

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH-I
KOLKATA

IA (IB) No.1058/KB/2020

in

CP (IB) No.03/KB/2017

In the matter of:

Under section 60(5) of the Insolvency and Bankruptcy Code, 2016, and other applicable provisions of the Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016

In the matter of

Nicco Corporation Limited
(inliquidation)

... Corporate Debtor

In the matter of

Nicco Employees Union (INTTUC) & others
Versus

...Applicant

Vinod Kumar Kothari, Liquidator of
Nicco Corporation Limited

....Respondent

Date of hearing: 24 November 2021

Date of pronouncement: 15 February 2022

Coram:

Shri Rajasekhar V.K.

: Member(Judicial)

Shri Balraj Joshi

: Member(Technical)

Appearances (via video conferencing):

For the Applicant

: 1. Mr. Jishnu Chowdhury, Advocate
2. Mr. Ashok Kumar Singh, Advocate
3. Mr. Joysurjo Roy, Advocate
4. Ms. Shubhangini Singh, Advocate

For the Liquidator

: 1. Mr. Joy Saha, Sr.Advocate
2. Ms. Barsha Dikshit, PCS

ORDER

Rajasekhar V.K., Member (Judicial):

1. This Court convened through video conferencing.
2. This Interlocutory Application No.1058/KB/2020 has been filed by the Nicco Employees Union (INTTUC) and others under section 60(5) of the Insolvency and Bankruptcy Code, 2016 (the Code), seeking *inter alia* the following reliefs:

- a. *The respondent Liquidator be directed to forthwith calculate the terminal benefits of 324 member workmen of the Applicants at ₹6,89,75,549 as indicated in Paragraph (i) hereinabove and, upon calculating the total amount payable to the said workmen on the basis thereof to forthwith disburse such payment to them;*
 - b. *An order be made directing the respondent Liquidator to pay to the Applicants the cost of the instant application assessed at ₹5 lac.*
3. Mr. Jishnu Chowdhury, learned counsel for the Applicants, submitted that Company Application (IB) No.469/KB/2019 was filed by the Applicants herein, for securing the terminal benefits of 324 member workmen of the Corporate Debtor and was subsequently disposed by this Adjudicating Authority *vide* order dated 22 Jan 2020. The said order directed the Liquidator to calculate the liability in respect of individual workmen as per the Supplementary Affidavit submitted to the Liquidator in accordance with the waterfall mechanism under section 53 of the Code and section 25FFF¹ of the Industrial Disputes Act, 1947.

¹ **25FFF. Compensation to workmen in case of closing down of undertakings.—**

- (1) Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of sub-section (2), be entitled to notice and compensation in accordance with the provisions of section 25F, as if the workman had been retrenched:
- Provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman under clause (b) of section 25F shall not exceed his average pay for three months.
- Explanation.—An undertaking which is closed down by reason merely of— (i) financial difficulties (including financial losses); or (ii) accumulation of undisposed of stocks; or (iii) the expiry of the period of the lease or licence granted to it; or (iv) in a case where the undertaking is engaged in mining operations, exhaustion of the minerals in the area in which such operations are carried on;
- (1A) Notwithstanding anything contained in sub-section (1), where an undertaking engaged in mining operations is closed down by reason merely of exhaustion of the minerals in the area in which such operations are carried on, no workman referred to in that sub-section shall be entitled to any notice or compensation in accordance with the provisions of section 25F, if—
- (a) the employer provides the workman with alternative employment with effect from the date of closure at the same remuneration as he was entitled to receive, and on the same terms and conditions of service as were applicable to him, immediately before the closure;
 - (b) the service of the workman has not been interrupted by such alternative employment; and
 - (c) the employer is, under the terms of such alternative employment or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by such alternative employment.

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4. In the light of the said order, the applicants had repeatedly requested the Liquidator to make payment of the terminal benefits of their members. The Liquidator though, has quantified the total terminal benefits of the 324 workmen at ₹6,89,75,549/- (Rupees six crore eighty-nine lakh seventy-five thousand five hundred forty-nine only) and agreed to make payment of 17% of the same.
 5. Mr. Chowdhury submitted that the total computation arrived at by the liquidator of terminal benefits payable to the 324 members is erroneous. The Liquidator has proceeded to admit compensation payable to the member workmen only in terms of section 25FFF read with section 25F² of the Industrial Disputes Act, 1947, while ignoring the entitlement of all but 40 such workmen to their dues on account of wages and salaries for the period of 24 months preceding the liquidation commencement date.
 6. The Liquidator has failed to take into account the unpaid salary and wages of the workmen for the 24 months preceding the liquidation date *i.e.*, for the period 18 Oct 2015 to 17 Oct 2017. The aggregate amount of salary and

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- (1B) For the purposes of sub-sections (1) and (1A), the expressions “minerals” and “mining operations” shall have the meanings respectively assigned to them in clauses (a) and (d) of section 3 of the Mines and Minerals (Regulation and Development) Act, 1957 (67 of 1957).]
 - (2) Where any undertaking set-up for the construction of buildings, bridges, roads, canals, dams or other construction work is closed down on account of the completion of the work within two years from the date on which the undertaking had been set-up, no workman employed therein shall be entitled to any compensation under clause (b) of section 25F, but if the construction work is not so completed within two years, he shall be entitled to notice and compensation under that section for every completed year of continuous service] or any part thereof in excess of six months.
- ² **25F. Conditions precedent to retrenchment of workmen.**—No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—
- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
 - (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
 - (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.

wages payable to the 324 workmen amounts to ₹10,30,61,554/- (Rupees ten crore thirty lakh sixty-one thousand five hundred fifty-four only) which has been totally ignored.

7. Even in the event of a *prorata* distribution between the workmen and the secured creditors who had given up their security, 17% of the total terminal benefits payable to the workmen of the company would amount to ₹2,92,46,307/- (Rupees two crore ninety-two lakh forty-six thousand three hundred seven only). The Liquidator has, however, offered to pay only ₹1,47,76,859/- (Rupees one crore forty-seven lakh seventy-six thousand eight hundred fifty-nine only).
8. The Liquidator has raised no dispute with regard to computation of terminal benefits as made by the applicants in terms of the provisions of section 25F of the Industrial Disputes Act, 1947 in their Supplementary Affidavit filed in the CA (IB) No.469/KB/2019.
9. Section 53(1)(b) of the Code provides that the workmen's dues for the period of twenty-four months preceding the liquidation commencement date would rank equally with the debts owed to the Secured Creditors who relinquish their security in terms of section 52 of the Code. The Explanation to section 53(3) of the Code provides that the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013. The explanation to section 326 of the Companies Act, 2013 provides that, the workmen's dues shall include all wages and salaries and any compensation payable under the Industrial Disputes Act, 1947.
10. In such circumstances, every member workman of the applicants is entitled to both wages and salaries and any compensation payable under the Industrial Dispute Act, 1947 and thus, every member workman is entitled to both wages and salaries payable to them, for the period of twenty-four months preceding the liquidation commencement date *i.e.*, 17 October 2017, as also

compensation payable under the provisions of the Industrial Disputes Act, 1947.

11. While the Liquidator has proceeded to compute the wages and salaries payable to about 40 workmen engaged during the CIRP period for maintenance activities at the company's Shyamnagar factory, there is no justification offered by the Liquidator for not recognizing the dues of the other workmen on account of wages and salaries for the period of twenty-four months preceding the liquidation commencement date, although these workmen have been paid their dues on account of gratuity. The Liquidator has also wrongly subjected the compensation payable under the Industrial Disputes Act, 1947 to the waterfall mechanism under section 53 of the Code.
12. In this context, it may be noted that *vide* order dated 22 January 2020, this Adjudicating Authority had made a distinction between the wages payable to the workmen and the compensation payable to them under provisions of Industrial Disputes Act, 1947 by providing that the Liquidator should calculate the 'wages' and 'compensation under the waterfall mechanism' under section 53 of the Code and section 25FFF of the Industrial Disputes Act, 1947.
13. Section 25FFF of the Industrial Disputes Act, 1947 provides for payment of compensation in respect of an undertaking closed down for any reason in accordance with section 25F, as if the workmen had been retrenched. Further, section 25F of the Industrial Disputes Act, 1947 provides that no workmen employed in any industry shall be retrenched until he has been paid retrenchment compensation.
14. Section 33(7)³ of the Code directs that an order of liquidation shall be deemed notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during

³ (7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

the liquidation process by the liquidator. This provision will override the provisions of section 25F and 25FFF of the Industrial Disputes Act, 1947 to the extent of date of discharge of the workmen. Hence, the computation of the workmen's dues will be done in the light of section 33(7) of the Code. All workmen will be deemed discharged/ retrenched from the date of order of liquidation except the ones working during the liquidation process.

15. Coming to the calculation of workmen's dues as provided under the Explanation to Section 326⁴ of the Companies Act, 2013, it is provided that the workmen's dues shall include all wages and salaries and any compensation payable under the Industrial Disputes Act, 1947. It will also include all accrued holiday remuneration becoming payable and all sums due from the provident fund, pension fund, the gratuity fund or any other welfare fund, as maintained by the company. The term "wages" will derive its meaning from section 2(gg)(rr) of the Industrial Disputes Act, 1947. Further, reading section

⁴*Explanation.*—For the purposes of this section, and section 327—

(a) "**workmen**", in relation to a company, means the employees of the company, being workmen within the meaning of clause (s) of section 2 of the Industrial Disputes Act, 1947 (14 of 1947);

(b) "**workmen's dues**", in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely:—

(i) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947 (14 of 1947);

(ii) all accrued holiday remuneration becoming payable to any workman or, in the case of his death, to any other person in his right on the termination of his employment before or by the effect of the winding up order or resolution;

(iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or amalgamation with another company or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (19 of 1923), rights capable of being transferred to and vested in the workmen, all amount due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company;

(iv) all sums due to any workman from the provident fund, the pension fund, the gratuity fund or any other fund for the welfare of the workmen, maintained by the company;

25FFF and section 25F of the Industrial Disputes Act, 1947, in light of section 33(7) of the Code, we are of the view that the workmen's due will additionally include compensation in the form of fifteen day's average pay for every completed year of continuous service or any part thereof in excess of six months.

16. On perusal of the computation submitted by the liquidator before this Adjudicating Authority, it can be seen that the Liquidator has failed to admit the compensation due to the workmen under sections 25FFF and 25F of the Industrial Dispute Act, 1947. Further, no explanation has been provided by the Liquidator for not admitting the wages/salaries of all but 40 workmen in their computation.
17. On the question of applicability of waterfall mechanism under section 53 of the Code to the compensation under Industrial Dispute Act, 1947, we are of the view that since the term "workmen's dues" under section 53 of the Code derives its meaning from section 326 of the Companies Act, 2013, which in turn includes compensation under Industrial Disputes Act, 1947, the same will also fall under the waterfall mechanism provided in section 53.
18. Mr. Joy Saha, Ld. Sr. Counsel for the Respondent has submitted that in compliance of the order dated 22nd January, 2020, the Liquidator sought necessary details from the Applicants and upon re-calculation, and accordingly submitted a modified list of stakeholders with the Adjudicating Authority. The modified claims of the applicants were uploaded to the website of the Respondent, sent to the Adjudicating Authority and also sent over mail to the Applicants. However, the Applicants never objected to the computations. As such, the same has attained finality and there arises no question for re-consideration of claims pertaining to unpaid salaries/wages.
19. We have noted the contention of the Liquidator regarding communication over e-mail to the Applicant as to the computations made by him. We also note the contention by the Ld. Sr. Counsel for the Liquidator regarding finality

of the list. Considering that the applicants consist of a class of workmen and daily wage earners, it cannot be expected from them to stay up to date with the progress of the liquidation process on every step of the way. Further, it may not be possible for all the workmen and the daily wage earners to have access to the email. As such, the notion of finality of the computations on the basis of such technicality cannot be upheld and hence, the delay in filing objections on part of the Applicants is condoned.

20. The Liquidator, in a supplementary affidavit has submitted that the Applicants have been using oppressive and undue tactics, designed to interfere with the liquidation proceedings, potentially with the view to make the Liquidator agree to the demands of the Applicants. The Applicants sent across defamatory letters on various occasions wherein they raised baseless allegations against the liquidator, and even independent professionals and counsels.
21. Further, the Applicants have sent a letter to the Board of Nicco Parks & Resorts Limited (NPRL), replete with unsubstantiated allegations against a Court- Appointed officer, independent professionals *etc*, whereby the Applicants questioned the right of the Liquidator to appoint nominee at the Board of NPRL. The Board of NPRL, without seeking clarifications from the Liquidator on the contentions raise, has moved ahead with publishing the baseless aspersions as a part of public disclosure made by NPRL to stock exchanges. Further, the Applicants have also tried to malign the image of the nominee director of the Corporate Debtor.
22. The Liquidator submits that similar attempts to defame the Liquidator and to obstruct the liquidation proceeding was attempted by one D& I Taxcon Private Limited, and in the said matter, this Adjudicating Authority had held that the conduct against an officer of the court was deplorable and proceeded to impose a penalty of ₹1,00,000/- on the said D&I Taxcon Private Limited.

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23. The allegations on the Liquidator in the instant case are of a serious nature. Such unsavoury remarks to the officer of the Court are hereby condemned by this Adjudicating Authority. Such act on part of the Applicants is not in good taste and the workmen are advised to refrain from committing such acts in the future. However, keeping in mind the financial conditions of the workmen members of the Applicant unions, this Adjudicating Authority is not in favour of imposing any cost on the Applicants.
24. In view of the above facts and circumstances, we are of the view that the computations submitted by the Liquidator are incomplete and inconsistent. As such, we direct the Liquidator to carry out fresh computations of the workmen's dues in compliance with the provisions of the Industrial Dispute Act, 1947, along with the requisite explanations and submit the same before this Adjudicating Authority within a period of two weeks.
25. **I.A.(IB) No. 1058/KB/2020** is hereby disposed of.
26. The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
27. Certified Copy of this order may be issues, if applied for, upon compliance of all requisite formalities.

BALRAJ JOSHI Digitally signed by
BALRAJ JOSHI
Date: 2022.03.15 16:25:44
+05'30'
Balraj Joshi
Member (Technical)

Rajasekhar V K Digitally signed
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