



IA/1172/(CHE)/2023

In

IA/484/2022

In

IBA/756/(CHE)/2019

Mrs. Praseeda Elangovan,

The erstwhile Vice President of Marketing of the Corporate Debtor
Having address of communication at,
Flat No. 3, 21/44Q Block,
17th Street, Anna Nagar,
Chennai – 600 040

.....Applicant

-Vs-

K. Sivalingam,

The Liquidator of
Cauvery Power Generation Chennai Private Limited,
Having address of communication at
Flat No. 1603, Tulive Horizon Residences,
16/01 Arunachalam Road, Saligramam,
Chennai, Tamil Nadu, 600093

....Respondent

Order pronounced on 10th January, 2025

CORAM:

SANJIV JAIN, MEMBER (JUDICIAL)

VENKATARAMAN SUBRAMANIAN, MEMBER (TECHNICAL)

For Applicant

: Ravi Rajagopalan, Advocate

For Respondent

: Sasank Iyer, Advocate

For Financial Creditors

: Arun C Mohan, Advocate



COMMON ORDER

(Hearing through Hybrid Mode)

The Applicants, the erstwhile promoter directors/management of the Company, have filed the applications under Section 60(5)(b) read with Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 (“IBC”) read with Rule 11 of the National Company Law Tribunal Rules, 2016 praying that the Respondent may be directed to effect payment of admitted gratuity dues payable to the Applicants herein under Section 36(4)(iii) of IBC, 2016, read with the provisions of the Payment of Gratuity Act, 1972 and grant such other incidental reliefs as deem fit and proper.

SUBMISSIONS OF THE APPLICANTS

2. It is stated that the Corporate Debtor was admitted into Liquidation vide order of this Tribunal dated 19.09.2022, passed in the proceedings numbered as IA (IBC) No. 484 of 2022 in IBA/756/2019.

3. It is stated that the Applicants had filed their claims with the Respondent including gratuity amount payable to them under the Payment of Gratuity Act, 1972, and the claims were admitted by the



Respondent. The details of the amounts claimed by the Applicants are as under,

S.No	Applicant/ Claimant	Deignation of the Applicant with relation to the Corporate Debtor as per the Application	Application Number	Gratuity dues claimed by the Applicants
1.	Abirami Premkumar	Vice President - Business Development	IA 1167/2023	Rs. 10,09,600
2.	S.A. Prem Kumar	Promoter and Driector	IA 1168/2023	Rs. 20,00,000
3.	Neeraj Elangovan	Marketing Manager	IA 1170/2023	Rs. 2,16,300
4.	Praseeda Elangovan	Vice President of Marketing	IA 1171/2023	Rs. 10,09,600
5.	S Elangovan	Promoter and Driector	IA 1172/2023	Rs. 20,00,000

4. It is stated that the Hon'ble Supreme Court in the case of *State Bank of India v. Moser Baer Karamchari Union and Anr (Civil Appeal No. 258 of 2020)* vide order dated 07.02.2023, has held that Gratuity dues are not treated as part of the liquidation estate and would not be covered under the waterfall mechanism provided under Section 53 of the Code. It was further held that if there are any deficiency to the Gratuity Fund, then the Liquidator shall ensure that the fund is made



available in the aforesaid accounts, even if the employer had not diverted the requisite amount.

5. It is stated that the Respondent, vide e-mail dated 23.02.2023, sought advice from the Stakeholder Consultation Committee (SCC) of the Corporate Debtor regarding payment of gratuity to the employees of the Corporate Debtor. Thereafter, the Respondent vide e-mail dated 09.03.2023 informed the Applicants that the SCC has instructed the liquidator to effect payment of admitted gratuity dues, to the employees on the payroll of the Corporate Debtor, except for the promoters/directors and related parties of such promoters/directors of the Corporate Debtor.

6. It is stated that the Applicants cannot be deprived of their statutory right to be paid gratuity under the Payment of Gratuity Act, 1972, for the reason that they are the Promoters/Directors of the Corporate Debtor. It is stated that there is no provision under IBC, 2016, wherein the Applicants can be discriminated and not be treated on par with the other employees, on the ground of them being a Promoter/Director. There is no disability imposed on such group to be



treated equitably and fairly from a distribution perspective, especially in light of Section 36(4)(iii) of the IBC, 2016.

7. It is stated that the Respondent being the Liquidator of the Corporate Debtor ought to have released the gratuity amount payments to the Applicants without having obtained the consent or permission from the SCC. The gratuity amounts payable to the Applicants is not part of the liquidation estate by virtue of Section 36(4)(ii) of the IBC, 2016, and the question of getting consent from the stakeholders to disburse the said amount does not arise.

8. It is stated that the action of the Respondent in not releasing the gratuity payments to the Applicant herein, despite being aware of the judgment of the Hon'ble Supreme Court in *Moser Baer Karamchari Union (supra)* and waiting for the approval/consent from the stakeholders, amounts to a failure in discharging his duties, violative of the provisions of the Code and the law as laid down by the Apex Court.

COMMON SUBMISSIONS OF THE RESPONDENT

9. The Respondent submitted the common counter vide SR No. 3615 dated 25.08.2023.



10. It is stated the M/s Sherisha Technologies Private Limited emerged as the successful bidder in the 2nd auction for sale of the Corporate Debtor as a going concern with bid amount of Rs. 75,80,00,000. The sale consideration was duly remitted and thereafter, the possession of all the assets of the Corporate Debtor other than the designated Liquidation Account and Not-Readily Realisable Assets ("NRRA") under the control of the Liquidator were handed over to the Successful Bidder.

11. It is stated that the Resolution Professional filed IA. Nos. 683/CHE/2021, IA 684/CHE/2021 and IA 757/CHE/2021 before this Tribunal, under sections 43, 45 and 66 of the IBC, 2016 respectively for reporting avoidance transactions. In the 6th SCC meeting, it was decided that recoveries anticipated from the proceedings for PUFÉ transactions pending before this Tribunal shall be treated as NRRA. Thereafter, in the 7th SCC meeting, it was resolved to issue invitation for Expression of Interest along with sale notice for NRRA. It is stated that M/s Sherisha Technologies Private Limited, emerged as the successful bidder. A Certificate of Sale along with an Assignment Deed was executed on 10.06.2023 to complete the assignment of NRRA.



12. It is stated that the amount realized from the sale of Corporate Debtor as a going concern was distributed by the Respondent to the stakeholders in accordance with Section 53 of the IBC, 2016, on 20.01.2023, 21.01.2023 and 20.04.2023, including distribution of unpaid gratuity, Provident Fund (PF) dues of unrelated employees and workmen, as approved by the SCC. Further, the amount realized from the auction for assignment / transfer of NRRA was also distributed to the stakeholders as per Section 53 of the of the IBC, 2016, on 30.06.2023, as per the advice of the SCC.

13. It is stated that as on the date when the Corporate Debtor was sold as a going concern, the rule laid down by the Hon'ble National Company Law Appellate Tribunal (NCLAT) vide order dated 11.02.2020 in *Savan Godiwala vs Apalla Siva Kumar [Company (Insolvency) No. 1229 of 2019; MANU/NL/0098/2020]* is relevant. As per the order of the Hon'ble NCLAT in *Savan Godiwala(Supra)*, the legal position with respect to payment of gratuity dues, provident fund dues and pension dues, is that in the absence of any 'fund', such dues were not payable by the liquidator to any employee/workmen. However, the Hon'ble NCLAT in *State Bank of India vs Moser Baer*



Karamchari Union and Anr [Company Appeal (AT)(Insolvency) No. 396 of 2019] held that once the liquidation estate/assets of the Corporate Debtor under Section 36 of the Code do not include all sum due to any workman and employees from the provident fund, the pension fund and the gratuity fund, for the purpose of distribution of assets under Section 53, the provident fund, the pension fund and the gratuity fund cannot be included. The same was affirmed by the Hon'ble Supreme Court vide its order dated 07.02.2023 in *Moser Baer Karamchari Union (supra)*. Further, the Hon'ble Supreme Court in its order in *Appala Siva Kumar vs Savan Godiwala (Civil Appeal No. 2520/2020)*, quashed and set aside the order of the Hon'ble NCLAT in *Savan Godiwala(Supra)* dated 11.02.2020.

14. It is stated that the Respondent intimated the SCC about the extant law and sought its instructions on the distribution of gratuity dues vide e-mail dated 23.02.2023. The SCC vide e-mails dated 27.02.2023 and 02.03.2023 advised the Respondent to pay the dues to all the employees on the roll except for the Promoters/Directors of the Corporate Debtor and their relatives/related parties. The reasoning for the decision of the SCC is that three avoidance applications in I.A. Nos.



683, 684 & 757 of 2021 are pending against the Applicants herein for preferential, undervalued and fraudulent transactions and any payout by whatever name called, may affect the realization of other stakeholders in view of the pending avoidance transaction IAs. Accordingly, the Respondent distributed the outstanding gratuity dues of the employees.

15. It is stated that decision of the SCC was conveyed to Mr. S Elangovan i.e., the Applicant in IA. No. 1172/2023, vide letter dated 09.03.2023. Further, the decision of the SCC was also conveyed to the Applicants in IA. No. 1172/2023 and IA. No. 1168/2023, vide e-mail dated 24.03.2024. It is stated that Mr. Elangovan and Mr. SA Prem Kumar were sent notices for the four SCC meetings that were held post the communication dated 09.03.2024. It is stated that, Mr. Elangovan and Mr. SA Premkumar did not put forward any objection before the SCC in the subsequent meetings.

16. It is stated that the SCC, under whose instruction the Respondent has acted, has not been made a necessary party in these IAs.



17. The Applicant filed Citations and Case law paper book vide S.R. No. 4944 dated 29.11.2023 wherein it was reiterated that IBC, 2016 does not provide for non-payment of gratuity dues by the Liquidator on the ground that the employee is promoter/director. Further, it is stated that the Liquidator ought not to have sought the consent or permission of SCC to pay the admitted gratuity dues.

18. The Respondent filed Synopsis of Arguments on behalf of the Respondent vide S.R. No. 4838 dated 30.09.2024 wherein it is stated that the commercial wisdom of the Stakeholders Consultation Committee (SCC) cannot be called in question and that the Respondent distributed the outstanding gratuity dues of the unrelated employees as per the directions of SCC.

19. A Note on Behalf of the SCC was filed before this Tribunal vide S.R. No. 4811 dated 27.09.2024. It is stated that gratuity that is claimed by the directors and related persons who are subject to applications under Sections 43, 45 and 66 of the IBC, 2016 and thus do not have the bonafide locus to make such a claim. Gratuity has been withheld only for persons who constitute related parties as they form part of the



suspended management or their immediate family members. It is stated that since the directors have extended personal guarantee for financial creditors, it has been the cause of withholding their gratuity on account of their irrefutable personal liability. It is stated that gratuity pertaining to all other bonafide employees has been released.

FINDINGS OF THIS TRIBUNAL

20. Heard the Ld. Counsels of the parties and perused the documents on record.

21. Before proceeding with the merits of the case, it would be relevant to note the statutory provisions of IBC, 2016 and Regulations framed thereunder pertaining to the liquidation process.

22. As per Regulation 19 of the IBBI (Liquidation Process) Regulations, 2016, a person claiming to be a workman or an employee of the Corporate Debtor shall submit his claim in the prescribed form along with the proof of claims to the Liquidator. Once, all claims are submitted, the Liquidator is bound by the provisions of Section 40 IBC, 2016, to verify the claims and thereafter, admit/reject the claim, in whole or in part. In case of rejection of claims, the Respondent shall record the reasons for such rejection in writing and communicate the



same to the creditor and corporate debtor within seven days of such admission or rejection of claims. As per Section 41 of IBC, 2016, the Liquidator, shall make the best estimate of the amount of the claim based on the information available with him, in cases where the amount claimed by a creditor is not precise due to any contingency or other reason. The relevant provisions are reproduced below,

Regulation 19: Claims by workmen and employees.

19. (1) A person claiming to be a workman or an employee of the corporate debtor shall submit proof of claim to the liquidator in person, by post or by electronic means in Form E of Schedule II.

(2) Where there are dues to numerous workmen or employees of the corporate debtor, an authorized representative may submit one proof of claim for all such dues on their behalf in Form F of Schedule II.

(3) The existence of dues to workmen or employees may be proved by them, individually or collectively, on the basis of-

(a) records available in an information utility, if any; or

(b) other relevant documents which adequately establish the dues, including any or all of the following –

(i) a proof of employment such as contract of employment for the period for which such workman or employee is claiming dues;

(ii) evidence of notice demanding payment of unpaid amount and any documentary or other proof that payment has not been made; and



(iii) an order of a court or tribunal that has adjudicated upon the non-payment of dues, if any.

(4) The liquidator may admit the claims of a workman or an employee on the basis of the books of account of the corporate debtor if such workman or employee has not made a claim.

Section 40: Admission or rejection of claims.

40. (1) The liquidator may, after verification of claims under section 39, either admit or reject the claim, in whole or in part, as the case may be:

Provided that where the liquidator rejects a claim, he shall record in writing the reasons for such rejection.

(2) The liquidator shall communicate his decision of admission or rejection of claims to the creditor and corporate debtor within seven days of such admission or rejection of claims.

Section 41: Determination of valuation of claims.

*41. The liquidator shall determine the value of claims admitted under section 40 in such manner as may be specified by the Board.

23. In the instant case, the Corporate Debtor was admitted to Liquidation process vide order of this Tribunal dated 19.09.2022 in IA(IBC) No. 484 of 2022 and the Respondent herein was appointed as the Liquidator. The Applicants have filed claims in Form-E for claiming gratuity on the basis of eligibility under Section 4(1) of the payment of Gratuity Act, 1972 to the Respondent. The Applicants have submitted the last drawn salary slip and the gratuity report of the



Corporate Debtor for the month of September 2019 as proof of claim.

The claims of the Applicants were admitted by the Respondent as follows,

S. No.	Name of Employee	Amount Claimed	Claim Admitted	Salary Claim Admitted	Gratuity Claim Admitted
1	C. Gowri Shankar	5,37,880	5,37,880	3,49,868	1,88,012
2	G Karthikeyan	2,62,038	2,02,038	-	2,02,038
3	M Munaswamy	56,394	56,394	-	56,394
4	R Ramesh	6,47,076	5,87,076	-	5,87,076
5	R Santhakumar	1,02,200	1,02,200	-	1,02,200
6	S Harikaran	1,66,673	1,66,673	-	1,66,673
7	R Satishkumar	1,46,800	1,46,800	-	1,46,800
8	L Babu	1,23,500	1,23,500	-	1,23,500
9	S Anthony	1,40,500	1,40,500	-	1,40,500
10	M Kalavathy	1,35,600	1,35,600	-	1,35,600
11	M Purushothaman	4,75,400	4,75,400	-	4,75,400
12	M Gunasekaran	69,200	62,307	-	62,307
13	K Ravi	1,08,700	1,08,700	-	1,08,700
14	S Kumaravel	1,06,900	1,06,900	-	1,06,900
15	S Manikandan	84,800	84,800	-	84,800
16	P Narasaiah	60,600	60,600	-	60,600
17	Praseeda Elangovan	10,09,600	10,09,600	-	10,09,600
18	SA Premkumar	2,40,00,000	2,40,00,000	2,20,00,000	20,00,000
19	Kasi Raman	67,700	67,700	-	67,700
20	S Elangovan	2,40,00,000	2,40,00,000	2,20,00,000	20,00,000
21	Neeraj Elangovan	2,16,300	2,16,300	-	2,16,300
22	G. Aiyapillai	51,900	51,900	-	51,900
23	Abirami Premkumar	10,09,600	10,09,600	-	10,09,600
24	Vasanthan M	43,269	43,269	-	43,269
25	K Raman (S/o- R Kannan)	1,08,700	1,08,700	-	1,08,700
26	Munirathinam S	43,270	43,270	-	43,270
Total		5,37,74,600	5,36,47,707	4,43,49,868	92,97,839

24. The NCLT, Principal Bench in its decision in *Alchemist Asset Reconstruction Co. Ltd v. Moser Baer India Limited (IB/378(PB)/2017)* dated 19.03.2019, has held that gratuity dues payable to employees fall outside the purview of liquidation estate as per Section 36(4) of IBC, 2016 and is not subject to the provisions of Section 53 of the Code. Further, it was held that any deficiency in provident fund, pension fund, gratuity fund of the Corporate Debtor shall be made good by the



Liquidator. The decision of NCLT, Principal Bench, was upheld by the Hon'ble NCLAT in *State Bank of India vs Moser Baer Karamchari Union and Anr [Company Appeal (AT)(Insolvency) No. 396 of 2019]* and Hon'ble Supreme Court of India vide its order dated 07.02.2023 in *Moser Baer Karamchari Union (supra)*. The relevant portions of the judgement of NCLT, Principal Bench are reproduced below,

“ 4. A perusal of the aforesaid para shows that the provident fund dues, pension funds dues and gratuity fund dues are not treated as a part of the liquidation estate and would not, therefore, be recovered by Section 53 of the Code which provides for waterfall mechanism. The liquidator has taken a perverse view by unnecessarily referring to explanation II of Section 53 and Section 326 of the Companies Act, 2013.

5. As a sequel to the above discussion, the application is allowed. Learned counsel for the liquidator states that the claim of the workmen dues shall be considered afresh as per law propounded in the present order as well as the order passed by Mumbai Bench of NCLT. It is made clear that if there is any deficiency to the provident fund, pension fund and gratuity fund, then the liquidator shall ensure that the fund is made available in the aforesaid accounts, even if their employer has not diverted the requisite amount. The prayer made with regard to the bonus and compensation shall also be decided in the light of the observations made in accordance with law.”



25. However, on the basis of the recommendation of the SCC, the Respondent has disbursed the gratuity dues to all employees except to the Applicants who are the promoters/directors and related parties of such promoter/directors. It is pertinent to note here that as per Regulation 31A of IBBI (Liquidation Process) Regulations, 2016, the role of the SCC is advisory in nature and not binding on the Liquidator. In case of any disagreement between the liquidator and the SCC and the liquidator takes a decision different from the advice given by the consultation committee, the Liquidator shall record the reasons for the same in writing and submit the records relating to the said decision, to the Tribunal and to the Board within five days of the said decision and include it in the next progress report. The relevant portion of Regulation 31A of IBBI (Liquidation Process) Regulations, 2016 is reproduced hereunder,

“Regulation 31A: Stakeholders’ consultation committee.

31A. (1) The liquidator shall constitute a consultation committee, comprising of all creditors of the corporate debtor, within sixty days from the liquidation commencement date, based on the list of stakeholders prepared under regulation 31, to advise him on matters relating to-

(a) remuneration of professionals appointed under regulation 7;



(b) sale under regulation 32, including manner of sale, pre-bid qualifications, reserve price, marketing strategy and auction process.;

(c) fees of the liquidator;

(d) valuation under sub- regulation (2) of regulation 35;

(e) the manner in which proceedings in respect of preferential transactions, undervalued transaction, extortionate credit transaction or fraudulent or wrongful trading, if any, shall be pursued after closure of liquidation proceedings and the manner in which the proceeds, if any, from these proceedings shall be distributed;

(f) review of marketing strategy in case of failure of sale of corporate debtor as a going concern;

(g) continuation or institution of any suits or legal proceedings by or against the corporate debtor;

(h) extension of payment of balance sale consideration as provided in clause (12) of Para 1 of Schedule I, beyond ninety days, to be disclosed in the auction notice.

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(10) The advice of the consultation committee shall not be binding on the liquidator:

Provided that where the liquidator takes a decision different from the advice given by the consultation committee, he shall record the reasons for the same in writing and submit the records relating to the said decision, to the Adjudicating Authority and to the Board within five days of the said decision; and include it in the next progress report



Explanation.- It is hereby clarified that the requirements of this regulation shall apply to the liquidation processes commencing on or after the date of the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019."

26. This Tribunal also takes note of the decision of the Hon'ble Supreme Court in *Swiss Ribbons Pvt. Ltd. vs Union of India (AIR 2019 SUPREME COURT 739)*, wherein it was held in that the role of the Liquidator in verification of claims is quasi-judicial in nature.

"60. ... It is clear from these Sections that when the liquidator—determines the value of claims admitted under Section 40, such determination is a—decision, which is quasi-judicial in nature, and which can be appealed against to the Adjudicating Authority under Section 42 of the Code."

27. Thus, it is settled position in law that the powers conferred on the Liquidator is "quasi-judicial" and the Liquidator is not bound by the decision of the SCC. Once the claim has been admitted by the Liquidator in exercise of its quasi-judicial powers, the Liquidator cannot escape from the settlement of such admitted claims on the grounds that the claimants are allegedly parties to avoidance transactions or related to such parties. Such a view of denial of payment of admitted



claims is not substantiated by the provisions of the Code or the relevant regulations.

28. Further, it is observed that the Corporate Debtor has been sold as a going concern to M/s Sherisha Technologies Private Limited for Rs. 75,80,00,000. The Applications, IA. Nos. 683/CHE/2021, IA 684/CHE/2021 and IA 757/CHE/2021 filed under Sections 43, 45 and 66 of the IBC, 2016 that are pending before this Tribunal were treated as NRRA and sold to M/s Sherisha Technologies Private Limited for consideration of Rs. 10,00,000. That being the case, the Respondent and the SCC have failed to demonstrate how the outcome of the pending PUFÉ applications will affect the interest of the other stakeholders.

29. With respect to the withholding payment of gratuity, on account of personal guarantee extended by the directors, we are of the view that rights of the Applicants arising under Section 4(1) of the Payment of Gratuity Act, 1972, in their capacity as an employee of the Corporate Debtor are independent of the rights of the Financial Creditors, if any, arising out of the personal guarantee contract. The personal liabilities of Applicants that may arise out of the personal guarantee extended by them in no way deter their rights to claim gratuity dues. Hence, the



same cannot be a ground for non-payment of gratuity dues to the Applicants. The Financial Creditors are at liberty to enforce the personal guarantee contract through appropriate legal action.

30. As per Regulation 43 of the IBBI (Liquidation Process) Regulation, 2016, any monies received by stakeholders in distribution shall be returned, if he was not entitled to at the time of distribution, or subsequently became not entitled to receive such money. Regulation 43 is reproduced hereunder,

Regulation 43: Return of money.

43. A stakeholder shall forthwith return any monies received by him in distribution, which he was not entitled to at the time of distribution, or subsequently became not entitled to.

31. In our considered view, the Respondent cannot refuse payment of the already admitted claims on flimsy grounds that the same are not affirmed by law. We find that the Applicants herein are entitled to payment of admitted gratuity claims in view of the provisions of the Payment of Gratuity Act, 1972. Hence, the Respondent is hereby directed to re-distribute the proceeds from the liquidation process to all the stakeholders, in terms of Section 36(4), Section 53 of IBC, 2016 and the order of the Hon'ble Supreme Court of India vide its order



dated 07.02.2023 in *Moser Baer Karamchari Union (supra)*. The stakeholders who have received money beyond their entitlement are directed to return the money as per the provisions of the aforementioned Regulation 43 of the IBBI (Liquidation Process) Regulation, 2016.

32. Accordingly, IA/1167(CHE)/2023, IA/1168(CHE)/2023, IA/1170(CHE)/2023, IA/1171(CHE)/2023 and IA/1172(CHE)/2023 are **allowed and disposed of.**

-Sd-

VENKATARAMAN SUBRAMANIAM
Member (Technical)

-Sd-

SANJIV JAIN
Member (Judicial)

Hresha S