

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH, COURT- I  
KOLKATA**

**I.A. (IB) No. 1519/KB/2022**

**in**

**C.P(IB) No. 3/KB/2017**

*In the matter of:-*

**Nicco Corporation Limited (In Liquidation)**

*... Corporate Debtor*

*And*

**I.A. (IB) No. 1519 /KB/2022**

*An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016  
and Rule 11 of the National Company Law Tribunal Rules, 2016.*

*In the matter of:-*

- 1. Nicco Employees Union (INTUC)**
- 2. Nicco Corporation Limited Cable Division Worker's Union (CITU)**
- 3. Nicco Sramik Union (BJMM)**
- 4. Nicco Employees' Union (INTTUC)**
- 5. AID (ATHPUR) Employees Union (INTUC)**

*... Applicants*

*Versus*

**Vinod Kumar Kothari,**

**Liquidator of the Corporate Debtor**

*... Respondent*

**Date of pronouncement:03 May 2024**

**Coram:**

<b>Shri Rohit Kapoor</b>	<b>:</b>	<b>Member (Judicial)</b>
<b>Shri Balraj Joshi</b>	<b>:</b>	<b>Member (Technical)</b>

**Appearances (through video conferencing):**

*For the Applicant* : Mr. Rishav Banerjee, Advocate  
Mr. Rahul Auddy, Advocate  
Mr. Aditya Gooptu, Advocate

*For the Liquidator* : Mr. Joy Saha, Senior Advocate  
Ms. Barsha Dikshit, PCS

*For GST Authority* : Mr. Abhradip Maity, Advocate

**ORDER**

***Per Balraj Joshi, Member (Technical)***

1. The Court convened through hybrid mode.

***Preliminary***

2. Nicco Corporation Limited, i.e. the Corporate Debtor was directed to be liquidated *vide* an order dated 17 October 2017 and Mr. Vinod Kumar Kothari, was appointed as the Liquidator of Nicco Corporation Limited.
3. The I.A. has been filed by Trade Unions registered under the Trade Union Act, 1926. The Applicants represent 324 workers of the Corporate Debtor i.e. Nicco Corporation Limited. The following reliefs have been prayed for:
  - a. *The respondent Liquidator be directed to forthwith admit the 24 months wages of all the 324 workers from 18<sup>th</sup> October 2015 to 17<sup>th</sup> October 2017 amounting to Rs.10,30,61,554;*
  - b. *The respondent Liquidator be directed to forthwith re-calculate the total terminal benefits of 324 member workmen (benefit under Industrial Disputes Act and benefit as per section 53 of the Code) as Rs.17,20,37,103/- after taking into consideration the 24 months wages of all the 324 workers from 18<sup>th</sup> October 2015 to 17<sup>th</sup> October 2017.*
  - c. *The Liquidator may be directed to disburse the proportional amounts to the 324 workmen in accordance with law forthwith within 15 days from the orders being passed;*
  - d. *Stay on disbursal of any further amounts from the Liquidation account to any stakeholders of the Corporate Debtor till the adjudication of this application;*

- e. *Direction on the Respondent Liquidator to seek refund of disbursed amounts from stakeholders if the amount to be distributed to the 324 workers is not sufficient in the liquidation account of the Corporate Debtor;*
- f. *An order be made directing the respondent Liquidator to pay to the applicants the cost of the instant application assessed at Rs.5Lac;*
- g. *Such further or other order or order be made and/or direction or directions be given as to this Hon'ble Tribunal mat seem fir and proper.*

#### **Submissions of the learned Counsel appearing on behalf of the Applicant**

4. It is submitted that as on the date of the Liquidation Order i.e. 17 October 2017, the Corporate Debtor had 324 workmen. *Vide* the said order, the Adjudicating Authority discharged all the workmen of the Corporate Debtor from their employment.
5. The Learned Counsel submitted that the Liquidator has paid gratuity to all 324 workmen which proves that all 324 workers were working in the Corporate Debtor till 17 October 2017.
6. The Liquidator issued a notice on 23 October, 2017, calling upon the creditors/workers/stakeholders to submit their proof of claims with him. Accordingly, the Applicants representing various workers, submitted their claims before the Liquidator in specified format.
7. On or about 13 December 2017 the Liquidator published a detailed list of workmen dues as on 17 October 2017. It is submitted that on perusal of the list, the amount receivable by the workers as “Terminal Benefits” has been omitted. All the workmen, who had filed their claims were permanent workers of the company till 17 October 2017 and hence are entitled to such terminal benefits under the relevant provisions of the Industrial Dispute Act, 1947 and other relevant acts.
8. The Applicants sent a letter dated 19 December 2017 to the Liquidator, requesting the Liquidator to make necessary corrections in the list, the Liquidator was further informed that a sum of Rs.28Crore is lying in several bank accounts of the Corporate Debtor, that were from the sale proceeds of several assets of the Corporate Debtor sold in the last 304 years.

9. The Corporate Debtor had temporarily suspended work in the factory since 23 April 2015 and since then nothing has been paid to the workmen towards salary/wages of the employees and workmen. Since the terminal benefits were not admitted by the Liquidator, the 324 workmen filed an application numbered as Mis. Application No.529 of 2018 before this Adjudicating Authority, *inter alia*, seeking diverse reliefs including a direction upon the Liquidator to disburse a sum of Rs.65Crore to the Applicants on account of the Terminal Benefits. However, since the prayers were not properly drafted, the said Misc Application No. 529 of 2018 was withdrawn on 06 February 2018 with a liberty to file afresh.
10. The Applicants state that in view of the liberty granted to the Applicants by the *vide* the aforesaid order dated 06 February 2018 the Applicants filed another application on 08 March 2019 which was numbered as IA (IB) No. 469/KB/2019. The main issue raised by the Applicants in IA (IB) No. 469/KB/2019 was whether the Terminal Benefits which are claimed by the workmen of the Corporate Debtor must be paid to the workmen notwithstanding the fact that the termination of the employment of the workmen took place pursuant to an order of liquidation passed under the Code.
11. It was submitted by the Applicants in IA (IB) No. 469/KB/2019 that merely because the termination of the workmen came into effect by reason of the liquidation of the Corporate Debtor, the same cannot disentitle the workmen of their terminal benefits. The Applicants further submitted that the commencement of liquidation of the Corporate Debtor pursuant to the order of this Adjudicating Authority would construe “closure” of the company within the meaning of the Industrial Disputes Act, 1947. It is also submitted that the discharge of the employees of the Corporate Debtor as a result of commencement of the liquidation results in “retrenchment” of the employees within the meaning of the Industrial Disputes Act, 1947.
12. Further the compensation to the workmen which is payable to them as a result of closing down of an undertaking would become due even in case of a liquidation proceedings under the Code. The learned Counsel submitted that reference to section 25 FFF (1) of the Industrial Disputes Act, 1947 by the Liquidator will have no consequence in the facts of the instant case, as the

closure of the company in liquidation cannot be said to have taken place on account of unavoidable circumstances beyond the control of the employers.

13. The consequence of non-approval of any proposed resolution plan of the Corporate Debtor cannot be termed as an act for which the employers would not be held responsible. In fact, the affairs of the Corporate Debtor were handled in such a manner that resulted the Corporate Debtor being declared as a Sick unit and then admitted under the Code, which was eventually followed by an order of liquidation. The aforesaid sequence of events would show that the employer/management of the Corporate Debtor handled the affairs of the Corporate Debtor in such manner that the company had to be eventually liquidated. In such circumstances the employer cannot claim that the employer did not have any control over the order of liquidation being passes by the Adjudicating Authority.
14. It is submitted that the Applicants submitted a supplementary affidavit IA (IB) No. 469/KB/2019 wherein the details with respect to the terminal benefits payable to their 324 workmen members were given. The computation of terminal benefits payable to the workmen was based on the provisions of section 53 of the Code and the provisions of section 25FFF of the Industrial Disputes Act, 1947.
15. IA (IB) No. 469/KB/2019 was disposed of by this Adjudicating Authority by an order dated 22 January, 2020, the relevant portion whereof is reproduced hereunder as follows:

*"CA(IB) No. 469/KB/2019 is an application filed by a group of 5 Trade Union claiming arrears of wages and compensation for deemed retrenchment of the workmen under the Union, who are employees of the Corporate Debtor undergoing liquidation. The questions raised by the parties, whether the workmen are entitled to compensation for retrenchment upon the Corporate Debtor undergoing Liquidation Process? Upon perusal of the Industrial Dispute Act, 1947 (In short, IDA) and Sections 25 F and 25 FF who are being party to this claim are entitled to have their benefit u/s. 25FFF of the IDA. Accordingly, we are directing the Liquidator to calculate the liability of the individual workmen as per the*

*supplementary affidavit submitted to the Liquidator and can have a re-calculation of wages and compensation due to the workmen in accordance to their service rendered to the Corporate Debtor Company under the waterfall mechanism u/s. 53 and Section 25 FFF.*

*Upon the above observation and directions issued to the Liquidator, CA is disposed accordingly.”*

16. Section 53(1)(b)(i) of the Code provides for payment of "workmen's dues for the period of 24 months preceding the liquidation commencement date". Explanation (ii) of section 53(2) of the Code provides that the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013.
17. It is further submitted that in view of the definition of workmen's dues as contained in section 326(2)(b) of the Companies Act, 2013, a workman of a company (in liquidation) is also entitled to compensation payable to workmen under the provisions of the Industrial Disputes Act, 1947.
18. Section 25FFF(1) of the Industrial Disputes Act, 1947 provides that 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 of the Industrial Disputes Act, 1947, as if the workman had been retrenched.
19. In view of the aforesaid provisions of the Code, the Companies Act, 2013 and the Industrial Disputes Act, 1947, the Applicants proceeded to calculate the dues of their member workmen on the basis of their wages and salaries payable to each of them for a period of 24 months preceding the liquidation commencement date i.e., for the period from 18 October 2015 till 17 October 2017, their accrued holiday remuneration and compensation payable under the Industrial Disputes Act, 1947 in respect of death or disablement of any workman. It is relevant to mention in this regard that after 17 October 2015, no salary or wages had been paid by the company (in liquidation) to any of the 324

workmen who continued to be in its roll at the time of passing of the order of liquidation.

20. The learned Counsel submitted that the Liquidator however, quantified the total terminal benefits of the 324 workmen of the company (in liquidation) at Rs. 6,89,75,549/- (Rupees Six Crore Eighty Nine Lakh Seventy Five Thousand Five Hundred Forty Nine only) and agreed to make payment of 17% of the same, in view of the provisions of section 53(1)(b) of the Code, which provides that the debts of the workmen and of the secured creditors who have relinquished their security would rank equally.
21. It is submitted that the claims of the workmen were of three folds, i.e. one was for gratuity, the second was for terminal benefit under the Industrial Dispute Act, 1947 and the third was for 24 months wages as stipulated in section 53 of the Code.
22. It is submitted that from the calculation of the Liquidator, it appeared that the Liquidator had admitted the claim for gratuity for all the 324 nos. workmen till 17 October 2017 and also retrenchment compensation under section 25FFF of Industrial Dispute Act, 1947 for all the 324 workmen till 17 October 2017 (terminal benefits) but whereas for the purpose of 24 months' wages for 324 workmen for preceding 24 months period of the liquidation commencement date (i.e. from 18 October 2015 to 17 January 2017) as per the section 53 of the Code and section 326 of the Companies Act, 2013 had been totally ignored by the Liquidator. The said discrimination was baseless and arbitrary because the part wages of 42 workmen who worked during the period of preceding 24 months of the liquidation date was admitted only on a pro rata basis.
23. The terminal benefits payable to the workmen of the Corporate Debtor under the statute cannot be sought to be revised by the Liquidator. The terminal benefit for 324 workmen is in two parts viz. one is under section 25FFF of the Industrial Dispute Act, 1947 and the compensation amount is Rs.6,89,75,549/- and another is for 24 months' wages under section 53 of Code and under section 326 of the Companies Act. 2013 and the amount involved is Rs.10,30,61,554/-. As such, the total claim on account of terminal benefit is Rs.17,20,37,103/-. On the basis of the order dated 22 January 2020 passed by this Adjudicating Authority in IA (IB) No. 469/KB/2019, the Liquidator admitted the

retrenchment compensation under section 25FFF of Industrial Dispute Act, 1947 i.e. Rs.6,89,75,549/- but the 2<sup>nd</sup> set of claims on account of wages for 24 months under section 53 of the Code of Rs.10,30,61,554/- was not admitted.

24. As stated above as will appear from the computation made by the respondent Liquidator, in proceeding to compute the terminal benefits payable to the workmen of the Corporate Debtor, the Liquidator has failed to take into account the unpaid wages of all the 324 workmen for the 24 months period preceding the liquidation commencement date, i.e. for the period of 18 October 2015 and 17 October 2017. The aggregate amount of wages payable to 324 member workmen of the applicants amounts to Rs.10,30,61,554/- (Rupees Ten Crore Thirty Lakh Sixty One Thousand Five Fifty Four only). The Liquidator has omitted this entire calculation while calculating the terminal benefits. The Applicants reiterate that the Liquidator has only admitted only Rs. 6.89Crore on account of retrenchment compensation under section 25FFF of Industrial Dispute Act, 1947 and has totally ignored the 24 months unpaid wages as per section 53 of the Code.
25. In the event, the 24 months wages is added to the terminal benefits otherwise payable to the workmen of the company in terms of provisions of section 326 of the Companies Act, 2013 and section 25FFF of the Industrial Disputes Act, 1947, the total terminal benefits payable to the 324 workmen of the company amounts of Rs.17,20,37,103/-. It is submitted that even in the event of a pro rata distribution between the workmen and the secured creditors who had given up their security, 17% of the total terminal benefits payable to the workmen of the company would amount to Rs. 2,92,46,307 (Rupees Two Crore Ninety Two Lakh Forty Six Thousand Three Hundred Seven only). The Liquidator has, however, offered to pay only Rs. 1,47,76,859 (Rupees One Crore Forty Seven Lakh Seventy Six Thousand Eight Hundred Fifty Nine only).
26. The learned Counsel submitted that the Liquidator had raised no dispute with regard to computation of terminal benefits as made by the applicants in terms of the provisions of section 25F of the Industrial Disputes Act, 1947 in their supplementary affidavit filed in the C.A.(I.B.) No. 469/KB/2019, even while accepting the entitlement of the workmen of the company (in liquidation) to terminal benefits under section 25F of the Industrial Disputes Act, 1947, the



respondent Liquidator has, however, totally ignored the unpaid wages of the workmen for the period between 18 October, 2015 and 17 October, 2017.

27. Since the liquidator was refusing to recalculate the terminal benefits as being claimed by the Applicants, the Applicants filed a 2<sup>nd</sup> application numbered as I.A. (IB) No. 1058/KB/2020 before this Adjudicating Authority in October 2020 with the following prayers:

- a. *“The respondent Liquidator be directed to forthwith calculate the terminal benefits of 324 member workmen of the applicants at Rs. 68975549 as indicated in paragraph (i) hereinabove and, upon calculating the total amount payable to the said workmen on the basis thereof to forthwith disburse such payment to them;*
- b. *An order be made directing the respondent Liquidator to pay to the applicants the cost of the instant application assessed at Rs.5 lac;*
- c. *Such further or other order or orders be made and/or direction or directions be given as to this Hon'ble Tribunal may seem fit and proper.”*

28. The entire aforesaid issue was considered by this Adjudicating Authority and *vide* its order dated 15<sup>th</sup> February 2022 came to a conclusion that the computations submitted by the Liquidator were incomplete and inconsistent and a direction was passed on to the Liquidator to carry out fresh computations of the workmen dues in compliance of the provisions of the Industrial Disputes Act, 1947 along with requisite explanations and to submit the same before the Adjudicating Authority within a period of two weeks.

29. The Liquidator has submitted a compliance affidavit on 05 April 2022 with this Adjudicating Authority which was served upon the workmen of the erstwhile Corporate Debtor *vide* email dated 28 June 2022.

30. However, the Liquidator has not made any changes in his calculations and in complete disregard of the observations and findings of this Adjudicating Authority in the order dated 15 February 2022 has not included the 24 months wages from 18 October 2015 till 17 October 2017 for all the 324 workers.

31. The workmen of a company which is sent into in liquidation under the provisions of the Code is statutorily entitled to payment of their dues which

includes their unpaid salaries/wages for the 24 months preceding the liquidation commencement date.

32. As such, the order dated 22<sup>nd</sup> January, 2020 passed in I.A. (IB) No 469/KB/2019 also clearly directed payment of wages and compensation to the workmen in accordance with the provisions of section 53 of the Code and section 25FFF of the Industrial Disputes Act, 1947.
33. However, the respondent Liquidator has deliberately chosen to only proceed on the basis of section 25FFF of the Industrial Disputes Act, 1947 in calculating the terminal benefits of the workmen while totally ignoring the provisions of section 53(1)(b) of the Code and section 326 of the Companies Act, 2013.
34. From the compliance affidavit dated 5<sup>th</sup> April 2022, it appears that even after two orders of this Adjudicating Authority and an opportunity to file a revised calculation sheet, the Liquidator has failed and neglected to follow the provisions of law for reasons best known to him.
35. In the circumstances afore stated, it is expedient and in the interest of justice to forthwith direct the respondent Liquidator to include the wages of all the 324 workmen from 18<sup>th</sup> October 2015 till 17<sup>th</sup> October 2017 in the calculation of terminal benefits and to re-calculate the total terminal benefits of the 324 number of workmen of the company (in liquidation) who were in the employment at the time of the passing of the order of its liquidation, by adding the terminal benefits payable to them under the provisions of section 326 of the Companies Act, 2013 and section 25FFF/25F of the Industrial Disputes Act, 1947, the entire unpaid wages for the 24 months period preceding the date of liquidation i.e., for the period from 18<sup>th</sup> October, 2015 and 17<sup>th</sup> October, 2017 as per section 53 of the Code and this when added to the terminal benefits payable to the said 324 number of workmen of the applicants as accepted by the respondent Liquidator, the total amount of terminal benefits will be increased from Rs. 6,89,75,549/- to Rs.17,20,37,103/-.
36. The Respondent Liquidator has calculated gratuity for all the 324 workmen considering 17<sup>th</sup> October 2017 as date of cessation of employment, has admitted terminal benefits under Industrial Disputes Act for all the 324 workmen considering 17<sup>th</sup> October 2017 as date of cessation of employment but however for the calculation of 24 months wages as per section 53 of the Code, the

- Respondent Liquidator has failed and neglected to calculate for all the 324 workers and has merely admitted for 42 workers for certain period of time.
37. Moreover, when the Liquidator has admittedly paid gratuity to all 324 workmen, which is an admitted fact, there is no reason as to why the Liquidator cannot pay the terminal benefits to all 324 workmen as payment of gratuity and that there is evidence of the fact that all 324 employees were working and/or in employment till 17<sup>th</sup> October 2017.
38. The Applicants understands that the Liquidator may have presumed and proceeded on the basis that there was a temporary suspension of work notice issued by the erstwhile management in the factory in 23<sup>rd</sup> April 2015 and thereafter the works did not commence in the factory of the Corporate Debtor. If such was the case, then the Liquidator ought not to have paid gratuity till 17<sup>th</sup> October 2017 to all 324 workmen. The Liquidator cannot approbate and reprobate at the same time.
39. The Applicant states that temporary suspension of work does not mean cessation of employment of the workmen. Cessation of employment happens on termination (which did not happen in April, 2015) and cessation of employment does not happen on account temporary suspension of work. Temporary suspension of work happens as per the provisions of Industrial Disputes Act and that under no circumstances can be treated as cessation of employment. In the instant case, cessation of employment has happened on 17 October 2017 upon issuance of order of liquidation. In fact, in the Order dated 17 October 2017, it has been clearly mentioned that “*the order of liquidation passed under section 33 of the Code shall be deemed to be Notice of Discharge to the officers, employees and the workmen of the Corporate Debtors*”. Prior to 17 October 2022, there was no Discharge Notice which was issued /served or there was no termination of the subject 324 workmen.
40. Thus, till 17 October 2017, all the 324 workers were employees of the Company and all the 324 employees are entitled to all the benefits under the various labour laws as well as the previous 24 months wages from 18 October 2015 till 17 October 2017 as per section 53 of the Code.
41. The arguments advanced by the liquidator in this instant proceeding has already been adjudicated by this Adjudicating Authority in its order dated 15 February

2022. The order dated 15 February 2022 has attained finality as no appeal has been filed by the liquidator against the order dated 15 February, 2022. The liquidator has accepted this Adjudicating Authority's order.

42. The liquidator during course of its argument has relied upon the judgment of Hon'ble Supreme Court of India in *Sunil Kumar Jain & Ors. v. Sundaresh Bhatt & Ors.*<sup>1</sup> to contend that wages to the applicant workers will not be paid since there was no work going on in the factory. In this regard, it is submitted that the judgment of the *Sunil Kumar Jain (supra)* was on the issue as to whether the claims of the workmen/employees concerned towards the wages/salaries payable during CIRP was and/or can be considered as CIRP cost under the provisions of Code. The Hon'ble Supreme Court of India was dealing with a completely different issue as would be evident from a bare perusal of paragraphs 18 and 19 of the said judgment.
43. The issue in this instant proceeding is not as to whether the employees are entitled to wages in capacity of it being CIRP cost. In fact, the Hon'ble Supreme Court of India in paragraph 20 of the judgment in *Sunil Kumar Jain (supra)* has categorically held that – “*the rest of the claims towards the wages/salaries of the workmen/employees as observed hereinabove, shall be governed by Section 53 (1) (b) and (c) IBC*”.
44. The claim in this instant proceeding is covered under sections 53 (1B) and 53 (1C) of the Code which even the Hon'ble Supreme Court of India is held that the employees/workmen are entitled to in paragraph 20 of the judgment of the Hon'ble Supreme Court of India. In fact, although, the judgment of the Hon'ble Supreme Court of India was subsequent to the order/judgment dated 15 February 2022 passed by this Adjudicating Authority, in effect the Adjudicating Authority even prior to the Hon'ble Supreme Court of India's order has rightly held that every workman of the applicants is entitled to both wages and salaries after duly taking into consideration section 53 (1) (b) of the Code. Thus, there is no inconsistency between the order/judgment dated 15 February 2022 passed by this Adjudicating Authority and the judgment of the Hon'ble Supreme Court of India in the case of *Sunil Kumar Jain (supra)*. In fact, this Adjudicating

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<sup>1</sup> 2022 7 SCC 540

Authority taking into account section 53 of the Code, in paragraphs 9, 10, 11, 12 and 17 of the order dated 15 February 2022 has rightly held that the workmen are entitled to their salaries and/or wages as per section 53 of the Code and the liquidator is obligated and/or bound to pay the same. As already stated above the same issues had attained finality by the order dated 15 February 2022 and the liquidator having not preferred an appeal against the order dated 15 February 2022 is bound to follow and/or respect the judgment of this Adjudicating Authority in its judgment dated 15 February 2022. The liquidator's argument on section 53 of the Code is thus contrary to paragraph 9 as well as paragraph 15 of the order/judgment of this Adjudicating Authority dated 15 February, 2022.

45. Any reliance on other judgment by the liquidator which is on the facts of those case is legally flout and having not appealed against the order of 15 February 2022, the liquidator cannot take a U-turn and contain that the judgment and/or order dated 15 February 2022 passed by this Adjudicating Authority was wrong.
46. Moreover, the Hon'ble Supreme Court of India in the case of Sunil Kumar Jain was not faced with an issue as to payment of wages for a particular period in respect of which gratuity has already been paid to the workmen/employees. Having paid gratuity to the workmen for the self-same period which was never an issue/fact before the Hon'ble Supreme Court of India, the liquidator cannot come and state as an afterthought that salaries and/or wages for that particular period for which gratuity has been paid is not payable to the applicants.

***Submissions of the learned Senior Counsel appearing on behalf of the Liquidator***

47. The learned Senior Counsel submitted that in the present I.A., the Applicants have admitted to the fact that the claims of the workmen are divided in three categories, i.e. gratuity dues, Terminal benefits and wages of 24 months as given in section 53 of the Code.
48. The Applicants have agreed that the Liquidator has admitted the claim towards gratuity and terminal benefits of all the workmen. It is further submitted that the main issue is that the claim towards wages for 24 months as envisaged under section 53 of the Code should be computed for 324 workmen, whereas the Liquidator has considered the claims of 45 workmen only.

49. The learned Senior Counsel submitted that the liquidation process of the Corporate Debtor commenced on 17 October 2017, hence the period of 24 months before the liquidation commencement date would be 18 October 2015 to 17 October 2017.
50. The Company's manufacturing operations at Shyamnagar in West Bengal and Baripada in Odisha were declared locked out with effect from 23 April 2015, this fact is undisputed.
51. As per the records of the Corporate Debtor only 45 workmen reported to work during the 24 months preceding the liquidation commencement date, the rest of the workmen were not required to report to work, due to lockout and hence did not report to work.
52. The learned Senior Counsel further submitted that since only certain security and other basic staff kept attending to basic work during the lockout, only the claims of those 45 workmen who reported to work was computed for the purpose of salary and wages for the 24 months preceding the liquidation commencement date.
53. It is further submitted that initially only 45 workmen had filed their claim, which also matches the records of the Resolution Professional and the records of the Corporate Debtor as provided by the ex-HR manager of the Corporate Debtor which also reflects that only 45 workmen have worked during the 24 months preceding the Liquidation Commencement Date. Based on this record, the Liquidator has computed the workmen's dues under the head 'salary and wages' for 45 workmen only under section 53(1)(b) of the Code.
54. It is further submitted that it was only after the order dated 22 January 2020 in I.A. (IB) No. 469/KB/2019 that the additional 279 workmen claimed past 24 months dues.
55. The learned Senior Counsel asserted that there is no link between the payment of terminal dues and gratuity dues with payment of salary and wages. For the purpose of computing the terminal benefits as well as gratuity the employment period has been taken as continuing for all the 324 workmen and accordingly the terminal benefits and gratuity were claimed and admitted. However, with respect to wages, the right of wages comes from work done and hence, workmen who did not report to duty cannot be entitled to wages.

56. The learned Senior Counsel placed reliance on the judgment of the Hon'ble Supreme Court in the matter of Sunil Kumar Jain and others v. Sundaresh Bhatt and others wherein the Hon'ble Supreme Court held that only with respect to those workmen/employees who actually worked during CIRP when the Corporate Debtor was a going concern, their wages/ salaries are to be included in the CIRP costs and shall have first priority over all other dues as per section 53(1)(a) of the Code
57. The learned Senior Counsel submitted that although the aforesaid judgment pertains to the first priority dues of the workmen, however, it is pertinent to note that the weightage has been given to the dues of workmen who have actually worked during the CIRP. Learned Senior Counsel further submitted that one cannot expect from a sinking company to make such kind or expenses at the cost of other creditors, hence since there was only 45 workmen who were working during the 24 months preceding the liquidation commencement date.
58. It is further submitted that the contention raised by the Applicants that the Liquidator has failed to comply with the directions of this Adjudicating Authority passed on 15 February 2022 in I.A. (IB) No. 1058/KB/2020, which is misconstrued. The Liquidator was directed to carry out fresh computation of the workmen's dues in compliance with the provisions of the Industrial Dispute Act, 1947 along with requisite explanations.
59. It is submitted that taking note of the guidance provided by this Adjudicating Authority in paragraph 15 of the order dated 15 February 2022, wherein it has been stated that the retrenchment compensation will be based on 15 days salary for every completed year of continuous service or any part thereof in excess of six months and in accordance with section 53 of the Code.
60. After consideration of the claim as originally filed on 20 November 2017, the claim admitted and the books and records of the Corporate Debtor, the Liquidator has submitted a Compliance affidavit on 05 April 2022.
61. It is further submitted that based on the realisation of assets, so far the Liquidator has made distribution totalling to 35% of the admitted claims of first ranking secured creditors and workmen to the extent of the workmen dues for the 24 months preceding the liquidation commencement date. The share of distribution

for the workmen has been retained in the Liquidation Account, since the workmen have refused to accept pari-passu distribution.

***Analysis and Findings***

62. Heard the learned Counsel appearing on behalf of the Applicants and the learned Senior Counsel appearing on behalf of the Liquidator and perused the records.
63. The main issue which needs to be dealt with is whether the concerned workmen/employees are entitled to compensation as per section 53(1)(b)(i) of the Code, which envisages that the workmen shall receive its dues for the period of twenty-four months preceding the Liquidation Commencement Date, or are entitled only to the retrenchment benefits as per Section 25FFF of the Industrial dispute act or both.
64. To consider the issue it is important to consider whether all the 324 workmen were in service for the period preceding Liquidation Commencement Date. In this case, the Liquidator has accepted that 45 workmen/employees were attending to their work due to the lockdown of the Corporate Debtor. Hence, they will be entitled to receive their dues under section 53(1)(b)(i) of the Code.
65. We now have to consider whether or not the remaining 279 workmen/employees are also entitled to receive their dues for the period of twenty-four months preceding the Liquidation Commencement Date i.e. from 18 October 2015 to 17 January 2017.
66. The Learned Senior Counsel has contended that the 279 workmen/employees were not in service during the said period and are not entitled to the same. To determine whether the 279 employees/workmen were in service or not, we shall refer to section 25B and section 25F of the Industrial Disputes Act, 1947 which is given below:

***“25B. Definition of continuous service.—For the purposes of this Chapter,—***

*(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;*



(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, **has actually worked** under the employer for not less than—

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, **has actually worked** under the employer for not less than—

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

*Explanation.*—For the purposes of clause (2), the number of days on which a workman **has actually worked** under an employer shall include the days on which—

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under this Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous years;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.]”

**“25F. Conditions precedent to retrenchment of workmen.—**

No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that

*employer until— (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; 1\* \* \* \* (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay 2 [for every completed year of continuous service] or any part thereof in excess of six months; and (c) notice in the prescribed manner is served on the appropriate Government 3 [or such authority as may be specified by the appropriate Government by notification in the Official Gazette].”*

67. *Vide* order dated 22 January 2020, this Adjudicating Authority had observed that upon commencement of Liquidation of the Corporate Debtor, the employees/workmen are entitled to compensation for retrenchment and had directed the Liquidator to calculate the liability of the individual workmen for the retrenchment compensation.
68. The Corporate Debtor was under lockdown from 23 April 2015 and thereafter no regular work was carried out in both the plants of the Corporate Debtor. The service of the workmen/employees were not terminated as is evident from the reply of the Corporate Debtor.
69. The Liquidator has admitted that the 279 workmen/employees were still in employment of the Corporate Debtor. Neither had the Corporate Debtor or Resolution Professional terminated the employment of the workmen/employees. Taking note of section 25B of the Industrial Disputes Act, 1947, there was no cessation of work of the 279 workmen/employees.
70. The Hon'ble Supreme Court in *Sunil Kumar Jain (supra)* has stated that the wages would be paid only if the workmen are continuously working in the Corporate Debtor. In the present case, the Corporate Debtor was a going concern but using only a skeletal staff of 45 workmen/employees as was called for. The 279 workmen/employees were not called for work nor was their employment terminated. They were left in lurch for no fault of theirs. The workmen/employees were on the rolls of the Corporate Debtor and hence were in service till the date of commencement of liquidation, whereafter they stood discharged in terms of Section 33(7) of the IBC 2016.

71. We are thus of the view that the workmen have been in continuous service as they were not discharged. It is only the liquidation order that discharges them. Once discharged through liquidation, the provisions of section 33 of the Code gets invoked and then workmen can be compensated by giving them wages for 2 years preceding liquidation.

72. On 15 February 2022, this Adjudicating Authority had passed an order wherein it was observed that:

9. *Section 53(1)(b) of the Code provides that the workmen's dues for the period of twenty-four months preceding the liquidation commencement date would rank equally with the debts owed to the Secured Creditors who relinquish their security in terms of section 52 of the Code. The Explanation to section 53(3) of the Code provides that the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013. The explanation to section 326 of the Companies Act, 2013 provides that, **the workmen's dues shall include all wages and salaries and any compensation payable under the Industrial Disputes Act, 1947.***

10. *In such circumstances, every member workman of the applicants is entitled to both wages and salaries and any compensation payable under the Industrial Dispute Act, 1947 and thus, every member workman is entitled to both wages and salaries payable to them, for the period of twenty-four months preceding the liquidation commencement date i.e., 17 October 2017, as also compensation payable under the provisions of the Industrial Disputes Act, 1947."*

73. In view of the above, it is clear that the terms of the definition of the Workmen dues, any other compensation shall also be forming a part in addition to the wages. As such we direct the Liquidator to calculate the dues of the 324 workmen/employees for the period of twenty-four months preceding the Liquidation Commencement Date i.e. from 18 October 2015 to 17 January 2017 and to also to calculate/re-evaluate the retrenchment compensation, if not already done and admit the claim for all the 324 workmen, since they continue

IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH, COURT- I

Nicco Employees Union & Ors. v. Vinod Kumar Kothari  
I.A. (IB) No. 1519/KB/2022 in C.P(IB) No. 3/KB/2017

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to be in service till the date of liquidation and consider payment to the workmen/employees within two weeks after admitting the same.

74. In view of the above directions, *I.A. (IB) No. 1519/KB/2022 is hereby allowed to the extent of the above directions and disposed of.*

75. List C.P. (IB) No. 03/KB/2017 on 16 May 2024 for further consideration.

76. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

77. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

78. File be consigned to the records.

**Balraj Joshi**  
Member (Technical)

**Rohit Kapoor**  
Member (Judicial)

Order signed on the 3<sup>rd</sup> day of May 2024.

GGRB\_LRA