

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

M.A. 283 OF 2019

Under Rule 11 of the NCLT Rules, 2016

Precision Fasteners Officers Association
...**Applicant**

In the matter of
C.P. (IB)No.1339/MB/2017
Asset Reconstruction Company (India)
Limited

...Financial Creditor

V/s.

M/s Precision Fasteners Limited
... Corporate Debtor

Order delivered on: 04/12/2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Applicant : Mr. Jane Cox, Advocate

For the Respondent : Mr. Ankit Lohia, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Interlocutory Application MA 283/2019 is filed in C.P. (IB) 1339/(MB)/2017 by Precision Fasteners Officer's Association, a registered trade union ("Applicant"), bearing Registration No. KA UA/Thane/500/94 representing all of the staff of the Digha factory of M/s Precision Fasteners Ltd., ("Corporate Debtor" or "Respondent"). The Applicant seeks direction to the Liquidator to make the payment of gratuity to the member employees of the Applicant, as calculated at Annexure F1 with compound interest @ 15% p.a., or simple interest @ 12% p.a or at a rate of interest as deemed fit by this Tribunal, which amounts be paid as soon as any proceeds are received from the sale of assets from the Corporate Debtor in the Liquidation proceedings of the Corporate Debtor; in alternate, direction for the payment of gratuity to the member employees of the Applicant, as calculated at Annexure F2 (plus in respect of those employees who have died / superannuated prior to 12.03.2018, compound interest @ 15% p.a., or at a rate of interest as deemed fit by this Tribunal), which amounts be paid as soon as any proceeds are received from the sale of assets from the Corporate Debtor Company; and pending the hearing and final disposal of this Application, direction that no disbursement to any party - except to the Provident Fund authorities in compliance with the Order of this Tribunal dt. 07.09.2018 in M.A. 576 & 752/2018 - be made from any proceeds are received from the sale of assets from the Corporate Debtor Company.
2. In this case, the Corporate Debtor was admitted into Corporate Insolvency Resolution Process ("CIRP"), and was subsequently ordered to be liquidated vide Order dated 12.03.2018 by this Tribunal and the

Respondent Sh. Divyesh Desai was appointed as liquidator to carry the Liquidation proceedings.

3. The Applicant has submitted that in the 1990s the Corporate Debtor started shifting its production from the Dighe factory. In 1996-1997 a VRS Scheme was floated and around 105 employees opted for this Scheme, leaving 362 shop floor employees plus 90 staff in the establishment. (The shop floor employees are represented by the Precision Fasteners Employees Association). Various unfair labour practices were engaged in by the Company and in 2001 the Company started paying only 70% of the due salary. W.e.f. 17.07.2004 the Company declared a Lock-out. For the period 2001 to 16.07.2004, around 19 months wages remain unpaid till date to each employee. This lock-out was challenged by the union before the Industrial Tribunal, Thane, vide Reference (IT). No. 22/2005.

3.1. The Applicant has further stated that on 01.11.2007 the Debtor Company and the Applicant Union reached an amicable settlement (under the provisions of the Industrial Disputes Act, 1947), before the Conciliation Officer, thus making it a Settlement u/s. 18(3) of the Act. By an Award dt. 24.11.2010 passed in Reference (IT). No. 22/2005, the Industrial Tribunal, Thane, was pleased to take the Settlement on record and dispose of the Reference in terms of the Settlement, with express directions to the Company to implement the terms of the Settlement.

3.1.1. By this Settlement, it was agreed that all of the employees of the factory would resign from their services on a VRS Scheme which included payment of gratuity along with other dues in full and final settlement of their dues. The principal gratuity amount was calculated as per the Payment of Gratuity Act, 1972, up till 30.9.2006. The Settlement expressly provided that the money

due to the employees would be paid into an Escrow account and then paid over to the employees within 30 days of the sanctioning of a BIFR Scheme, which would include this settlement. Clause 15 of the settlement expressly provided that in the event that the Scheme is not sanctioned by the BIFR within 7 months from the date of the Agreement and/or payment is not made into the Escrow account within 35 days thereunder, then the Settlement shall stand set aside and will be void; and that in such a case the Union and the Company would have the same rights and liabilities as if the Settlement had not been entered into and would be at liberty to pursue their respective rights and remedies as available to them in law.

3.2. The Applicant has further stated that the BIFR Scheme was sanctioned on 16.10.2008. It provided for 12% interest on the payment of gratuity. By Award dt. 24.11.2010 the Industrial Tribunal was pleased to record the same. However, in spite of the express direction and Award of the Industrial Tribunal to the Debtor Company to implement the settlement, the money due as per the Settlement was never paid to the workmen. On 1.03.2011, the BIFR sanctioned Scheme was declared as "failed" by the BIFR, which was upheld by the AAIFR. Though this Order was challenged by the Corporate Debtor before the Hon'ble Delhi High Court, who was pleased to hold vide Order dated 16.5.2017 that the SICA, 1985, itself had since been repealed and disposed of the Petition accordingly.

3.3. The Applicant states that in 1994 the Debtor Company started a Gratuity Fund by way of a LIC Policy/ Scheme for the employees, which is mandated under section 4A of the Payment of Gratuity Act, 1972. However, as per the information of the Applicant, the Debtor

Company only made payments / deposits to the same from 1994 till 1998 and thereafter, illegally, stopped the payments/ deposits of the same.

- 3.4. The Applicant has further stated that the members of the Applicant union have submitted their claims calculating gratuity amounts upto 30.09.2006 i.e. upto date of settlement, pursuant to the advertisements issued in November 2018 inviting claims in CIRP. The Order dt. 12.03.2018 passed by this Tribunal to liquidate the Corporate Debtor specifically provided that this order would be deemed to be notice of discharge to the officers, employees and workmen of the corporate debtor (except to the extent that the business of the corporate debtor is continued during the liquidation process by the Liquidator).
- 3.5. The Applicant has stated that as per section 36 (4)(i)(a) of the Insolvency and Bankruptcy Code, 2016, all sums due to any workman or employee from the provident fund and the gratuity fund shall not be included in the liquidation estate assets of the corporate debtor, accordingly, the amounts due but not deposited in a fund shall also not form part of the Liquidation Estate and would also include amounts due by way of gratuity where no physical / separate fund has been created by an employer. The Applicant invited our attention to the Order dated 7.9.2018 passed by this Tribunal in M.A. 576 &752/2018 in respect of Provident Fund.
- 3.6. The Applicant also submitted that the Settlement binds the Debtor till date. This is even more so in light of the Award dt. 24.11.2010 passed by the Industrial Tribunal, Thane, in Reference (IT). No. 22/2005, taking the Settlement on record and disposing off the Reference in terms of the Settlement, with express directions to the

Company to implement the terms of the Settlement. The employees are accordingly entitled to gratuity calculated up till the date of 30.09.2006 as provided for in the said Settlement, with interest.

3.7. The Applicant has also submitted, in the alternate, that in light of the sequence of events the Settlement dt. 01.11.2007 stands set aside and void and the Union / employees & the Company have the same rights and liabilities as if the Settlement had not been entered into and would be at liberty to pursue their respective rights and remedies as available to them in law. In labour and industrial law, the employer employee relationship continues as and until brought to an end by a method known to law. Though there was a lock-out in the company w.e.f. 17.07.2004, this in law does not bring an end to the employer- employee relationship which continued to subsist. Accordingly, in the event that this Tribunal holds that the Settlement does not subsist, the Applicant submits that it's members are entitled to payment of gratuity calculated w.e.f. their respective dates of joining and until the date of the date of Liquidation - 12/03/2018.

3.7.1. The Applicant further stated that as per section 33 (7) of the Insolvency and Bankruptcy Code, 2016, only an order of liquidation u/s. 33(1) shall be deemed to be notice of discharge to the officers, employees and workmen of the corporate debtor (unless the business of the corporate debtor is continued during the liquidation process by the Liquidator). This provision is pari materia with section 445(3) of the Companies Act 1956, & section 277(3) of the Companies Act 2013. The present Order of Liquidation has also specifically directed the same.

3.7.2. The Applicant has further stated that the business of the present corporate debtor has not been continued during the

liquidation process by the Liquidator. The Applicant thus submits that in light of the law laid down, employee's dues continue to accrue until a winding up order has been passed and in these circumstances the Corporate Debtor has been wound up w.e.f. 12.03.2017. The Applicant submits that as per law, the claims of the employees shall have to be calculated upto the date of a winding up order being passed.

- 3.8. Accordingly, the applicant contended that the employees are entitled to gratuity, calculated w.e.f. their respective dates of joining and until the date of 30.09.2006 as provided for in the Settlement dt. 01.11.2007. The Applicant submits that the employees are further entitled to payment of interest thereon. As per section 8 of the Payment of Gratuity Act, 1972, employees are entitled to compound interest at the rate of 15% (which is the rate presently prescribed by the Central Government) (so long as it does not exceed the principal amount due). As per the Scheme sanctioned by the BIFR, which incorporated the terms of the Settlement, interest on gratuity was to be paid @ 12% (simple interest). It was on account of the same that the employees did not pursue their remedy for payment of due gratuity under the Payment of Gratuity Act, 1972. At this stage it is practicably impossible for all of the employees - including the widows / widowers / legal heirs of those who have died - to pursue individual claims for the same before the Competent Authority under the Payment of Gratuity Act, 1972. The Applicant thus submits that in law and the interests of justice, the employees are entitled to payment of compound interest at the rate of 15%, or @12%, or at a rate deemed fit by this Hon'ble Tribunal.
4. The Liquidator filed an Affidavit in Reply stating that gratuity amount was to be calculated as per the Payment of Gratuity Act, 1972 ("POGA") till 30.9.2006 in terms of the Settlement Agreement, and the Applicant's

employees members have claimed gratuity as per the Memorandum of Settlement only and all claims towards gratuity dues of the Kalwa unit employees have been accepted by the Liquidator. It was also submitted that -

- 4.1. The aforesaid Memorandum of Settlement formed a part of the BIFR Scheme of the Corporate Debtor which was sanctioned on October 16, 2008. The BIFR Scheme provided for 12% interest on payment of gratuity.
- 4.2. The Applicant has stated that in 1994 the Corporate Debtor started a Gratuity Fund by way of an LIC Policy/Scheme for the employees as per Section 4A of the POGA. I say that as per my information, presently, an amount of approximately Rs.58,54,415/- (Rupees Fifty-Eight Lakhs Fifty Four Thousand Four Hundred and Fifteen) is lying with the LIC as on March 31, 2019 corresponding to the scheme, for which the Liquidator had followed up with LIC vide letter dated 22.09.2021 to get the updated figures of the amount lying with them in the Gratuity Fund for the employees as per Section 4A of the Payment of Gratuity Act.
- 4.3. It is undisputed fact that the Kalwa unit of the Corporate Debtor has not been carrying any business since 2003 and there has been no business operations since then and no employees of the Kalwa unit of the Corporate Debtor have filed any claim in relation to its unpaid salaries till date.
- 4.4. The audited Annual Report for 2006-07 (Schedule 14 pg. no.33) reflects a provision for gratuity for an amount of Rs.3,39,54,000 (Rupees Three Crores Thirty-Nine Lakhs and Fifty-Four Thousand only). However, the same report also pointed out that the Corporate Debtor had not provided for liability towards leave salary and

gratuity in accordance with Accounting Standard 15 (pg. no.22, para II.c).

- 4.5. The Liquidator cannot be directed to make payment of gratuity to the member employees of the Applicant. Since, it is contended by the Applicant that all sums due to any workman or employee from the provident fund and the gratuity fund shall not be included in the liquidation estate of the Corporate Debtor as per Section 36(4)(iii)(a) of the Insolvency and Bankruptcy Code, 2016 ("Code"), the Liquidator has no domain to deal with the same.
- 4.6. Section 36(4)(iii)(a) of the Code does not include amounts due but not deposited in a fund. Although the Corporate Debtor had made a provision for gratuity for an amount of Rs.3,39,54,000 (Rupees Three Crores Thirty-Nine Lakhs and Fifty-Four Thousand only), the same was not funded and said provision was also not in accordance with AS-15. It is a matter of record that the Corporate Debtor's management had prepared accounts and maintained records only upto the financial year 2006-07, some of the records and books of accounts of the Corporate Debtor were destroyed by theft or by fire much before commencement of CIRP. Therefore, it is practically difficult for the Liquidator to ascertain the employee/workmen wise details with respect to date of joining, date of retirement/termination of service, salary/wages, number of years of continuous service, gratuity payable to each employee/workmen etc. in the absence of co-operation from the suspended management, who have settled abroad, after leaving the Corporate Debtor dormant and non-functional even before the commencement of CIRP.
- 4.7. The Liquidator is willing to release an amount calculated on pro-rata basis from the total amount of Rs.58,54,415 lying with the LIC (as on 31.3.2019) in favour of the Applicant for distribution amongst its

members, subject to necessary directions from this Hon'ble Tribunal. The Applicant has filed the present Application without understanding the mechanism / procedure laid down under the Payment of Gratuity Act. In terms of Section 7 of the Payment of Gratuity Act, the Applicant or its members should have sent a written application to the Corporate Debtor within such time and in such form, as may have been prescribed, for payment of gratuity as per their eligibility, and the Applicant's members have failed to bring any such application to my notice or on record in relation to the present matter. Further, as per Section 8 of the POGA, the Applicant or its members should have made a written application to the controlling authority under the POGA if the amount of gratuity payable under the POGA was not paid by the Corporate Debtor within the prescribed time. It is a matter of record, that the Applicant has neither produced any such written application addressed to the controlling authority nor any recovery certificate issued by the controlling authority in support of its claim of gratuity dues.

4.8. The scheme / provisions of the POGA are different from that of Employees Provident Fund Act, 1952 ("EPFO Act") and therefore, the Applicant cannot rely / take undue advantage of the order dated September 7, 2018 in M.A. 576 & 752 of 2018 to sustain its gratuity claim.

4.9. The Applicant's alternative case/prayer is inconsistent with the Applicant's Proof of Claim as well as facts and circumstances of the present case. The Applicant, in its Proof of Claim, has claimed gratuity dues till September 30, 2006 whereas in its alternative case/prayer in the Application, the Applicant has claimed gratuity dues till March 12, 2018 ("liquidation commencement date"). In

view of this inconsistency alone, the alternative case/prayer of the Applicant must be ipso facto disallowed.

4.10. The difference between the amounts claimed as gratuity dues at Annexure F-1 of the Application and those claimed at Annexure F-2 of the Application is primarily attributable to increase in the number of years for eligibility and change in the amount of dearness allowance (D.A.) with the change in year of due/claim.

4.11. It is undisputed fact that the Corporate Debtor was registered as a 'sick company' by the competent authority in 2003 under the Sick Industrial Companies Act owing to its critical financial conditions. Pursuant to this, the operations of the company were virtually closed. I submit that the period of non- operations continued right until liquidation commencement date. Since the company was inoperative, it cannot be said that the employees / workmen were in continuous service. Hence, the benefit of gratuity to employees/workmen, if any. must not be extended to a period beyond which the company was functional.

4.12. It was submitted by the Liquidator that, in the alternative, and if this Tribunal deems fit, he may be permitted to utilise the balance amount of Rs.58,54,415 lying with the LIC to distribute gratuity dues on pro-rata basis and the Applicant be entitled for the remaining dues as per mechanism provided under section 53 of the Code.

5. Heard the learned counsel and perused the material on record.

5.1. We find the issue for consideration in the present application is (a) whether the gratuity payable to the workmen and employees, but not deposited in the fund maintained by the employer shall stand excluded from the liquidation estate; (b) the date upto which the

Applicant's members ought to be paid gratuity; and (c) whether any interest is payable thereon.

5.2. In terms of Section 36(4)(a)(iii) of the Insolvency & Bankruptcy Code, 2016, “*all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund*” are excluded from the liquidation estate.

5.2.1. The Hon'ble Supreme Court in the case of ***State Bank of India v. Moser Baer Karamachari Union***, 2023 SCC OnLine SC 140 held that the decision of Hon'ble NCLAT in Appala Siva Kumar v. Savan Godiwala, Civil Appeal No. 2520 of 2020 holding that “*in a case, where no fund is created by a company, in violation of the statutory provision of Section 4 of Payment of Gratuity Act, 1972, 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*”, is in ignorance of its earlier order dated 19-08-2019 which was affirmed in Civil Appeal No. 258 of 2020.

5.2.2. Further, in the case of ***Central Board of Trustees v. Shri Kumar Rajan***, 2023 SCC OnLine NCLAT 284, while relying on *Jet Aircraft Maintenance Engineers Welfare Assn. v. Ashish Chhawchharia*, 2022 SCC OnLine NCLAT 418, the NCLAT opined that both Provident Fund and Gratuity Fund is to be paid in full as per the provisions of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 and Payment of Gratuity Act, 1972. “*...the share of workmen dues shall be kept outside the Liquidation assets and the concerned workmen / Employees shall have to be paid the same, out of such Provident fund, Gratuity Fund, if any available*”. The words, ‘*if any available*’, cannot be read to mean that the workmen and employees are not entitled for Provident fund, Gratuity Fund, Pension fund, if not available with the Liquidator.”

5.2.3. Accordingly, we hold that the gratuity dues, as accounted in the books of accounts of the corporate debtor and acknowledged to have accrued, as well as dues further accruing to such

workmen employees till the date of their employment are to be kept outside the Liquidation estate, irrespective of fact whether such dues were not funded in terms of the provisions of Payment of Gratuity Act. Hence, the Liquidator shall admit the claim of the employees, and pay such amount in full.

5.3. As regards date upto which the employees are entitled to payment of gratuity depends on the date when their employment can be said to have ceased. It is undisputed fact that the Kalwa unit was not operational even prior to commencement of CIRP and the records pertaining to the attendance and working of the employees are not available with the Resolution Professional on account of absence of suspended management and relevant staff to provide the same. The only evidence on record to prove the employment is the settlement agreement and the books of the Corporate Debtor acknowledging certain liabilities towards gratuity, which is also stated to be accounted for on the basis of stated formula, which is not in consonance with the AS-15 but this Bench is of considered view that the liability to pay gratuity arises in accordance with the formula prescribed in the Payment of Gratuity Act, and the accounting entries can not be determinative of the actual gratuity payable.

5.3.1. The workmen and employees have filed their claim on the basis of settlement agreement, yet the applicant is disputing the determination of gratuity payable on basis of such claim pleading that the settlement agreement does not survive after failure of the corporate debtor to settle their dues within the stipulated time frame. From the audited financial statements, we find that the settlement agreement was arrived at on the basis of suspended management's commitment to infuse more funds from their sources or third party investor and they failed to do so. It is undisputed fact that Kalwa unit was not working prior to settlement agreement and that led to arriving at settlement

contemplating retirement of such employees from the employment. It is not applicant's case that the corporate debtor had funds available with it and failed to pay. It is undisputed fact that the Corporate Debtor was under financial distress which took it to the BIFR for scheme of rehabilitation as well as to winding up in terms of the provisions of Companies Act, 2013/1956. Accordingly, it can not be said that the settlement agreement has lost its relevance, more so when the employees themselves chose to lodge a claim on the basis of such settlement agreement. Nonetheless, grant of interest on the amount of gratuity payable as on 30.09.2006 would, in a way, penalise the other stakeholders in reducing the amount available to them without their fault. We also find that section 7 and section 8 of the Payment of Gratuity Act, 1972 mandates payment of interest, in case the gratuity is not paid by the employer within the stipulated time. However, that amount of interest can not be considered as part of gratuity fund, as contemplated in Section 36(4)(a)(iii) of the Code, as the said clause excludes the amount due from the gratuity fund and not the amount due under the Payment of Gratuity Act, 1972. The Payment of Gratuity Act makes an employer liable to pay interest on the delayed contribution to the gratuity fund in terms of section 4A thereof, however, the gratuity fund value is determined every year by the Insurance Company and the deficit amount is taken as contribution, making payment of interest neutral.

6. In view of the foregoing, we direct the Liquidator to pay the amount of gratuity payable by the employees in their claim form, which is determined as on 30.09.2006. Such gratuity amount shall not form part of the Liquidation Estate and shall be paid in full. We direct the Life Insurance Corporate of India to release the funds lying under the Gratuity Policy of the Corporate Debtor to the Liquidator in Liquidation

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

M.A. 283 OF 2019

Account for the purpose of settlement of gratuity dues of the employees in accordance with this Order.

7. Further, the Liquidator shall admit the claim of interest as notified by the Central Government from time to time for repayment of long-term deposits, in terms of section 7 of the Payment of Gratuity Act, 1972, from the date on which the gratuity becomes payable i.e. 30.10.2006 to the date on which it is paid and such interest shall be considered as other dues payable to Workmen and Employees and shall be dealt with in accordance with section 53(1)© of the Code for the purpose of its distribution out of liquidation proceeds.
8. With the aforesaid directions, this MA 283/2019 is disposed of as partly allowed.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

V.G. Bisht
Member (Judicial)