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In Chamber

Case :- WRIT - C No. - 10015 of 2021

Petitioner :- M/S Lml Limited
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Shubham Agarwal
Counsel for Respondent :- C.S.C.,Bushra Maryam

Hon'ble Jayant Banerji,J.

This writ petition has been filed by the Company under liquidation through the authorized signatory of the liquidator against the following respondent:

"1. State of U.P. through State of U.P.
through its Principal Secretary, Labout Department,
Government of U.P. Secretariate, Bapu Bhawan, Lucknow

2. Presiding Officer, Industrial Tribunal(III), Kanpur,Uttar Pradesh

3. LML Mazdoor Ekta Sangathan
F-679, Barra-8, Kanpur"

The prayer in the petition is for quashing/setting aside the award dated 19.2.2020 published on 12.3.2020 made by the Industrial Tribunal. Further relief has been sought for restraining the respondents from proceedings against the petitioner-company pursuant to the aforesaid award.

The facts appearing in the present petition is that the Company was engaged in the business of manufacturing of geared scooters and had an employee strength of more than 6,000 employees including staff and workers. Around the late 1990s in view of the significant change in the consumer behavior towards motorcycles as opposed to scooters, the Company suffered substantial losses. On inability to arrange fresh working capital, the Company was only able to achieved partial restructuring in the year 2005. However, in view of the rapid erosion of the Company's net worth, a reference was filed before the Board for Industrial and

Financial Restructuring[1] under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985[2]. In the proceeding of BIFR held on 8.5.2007, an operating agency was appointed to prepare a revival scheme if feasible.

The workmen of the petitioner-Company resorted to strikes and demonstrations with effect from 27.2.2006, which paralyzed its functioning and a lockout was declared with effect from 7.3.2006. In order to salvage the Company's business, the management of the Company and its workmen represented by the registered union of the Company namely Lohia Machines (LML) Karmchari Sangh[3], engaged in protracted tripartite discussions and arrived at settlement on 13.4.2007 before the Additional Labour Commissioner, Kanpur Region, Conciliation Officer and Additional Labour Commissioner (IR) U.P., Head Office Kanpur. It is stated that since the inception of the petitioner-Company, and at the time of the negotiations, the interests of the workmen were represented solely by LMLKS. In terms of the aforesaid settlement, it was decided that the workmen would withdraw the strike and the lockout would be lifted with effect from 15.4.2007; that the petitioner-Company will take steps to revive the establishment and only such number of workmen shall be taken on work and employment in phases as per requirement of work and production as far as on departmental seniority basis, and all other workmen, save and except those who were required to resume work and production, shall stand laid off. The settlement further provided that the laid off workmen would be entitled to receive lay off compensation in the manner specified.

Thereafter, the lockout was lifted with effect from 15.4.2007 and the settlement was implemented. However, a small splinter

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1 BIFR
2 SICA
3 LMLKS

group of workmen describing themselves as LML Mazdoor Union which was neither a registered nor a recognized union filed a Writ Petition No. 25445 of 2007 seeking to dissolve the settlement, which petition was dismissed by this Court. Subsequently, by means of a reference order dated 21.5.2008, the State Government *suo moto* referred an industrial dispute for adjudication to the Industrial Tribunal (respondent no. 2) on the following terms:

> ''क्या सेवायोजकों द्वारा प्रतिष्ठान में दिनांक 15.04.2007 से किया गया ले–आफ उचित तथा /अथवा वैधानिक है? यदि नहीं, तो प्रतिष्ठान के ले–आफ से प्रभावित श्रमिकगण क्या हितलाभ/उपशम पाने के अधिकारी हैं व अन्य किन विवरणों सहित।''
>
> "Whether the lay-off done by the employers in the industry from 15.04.2007 is correct and / or legal? If not, then what benefits / relief are the workman of the industry affected by lay-off are entitled to and what other details."
>
> *(English translation provided)*

The respondent no. 3, LML Mazdoor Ekta Sangathan[4], was granted a registration certificate on 18.1.2008 under the Trade Unions Act, 1926. The registration certificate issued to the respondent-Union was challenged before this Court by way of Writ Petition No. 5903 of 2008 and Writ Petition No. 13658 of 2008. The aforesaid petitions were allowed on 21.04.2008 holding that since all the members of the respondent-Union are laid off employees, therefore, the registration was granted dehors the statute. The Special Appeals, bearing numbers 834 of 2008 and 833 of 2008, filed by the respondent-Union came to be dismissed by this Court by a judgement dated 1.2.2013. However, Special Leave Petitions filed against the aforesaid judgement passed in the Special Appeals are pending before the Supreme court in which the effect and operation of the order dated 1.2.2013 has been stayed until further orders.

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4 respondent-Union

The order of reference dated 21.5.2008 made under Section 4K of the Act was also challenged by the petitioner-Company in Writ Petition No. 33896 of 2007 which was dismissed by a judgement delivered on 17.09.2010. The Special Appeal No. 1699 of 2010 filed challenging the judgement of the writ Court was also dismissed by means of a judgement dated 31.1.2014.

A corporate insolvency resolution process of the petitioner-company, which is a corporate debtor, was initiated pursuant to an order dated 18.5.2017 passed by the NCLT admitting the company petition bearing CP No. (IB)-55/ALD./2017 filed under Section 10 of the Insolvency and Bankruptcy Code, 2016[5]. The NCLT issued consequential directions while passing an order of moratorium under Section 14 of the Code. Since, the resolution plan submitted by one Rimjhim Ispaat Limited was rejected by the Committee of Creditors in the meeting held on 21.1.2018, the NCLT, by means of its order dated 23.3.2018 ordered liquidation of the petitioner-company in the manner laid down in Chapter III of the Code and passed consequential directions. By the order dated 9.4.2018, the NCLT appointed a Liquidator. Pursuant to the order dated 23.3.2018 passed by the NCLT, the petitioner-company made a public announcement dated 16.4.2018. Around 2016 claims of workmen/employees were received. However, on perusal of the books of accounts and record, the Liquidator in accordance with the provisions of Regulation 19(4) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 admitted claims of 6337 workmen/ employees. The petitioner-company started disbursing funds of the employees/workmen whose claims were admitted and till the date of filing of the petition, the Liquidator had disbursed funds amounting to Rs. 37,03,28,557/- to 2946 workmen/employees of the Corporate Debtor/petitioner-company. However, by means of

5 Code

the impugned award dated 19.2.2020, the Industrial Tribunal answered the reference in favour of the workmen and held that the lay off of workmen on 15.4.2007 was illegal and for the period of lay off from 15.4.2007, the workmen are entitled to entire wages, allowances and benefits. It was further held that from 15.4.2007 till the closure of production of the unit of the factory or till the date of appointment of the Liquidator, the workmen who have received lay off compensation, the same would be adjusted and the payable amount would be disbursed within 30 days of the award by the employer/Liquidator.

The contention of the learned counsel for the petitioner-company is that in view of the repeated strikes and unrest created by the workmen as well as the losses suffered by the Company, rapid erosion of the Company's net wealth took place whereafter a reference was filed before the BIFR under the provisions of SICA in which, in the proceedings of BIFR held on 8.5.2007, an operating agency was appointed to prepare a revival scheme, if possible. The discussions between the Company and the registered union of the Company, LMLKS, before the Additional Labour Commissioner and the Conciliation Officer, resulted in a settlement on 13.4.2007 which was given effect to. The lockout was lifted with effect from 15.4.2007 and the settlement was implemented. It is contended that since the registration of the respondent-Union, was canceled by the order of the Court, therefore, under the provisions of Section 6(I) of the U.P. Act, none of its officers were entitled to represent the workmen before the Industrial Tribunal. It is contended that the validity of the settlement was upheld in Special Appeal before this Court, which order has become final and the lay off compensation contemplated in the settlement is strictly in accordance with the provisions of the U.P. Act. The contention is that after the repeal of the SICA, steps were taken by

the Company before the NCLT under the provisions of the Code in which an order of moratorium was passed under the provisions of Section 14 of the Code. Given the order of the NCLT, the Labour Court ought not to have proceeded with the matter. It is further contended that once the order of liquidation was passed on 23.3.2018 and the Liquidator was appointed by NCLT by the order dated 9.4.2018, no award could have been made by the Industrial Tribunal for grant of full back wages and other dues in view of the provisions of Section 53 of the Code. It is contended that there was no material before the Industrial Tribunal to demonstrate want of gainful employment of the workmen after lay-off. Therefore, there was no occasion to grant back wages to the workmen. He has contended that the Tribunal has vaguely referred to new appointments being made without giving any specific details as to which new appointments were made and as such no adverse inference can be drawn against the petitioner-Company. Claims of 6337 workmen / employees of the petitioner-company had been admitted by the Liquidator and funds amounting to Rs.37,03,28,557/- had already been disbursed to the workmen/employees. It is contended that pursuant to the award of the Industrial Tribunal, the respondent-Union has called upon the Liquidator to compute the amount payable to the workers seeking implementation of the award. It is stated that the respondent-Union has not even submitted a list of workers, whose interest it claims to represent, and though, by a letter dated 05.11.2020, has claimed a sum of Rs.216.91 crores to be payable to 1338 workers, yet, it has sought payment of wages for the entire work-force by a letter dated 31.08.2020 that has been enclosed as Annexure-16 to the writ petition. No finding has been recorded in the award regarding the number of the workmen of the respondent-Union. Though the learned counsel for the petitioner-company has submitted a compilation of judgements and several judgements are mentioned

in the pleadings, however, in support of his contentions, he has relied upon the following judgments:- **Parry & Company Ltd. Vs. P.C. Lal, Judge of the Second Industrial Tribunal**[6]; **B. Srinivasa Reddy vs. Karnataka Urban Water Supply & Drainage Board Employees' Association & Ors.**[7]**; Tata Engineering and Locomotive Company Ltd. v. Their Workmen**[8]**; Surendra Kumar Verma vs. Central Government Tribunal-cum-Labour Court, New Delhi & Ors.**[9]**;** and **National Engineering Industries Ltd. vs. State of Rajasthan and Ors.**[10].

Learned counsel for the respondent-Union, on the other hand, has urged that wages were not paid to the employees of the petitioner-company since December 2006. The Union with which the petitioner-company entered into the settlement, does not represent the majority of the workmen. The circumstances led to the workmen forming the respondent-Union, the registration of which was challenged in a writ petition. It is contended that in view of the interim order passed by the Supreme Court in a Special Leave Petition staying the operation of the order of the Division Bench of this Court passed in a Special Appeal, the registration of the respondent-Union stood revived. It is contended that even an unregistered Union is not debarred from representing the interest of a workman. In this regard, the learned counsel has referred to the aforesaid judgment of the Division Bench of this Court in Special Appeal No.1699 of 2010 in which, while observing that whether the circumstances existing after seven years of the settlement still justify its terms to be binding on more than 2500 workmen, which is about 80% of the total number of workmen, which were employed on the date of lock-out requires to be examined by the Industrial Tribunal, the Court held that it is not disputed that even

6 AIR 1970 SC 1334
7 (2006) 11 SCC 731
8 (1981) 4 SCC 627
9 (1980) 4 SCC 443
10 (2001) 1 SCC 371

the workmen of unregistered Union may make a reference by raising an industrial dispute. Learned counsel, in this regard, has referred to paragraph no. 4 of the judgment of the Supreme Court in the matter of **Newspaper Limited Allahabad vs. U.P. State Industrial Tribunal**[11]. The learned counsel has also urged that the Court had further observed that the industrial dispute had been referred *suo moto* by the State Government and as such the satisfaction of the State Government cannot be lightly interfered with by the High Court nor the settlement could be said to be binding on the State Government for all times to come if it is satisfied that there exists an industrial dispute which needs to be adjudicated and resolved. The Court had further observed that the settlement was inconclusive and was entered into to bring temporary industrial peace and it did not end the relationship of employer and employee. The learned counsel has referred to that part of the award which deals with whether the layoff done on 15.02.2007 is correct or legal, to contend that the settlement was never filed on behalf of the petitioner-company before the Industrial Tribunal. It is contended that given the definition of lay-off appearing in Section 2(n) of the U.P. Act, it was incumbent on the petitioner-company to have demonstrated before the Industrial Tribunal that circumstances existed justifying lay-off by the petitioner-company. That having not been done, it is contended, it is not open for the petitioner-company to challenge the award. It is further submitted that it is evident from the cross-examination made on behalf of the authorized representative of the petitioner-company that no documentary evidence was filed and neither was there any material placed to demonstrate that 50% of the lay-off compensation was paid.

In rejoinder, Shri Navin Sinha, learned Senior Advocate appearing on behalf of the petitioner-company, has contended that

11 AIR 1960 SC 1328

way back in the year 2006 itself, the petitioner-company had become sick which finally led to the order of liquidation passed by the NCLT under the Code. It is contended that the petitioner was not a healthy company where the production was going-on in full swing that could enable it to meet its statutory liability.

Having heard the learned counsel for the parties and perused the record, the issue that arises for consideration is whether the award made by the Industrial Tribunal was justified. For consideration of the issue, the submissions on behalf of the learned counsel require to be analyzed.

Representation of the workmen before the Industrial Tribunal:

Annexure No.7 to the writ petition is an order issued on 21.05.2008 passed by the ex-officio Secretary to the Labour Department of the Government of Uttar Pradesh communicating the opinion of the Governor regarding the industrial dispute between the employer and its workmen and referring the same under Section 4-K of the U.P. Act *suo moto*. The aforesaid order of reference was challenged by the petitioner-company in a writ petition which came to be dismissed on 17.09.2010. In the Special Appeal filed by the petitioner-company, M/s L.M.L. Limited[12], against the aforesaid order, the Appellate Court upheld the settlement to be binding despite it being unregistered, however, held that the settlement is not binding on all the workmen of the petitioner-company. It was held as follows:-

> *"26. We find that though learned Single Judge has committed an error in law in holding that the settlement or agreement to be binding must be registered under Section 6-B of the Industrial Disputes Act and has ignored the ratio of the judgment in Herbertsons Limited vs. The Workmen of Herbertsons Limited (supra) as well as the judgment of Supreme Court in National Engineering Industries Ltd vs. State of Rajasthan (supra), in respect of the validity and effect of the settlement arrived at during the course of conciliation proceedings, he did not commit any mistake on the other count namely that in the circumstances of the case the settlement is not*

12 M/s L.M.L. Limited v. State of U.P. And others – Special Appeal No.1699 of 2010

binding on all the workmen of the petitioner-company. From the facts and documents available on record we find that the question, whether the agreement is valid, fair and reasonable and whether at such a distance of time, the open ended provisions in the settlement giving the option to the management-employer to take some of the employees at its discretion leaving the remaining employees with only 50% of lay off compensation and which has also not been paid in full or even in part awaiting finalisation of draft resettlement plan before BIFR, is a question, which requires to be considered by the Industrial Tribunal.

27. The reference made by the State Government, as to whether the lay off was legal and valid and if it is held to be illegal and invalid, the benefits to which the laid off workmen are entitled, is a question, which will also require adjudication of the validity of the settlement.

28. The argument, that the settlement is binding upon all the workmen, does not meet the question raised by Ms. Bushra Maryam that the settlement is not valid in law inasmuch as it is unfair, unconscionable and thus against public policy. In the circumstances, even if the settlement, which did not resolve the dispute with all or even majority of workmen and was not conclusive as it provided for only part payment of lay off compensation, when it was entered into on 13.4.2007, treated to be binding on all the workmen, the question whether the circumstances existing today, after seven years still justify its terms to be binding on more than 2500 workmen, which is about 80% of the total number of workmen which were employed on the date of lock-out requires to be examined by the Industrial Tribunal. In case the settlement is not found to be illegal as it left an unguided discretion to the employer to take back a group of workmen in employment leaving the majority of workmen to be laid off for an indefinite period providing payment of only 50% of the laid of compensation, is not found to be legal and valid, its binding effect on all the workmen would not make the settlement valid for all the workmen for denying a reference.

29. The legal position, that even the workmen of unregistered union may make a reference, is not disputed and thus even if the LML Mazadoor Ekta Sangathan, Kanpur is not a registered union, it could have raised an industrial dispute. In the present case, the industrial dispute has been referred suo moto by the State Government, which makes the case of the petitioner still weaker inasmuch as the satisfaction of the State Government cannot be lightly interfered with by the High Court under Article 226 of Constitution of India, nor the settlement could be said to binding on the State Government for all times to come, if it is satisfied that there exists an industrial dispute which needs to be adjudicated and resolved. The settlement in any case on the face of its terms was inconclusive and was entered into to bring temporary industrial peace on 13.4.2007. It did not end the relationship of employer and employee.

> *30. We further find that even if the settlement dated 13.4.2007 for arguments sake was valid and binding on all the workmen, its effect and consequence on all the workmen cannot be considered to be valid for all times to come and that at this distance of time, when the settlement has not worked out to benefit all the workmen inasmuch majority of workmen being more than 80% of the employees at the time of lock out have not been paid the full laid off compensation and are still waiting for the settlement of such lay off compensation, it cannot be said that there is no bonafide or genuine industrial dispute, which requires to be decided by the Industrial Tribunal."*

The validity of the registration granted in favour of the respondent-Union, is subject to adjudication before the Supreme Court. It is iterated that the registration certificate granted on 18.01.2008 was quashed in a writ petition which order was upheld in the intra-court Special Appeal. The order passed in the Special Appeal was stayed until further orders by the Supreme Court on 21.02.2014 in Special Leave to Appeal (Civil) (CC) No.21380-21381 of 2013 (Vijay Bahadur Kushwaha & Anr. vs. Registrar, Trade Unions, State of U.P. & Ors.).

The Supreme Court in the case of **Shree Chamundi Mopeds Ltd. vs. Church or South India Trust Association**[13], observed that quashing of an order results in the restoration of the position as it stood on the date of passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of passing of the stay order and does not mean that the said order has been wiped out from existence.

Therefore, the order of cancellation of registration of the respondent-Union, remains in abeyance with effect from 21.02.2014 on which date the Supreme Court stayed the order dated 01.02.2013 passed by this Court in Special Appeal No.833 of 2008 and 834 of 2008.

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13 (1992) 3 SCC 1

Learned Senior counsel for the petitioner-company has relied upon the provision of sub-section (3) of section 6-I of the U.P. Act to demonstrate the ineligibility of the respondent-Union to represent the workmen before the Industrial Tribunal. Section 6-I of the U.P. Act reads as follows:-

> *"**6-I. Representation of the parties**.—(1) Subject to the provisions of sub-sections (2) and (3), the parties to an industrial dispute may be represented before a Board, Labour Court, or Tribunal in the manner prescribed.*
>
> *(2) No party to any proceeding before a Board shall be represented by a legal practitioner, and no party to any proceeding before a Labour Court or Tribunal shall be represented by a legal practitioner, unless the consent of the other party or parties to the proceeding and the leave of the Presiding Officer of the Labour Court or Tribunal, as the case may be, has been obtained.*
>
> *(3) No officer of a Union shall be entitled to represent any party unless a period of two years has elapsed since its registration under the Indian Trade Unions Act, 1926, and the Union has been registered for one trade only:*
>
> *Provided that an officer of a federation of unions may subject to such conditions as may be prescribed represent any party."*

It has been observed by this court in the Special Appeal of **L.M.L. Limited** (supra) that the reference was made *suo moto* by the State Government and that it was always open to the workmen of the petitioner-company who are members of the respondent-Union, which is stated to be unregistered, to raise an industrial dispute. Rule 40 of the U.P. Industrial Disputes Rules, 1957[14] reads as follows:-

> *"**40. Representation of parties.** - (1) The parties may, in their discretion, be represented before a Board, Labour Court or Tribunal, -*
>
> *(i) in the case of a workman subject to the provision of sub-section (3) of Section 6-1, by -*
>
> *(a) an officer of a Union of which he is member, or*

14 U.P. Rules

(b) an officer of a Federation of Unions to which the union referred to in clause (a) above, is affiliated, and

(c) where there is no union of workmen, any representative, duly nominated by the workman who are entitled to make an application before a Conciliation Board under any orders issued by Government, or any member of the executive, or other officer;

(ii) in the case of an employer, by

(a) an officer of a union or Association of employers of which the employer is a member, or

(b) an officer of a federation of unions or associations of employers to which the union or association referred to in clause (a) above, is affiliated, or

(c) by an officer of the concern, if so authorized in writing by the employer :

Provided that no officer of a federation of unions shall be entitled to represent the parties unless the federation has been approved by tire Labour Commissioner for this purpose.

(2) A party appearing through a representative shall be bound by the acts of that representative.

(3) ….....
(4) ….....
(5) ….....
(6) ….....
(7) ….....
(8) ….....”

Therefore, clause (i) of sub-rule (1) of Rule 40 of the U.P. Rules gives discretion to the workmen for opting for representation by the persons mentioned therein. It has not been stated in this petition that who was the person authorized by the workmen to represent them and appear before the Industrial Tribunal. It is also not known on which date was the authority letter filed on behalf of the workmen before the Industrial Tribunal. In any view of the matter, an authority letter filed after the aforesaid interim order of the Supreme Court dated 21.02.2014, even by an officer of the respondent-Union would anyway enable him to represent the workmen. For that matter, even if such letter of authority was filed prior to the aforesaid interim order of the Supreme Court, such an officer would be enabled to represent after 21.02.2014 in view of the interim order of the Supreme Court. Therefore, the contention regarding non-entitlement of the respondent-Union to

represent the interest of the workmen before the Industrial Tribunal would not be acceptable.

While placing the judgment in the case of **B. Srinivasa Reddy**, the learned counsel for the petitioner-company has specifically referred to paragraph no.38 thereof in which it is held as follows:-

> *"38. In the writ petition filed by Respondents 1 and 2 their locus standi to challenge the appointment of the appellant was asserted in the following words:*
>
> *"The petitioner Association is a trade union registered under the Trade Unions Act, 1926. The petitioner is the only registered trade union existing in the 2nd respondent Board. The Board has held several negotiations with the petitioner Union with regard to the service conditions of the employees of the 2nd respondent Board since its formation in the year 1986. The Board has entered into several settlements with the petitioner Union with regard to their service conditions. The petitioner which is a recognised trade union is entitled to agitate the matter with regard to the appointment of the 3rd respondent to the Board. The petitioner is concerned about the functioning of the 2nd respondent Board, and as such is entitled to question the appointment of the 3rd respondent as Managing Director on contract basis. Hence, the petitioner has locus standi to file this writ petition." (emphasis supplied)*
>
> *These averments were established to be false. The registration of the first respondent under the Trade Unions Act had been cancelled as early as on 2-11-1992. It is not a registered and recognised union. In fact, it was pointed out that the one recognised association is the Karnataka Urban Water Supply and Drainage Board Officers' and Employees' Association and the first respondent does not have even a handful of members. The fact of cancellation of registration of the first respondent came to the knowledge of the appellant long after the disposal of the earlier Writ Petition No. 44001 of 1995 wherein the Court had given a finding that the first respondent has locus standi to challenge the appointment of the appellant to the post of Managing Director of the Board solely on the ground that it is a registered trade union. In our opinion, the High Court gravely erred in refusing to examine the question of locus standi on the ground that it is decided in the earlier writ petition which operates as res judicata and that the petitioners even otherwise have locus standi. Chapter III of the Trade Unions Act, 1926 sets out rights and liabilities of the registered trade unions. Under the said enactment, an unregistered trade union or a trade union whose registration has been cancelled has no manner of right whatsoever, even the rights available under the ID Act have been limited only to those trade unions which are registered under the Trade Unions Act, 1926 by insertion of clause 2(qq) in the ID Act w.e.f. 21-8-1984 defining a trade union to mean a trade union registered under the Trade Unions Act, 1926."*

In view of the facts and circumstances of the present case, the case of **B. Srinivasa Reddy**, is distinguishable. On the other hand, in the judgement of the Supreme Court in **Newspapers Ltd.** (supra) it was observed as follows:-

> *"4. Then it was urged that the association which sponsored the case of Respondents 3 to 5 was an unregistered body and that made the reference invalid. Both the courts have held, and rightly, that it is not necessary that a registered body should sponsor a workman's case to make it an industrial dispute. Once it is shown that a body of workmen, either acting through their union or otherwise had sponsored a workman's case it becomes an industrial dispute."*

Under the circumstances, the challenge to the representation by the respondent-Union in seeking the reference or in appearing before the Industrial Tribunal cannot be sustained.

Consideration of the settlement by the Industrial Tribunal:

As regards the settlement dated 13.4.2007, its scope and extent has already been discussed by the judgement dated 31.1.2014 in the aforesaid Special Appeal of **M/s L.M.L. Limited** (supra). Lay-off by the petitioner-Company formed part of the settlement. The issue regarding lay-off was the subject matter of the reference made *suo moto* by the State Government to the Industrial Tribunal which, in turn, has answered the reference aforesaid in favour of the workmen.

It, however, needs to be mentioned that the reference by the State Government does not refer to the workmen who are the members of any particular Union, but, refers to the workmen who were laid off. Given the unrest among the workers with regard to their disengagement as a result of lay off, the State Government *suo moto* made the order of reference under Section 4-K of the U.P. Act. It is pertinent to mention here that the award of the Industrial Tribunal is in respect of the workers who were laid off by the

petitioner-company on 15.4.2007, and not only in respect of workmen having membership of any particular Union. Interestingly, it appears from the award itself that the registered Union which had signed the settlement, namely, LMLKS, had appeared before the Industrial Tribunal and had filed a copy of the settlement dated 13.04.2007 as an enclosure to its application 33/D. However, there is no material on record to demonstrate that it opposed the respondent-Union.

As far as the settlement dated 13.04.2007 being binding on the parties to the settlement is concerned, the Court in the Special Appeal of **M/s LML Limited** (supra) has already affirmed that position, but, the Court has also observed that in the circumstances of the case, the settlement is not binding on all the workmen of the petitioner-company. The Court went on to observe that whether the agreement is valid, fair and reasonable and whether at such a distance of time, the open ended provisions in the settlement giving the option to the management-employer to take some of the employees at its discretion leaving the remaining employees with only 50% of lay off compensation and which was also not paid in full or even in part awaiting finalisation of draft resettlement plan before BIFR, was a question, which required consideration by the Industrial Tribunal. The Court also held that the reference made by the State Government was one which would also require adjudication about the validity of the settlement dated 13.04.2007.

As referred to above, the settlement dated 13.04.2007 was not filed by the petitioner-company before the Industrial Tribunal, but it was filed by the registered Union, LMLKS. The Industrial Tribunal has observed that with regard to the rationale and legality of the settlement, no documentary or oral evidence was furnished by the employers which could have demonstrated that the settlement was lawful and logical. It is observed by the Industrial

Tribunal that Section 2(n) of the U.P. Act specifies all conditions under which lay-off can be made, but the lay-off done by the employers was shown to be due to the crisis of working capital, which is contrary to the provisions of Section 2(n). It is pertinent to mention here that the Industrial Tribunal has observed that from 15.04.2007, for a continuous period of 10 years, the workmen are without any work and despite the respondent-Union opposing the lay off, the lay-off was not brought to an end and no work was allotted to them. The Industrial Tribunal has further held that in the settlement no additional benefit has been given to the workmen and they were entitled to lay-off compensation, but lay off compensation has not been paid in its entirety which is improper and illegal. The Industrial Tribunal further noticed that the partial payments of the compensation for the lay-off that was being made from the year 2017 was stopped from March, 2017 and accordingly, it held that it cannot be assumed that by means of the settlement, approval had been given to the petitioner-company to keep the workmen laid off for an indefinite period of time and not make payment of the entire compensation.

Section 2(n) of the U.P. Act reads as follows:-

> *“**(n) 'Lay-off'** (with its grammatical variations and cognate expressions) means the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stock or the breakdown of machinery, or for other reason, to give employment to a workman whose name is borne on the muster-rolls of his industrial establishment and who has not been retrenched;*
>
> *Explanation. - Every workman whose name is borne on the muster-rolls of the industrial establishment and who presents himself for work at the establishment at the time appointed for the purpose during normal working hours on any day and is not given employment by the employer within two hours of his so presenting himself shall be deemed to have been laid off for that day within the meaning of this*

clause :

Provided that if the workman, instead of being given employment at the commencement of any shift for any day is asked to present himself for the purpose during the second half of the shift for the day and is given employment then, he shall be deemed to have been laid off only for one-half of that day:

Provided further that if he is not given any such employment even after so presenting himself, he shall not be deemed to have been laid-off for the second half of the shift for the day and shall be entitled to full basic wages and dearness allowance for that part of the day;"

Section 6-K of the U.P. Act, which deals with payment of compensation to laid-off workmen, reads as follows:-

6-K. Right of workmen laid-off for compensation.*—(1) Whenever a workman (other than a substitute or a casual workman) whose name is borne on the muster rolls of an industrial establishment and who has completed not less than one year of continuous service under an employer is laid-off, he shall be paid by the employer for all days during which he is so laid off, except for such weekly holidays as may intervene, compensation which shall be equal to fifty per cent of the total of the basic wages and dearness allowance that would have been payable to him had he not been so laid-off:*

Provided that the compensation payable to a workman during any period of twelve months shall not be for more than forty-five days.

(2) Notwithstanding anything contained in the proviso to sub-section (1), if during any period of twelve months, a workman is laid-off for more than forty-five days, whether continuously or intermittently and the layoff after the expiry of the first forty five days comprises continuous periods of one week or more, the workman shall, unless there is any agreement to the contrary between him and the employer, be paid, for all the days comprised in every such subsequent period of lay-off for one week or more, compensation at the rate specified in sub-section (1):

Provided that it shall be lawful for the employer in any case falling within this sub-section to retrench the workman in accordance with the

provisions contained in Section 6-N at any time after the expiry of the first forty-five days of lay-off and when he does so, any compensation paid to the workman for having been laid-off during the preceding twelve months may be set-off against the compensation payable for retrenchment.

Explanation—"Substitute workman" means a workman who is employed in an industrial establishment in the place of another workman whose name is borne on the muster rolls of the establishment, but shall cease to be regarded as such for the purposes of this section, if he has completed one year of continuous service in the establishment.

As observed by the Industrial Tribunal, no documentary or oral evidence was filed on behalf of the petitioner-company which could have demonstrated that the settlement was lawful and logical. A perusal of the award impugned reveals that despite adequate opportunity to the employers, no documents whatsoever were produced, whereas the respondent-Union had produced 27 documents along with a list numbered as 38-B(2). The fact that the petitioner-company had gone into liquidation was communicated to the Industrial Tribunal on 27.04.2018. On 27.08.2018, the nominated representative of the liquidator was present before the Industrial Tribunal and he filed his authority letter which was marked as paper no.51/A. On this authority letter, an objection was made by the respondent-Union that the nominated representative was an advocate and, after hearing the parties, the authority letter was rejected. Thereafter, Shri Umesh Chandra Tripathi filed his authority letter no.53/A on behalf of the petitioner-company. On behalf of the respondent-Union, Shri Vijay Bahadur Kushwaha testified which testimony was recorded and marked as paper no.54/C. This witness also proved the documents which were exhibited as D-1 to D-26. It was testified by this witness that the compensation in accordance with Section 6-K of the U.P. Act was not paid to the workmen affected by the lay-off declared on

15.04.2007. All the workmen affected by lay-off used to visit the Head Office of the Establishment for recording their attendance and they are still doing so. It was stated that payment of 50% of lay off compensation that was being paid by the employer was also stopped from March 2017. It was stated that the respondent-Union is representing all the affected workmen. The lay-off notice dated 15.04.2007 was opposed by the respondent-Union by sending representations to various authorities including the Labour Commissioner of Uttar Pradesh. Despite the employers being called by the Labour Department by means of a notice to give their clarification but they never appeared. It was testified that with regard to the lay-off, an agreement was entered into between the employers and their 'pocket' Union which was opposed by the respondent-Union as well as the 756 workers employed in the Establishment. The witness for the workmen also proved document no.23 which was a counter affidavit filed by the Labour Department in a writ petition filed by the employers (petitioner-company) in Writ Petition No.42868 of 2010. That it was evident from that counter affidavit that the lay-off done by the employers was not in accordance with law. The witness, while referring to document no.26, stated that it was an order made by the Labour Commissioner of Uttar Pradesh to make payment of lay off compensation in accordance with law, but the employer did not obey that order. The witness testified that after lifting of the lock-out, around 400 workmen were employed and those 400 workmen are not included in the case before the Tribunal.

On behalf of the petitioner/liquidator, Shri Suraj Narain Shukla appeared as witness E.D.-1. He testified in his examination-in-chief that the industrial dispute came to an end after the settlement dated 13.04.2007. That 50% of the lay-off compensation was paid to the workmen. In his cross-examination, the witness

stated that no document had been filed before the Industrial Tribunal with regard to the lay-off. The witness stated that no document with regard to payment of 50% of the lay-off compensation to the workmen had been filed before the Industrial Tribunal. The witness had no knowledge whether the settlement dated 13.04.2007 was registered or not. He stated that as per his knowledge, due amount of the lay-off compensation in terms of the settlement was paid alongwith two months wages. He, however, could not state that when did the lay-off period come to an end and how many workmen were affected by the lay-off. The witness also could not state that whether any rehabilitation package was approved in respect of the establishment or not. The witness also did not have any knowledge whether any calculation has been made by the liquidator with regard to computation of the balance amount of lay-off compensation.

The Industrial Tribunal noticed in the award that the settlement dated 13.04.2007 was brought on record by the registered Union, namely, Lohia Machine (LML) Karmchari Sangh, alongwith their application paper no.33/B. The Industrial Tribunal noticed that a letter signed by 756 workers was sent to the Labour Commissioner, Kanpur in which the lay-off of 2700 workmen was opposed with the demand of ending the lay-off and for the workmen to be provided work. Pertinently, it was noticed that in paragraph 19 of the counter affidavit filed on behalf of the State Government in Writ Petition No.42868 of 2010, which document was proved by the workmen's witness, it was stated that at the time of the settlement dated 13.04.2007, 2800 workmen were employed with the petitioner-company, of whom 743 workmen were members of LMLKS. Consequent to the agreement dated 13.04.2007, 743 workmen were employed and around 2000 workmen were not employed because of which the reference was made for adjudication. Again, in paragraph 22 of that counter

affidavit, it was mentioned that only a small group of 743 workers were given benefit of the agreement dated 13.04.2007 and the rest of the workmen were not given the benefit and they were deprived of work and were laid off. The Industrial Tribunal noticed that in the evidence, an important point was reflected that during the period of lay-off, the petitioner-company made fresh appointments for carrying on production, but laid off workers were not given priority for employment. Reference has been made to a notice of the Labour Department on the complaint of the Union dated 02.08.2010 that in the months of October and November 2009, instead of laid off workmen, new appointments were made for carrying on production. In the said notice, it was mentioned that the period of the settlement dated 13.04.2007 had come to an end and the workmen laid off should be employed. It was noticed that this notice of the Labour Department was not opposed by the employers nor was any oral evidence led to contradict this fact. Thereafter, after detailed analysis of the evidence, the Industrial Tribunal held that the lay-off done on 15.04.2007, under cover of settlement dated 13.04.2007, was completely unjustified and illegal. It was further held that from the date of the lay-off, that is, from 15.04.2007, the workmen are entitled to full wages, allowances and other consequential benefits.

The memorandum of settlement dated 13.04.2007, that is the bone of contention between the contesting parties, has been enclosed as Annexure No.4 to the writ petition. It is made in Form-1 and under Section 4-F of the U.P. Act read with Rule 5(1) of the U.P. Rules. The names of the parties and their addresses are mentioned as M/s. LML Limited, Scooter Unit, Site-II, C-10, Panki Industrial Estate, Kanpur (Company) and the workmen through their Union - Lohia Machines (LML) Karmchari Sangh, 117/533, Pandu Nagar, Kanpur. The representatives of the

employer were (1) Shri R.K. Srivastava, Whole time Director, and (2) Shri K.P. Tripathi, Divisional Manager (P&IR). The representatives of the workmen are 15 in numbers headed by the acting President. In the recital of the case appearing in the settlement, it is narrated that the company's performance during the previous two years had been adversely affected due to the drastic shift in the market from geared scooters to motorcycles; and inspite of significant efforts, the company could achieve only partial financial restructuring in the year 2005 and could not obtain fresh working capital facilities with the result that liquidity constraints and high break even point continued to adversely affect the performance of the company causing it to incur heavy losses; due to strikes and demonstrations by the workmen with effect from 27.02.2006, the company's working was completely paralysed and lock-out was declared on 07.03.2006 which was continuing; as a result of huge losses of approximately Rs.411.44 crores, the company's net worth had been fully eroded and the company filed a reference before the BIFR under the provisions of SICA. The recital further narrates that for resolving various issues, a tripartite meeting had taken place before the Additional Labour Commissioner, Kanpur Region as well as the Additional Labour Commissioner, U.P. (I.R) which culminating in execution of a tripartite settlement dated 24.07.2006 in pursuance of which settlement, the Management had disbursed wages to the workmen for January and February 2006 which was accepted in full. In view of the extremely precarious financial position of the company, its business plan had to be totally recasted and with a view to revive the Unit, the company would favourably consider to restart its scooter operations on a limited scale, primarily for the export market. The parties agreed for the downsizing of manpower and all other measures, as may be required at the sole discretion of the management, would be adopted to make the Unit viable so as to

ensure its survival and revival, and bring the company back to a position of sustained profitability. It is mentioned in the recital that the company would need time to complete the process required for formulation, consideration and approval of the revival package which, *inter alia*, would involve induction of fresh funds from financial/strategic investors, settlement/restructuring of liability etc. It was recognised by the parties that it is in the interest of the company and workmen that the company resumes its operations as contemplated for manufacture and export of scooters and also time would be needed by the company thereafter for formulation, consideration and approval of the revival package by the BIFR. It was finally mentioned in the recital that after meeting between the management and the office bearers of the registered and recognised Union working in the company, a tripartite meeting had taken place on 13.04.2007 before the Additional Labour Commissioner, Kanpur Region, Kanpur and the Additional Labour Commissioner, U.P. (I.R) head office at Kanpur wherein the following settlement had been arrived at between the parties with their consent. The 11 clauses of the terms of the settlement are as follows:-

> *"**Terms of Settlement***
>
> *1. That it has been discussed and decided that the workman shall withdraw the strike with immediate effect and accordingly the Company shall lift the Lockout with effect from 15th April 2007. The Company, shall first start cleaning and carry out maintenance work of the plant & machinery which will take 7 to 10 days time and only thereafter normal production activity can be gradually restarted.*
>
> *2. That since work and production of scooters is to be started in a phased manner depending on the market requirement and orders, it has been agreed and decided that only such number of workmen shall be taken on work and employment, in phases, as per requirement of work and production and as far as departmental seniority basis. That all other workmen, save and except those who are required to resume work and production and whose names shall be displayed at the notice board of the Company from time to time, shall stand Laid Off. The workmen so Laid Off shall be entitled to receive Lay Off Compensation ("LOC") in terms of the*

UP Industrial Disputes Act 1947 in the manner as discussed and decided hereunder.

a). That the workmen and the union agree that looking to the precarious financial condition of the Company, the LOC payable to the eligible laid off workmen will be paid in the following manner:

i) That only 50% of the LOC shall be paid to the laid off eligible workmen and remaining 50% shall be payable to them after the Revival Package of the company has been approved by Hon'ble BIFR and the necessary funds foreseen under the Revival Package has been received by the Company in the manner as would be set out under the said Revival Package.

ii) That the above LOC amount of 50% shall be paid to the Laid Off Workmen by crediting the same to the workmen's respective bank accounts in Indian Overseas Bank, LML Extension Counter, Panki, Kanpur on every 25th of the subsequent month.

b) That all the workmen so Laid Off shall have to present themselves every day for marking attendance at the Company's registered office at C-3, Panki Industrial Area, Kanpur at 10 a.m. and 3 p.m. as per the attendance schedule which will be displayed on the Notice Board. All those workmen who do not present themselves to punch their attendance on the above appointed time and place shall not be entitled for any LOC.

c) That, since large number of workmen have lost their cards for marking their attendance, the Management has, on the request of the Union and workmen, agreed to make arrangement for the issue of new cards for marking attendance to all the workmen. It is, therefore, agreed that all workmen including those who are Laid Off shall first receive the new cards from the Time Office at C-3, Panki Industrial Estate, Kanpur, and then mark their attendance accordingly.

d) That those Laid Off workmen who refuse to accept any alternative employment/job, offered by the Company shall not be entitled for any LOC whatsoever.

e) That any Laid Off workmen remaining absent for more than 15 consecutive days shall lose his lien on employment and shall be treated as having left the employment of the Company on his own accord as per the provisions of Certified Standing Orders of the Company and accordingly his name shall be struck off from the muster rolls of the Company.

3. That the workmen and their union agree that looking to the precarious financial condition of the company and for its revival, there will be moratorium on revision of salary/wages as on February 2006 of the employees for a period of three years from the date of lifting of the Lockout.

4. That the workmen and their union agree that the Canteen will be run on "No Profit No Loss basis" by a Contractor as per Factories Act. Management shall not give any subsidy what so ever.

5. That in terms of the agreement dated 24.07.2006 with regard to pending ACO lying in the name of workmen till December 2005, it is agreed that the ACO amount shall be adjusted from the workmen's earned monthly wages @ Rs. 1000/- per month, effective from the date of the lifting of the lockout. It is however, clarified that no adjustment of ACO will be made from the amount paid to the Laid Off workmen from their LOC.

6. That workmen and the union agree that while making full & final payment at the time of severance for any reason whatsoever of any workman, the company shall make adjustment of all advances including ACO in terms of the agreement dated 24.07.2006, PROVIDED that such payment shall only be made to the workmen after the Revival Package of the Company has been approved by the Hon'ble BIFR and the necessary funds foreseen under the Revival Package including for making of severance payment has been received by the Company in the manner as would be set out under the said Revival Package.

7. That as regards the payment of balance 50% Bonus for the year 2003-2005, it has now been finally decided that it shall be paid to the workmen in three equal installments as under:

a. First Installment by end of June 2007

b. Second Installment by end of August 2007

c. Third Installment by end of October 2007

8. With regard to the workmen, who are rendered surplus including but not limited to the scaling down, suspension of Motorcycle operations and/or any other operations and activities in the plant and/or for any reason whatsoever and/or should their services be not required shall be governed as per the law.

9. That all parties agree that Management shall outsource non core activities which it deems expedient to vendors and / or by or through contractors.

10. That it has been discussed and agreed between the parties that the workmen shall not be entitled for any wage and or salary and or any benefit for the strike/lockout period on "no work no pay" basis and as a result of this settlement all the issues pertaining to the strike / lockout stand fully and finally resolved.

11. That the workmen and the union assure the Management that they would extend their full co-operation for restoring normalcy in work and production to ensure the survival and revival of the Company and to make it viable."

At the end of the aforesaid memorandum of settlement, the representatives of the employers and the 15 representatives of the workmen have signed in the presence of Additional Labour Commissioner, Kanpur Region, Kanpur as well as the Additional Labour Commissioner, U.P. (I.R) Kanpur.

Before considering the aforesaid settlement with regard to lay-off and the award of the Industrial Tribunal on this aspect, it may be mentioned that in the counter affidavit filed by the respondent-Union, a copy of the certified Standing Orders dated 27.08.1984 has been enclosed as Annexure-CA-1 framed under the Industrial Employment (Standing Orders) Act, 1946. This document has not been specifically denied in the rejoinder affidavit filed by the petitioner-company. The provisions of lay-off of workmen, payment of compensation, and maintenance of muster rolls are mentioned in clauses 19, 20 and 21 respectively of the aforesaid Standing Orders. They are quoted below:-

"19. LAY OFF OF WORKMEN :

Lay off will have the same meaning as given in Section 2 of U.P. Industrial Disputes Act, 1947.

The employer may at any time or times in the event of fire, catastrophy, breakdown of machinery or stoppage of the power supply, epidemic, civil commotion or any other causes whether of a like nature or not, beyond the control of employer, stop any machine or machines or department or departments, wholly or partly, for any period or periods, and lay off of the workmen. The employer shall not be liable to pay compensation to the laid off workmen if the lay off is for reasons beyond the control of employer.

Provided that it shall be lawful for the employer to retrench the workman in accordance with the provisions contained in section 6-N of the U.P. Industrial Disputes Act, 1947, at any time after the expiry of the first forty five days of lay off and when he does so any compensation if paid to the workman for having been laid off during the preceding twelve months, may be set off against the compensation payable for retrenchment.

20. WORKMAN NOT ENTITLED TO COMPENSATION IN CERTAIN CASES :

No compensation shall be paid to a workman who has been laid off :

(i) If he refuses to accept any alternative employment in the Industrial Establishment, if in the opinion of the employer, such alternative employment does not call for any special skills or previous experience and can be done by the workman provided that the wages which would normally have been paid to the workman are offered for the alternative employment also.

(ii) If he does not present himself for work at the Industrial Establishment at the appointed time during normal working hours at least once a day.

(iii) If such laying off is due to a strike or slowing down of production or partial working on the part of workmen in another part of the establishment.

No lay off compensation shall be payable if the strength of the workman employed is less than 50.

21. MAINTENANCE OF MUSTER ROLLS OF LAID OFF WORKMAN:

The employer shall maintain muster roll of laid off workmen and shall provide for the making of entries therein by laid off workman who present themselves for work at the Industrial Establishment at the appointed time during normal working hours."

There is nothing on record to demonstrate that a copy of the Standing Orders, that has been enclosed as Annexure CA-1 to the counter affidavit, was filed by any party before the Industrial Tribunal. Alongwith the aforesaid counter affidavit, the testimony of Shri Suraj Narain Shukla, who was authorised by the liquidator to testify in the adjudication case, has also been enclosed as Annexure CA-2. This document has also not been specifically denied in the rejoinder affidavit of the petitioner-company. The narration of the testimony as appearing in the award aforesaid, has already been referred to above and, therefore, is not being repeated here for the sake of brevity. Suffice to say that the witness for the petitioner-Company apparently had superficial knowledge of the settlement dated 13.04.2008 and did not prove from any record whether the terms of the settlement pertaining to lay-off were complied with. Under clause 19 of the Standing Orders, the employer has powers to lay-off workmen in the eventualities mentioned therein for any period or periods and the employer is

not liable to pay compensation to the laid off workmen, if the lay-off is for reasons beyond the control of the employer. It is provided therein that it would be lawful for the employer to retrench the workmen in accordance with the provisions contained in Section 6-N of the U.P. Act at any time after the expiry of the first 45 days of lay-off, and when he does so, any compensation, if paid to the workmen, for having been laid off during the preceding 12 months, may be set off against the compensation for retrenchment.

A perusal of the terms of the settlement dated 13.04.2007, reveals that contrary to the Standing Order aforesaid, no period of lay-off has been specified therein. On the face of it, the settlement purports to keep the workers laid-off indefinitely and that too on a meagre lay-off compensation, and even that, as is recorded by the Industrial Tribunal, has not been paid. There was no material on record before the Industrial Tribunal on behalf of the petitioner-company to demonstrate that the laid-off workmen were paid compensation in accordance with the terms of the settlement. As a matter of fact, the authorised witness of the liquidator made no statement with regard to the fact whether laid off workmen had been paid compensation in terms of the settlement and, if so, to what extent.

With regard to the finding of the Industrial Tribunal that fresh appointments had been made without giving priority to the laid off workmen, it has been contended on behalf of the petitioner-Company that the finding is vague inasmuch as it does not give any specific details. However, a perusal of the award reveals that the finding has been recorded on the basis of a notice issued by the Assistant Labour Commissioner, Kanpur Region, Kanpur (which was marked as Exhibit D-19) which referred to new appointments being made by the petitioner-company for production in place of the laid off workmen and that the lay-off be ended and the

workmen be provided work. The Industrial Tribunal has noticed that the aforesaid notice had not been disputed by the employers by any document nor on the basis of oral testimony and therefore, Exhibit D-19 is completely believable and during the period of lay off, appointment of new workmen by the employer and not re-employing the laid off workmen, was unjustified and illegal. At the cost of repetition, it is mentioned here that no document whatsoever was filed on behalf of the petitioner-company as has been noticed by the Industrial Tribunal in the award. The Industrial Tribunal has also referred to the counter affidavit of the State Government filed in Writ Petition No.42868 of 2010 in which it was mentioned that only 743 workmen of the company were members of the registered Union by the name of Lohia Machines (LML) Karmchari Sangh whereas at the time of the settlement on 13.04.2007, 2800 workmen were employed and since under the settlement only 743 workmen were given employment and 2000 were deprived of employment, the reference was made. A perusal of the testimony of the witness on behalf of the petitioner-company reveals that no questions were put to him in the examination-in-chief with regard to the aforesaid counter affidavit.

At this stage it may be mentioned that in the judgement dated 21.4.2008 passed in Civil Misc. Writ Petition No. 5903 of 2008 (LMLKS Vs. Registrar, Trade Unions & others), by which the registration of the respondent-Union was quashed, it has been observed that “There is no denial that out of the work force of 3000, about 2500 are members of the petitioner-Union.....”. However, in the present case, after considering the evidence, the Industrial Tribunal has recorded that only 743 workmen were members of LMLKS whereas at the time of the settlement, 2800 workmen were employed. A perusal of the record reveals that no perversity is attributable to this observation of the Industrial Tribunal.

However, the observation of the Industrial Tribunal that the lay-off being based on the crisis of lack of working capital is against the provision of Section 2(n) of the U.P. Act, is not correct. The phrase “for other reason” appearing in Section 2(n) and the phrase “any other causes whether of a like nature or not, beyond the control of employer” appearing in clause 19 of the Standing Orders, are wide enough to cover the lay-off made by the petitioner-Company. Nevertheless, this observation of the Tribunal would not have bearing on the finding of the Tribunal that the lay-off was unjustified and illegal.

Paragraph no.14 of the judgement of **Parry and Company Ltd.** (supra) has been relied upon by the learned Senior Counsel for the petitioner-company to contend that it was not open to the Industrial Tribunal to question the settlement because it was the prerogative of the petitioner-company to organise and arrange its business in the manner considered best, and if that leads to surplusage of employees no employer is expected to carry the burden of such economic dead-weight and retrenchment has to be accepted as inevitable, however unfortunate it is. The relevant part of paragraph no. 14 of the judgement is quoted below:-

> *“14. It is well established that it is within the managerial discretion of an employer to organise and arrange his business in the manner he considers best. So long as that is done bona fide it is not competent of a tribunal to question its propriety. If a scheme for such reorganisation results in surplus age of employees no employer is expected to carry the burden of such economic dead-weight and retrenchment has to be accepted as inevitable, however unfortunate it is. The Legislature realised this position and therefore provided by Section 25-F compensation to soften the blow of hardship resulting from an employee being thrown out of employment through no fault of his. It is not the function of the Tribunal, therefore, to go into the question whether such a scheme is profitable or not and whether it should have been adopted by the employer. In the instant case, the Tribunal examined the*

propriety of reorganisation and held that the Company had not proved to its satisfaction that it was profitable. ....."

In the present case, the Industrial Tribunal has answered the reference which pertained to the validity of the lay-off by means of the award and has recorded a definite finding about the lay-off being unjustified and illegal. The Tribunal has analyzed the settlement only for consideration of the provisions and terms of lay-off. Moreover, in the case of **Parry and Company Ltd.**, the workmen were retrenched, whereas in the present case, despite the Standing orders providing for retrenchment in circumstances where the lay off was extended, the lay-off was being indefinitely extended without resorting to retrenchment. This judgement is distinguishable in view of the facts and circumstances of the present case.

The learned counsel for the petitioner-company has then referred to paragraph no.10 of the judgement of the Supreme Court in the case of **Tata Engineering and Locomotive Company Ltd.**, which is as follows:-

"10. The conclusion reached by the Tribunal that the settlement was not just and fair is again unsustainable. As earlier pointed out, the Tribunal itself found that there was nothing wrong with the settlement in most of its aspects and all that was necessary was to marginally increase the additional daily wage. We are clearly of the opinion that the approach adopted by the Tribunal in dealing with the matter was erroneous. If the Settlement had been arrived at by a vast majority of the concerned workers with their eyes open and was also accepted by them in its totality, it must be presumed to be just and fair and not liable to be ignored while deciding the reference merely because a small number of workers (in this case 71 i.e. 11.18 per cent) were not parties to it or refused to accept it, or because the Tribunal was of the opinion that the workers deserved marginally higher emoluments than they themselves thought they did. A settlement cannot be weighed in any golden scales and the question whether it is just and fair has to be answered on the basis of principles different from those which come into play when an industrial dispute is under adjudication. In this connection we cannot do better than quote extensively from Herbertsons Ltd. v. Workmen [(1976) 4 SCC 736 : 1977 SCC (L&S) 48 : (1977) 2 SCR 15] wherein Goswami, J., speaking for the Court observed: (SCC pp. 743-45, paras 21, 24-25 and 27)

"Besides, the settlement has to be considered in the light of the conditions that were in force at the time of the reference. It will not be correct to judge the settlement merely in the light of the award which was pending appeal before this Court. So far as the parties are concerned there will always be uncertainty with regard to the result of the litigation in a court proceeding. When, therefore, negotiations take place which have to be encouraged, particularly between labour and employer, in the interest of general peace and well being there is always give and take. Having regard to the nature of the dispute, which was raised as far back as 1968, the very fact of the existence of a litigation with regard to the same matter which was bound to take some time must have influenced both the parties to come to some settlement. The settlement has to be taken as a package deal and when labour has gained in the matter of wages and if there is some reduction in the matter of dearness allowance so far as the award is concerned, it cannot be said that the settlement as a whole is unfair and unjust.

* * *

We should point out that there is some misconception about this aspect of the case. The question of adjudication has to be distinguished from a voluntary settlement. It is true that this Court has laid down certain principles with regard to the fixation of dearness allowance and it may be even shown that if the appeal is heard the said principles have been correctly followed in the award. That, however, will be no answer to the parties agreeing to a lesser amount under certain given circumstances. By the settlement, labour has scored in some other aspects and will save all unnecessary expenses in uncertain litigation. The settlement, therefore, cannot be judged on the touchstone of the principles which are laid down by this Court for adjudication.

There may be several factors that may influence parties to come to a settlement as a phased endeavour in the course of collective bargaining. Once cordiality is established between the employer and labour in arriving at a settlement which operates well for the period that is in force, there is always a likelihood of further advances in the shape of improved emoluments by voluntary settlement avoiding friction and unhealthy litigation. This is the quintessence of settlement which courts and tribunals should endeavour to encourage. It is in that spirit the settlement has to be judged and not by the yardstick adopted in scrutinising an award in adjudication. The Tribunal fell into an error in invoking the principles that should govern in adjudicating a dispute regarding dearness allowance in judging whether the settlement was just and fair.

* * *

It is not possible to scan the settlement in bits and pieces and hold some parts good and acceptable and others bad. Unless it can be demonstrated that the objectionable portion is such that it completely outweighs all the other advantages gained the Court will be slow to hold a settlement as unfair and unjust. The settlement has to be accepted or rejected as a whole and we are unable to reject it as a whole as unfair or unjust. Even before this Court the 3rd respondent representing admittedly the large majority of the workmen has stood by

> *this settlement and that is a strong factor which it is difficult to ignore. As stated elsewhere in the judgment, we cannot also be oblivious of the fact that all workmen of the company have accepted the settlement. Besides, the period of settlement has since expired and we are informed that the employer and the 3rd respondent are negotiating another settlement with further improvements. These factors, apart from what has been stated above, and the need for industrial peace and harmony when a union backed by a large majority of workmen, has accepted a settlement in the course of collective bargaining have impelled us not to interfere with this settlement."*

In the present case the settlement has been signed by 15 members of LMLKS. The observation of the Industrial Tribunal is that the petitioner-company did not produce any documentary or oral evidence regarding the appropriateness and validity of the settlement by which it could be proved that the settlement is justifiable and reasonable. On the basis of evidence it was found that at the time of the settlement around 2700-2800 workmen were employed in the establishment out of which only 743 workmen were members of LMLKS and only they were re-employed while the rest of the workmen remained without work from the date of their lay-off for nearly 10 years. The lay-off compensation also was not duly paid to the workmen. Therefore, the facts of the present case being distinguishable, under the circumstances, the petitioner-company would not be entitled to any benefit of the aforesaid judgement of **Tata Engineering and Locomotive Company Ltd.**

The learned counsel for the petitioner-company has also relied upon paragraph no.24 of the judgement of the Supreme Court in **National Engineering Industries Ltd.**(supra), but in view of the peculiar fact situation of the present case and the findings of the Industrial Tribunal, its benefit would not inure to the petitioner-company.

In view of the facts and circumstances mentioned above, the finding of the Industrial Tribunal with regard to the lay-off done on 15.04.2007 by the petitioner-company being completely unjustified

and illegal, is correct and deserves no interference. There is no such perversity or arbitrariness in the impugned award of the Industrial Tribunal, with regard to this aspect of the matter, that would merit interference.

Award of back wages, allowances and consequential benefits:

Annexure No.2 to the writ petition is a summary record of proceeding of the hearing held on 08.05.2007 before the bench of the BIFR which reflects that the BIFR was satisfied that the petitioner-company had become a sick industrial company as on 31.08.2006 and had declared it to be so. The BIFR then appointed IDBI as the operating agency with directions to prepare a revival scheme for the petitioner-company, if feasible. The recital of the memorandum of settlement dated 13.04.2007, also reflects that the petitioner-Company was in precarious financial condition. It, therefore, appears that various unsuccessful efforts were made by the petitioner-company for revival of the Unit. Though the respondent-Union had successfully staked its claim before the Industrial Tribunal regarding the invalidity of the lay-off made pursuant to the settlement dated 13.04.2007, however, the recitals made in the settlement aforesaid with regard to the financial condition of the petitioner-company, as well as the fact that the company was declared sick by the BIFR, have not been disputed by the respondent-Union.

In the case of **Surendra Kumar Verma (supra)**, which has been relied upon by the learned counsel for the petitioner-company, the Supreme Court held as follows:

> *"**6.** We do not propose to refer to the cases arising under Sections 33 and 33-A of the Industrial Disputes Act or to cases arising out of references under Sections 10 and 10-A of the Industrial Disputes Act. Nor do we propose to engage ourselves in the unfruitful task of answering the question whether the termination of the services of a workman in violation of the provisions of Section 25-F is void ab initio or merely invalid*

> *and inoperative, even if it is possible to discover some razor's edge distinction between the Latin 'void ab initio' and the Anglo-Saxon 'invalid and inoperative'. Semantic luxuries are misplaced in the interpretation of 'bread and butter' statutes. Welfare statutes must, of necessity receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the court is not to make inroads by making etymological excursions. 'Void ab initio', 'invalid and inoperative' or call it what you will, the workmen and the employer are primarily concerned with the consequence of striking down the order of termination of the services of the workmen. Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-à-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders. The court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted."*

In the present case, the petitioner-company is under liquidation by the order of the NCLT as the Resolution Plan was rejected by the Committee of Creditors. The assets of the petitioner-company are being liquidated. It is not that the petitioner-company is continuing with its business or production, and that in that eventuality it would place an impossible burden on the employer if it is saddled with the liability of payment of back wages, etc. Under the facts and circumstances of the present case, the petitioner-company being under liquidation, the plea for

remission of the back wages for reason of 'impossible burden on the employer' cannot be acceded to. It is for the Liquidator to assess the claims of the workmen also taking into account the impugned award of the Industrial Tribunal. Thereafter the proceeds from the sale of the liquidated assets can be distributed in accordance with the Code. Therefore, the judgement of **Surendra Kumar Verma** (supra) is distinguishable.

At this stage, it is appropriate to consider certain facts and the provisions of the Code and the effect they would have on the impugned award made by the Industrial Tribunal.

On record as Annexure No. 14 to the writ petition is an affidavit dated 6.12.2019 given by the Liquidator before the Industrial Tribunal in which it is reflected that he was appointed Liquidator by the order of the NCLT dated 9.4.2018 and an undertaking was given by the Liquidator that if any monetary liability arises on the petitioner-company after the final disposal of the matter, the Liquidator undertook to safeguard the interest of the workmen in accordance with Section 53 of the Code.

Section 14 of the Code reads as follows:

> *"**14. Moratorium.**- (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:-*
>
> > *(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;*
> >
> > *(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
> >
> > *(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);*

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.- *For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;*

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to -

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

Section 30 of the Code provides for submission of a resolution plan and Section 31 provides for its approval. Section 31

reads as follows:

> *"**31. Approval of resolution plan.**- (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.*
>
> *Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.*
>
> *(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.*
>
> *(3) After the order of approval under sub-section (1),-*
>
> *(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and*
>
> *(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.*
>
> *(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:*
>
> *Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors."*

Liquidation of the corporate debtor is initiated under Section 33 and a Liquidator is appointed under Section 34 of the Code. Sections 33 of the Code are as follows:

> *"**33. Initiation of liquidation.**- (1) Where the Adjudicating*

Authority, -

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein,

it shall-

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six per cent of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

Explanation.- *For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (7) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.*

(3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

(6) The provisions of sub-section (5) shall not apply to

legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(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.

Sub-section (4) of Section 36 of the Code excludes from the liquidation estate assets, those assets which shall not be used for recovery in the liquidation. Sub-section (4) of Section 36 of the Code reads as follows:

"(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:-

(a) assets owned by a third party which are in possession of the corporate debtor, including-

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor."

The Liquidator is enjoined to receive and collect the claims of the creditors within a period of 30 days from the date of

commencement of the liquidation process, verifying their claims under Section 39 and admitting or rejecting the claims under Section 40. The valuation of the admitted claims is required to be done by the Liquidator under section 41 of the Code in the manner to be specified by the Insolvency & Bankruptcy Board of India. An appeal lies to the Adjudicating Authority against the decision of the Liquidator accepting or rejecting the claims under Section 42 of the Code. Section 53 of the Code deals with distribution of assets and it reads as follows:

> *"**53. Distribution of assets.**- (1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely :-*
>
> *(a) the insolvency resolution process costs and the liquidation costs paid in full;*
>
> *(b) the following debts which shall rank equally between and among the following :-*
>
> *(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and*
>
> *(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;*
>
> *(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;*
>
> *(d) financial debts owed to unsecured creditors;*
>
> *(e) the following dues shall rank equally between and among the following:-*
>
> *(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;*
>
> *(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;*
>
> *(f) any remaining debts and dues;*
>
> *(g) preference shareholders, if any; and*

(h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.- For the purpose of this section-

(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013."

It is not on record that what all orders were passed by the Industrial Tribunal after the order of the moratorium passed by the NCLT till the order of liquidation passed on 23.3.2018. However, the fact remains that the award of the Industrial Tribunal was made well after the order of liquidation dated 23.3.2018. Sub-section (5) of Section 33 of the Code prohibits the institution of any suit or other legal proceeding by or against the corporate debtor (in the present case, the petitioner-company) when a liquidation order has been passed subject to the proviso that the suit or legal proceeding may be instituted by the liquidator on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority. This provision is also subject to the provisions of Section 52 of the Code that provides for the role of a secured creditor in liquidation proceedings. Sub-section (7) of Section 33 of the Code provides that an order of liquidation under the 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 insolvency resolution process period has been defined in sub-section (14) of Section 5 of the Code, which reads as follows:

> *“(14) "insolvency resolution process period" means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day;”*

Insolvency commencement date is defined in sub-section (12) of Section 5 of the Code, which means that the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under Sections 7, 9 or Section 10, as the case may be. Sub-section (4) of Section 14 of the Code provides the order of moratorium to have effect from the date of such order till the completion of the corporate insolvency resolution process provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

As such, in view of the liquidation order passed by the NCLT on 23.3.2018, the order of moratorium passed under Section 14 ceased to have effect. Accordingly, further proceedings in the pending adjudicating case before the Industrial Tribunal was not barred after the order of liquidation passed by the NCLT.

Under Section 238 of the Code, the provisions of the Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Therefore, the distribution of the proceeds from the sale of liquidation assets are to be distributed in the order of priority as provided under Section

53 of the Code after determination of the claims by the Liquidator. The priority of distribution of the proceeds from the sale of the liquidation assets pertaining to workmen's dues for the period of 24 months preceding the liquidation commencement date rank equally with the debts owed to a secured creditor where the secured creditor has relinquished security, in view of clause (b) of sub-section(1) of Section 53 of the Code. Only workmen's dues for a period of 24 months preceding the liquidation commencement date are required to be distributed to the workmen in this priority. With regard to the other debts and dues pertaining to workmen, the sums would be required to be paid in the order of priority mentioned at clause (f) of sub-section (1) of Section 53 of the Code. In terms of clause (ii) of sub-section (3) of Section 53, the “workmen's dues” would have the same meaning as assigned to it in Section 326 of the Companies Act, 2013 which reads as follows:

> *“**326. Overriding preferential payments.**- (1) In the winding up of a company under this Act, the following debts shall be paid in priority to all other debts:-*
>
> *(a) workmen's dues; and*
>
> *(b) where a secured creditor has realised a secured asset, so much of the debts due to such secured creditor as could not be realised by him or the amount of the workmen's portion in his security (if payable under the law), whichever is less, pari passu with the workmen's dues:*
>
> *Provided that in case of the winding up of a company, the sums referred to in sub-clauses (i) and (ii) of clause (b) of the* Explanation, *which are payable for a period of two years preceding the winding up order or such other period as may be prescribed, shall be paid in priority to all other debts (including debts due to secured creditors), within a period of thirty days of sale of assets and shall be subject to such charge over the security of secured creditors as may be prescribed.*
>
> *(2) The debts payable under the proviso to sub-section (1) shall be paid in full before any payment is made to secured creditors and thereafter debts payable under that sub-section shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.*

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;

(c) "workmen's portion", in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of the amount of workmen's dues and the amount of the debts due to the secured creditors."

Thus, in view of the manner of distribution of the assets of the company in liquidation as provided under Section 53 of the Code, the "workmen's dues" of the company in liquidation shall be made

strictly in accordance with the priority, to the extent, and, in the manner provided in Section 53 of the Code.

As regards the direction of the Industrial Tribunal for payment of back wages, it is contended that there was no material before the Industrial Tribunal to demonstrate want of gainful employment of the workmen after lay-off and therefore, there was no occasion to grant back wages to the workmen. However, in this respect, in the testimony of the witness on behalf of the petitioner-Company, no question was put to him whether the workmen were gainfully employed elsewhere. Even otherwise, no negative evidence could have been led by the workmen in this regard. It is pertinent to note that in the testimony of the witness on behalf of the workmen, it was stated that all the workmen affected by lay-off used to visit the Head Office of the Establishment for recording their attendance and they are still doing so. Therefore, under the circumstances of the present case, this piece of evidence would suffice to demonstrate that the workmen were not gainfully employed elsewhere.

With regard to the submission that the list of workers has not been furnished by the respondent-Union, in my opinion, given the facts of the present case and the findings of the Tribunal, that alleged omission would not come in the way of the workmen's entitlement. It is pertinent to mention here that in paragraph no.19 of the writ petition itself it is reflected that around 2016 claims of workmen / employees were received, but on perusal of the books of accounts and record, the Liquidator admitted claims of 6337 workmen/ employees. Therefore the details of all the workmen of the petitioner-Company are with the Liquidator.

The lay-off having been held to be unjustified and illegal by the Industrial Tribunal, what follows is that all the workmen who were not employed after lifting of the lock-out with effect from

15.04.2007 and were laid off, would be entitled to full wages, allowances and consequential benefits as directed by the Industrial Tribunal. Any amounts received by them towards lay-off compensation shall be adjusted. However, as observed above, the workmen would only be entitled to receive / recover their dues in accordance with the provisions of Section 53 of the Code.

Subject to the aforesaid observations, this writ petition is **disposed of**.

Order Date :- 25.1.2022
A. V. Singh

(Jayant Banerji, J.)