NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.87 of 2021

IN THE MATTER OF:

Moser Baer Karamchari Union, Gautam Buddh Nagar ...Appellant

Versus

Mr. Anil Kohli
Liquidator for Moser Baer India Ltd. & Anr. ...Respondents

For Appellant: **Shri Swapnil Gupta and Shri Ishaan Karki, Advocates**

For Respondents: **Shri Abhishek Anand and Shri Viren Sharma, Advocates**

O R D E R
(Virtual Mode)

10.02.2021 Heard.

2. This Appeal has been filed by the Employees Union against Impugned Order dated 4th December, 2020 passed in IB-378(PB)/2017 by the Adjudicating Authority (National Company Law Tribunal, New Delhi Principal Bench).

3. By the Impugned Order, the Adjudicating Authority refused to recall its previous Order dated 24th August, 2020 vide which Order CA 767(PB)/2019 filed by the Appellant Union was withdrawn by the Counsel for the Appellant.

4. We have heard Counsel for both sides. A brief reference to the developments may be noticed.

The Corporate Debtor – Moser Baer India Ltd. is under liquidation. The Appellant is Employee Union of the said Corporate Debtor. It is claimed by the Appellant that it had filed CA-19(PB)/2019 claiming that the Respondent should pay the workmen provident fund dues, pension fund and gratuity. The said Application was allowed vide Order dated 19th March, 2019 (Annexure – B). The Appellant claims that the Respondent by e-mail (Annexure - C – Page 39) dated 2nd April, 2019 admitted the preferential payments and payments under Section 53 of the Insolvency and Bankruptcy Code, 2016 (IBC – in short) which was due to the workmen. The Appellant then filed CA 767(PB)/2019 in C.P. No. IB – 378(PB) of 2017 on 15th April, 2019 (Annexure - D – Page 40). In the Application, inter alia, it was claimed as under:-

> "6. That following are the objections of the Applicant herein with respect to the revised calculation.
>
> **A. Gratuity:** The Liquidator while calculating the Gratuity has adopted the view, which is contrary to Section 2(s) of Payment of Gratuity Act, 1972. For ready reference Section 2(s) of Payment of Gratuity Act, 1972 is extracted herein below:
>
> > "Section *2 (s): **'wages'** means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employments and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance".*
>
> It is clear from the aforesaid Section that while calculating Gratuity, Dearness Allowance (**hereinafter referred as DA**) has to be added to basic salary. In present case, the workmen were never paid DA, right from inception. The aforesaid provision carves out an exception

with respect to other allowances, as normally DA is paid to workmen. In the present set of facts, the workmen were given supplementary allowance and not DA.

Therefore, Supplementary allowance needs inclusion for the calculation of Gratuity, otherwise the workmen will stand deprived of their hard-earned allowance which was given to them in place of DA. Therefore, fresh calculation of gratuity is warranted including the payments of Supplementary Allowance.

B. Compensation under Section 25 FFF of Industrial Disputes Act, 1947: The Liquidator has taken a view and has calculated, the compensation u/s 25 FFF for the period of three months only. For ready reference Section 25 FFF of Industrial Dispute Act, 1947 is extracted **herein below**:

> **"25FFF. Compensation to workmen in case of closing down of undertakings.-**
> (1) Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of sub-section (2), be entitled to notice and compensation in accordance with the provisions of section 25F, as if the workman had been retrenched:
>
> Provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman under clause (b) of section 25F, shall not exceed his average pay for three months:
>
> **Explanation**: An undertaking which is closed down by reason merely of-
>
> (i) Financial difficulties (including financial losses); or

(ii) Accumulation of undisputed off stocks; or

(iii) The expiry of the period of the lease or license granted to it; or

(iv) In a case where the undertaking is engaged in mining operations, exhaustion of the minerals in the area in which such operations are carried on; **shall not be deemed to be closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this sub-section.**

(1A) Notwithstanding anything contained in sub-section (1), where an undertaking engaged in mining operations is closed down by reason merely of exhaustion of the minerals in the area in which such operations are carried on, no workman referred to in that sub-section shall be entitled to any notice or compensation in accordance with the provisions of section 25F, if;

(a) The employer provides the workman with alternative employment with effect from the date of closure at the same remuneration as he was entitled to receive, and on the same terms and conditions of service as were applicable to him, immediately before the closure;

(b) The service of the workman has not been interrupted by such alternative employment; and

(c) The employer is, under the terms of such alternative employment or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by such alternative employment.

(1B) For the purposes of sub-sections (l) and (1A), the expressions "minerals" and

> "mining operations" shall have the meanings respectively assigned to them in clauses (a) and (d) of section 3 of the Mines and Minerals (Regulation and Development) Act, 1957 (67 of 1957).
>
> (2) Where any undertaking set- up for the construction of buildings, bridges, roads, canals, dams, or other construction work is closed down on account of the completion of the work within two years from the date on which the undertaking had been set-up, no workman employed therein shall be entitled to any compensation under clause (b) of section 25F, but if the construction work is not so completed within two years, he shall be entitled to notice and compensation under that section for every completed year of continuous service or any part thereof in excess of six months".

From the calculation sheet and from the Email dated 02.04.2019, it is clear that the Liquidator had taken resort to the Proviso under Section 25FFF(1).

It is respectfully submitted that the Explanation to the Section 25 FFF (1) squarely covers the exceptions to the **"UNAVOIDABLE CIRCUMSTANCES"** as mentioned in the Proviso to the Section 25 FFF (1). Explanation 1 clearly says financial difficulties including financial losses shall not be deemed to be closed down on account of Unavoidable Circumstances beyond the control of Employer within the meaning of Proviso to the Sub-Section (1) to Section 25FFF. Thus, it is crystal clear that the Proviso is inapplicable in the present case. The workmen are entitled to the entire compensation as per Section 25 F (b) of the Industrial Disputes Act 1947.

Therefore, it is respectfully submitted the view taken by the Liquidator is clearly unsustainable in the eyes of law."

The learned Counsel for the Appellant referred to this portion of the Application to claim that the Appellants have claimed certain dues on the basis of the provisions of law and such Application had come up before the Adjudicating Authority when, according to the learned Counsel for Appellant, under a mistake Application was withdrawn by the concerned Counsel for Appellant on 24th August, 2020. Copy of Order in that regard is at Page – 77 (Annexure – K) which reads as under:-

"**ORDER**

> At request of the Resolution Professional in IA-866/2020, he is directed to file reply within one week hereof and rejoinder, if any, within one week thereof.
>
> At request of the Applicant counsel, CA-767/2019 is hereby dismissed as withdrawn with liberty to the Applicant to proceed in accordance with law.
>
> List IA-866/2020 and IA-2479/2019 along with other applications for hearing on 30.09.2020."

5. The learned Counsel for the Appellant has submitted that the Application was withdrawn with liberty to the Appellant to proceed in accordance with law. It is claimed that there was a mistake on the part of the Appellant in thinking that the other modes of law could be resorted to but the Appellant later realised that the Appellant cannot go to the High Court in Writ Petition or to any other Forum when liquidation proceedings are pending. The learned Counsel states that in view of this, the Appellant filed Application (Annexure - L – Page – 78) for recall of the Order dated 24th August, 2020 but the Adjudicating Authority rejected the same by Impugned Order (Annexure - A – Page 32) which reads as under:-

"**ORDER**

In IA-4702/2020, progress report filed is taken on record. Accordingly, this IA-4702/2020 is hereby **disposed of**.

In IA-5157/2020, the Liquidator having sought for extension of liquidation period for one more year, the same is allowed by extending liquidation period for another year with effect from **26.11.2020**.

Accordingly, IA-5157/2020 is hereby **allowed**.

An application filed by the Workers Union for recall of the Order dated 24.08.2020 on the ground that the workers union did not give any consent or instructions to their erstwhile counsel namely Ms. Shreya Meni for withdrawal of the said application.

As against this submission, the Liquidator counsel has stated that on 24.08.2020, when Bench questioned about the maintainability of the said application, the Applicant Counsel in CA-767/2019 withdrew the said application. He has further stated that on the said date, this Bench indeed asked Ms. Shreya Meni to take instructions from the party and until such time, the matter would be passed over. Accordingly, the matter was passed over. The after some time, the Applicant counsel came back and sought for withdrawal of CA-767/2019 stating that she took instructions from the Applicant.

In view thereof, this Bench dismissed that application as withdrawn with liberty to the Applicant to proceed in accordance with law. When such order was passed by this Bench, this Applicant sought not to have filed this Application seeking recall of the earlier order stating that the Applicant has not given instructions to the erstwhile counsel.

It goes without saying, when counsel withdrew the application on instructions, it is to be presumed that application has been withdrawn with the instructions of the party. When the application was withdrawn with instructions of the Applicant, this Bench cannot go back and revisit that application based on the application presently filed by Applicant. If the impugned order is assailed on the ground the erstwhile counsel played fraud in withdrawing the said application despite

> the applicant has case, there could be a possibility to look into it, and otherwise this Bench cannot get into it.
>
> However, IBC has not set out any review of the orders already passed, the present application is hereby **dismissed as misconceived**.
>
> List IA-2749 & IA-3477/2019 along with other pending applications for hearing on **23.12.2020**."

6. The learned Counsel for the Liquidator is submitting that the Liquidator had calculated the dues as per provisions of law and the dues have also been paid but the workmen are still unsatisfied. The Compliance Affidavit was filed when CA 767(PB)/2019 was filed, copy of which is at Page – 66 of the Appeal. The learned Counsel submits that the Liquidator has relied on the Proviso of Section 25 FFF of the Industrial Dispute Act, 1947 and thus according to the learned Counsel, the Liquidator has properly calculated and made the payments. Thus, according to him, there is no reason for interfering with the Impugned Order which has been passed. The learned Counsel for Respondent further submits that even after the present Impugned Order, the Appellant had filed yet another Application seeking similar relief and later withdrew the same on 6th January, 2021. It is also stated that yet again now the Appellant has filed another Application of which Notice has been given to the Liquidator.

7. Considering the Impugned Order, it can be seen that the Adjudicating Authority before passing the Order dated 24th August, 2020 had given chance to the Advocate for Appellant to take instructions when request for withdrawal was made and the Counsel discussed with the client and again made a statement. The learned Counsel for the Appellant states that when the arguments took place on 21st August, 2020 in the Court, the impression that

was gained by the Appellant was that it has no case and thus the Counsel for the Appellant proposed such steps and under misconception that there would be other remedy available, withdrew the Application. It is stated that for such act, the Appellant which is an Employee Union, may not be deprived by a right to have a decision on merits of the claim they are making.

8. Ordinarily, we would treat an Application withdrawn that too after consulting the client that the matter should remain closed. However, considering the issue which is seen in para – 6 of the CA 767 of 2019 which we have reproduced above, we feel it appropriate that in the interest of justice, the Adjudicating Authority should give chance to Appellant to have a decision on merits, one way or the other, so that the Appellant comprising of number of workmen, should not go with the impression whether or not justice has been done to them. Rule 11 of the National Company Law Tribunal Rules reads as under:-

> "**11. Inherent Powers.** – Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal."

9. Apart from the above, if Section 424 of the Companies Act, 2013 is seen, the procedure is guided by principles of natural justice. As an exception, which need not be necessarily followed in other matters, in the facts of present matter, we observe that it would be appropriate and in interest of justice that the Adjudicating Authority should decide CA 767 of 2019 on its merits one way or the other.

10. For the above reasons, the Appeal is allowed. Impugned Order is quashed and set aside. CA-767(PB)/2019 in C.P. No. IB – 378(PB) of 2017 (Annexure - D – Page 40) is restored to the file of Adjudicating Authority. We request the Adjudicating Authority to decide the Application on merits, one way or the other.

11. We may record that we have not expressed any opinion on the merits of the claims which have been made by the Appellant. The Adjudicating Authority may take a decision in the Application independent of any observations made by us in this Judgement.

This Appeal is disposed accordingly.

[Justice A.I.S. Cheema]
Member (Judicial)

[V.P. Singh]
Member (Technical)

rs/md