

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

WPA 532 of 2025

**M/s. Stesalit Limited
Vs
Union of India & Ors.**

For the Petitioner : Mr. Jishnu Chowdhury, Sr. Adv.
Mr. Divyakant Lahoti,
Ms. Shrinalli Kajaria,
Mr. Vijay Kumar,
Ms. Pramena Bisht,
Mr. Madhus Jhaver,
Mr. Siddharth Tripathi.

For the Respondent no. 4 : Mr. Subhash Chandra Sarkar.

Hearing concluded on : 11.02.2025

Judgment on : 21.02.2025

SHAMPA DUTT (PAUL), J. :

1. The present writ petition has been preferred against the Order dated 11.11.2024 passed by the Assistant Labour Commissioner (Central) & Controlling Authority in Case No. 48(24) 2020-E2 (Shri Arun Roy v M/s Stesalit Limited).

2. Vide the order under challenge the Assistant Labour Commissioner Central and Controlling Authority under Payment of Gratuity Act, 1972 directed payment of gratuity along with interest till actual payment.
3. The petitioner's case as made out in the writ application is that the Respondent No. 4 was an ex-employee of the Petitioner Company, who had joined the erstwhile management of the petitioner company **in the post of Manager, Technical Operations** with effect from 18.09.2002 and thereafter, had resigned on 03.12.2014.
4. **The respondent no. 4 in his written notes has raised the issue of maintainability of the writ petition on the following grounds:-**
 - i. That if the petitioner be aggrieved with the order of the Controlling Authority it had the remedy before the Regional Labor Commissioner, the Appellate Authority.*
 - ii. That without exhausting all the avenues the petitioner has come to this Writ Court to avoid the deposit of the Award amount. The petitioner in a circuitous manner is challenging Section 10 of the Payment of Gratuity Act 1972.*
 - iii. That the Respondent no. 4 was working as Management Staff as such there cannot be any*

Industrial Dispute as he belongs to Supervisory staff as such this cannot come under Group III determination.

5. On the other hand the petitioner's case is that the present petition under Article 226 of the Constitution of India, has been filed by the Petitioner aggrieved by the Order dated 11.11.2024 passed by the Respondent No.3 i.e. Controlling Authority & Assistant Labour Commissioner (Central) Kolkata **(without preferring an appeal)** as the controlling authority has wrongly and arbitrarily allowed the application under the provisions of Payment of Gratuity Act, 1972, filed by the Respondent No.4, without considering that:-

(a) The Petitioner Company has now been taken over by a new management under the Corporate Insolvency Resolution Proceedings (hereinafter referred to as the "CIRP") conducted under the provisions of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code").

(b) The Respondent No.4 has already filed his claim for gratuity amount (amongst others) before the IRP during the aforesaid CIRP. The said claim was duly considered and admitted by the IRP and the Petitioner was then awarded an amount of Rs. 38,808.43/- under the approved Resolution Plan (submitted by the Successful Resolution Applicant i.e. the present Petitioner), against the claims raised by him.

(c) Respondent No. 4 has not challenged the approved Resolution Plan or the amount awarded to him under the said Plan before the Learned Adjudicating Authority under IBC.

(d) The Application was filed by the Petitioner under the provisions of the Gratuity Act despite having an award of an amount in respect of his claims during the CIRP, and this amounts to forum shopping and an abuse of the process of law.

(e) The provisions of IB Code, 2016, being a special legislation have an overriding effect over the provisions of Payment of Gratuity Act, in view of Section 238 of the IB Code.

6. The respondent no. 4 herein has relied upon the judgment/order of the NCLT, Mumbai Bench, Court-II passed in the case of ***Dnyanaba Namdeo Karande & Ors. vs Calyx Chemicals and Pharmaceuticals Limited***, Where in the Bench held:-

“18. The Respondent No. 1 has failed to substantiate that the Applicants are not entitled for any payment under the Resolution Plan. The provisions of the Code also do not allow differential treatment of employees whose claims have been admitted on the basis of Insolvency Commencement Date. Further, we are of the considered view that the decision of the Hon'ble NCLAT in Hindustan Newsprint Limited (Supra) that gratuity is to be paid in full as per the provisions of payment of Gratuity Act, 1972 is applicable in this case. The implementation of the Resolution Plan and distribution of resolution amount to various stakeholders will not make any difference as regards the application of the above ratio laid down by the Hon'ble Supreme Court in

Jet Aircraft Maintenance Engineers Welfare Association and followed by the Hon'ble NCLAT in Hindustan Newsprint Limited (Supra).

19. Based on the above discussion, we are of the view that the Application claiming gratuity dues as per the provisions of the Payment of Gratuity Act, 1972 against the Corporate Debtor/Respondent No. 1 to the extent of admitted claims deserves to be paid."

7. In appeal, the NCLAT appellate tribunal held that:-

PF, Pension Fund and Gratuity Fund does not come within the meaning of Assets of Corporate Debtor for distribution under S. 53 IBC.

8. In *IDBI Bank Limited vs Lanco Infratech Limited*, the NCLT Hyderabad Bench-1, on 04.05.2023, held:-

*"2. According to the applicants, this Tribunal vide order in IA.No.96/2019 dated 01.10.2019 while allowing the said IA directed the Liquidator to make necessary arrangements for **payment of gratuity to the applicants as per their eligibility and the said amount shall not be treated as part of the liquidation estate.** Aggrieved by the said order the Liquidator had preferred an Appeal before Hon'ble NCLAT, which has been allowed. However, the Civil Appeal No.2520/2020 preferred by the Petitioners as against the order of Hon'ble NCLAT before the Hon'ble Supreme Court of India, has been allowed vide the order dated 07.02.2023 whereby the order of the Hon'ble NCLAT has been set aside and the order of this Tribunal dated 28.02.2023 has been restored. Therefore, for noncompliance of the order of this Tribunal dated 01.10.2019, this application is filed for its forthwith implementation and in default to initiate contempt proceedings against the liquidator."*

9. In the matter of ***Savan Godiwala, the Liquidator of Lanco Infratech Limited vs. Apalla Siva Kumar, in company Appeal CAT (insolvency) No. 1229 of 2019 on 11th Feb 2020, the Supreme Court on February 07, 2023, has upheld the NCLT judgment that “even if no fund is kept, the liquidator must make adequate provisions for paying gratuities to the applicants in accordance with their eligibility.*** The Liquidator cannot avoid the obligation to pay gratuities to the employees on the grounds that the CD did not maintain separate funds”. Thus, it is not an asset of the CD and therefore IRP/RP has to release the dues as and when it is due and payable irrespective of the fact that whether CD has been maintaining a separate Fund or not.

10. “Gratuity” and its Interplay with IB Code:-

- i. “Gratuity”, is a sum payable by the employer to his workers upon completing service for the prescribed period of time. Once the company is brought to an end by the liquidation, then clearly such payment is to be paid to the workers.
- ii. Simultaneously, the IB Code provides for the formation of a “liquidation estate” containing all the assets of the debtor. It is these proceeds that will be distributed to the

respective stakeholders (creditors) in terms of waterfall mechanism under Section 53 of the IB Code.

- iii.** Issue arises because if the gratuity falls under the “liquidation estate” and is to be distributed in terms of Section 53, then the workers may not get their dues in total.

However, Section 36 of the IB Code stipulates certain payments that are not to form part of the “liquidation estate”. Section 36(4)(a)(iii) of the IB Code stipulates that:

(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)-(ii)

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

In other words, any amount due to the workers from the pension fund, provident fund, and the gratuity fund will not form a part of the liquidation estate of the corporate debtor and will not be used for recovery in liquidation.

- iv.** Since in many instances, liquidation results in the complete closure of the business of the ailing debtor, which results in the termination of the employment of the workers. In legal parlance, this discharge of workers amounts to their retrenchment i.e. the termination of service of workers by the employer for any reason other than punishment inflicted by way of disciplinary action. Naturally to protect the workers, funds such as pension fund, provident fund, and the gratuity fund are kept out of the liquidation distribution and to be used solely for the benefit of the workers.
- v.** This question was even dealt with by the National Company Law Appellate Tribunal (NCLAT) in *Somesh Bagchi v. Nicco Corpn. Ltd.* (*Somesh Bagchi*) as well *SBI v. Moser Baer Karamchari Union* (*Moser Baer – NCLAT*) wherein the Appellate Tribunal had held that gratuity does not form a part of the liquidation estate.

The precedent of Alchemist Asset Reconstruction Co. Ltd. v. Moser Baer India Ltd – NCLT referred to by the NCLT in Agro Industries[13] was primarily on the issue of whether gratuity funds could be used to make up the “liquidation estate” and consequently available for distribution amongst other creditors in terms of Section 53 of the IB Code. Allowing the prayer of the workers, the NCLT held that amount due towards the workers cannot be used for the purposes of distribution in terms of Section 53 of the IB Code.

In Moser Baer – NCLT, the Court further directed the liquidator that in cases there is any deficiency to the provident, pension or the gratuity funds; the liquidator shall ensure that the fund is available in these accounts, “even if their employer has not diverted the requisite amount”.

This order was impugned by the State Bank of India – a secured creditor of Moser Baer in SBI v. Moser Baer Karamchari Union, where the limited question that came before the NCLAT was whether the gratuity dues formed a part of the liquidation estate. Holding the answer in

negative, the NCLAT decided not to interfere with the order of the NCLT.

11. In the present case, there is no such fund maintained by the company. **Herein, the company never closed down nor did it go into liquidation.**

12. It is the specific case of the petitioner herein is that the claim of the respondent no. 4, though considered, was not awarded in full.

“c) The said claim was duly considered and the entire amount claimed towards gratuity was admitted by the IRP. The Petitioner was then awarded an amount of Rs. 38,808.43/- under the approved Resolution Plan (submitted by the Successful Resolution Applicant i.e. present Petitioner), against the claims raised by him.”

13. This proves that though the total claim was admitted, only an amount of Rs. 38,808.43/- was approved under the resolution plan.

14. The dues of the workers have to be paid in full.

15. The dues for the welfare of the workers is not permissible to be included in the liquidation estate and is to be utilized only for the payment of the dues of such workers in full.

16. Admittedly the respondent joined in the post of Manager Technical Operations and is not a worker and any dispute raised

by him is thus not an industrial dispute. **But the claim herein is in respect of gratuity in respect of an 'employee' which is guided by the labour legislation, payment of gratuity act and applies to all employees.**

- 17. Thus the findings of the controlling authority on the said issue which is as follows requires no interference:-**

“VII. Additionally, the Payment of Gratuity Act, 1972, uses the term "employee" instead of "workman," reflecting a broader definition that includes both workers and supervisory personnel. Under Section 36(4) of the Code, gratuity dues are distinct; they are not simply part of the debtor's assets but represent the earned entitlements of employees. In contrast, "workmen's dues" as defined in Section 53 represent a form of retrenchment compensation, acknowledging the workers' deemed termination upon liquidation. This compensation equates to 24 months of service benefits for the workers but is separate from the gratuity dues already accrued to employees, which stand as third-party assets outside the corporate debtor's estate.”

- 18.** The order challenged is dated 11.11.2024.
- 19.** There has been no appeal filed on the ground that the order has been passed without jurisdiction.
- 20. The relevant findings of the controlling authority are as follows:-**

“IX. Even if the issue of fund creation is considered literally, it holds relevance only when evaluating workmen's dues under Section 53 of the Insolvency

and Bankruptcy Code (IBC). The absence of such a fund does not influence the treatment of excluded dues-like gratuity dues-under Section 36 of the Code. Gratuity payments are classified as excluded dues, and thus they remain outside the scope of asset distribution among creditors, as stipulated by the waterfall mechanism in Section 53. Therefore, the respondent's reliance on the absence of a gratuity fund is unfounded in this context.

X. When submitting the resolution plan, the respondent needed to recognize that, until the company ceased operations, any dues owed to workers-including salaries, provident fund contributions, and gratuity-constituted assets already earned by the workers. The employer held no proprietary right over these amounts, as they had been accrued through the employees' services. Consequently, these dues fell into the category of excluded assets in possession of the Corporate Debtor. The respondent was therefore obligated to prioritize the release of these dues and to explicitly include them within the resolution plan. Failing to account for these obligations reflects a significant oversight by River Rail in the submission of the resolution plan and the acquisition process. This negligence compromised the rightful entitlements of the workers, disregarding their status as earned and excluded dues.

XI. In the matter of State Bank of India Vs. Moser Baer Karamchari Union & Anr, it was held by Hon'ble NCLT that 'Provident fund Dues', 'Pension Fund Dues' and 'Gratuity Fund Dues' cannot be part of Section 53 of the Code.

XII. Further, In the matter of Savan Godiwala, the Liquidator of Lanco Infratech Limited vs. Apalla Siva Kumar, the Hon'ble Supreme Court on

February 07, 2023, has upheld the Hon'ble NCLT judgement that "even if no fund is kept, the liquidator must make adequate provisions for paying gratuities to the applicants in accordance with their eligibility. The Liquidator cannot avoid the obligation to pay gratuities to the employees on the grounds that the CD did not maintain separate funds". Thus, it is not an asset of the CD and therefore IRP/RP has to release the dues as and when it is due and payable irrespective of the fact that whether CD has been maintaining a separate Fund or not.

XIII. It was held in *Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia RP of Jet Airways (India) Ltd. & Ors.* - NCLAT New Delhi that "Due to their exclusion from the liquidation estate under Section 36(4)(b)(iii), the workers and employees are entitled to the full amount of the provident fund and gratuity." A three judge bench of the Hon'ble Supreme Court of India, by way of its order in *Jalan Fritsch Consortium v Regional Provident Fund Commissioner and Another* [Civil Appeal Number 407 of 2023], upheld the judgment of the National Company Law Appellate Tribunal (NCLAT) in the matter of *Jet Aircraft Maintenance Engineers Welfare Association v Ashish Chhawchharia, Resolution Professional of Jet Airways (India) Limited and Others* [Company Appeal (AT) (Insolvency) Number 752 of 2021], whereby *Jalan Fritsch consortium* (Successful Applicant) was directed to disburse gratuity and employees' provident fund dues of the workmen of *Jet Airways (India) Limited* (Jet Airways) in entirety.

In light of the above arguments and cited case law, I find that River Rail, as the entity that assumed control of the corporate debtor, demonstrated a lack of due diligence when submitting the resolution plan by disregarding the mandatory provisions

under the Payment of Gratuity Act, 1972. This omission reflects a significant oversight on River Rail's part, as it failed to adequately account for the gratuity obligations owed to employees. Such negligence does not absolve River Rail from its responsibility to honor these dues, nor should the applicant bear the consequences of the company's oversight.

*Furthermore, this principle falls under the doctrine of Caveat Emptor, a fundamental tenet in commercial transactions that translates from Latin as "let the buyer beware." Under this common law principle, the **buyer is responsible for conducting thorough due diligence on any prospective purchase to fully understand the assets, liabilities, and potential obligations that accompany it.** In this context, River Rail, as the buyer taking over the corporate debtor, had an inherent duty to conduct comprehensive due diligence on all financial and legal obligations tied to the employees' dues.*

This due diligence should have extended to evaluating the company's statutory responsibilities, including any outstanding gratuity payments due to employees. River Rail's failure to recognize or account for these accrued liabilities before acquiring the corporate debtor reveals a significant oversight. By not ensuring that the workers' gratuity dues were either maintained in a secure fund or explicitly addressed as excluded assets within the plan, River Rail disregarded its obligations to the employees. This negligence not only breached the workers' entitlements but also demonstrated a lack of compliance with the Caveat Emptor principle.

Therefore, by failing to account for these worker-specific excluded dues in their due diligence and resolution submission, River Rail's actions reflected

*a substantial departure from required due diligence standards. **The resolution plan submitted disregarded the legal distinction between priority dues and excluded dues, which are legally recognized as workers' assets earned through their labor and not subject to distribution under Section 53 of the IBC.***

Additionally, Section 14 of the Payment of Gratuity Act, 1972, confers this Act with overriding authority, clearly stating that "the provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act." This clause is designed to ensure that the provisions of the Gratuity Act prevail over any conflicting legislation, thereby protecting the statutory rights of employees. Accordingly, River Rail cannot evade its liability for gratuity payments under the guise of other statutes, as the Gratuity Act takes precedence.

In view of above, I hold that present management shall pay gratuity to the applicant."

21. The controlling authority finally directed as follows:-

"ORDER

*I hereby direct respondent to pay the amount of gratuity amounting to **Rs. 2,11,154/- (Rupees Two Lakh Eleven Thousand One Hundred Fifty Four only)** along with **simple interest @ 10%** per annum as specified by the Central Government in the Gazette of India Notification vide SO No.847(E), dated 01.10.1987 under sub-section (3A) of Section 7 of the PG Act, 1972 w.e.f. **03/12/2014** till the actual payment of gratuity to Sh. Arun Roy within 30*

days from the receipt of this order under intimation to this Controlling Authority.

Given under my hand and seal on this 11th day of November 2024.”

22. In view of the said facts on record the following is evident:-

- i) **All ‘employees’ are covered under the payment of gratuity act and the said act is a labour legislation. This answers the point of jurisdiction/determination.**
- ii) Admittedly the company never closed down, as the petitioner-company was taken over by the new management under the CIRP and the company remained active. Thus the jurisdiction of the concerned authority has never been ousted.
- iii) There being no specific fund maintained for such purpose by the company, the controlling authority rightly held that the entire dues of the workers would not come under the ‘liquidation assets’ and a worker was entitled to his total dues from the assets of the company. Such claim was above the claim of other creditors.

iv) The controlling authority thus had jurisdiction to decide the issue of gratuity as the company never closed down. **CIRP is a recovery mechanism for creditors unlike liquidation which is a way to end a company's life.**

23. The findings of the controlling authority also being in accordance with law requires no interference.

24. The writ petition being WPA 532 of 2025 is thus dismissed.

25. All connected application, if any, stands disposed of.

26. Interim order, if any, stands vacated.

27. Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties, expeditiously after complying with all necessary legal formalities.

[Shampa Dutt (Paul), J.]