till the date the winding up order is passed. The liquidator cannot be expected to make good any short fall or deficit because he is not an employer, as is understood by the applicant herein. In other words, when the Provident Fund Act mandates creation of a fund consisting of deductions and contributions from employer-employees, it can never be the intention that a person like Liquidator is obliged to forward any contribution from the funds collected by him after disposal of the assets and properties of the company in liquidation. As has been explained above, the argument is misconceived because if the liquidator is not the employer, then merely because he steps in after a winding-up order is made, does not mean that after he has stepped in he should go on contributing to the Provident Fund on the basis that the relationship between the company in liquidation and the employee subsists or continues in law. The Liquidator cannot be expected to deposit any monies in such funds. He has to utilise the monies realised from sale and disposal of the assets and properties of the company in liquidation in the manner directed by company law. It was never intended therein that he should deposit any sums in the funds. Nothing is pointed out to me which would indicate any obligation of this nature. All that can be expected from the Liquidator is to assist the workmen in realising the sums due to them from the Provident Fund and that expectation will have to be fulfilled by the Liquidator. That he fulfills such an expectation of the applicant and other employees, is something which has been achieved by my directions issued to him. In these circumstances, the request to direct the Liquidator to make contribution of employer's share to the Provident Fund Authorities for the relevant period, cannot be granted and it is hereby rejected.

40. My view finds support in a reported decision. Some what identical view was taken by a learned Single Judge of Calcutta High Court in AIR-1960-Cal.-19 (in the matter of Mahalaxmi Cotton Mills Ltd.) (in Liquidation). After referring to the provisions of the old Act and Section 530 of the 1956 Act, the Court proceeded to observe thus:-

“13. On behalf of the Official Liquidator reference was also made to S.11 of the Employees' Provident Funds Act to show that priority of payment of contributions over other debts is accorded only where the liability accrued before the Company was wound up. That is the priority of pre-liquidation contribution. It is, therefore, said that the Statute makes no provision for post-liquidation contribution. Now S.11 of the Employees' Provident Funds Act expressly refers to

S.230 of the Companies Act. Section 230 of the Companies Act deals with preferential payments. It sets out the payments of certain amounts in priority to all other debts. In that list in sub-clause (3) is mentioned "all sums due to any employee from a Provident Fund, a Pension Fund, a Gratuity Fund or any other fund for the welfare of the employees maintained by the Company." That, again, means that sums already due to an employee will have priority. This, again, does not deal with post-liquidation liabilities. Reference to S.11 of the Employees' Provident Funds Act and S.230 of the Companies Act for preferential payments does not help the argument of the Official Liquidator that this contribution to the Provident Fund should not be made by him although he has been asked to continue the factory engaged in the industry and to keep it going and to sell it as a going concern. These liabilities are not liabilities for preferential payments, but they are statutory and indispensable liabilities such as the many liabilities which a Liquidator has to undertake, as for instance, as when he is to continue a lease to keep on paying the rent or where he is holding other properties, to see that rates and taxes in respect of them are paid.

14. Now what is going to be the result if the construction contended for by the Liquidator is adopted? Apart from creating a special class of persons who would be permitted to do business without the statutory liabilities enjoined in such business, there will be many other serious consequences. The Provident Fund will cease to exist, and in that event the workers may very well leave the factory. As a consequence, the business will not be able to sell the factory as a running concern which is the order of the Court.

15. I am, therefore, satisfied, both on the construction of the Employees' Provident Funds Act and its Scheme as well as on the special order made in this case directing the Liquidator to carry on the factory engaged in the industry and to sell it as a going concern, that the Liquidator is liable as an 'employer' and 'occupier' within the meaning of that Act to make the contributions required by the Statute and the Scheme framed thereunder.

16. I shall not be understood as holding that where the Liquidator is asked to wind up a factory and close it down, he would still be liable for contribution under this Act. In fact, I have already said that in such an event the Liquidator will not be liable under the Act for contribution because it will no longer be a factory "engaged" in the specified industry. In fact, it will then be disengaged from the industry and closed down."

No contrary view has been shown to me.

41. As far as Provident Fund is concerned, the Liquidator has been called upon by the applicant union to make contributions to the P.F. Fund of employees share for the relevant period i.e. 1st May 1994 to 9th January 1998. No reliance has been placed on any provision save and except Section 11 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952. That provision is reading thus :-

“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 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 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 therefor has accrued before the order of adjudication or winding up is made, be deemed to be included among the debts which under section 49 of the Presidency-Towns Insolvency Act, 1909 (3 of 1909), or under section 61 of the Provincial Insolvency Act, 1920 (5 of 1920), or under section 530 of the Companies Act, 1956 (1 of 1956) are to be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up, as the case may be.

(Explanation.- In this sub section and in section 17, "insurance fund" means any fund established by an employer under any scheme for providing benefits in the nature of life insurance to employees, whether linked to their deposits in provident fund or not, without payment by the employees of any separate contribution or premium in that behalf.)

(2) Without prejudice to the provisions of sub section (1), if any amount is due from an employer 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 force, be paid in priority to all other debts.)

42. In other words, this provision means that upon an employer being a company and it being ordered to be wound up, the amount due in relation to the funds mentioned in the said clauses and damages or any charges due from the employer in relation to the establishment so also in relation to an exempted establishment from the employer shall have priority in terms of Section 530.

43. This provision does not mean that the Liquidator becomes the employer. In any event, it only means that the amounts due from the employer in relation to the establishment as contributions towards scheme etc. shall, if the liability therefor has accrued before the order of winding up, be deemed to be included under section 530 and paid in priority to all other debts. By relying upon this provision the applicant's case cannot be stretched to direct the Liquidator to make contribution in the fund after he takes charge. I am of the view that relying upon this provision the Liquidator cannot be called upon to make contributions for the period specified by the abovementioned provision on the basis that he is an employer, if the employer has defaulted in any payment thereof. More so, when he is not running the unit or factory.

44. The above provision of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 enables the applicant to take such proceedings as are provided thereunder against the employer and after an order is passed against him, any dues, charges etc. under that order, shall have priority. But that does not mean that this Court can proceed on the basis that the Liquidator is an employer, and, therefore, is obliged to make contributions, as prayed."

17. It is imperative to note that while construing the provisions of Section 11 of the EPF Act, 1952, the learned Single Judge observed in paragraph 42 that the amount due in relation to the funds mentioned in the said section shall have priority in terms of Section 530. It was further clarified that

Section 11 does not imply that the liquidator becomes the employer. At best, it only means that the amounts due from the employer in relation to the establishment as contributions towards the scheme etc. shall, if the liability therefor has accrued before the order of winding up, be deemed to be included under Section 530 and paid in priority over all other debts.

18. In my view if the aforesaid observations in paragraphs 42 and 43 of the judgment in the case of *Engineering Workers Association* (supra) are construed in a proper prospective, they do not advance the cause of the submission on behalf of the Official Liquidator to the extent desired by the Official Liquidator. Undoubtedly, Section 11 cannot be so construed as to forge an employer and employee relationship between the Official Liquidator and the workmen, where the company in liquidation is not a running concern, and liability cannot be fastened on the Official Liquidator as if he happens to be an employer. This proposition which is essentially the ratio of the judgment in the case of *Engineering Workers Association* (supra), however, cannot be stretched to lend support to a further submission that the overriding effect of Section 11 in the matter of payment in priority is diluted. On the contrary, in *Engineering Workers Association* (supra) the Court expressly

noted that the provisions of Section 11 would imply that the amount due from the employer in relation to the establishment as contribution towards scheme etc. shall, if liability therefor has been incurred before the winding up, be deemed to be included under Section 530 and paid in priority over all other debts.

19. In the instant case, the proposed basis for adjudication, especially Clause-v (extracted above), if implemented, has the propensity to negate this claim of priority in payment under Section 11 as it is proposed that there shall be no deductions towards the employees contribution of the provident fund as the claims are to be adjudicated at gross earnings. If the mandate of Section 11 of the EPF Act, 1952 is to be given effect to, in its true spirit, the dues payable by the employer towards provident fund must be treated as a first charge on the assets of the establishment and they be recovered in priority to other debts including the workmen's other dues.

20. I am therefore persuaded to agree with the submission of Ms. Cox that the basis of determination needs to be suitably modified so as to provide that the dues towards provident fund be deducted from the gross wages and paid in priority before

adjudicating the claims under Section 529A and 530 of the Companies Act, 1956.

21. On the second aspect of the medical representatives allegedly falling within the ambit of the definition of “workman”, it is necessary to note that in view of Clause (a) of Sub-section (3) of Section 529, for the purpose of Section 529, 529A and 530, of the Companies Act, 1956, “workmen”, in relation to a company, means the employees of the company, being workmen within the meaning of the Industrial Disputes Act, 1947.

22. Clause (s) of Section 2 of the Industrial Disputes Act, 1947 defines a “workman” as under:

“Section 2(s) “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person--

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding* ten thousand rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.”

(*substituted for “one thousand six hundred rupees” w.e.f. 15-09-2010)

23. It is the claim of the workmen that the aforesaid Clause (s) which defines a workman, has since been amended by as many as 12 States so as to include a person employed for the promotion of sales for hire or rewards. Consequently, the medical representatives, who were employed by the company in liquidation for promotion of sales, deserve to be classified as “workmen”. Copies of the various State Amendment Acts incorporating the aforesaid change in the definition of workman are annexed to the affidavit-in-reply filed by Mr. Basab Roychowdhury.

24. It seems that this aspect of the matter has not been adverted to by the Official Liquidator and JMT Associates while determining the basis for adjudication. It would, therefore, be expedient to direct the Official Liquidator to redetermine the basis for adjudication keeping in view governing statutory provisions, as amended by the State Legislatures, wherever applicable.

25. So far as the directions sought by the Official Liquidator to adjudicate the claims of 432 claimants, who lodged the claims beyond the stipulated period, there does not seem to be any impediment in allowing the Official Liquidator to adjudicate

their claims in accordance with law as that would be a measure in advancing the cause of justice. Hence, the following order.

: ORDER :

- (i) The Official Liquidator shall redetermine the basis of adjudication in the light of the directions contained in paragraph nos.20, 23 and 24 as above.
- (ii) The delay in lodging the claim of 432 claimants stands condoned and the Official Liquidator shall adjudicate the claims of those 432 claimants in accordance with law.
- (iii) The report stands disposed.

[N. J. JAMADAR, J.]