IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION NO. 593 OF 2011
IN
COMPANY PETITION NO. 778 OF 2005

B.I.F.R. …Petitioner
vs.
KMA Limited ....Respondent
and
Mrs.Triveni A. Kulkarni ...Applicant
vs.
Official Liquidator, High Court,
Bombay & Ors. ...Respondents

WITH

COMPANY APPLICATION NO. 620 OF 2011
IN
COMPANY PETITION NO. 778 OF 2005

Board of Industrial & Financial Restructuring ...Petitioner
and
KMA workers and Staff Union ...Applicant
vs.
Official Liquidator of KMA Ltd. ...Respondent

Mr.N.M. Ganguli for Applicant in CA 593/2011.
Mr.S.C. Naidu with Mr.S.B. Rao i/b. Gauri S. Rao for Applicant In CA 620/2011.
Ms.Meena Doshi for Kamani Employees' Union / Respondent No2.
Mr.S. Ramakantha, Official Liquidator with Ms.Yogini Chauhan, Asstt.Official Liquidator.

CORAM : S.C. GUPTE, J.

RESERVED ON : 20 AUGUST 2015

PRONOUNCED ON : 6 JANUARY 2016

ORDER :

Company Application No.593 of 2011, filed by an individual Applicant, who was a workman of the company (In Liquidation), seeks a direction against the Official Liquidator, High Court, Bombay, for adjudication of claims of

workmen and secured creditors of the company (In liquidation), in accordance with Sections 529A and 530 of the Companies Act, 1956 and payment of dividend accordingly. Company Application No.620 of 2011 is an application by a trade union claiming to represent 63 members, who were workmen of the company (In liquidation), also for adjudication of the claims of workmen. It also seeks quashing of an adjudication made by Official Liquidator in respect of 11 workmen set out in a resubmitted report, being OLR No.158 of 2010, of the Official Liquidator and re-adjudication of the claims on the basis of an order and judgment passed by the Industrial Court in Complaint (ULP) No.144 of 2005 dated 2 July 2005.

2. The facts of the case may be briefly set out as follows:

(i) In or about 1991, KMA Ltd. (in liquidation) (hereinafter referred as "the company") was referred to BIFR in a suo motu reference. On 16 April 1993, BIFR passed an order approving a scheme of rehabilitation for the company. The scheme envisaged taking over of the management of the company by a workers' cooperative. Under the scheme, each worker was entitled to become a member of the cooperative and also continue as an employee of the company upon payment of Rs.20,000/- (for workers working in the Mumbai unit of the company) and Rs.15,000/- (for workers working in the Bangalore unit). 50% of the wages of workmen due from the year 1991 and upto the date of restarting of the production through the workers' cooperative was to be converted under the scheme to equity and the balance 50% was to be waived.

(ii) Workers' cooperative continued to run the company under the scheme and paid wages to its workmen till December 1998. Wages for the month of January 1999 onwards remained unpaid. The company was thereafter not able to pay the wages.

(iii) By an order dated 6 September 2000, BIFR recommended winding up of the company. The company filed an appeal before AAIFR

challenging the order of recommendation. During the pendency of that appeal, AAIFR constituted an Asset Sale Committee ("ASC") to sell the assets of the company under the supervision of AAIFR. On 7 February 2005, the company's appeal was dismissed by AAIFR. The order of dismissal was challenged by the company in a writ petition, being Writ Petition No.1512 of 2002, in this Court. On 20 December 2002, a consent order was passed in that writ petition for sale of movable and immovable assets, including lands, buildings, and plant and machinery of the factories at Mumbai and Bangalore through public auction. These were to be auctioned by ASC constituted along the lines of the order of AAIFR, with Bank of Baroda, which was a lead bank representing the consortium of lenders, and also the workers' co-operative as its constituents, and the sale proceeds were to be retained in an interest bearing no lien account.

(iv) The factory premises, including the plant and machinery at Mumbai and Bangalore, were thereupon sold by the ASC. On 15 December 2004, by two separate orders passed in the matter, this Court confirmed the sale of factory premises. An amount of Rs.81.21 crores was realised through this sale, which amount was deposited in a no lien account under the directions of this Court.

(v) Thereafter, by an order dated 4 April 2005, this Court directed the company to adjudicate the claims of workmen and secured creditors. The company proceeded to have the claims of workmen adjudicated before the Industrial Court and the claims of banks and financial institutions before the Debt Recovery Tribunal ("DRT"). On 2 July 2005, by a judgment and order, the Industrial Court, Mumbai, crystalised the claims of workmen. Similarly, by an order dated 17 August 2005, the DRT adjudicated the claims of banks and financial institutions.

(vi) On 30 September 2005, this Court appointed a provisional liquidator of the company.

(vii) Kamani Employees Union, which was the registered trade union of the workmen of the company as well as the company and the consortium of banks and financial institutions of the company, challenged the orders of the Industrial Court and DRT. Three writ petitions, one by the Company, one by the Union and one by the lead bank on behalf of the Consortium of banks, were filed in this behalf. In 2007-08, negotiations were held between the banks and the registered trade union regarding the claims of workmen as well as secured creditors. Consent terms specifying the amounts payable to both workmen and secured creditors including the consortium of banks were arrived at. At general body meetings of the union, resolutions accepting the culmination of negotiations and approving draft consent terms to be filed in terms thereof, were approved. Workmen signed affidavits accepting the amounts set out in the consent terms towards full and final settlement of their dues and authorised the union to sign the consent terms. Accordingly, consent terms were signed between the union and the banks. Thereafter, on 8 July 2008, a Division Bench of this Court disposed of all three writ petitions in accordance with the consent terms, in the presence of dissenting workmen. The order, however, provided that the consent terms would need concurrence of the Company Judge, since the petition for winding up of the company was pending at that time before the Company Court.

(viii) On 7 August 2008, the company court passed an order on the Official Liquidator's report directing issuance of public advertisements inviting claims against the company from workmen as well as secured creditors. On 24 September 2008, the Official Liquidator submitted a report regarding claims received in pursuance of such public advertisements, including claims of the registered union on behalf of 1162 workmen as well as dissenting workmen and claims of the secured creditors including banks and financial institutions. By an order dated 25 September 2008, the company court directed the Official Liquidator to verify whether any workman had been left out of the consent terms. An

application was thereafter moved by the Union for grant of company court's concurrence to the consent terms.

(ix) On 24 October 2008, the company court ordered winding up of the company. The Official Liquidator was directed to forthwith adjudicate the claims of workmen as well as secured creditors and disburse the sale proceeds in accordance with the mandate of the consent terms as also in compliance with Section 529A of the Companies Act, 1956. The Official Liquidator took a stand before the company court that the consent terms were in accordance with Section 529A of the Companies Act. On 13 March 2009, after taking into account submissions made by various stakeholders, including the registered the trade union, the Official Liquidator, the secured creditors as also the dissenting workmen of Bangalore and Mumbai Units of the company, the learned Company judge accepted the consent terms and authorised payments to be made in accordance with the consent terms. An amount of Rs.11.38 crores was set aside towards adjudication of claims of dissenting workmen.

(x) In April-May 2009, approximately 1000 workers were paid their respective dues in accordance with the consent terms. Thereafter, in or about May 2009, 8 dissenting workmen from Bangalore unit approached the union and requested for payment in accordance with the consent terms. Even this payment was allowed subsequently by an order passed by this Court. From August 2009 onwards, various claims were filed by dissenting workmen from Mumbai and Bangalore units. Several meetings were held before the Official Liquidator for adjudication of these claims. On 5 May 2010, the Official Liquidator presented a report, seeking extension of time for adjudication as also directions to the parties to provide copies of claims and make submissions on the claims. On 6 May 2010, the Company Court allowed the report. Several further meetings were thereafter held before the Official Liquidator for adjudication of the claims of dissenting workmen. A resubmitted report was filed by the Official Liquidator, being resubmitted OLR No.158 of 2010, submitting

inter alia that the amounts payable under the consent terms being higher than the adjudicated amounts, the dissenting workmen be paid their dues in accordance with the consent terms.

(xi) In or about October / November 2011, the present company applications were respectively filed by the individual dissenting workman – Ms. Triveni Kulkarni and the rival union of workmen for adjudication of their claims, as noted above. By an order dated 2 February 2012, these applications were partly allowed by the Company Court *inter alia* directing the Official Liquidator to adjudicate the claims of dissenting workmen on the basis of the order of the Industrial Court and also the records of provident fund. On 19 June 2012, the Official Liquidator filed a report setting out the amounts of adjudicated claims of dissenting workmen on the basis of the order of the Industrial Court and also provident fund records. On 21 June 2012, an order was passed for payment of 50% amount of such adjudicated claims.

(xii) In the meantime, the order of the learned Company Judge dated 2 February 2012 was challenged before a Division Bench of this Court. The Division Bench, by its order dated 30 August 2012 passed in Appeal (Lodging) No.602 of 2012 filed by the registered trade union, set aside the order of the learned Company Judge and restored Company Application Nos.593 of 2011 and 620 of 2011 to file, with directions to the Company Judge to decide the applications afresh on merits after taking into consideration the objections raised by the registered trade union and also after giving an opportunity of hearing to the registered trade union as well as secured creditors. That is how the company applications have come up for hearing before this Court.

3. I have heard Mr.Ganguli and Mr.Naidu, learned Counsel appearing for the Applicants in the two company applications, Ms.Doshi, learned Counsel appearing for Kamani Employees' Union (the registered Union which was party to

the consent terms) and the Official Liquidator for the company.

4. The broad contours of the controversy may be outlined as follows : The company had a total of about 1162 workmen, majority of whom have accepted the consent terms between the registered union and the secured creditors filed in the writ petitions and approved by the Company Court. Eight Workmen led by the Applicant in Company Application No.593 of 2011, who are represented by Mr.Ganguli and sixty three workmen through the rival union represented by Mr.Naidu are the only dissenting workmen out of these 1162 workmen. Their case is that they are not bound by the consent terms and must be paid in accordance with the adjudication originally made by the Industrial Court or at any rate, on the principles of that adjudication and in the alternative, in accordance with their entitlement in law under Sections 529A and 530 of the Companies Act, 1956. They submit that whilst their dues other than preferential dues under Section 529A can wait (and which they would like to be kept open) till there is availability of surplus of funds, their dues under Section 529A be determined and paid from the amount set apart for the purpose. Ms.Doshi, on behalf of the registered Union, opposes the applications. She submits that the dissenting workmen cannot oppose the consent terms. Many of them have given affidavits accepting the consent terms. She submits that even otherwise in the facts of the case, the consent terms need to be adhered to. She opposes the basis on which Mr.Ganguly and Mr.Naidu calculate their entitlements under Section 529A. Based on these rival submissions, the following questions broadly arise for the consideration of this Court :

(a) Whether the dissenting workmen are bound by the consent terms or whether they are entitled to be paid in accordance with Sections 529 and 529A of the Companies Act, 1956?

(b) If they are to be paid according to their entitlement under Sections 529 and 529A, upto what date are they entitled to be paid wages?

(c) Whether they are entitled to any (i) notice pay, (ii) leave wages, (iii) bonus

or (iv) gratuity and (v) any interest on these dues?

5. The dissenting workmen cannot be said to be represented by the Union which signed the consent terms. The sixty three workmen whom the rival union, KMA workers and Staff Union, Bangalore, claims to represent say that they were not consulted when the consent terms were arrived at; that they never authorised the union to enter into any consent terms; and that they have throughout objected to the consent terms. Ditto for the Applicant in Company Application No. 593 of 2011. Ms.Doshi, for the registered union, submitted that many of these workmen including the Applicant in Company Application No.593 of 2011 did sign affidavits in favour of the registered union accepting the consent terms. But there is no support for this contention in the pleadings or documents. The affidavits themselves are not on record. In fact, the record of the case including affidavits and documents referred to therein suggest otherwise. These dissenting workmen have to be paid dues on the basis of their entitlements in law, particularly under Sections 529 and 529A of the Companies Act, 1956. That is how the Company Court had sanctioned the consent terms, noticing that the funds set apart were adequate to meet the claims of dissenting workmen upon adjudication thereof by the Liquidator. The issue of their entitlement was clearly kept open.

6. Before we take up the individual items forming part of their claims, we may dispose of one particular contention of these workmen. It is submitted that the dues of the workmen should be decided in accordance with the order dated 2 July 2005 passed by Industrial Court in Complaint (ULP) No.144 of 2005. That order was passed by the Industrial Court on the complaint of the registered union of the workmen of the Company. The Industrial Court in that order held that non-payment of wages and other benefits to its workmen by the Company amounted to an unfair labour practice within the meaning of the Maharashtra Registered Trade Unions & Prevention of Union Labour Practices Act, 1971. On the basis of that finding, the Industrial Court further held that the complainant union would be entitled to an order of wages, privilege leave encashment, L.T.A. with interest as claimed together with gratuity with 10 per cent interest and bonus

with 6 per cent interest plus interest claimed on the provident fund amount of employees' contributions. The Industrial Court also directed that the workmen, who were in employment, were entitled to monthly wages till subsistence of the contract of employment. This order *inter alia* was the subject matter of challenge in the writ petitions, namely, Writ Petition Nos.285 of 2006, 195 of 2006 and 459 of 2007. In accordance with the consent terms arrived at by the registered union and the secured creditors, the Division Bench hearing the writ petitions disposed of the petitions. The consent terms provide for distribution of assets of the Company in a particular manner amongst workmen and secured creditors. The distribution inter se amongst workmen is provided for in an annexure prepared by the registered union and forming part of the consent terms. With these terms being put in place, the dues provided for by the order of Industrial Court necessarily get varied. The Division Bench whilst disposing of the petitions in terms of the consent terms was conscious of the fact that the Company Court was seized of liquidation proceedings in respect of the company and accordingly, directed the parties to seek concurrence of the Company Court to the consent terms. The Company Court did give such concurrence in its order dated 13 March 2009, though without prejudice to the rights of the dissenting workmen. That means the Company Court did put its seal on the adequateness and propriety of the distribution in favour of at least the consenting workmen from the standpoint of Sections 529 and 529A of the Companies Act, 1956. With the Division Bench so disposing of the writ petitions in terms of the consent terms and the Company Court concurring with the consent terms, the order of Industrial Court dated 2 July 2005 clearly ceases to hold the field. In fact, when the matter was before the Appeal Court from the order of the Single Judge which had originally disposed of the Company Applications herein, the Appeal Court set aside the order of the Single Judge insofar as it directed the Official Liquidator to re-adjudicate claims of dissenting workmen on the basis of the order of Industrial Court dated 2 July 2005. The Appeal Court clearly held that since the consent terms were placed on record and accepted by the Division Bench whilst disposing of the writ petitions and the Company Court granted its concurrence thereto, it cannot be said that the judgment and order of Industrial Court dated 2 July 2005 holds the field any longer; and that the consent terms were in effect in substitution of the judgment

and order of 2 July 2005. Thus, though the dissenting workmen are entitled to their dues in accordance with Sections 529 and 529A, the Official Liquidator is not bound by the order of 2 July 2005 in the matter of adjudication of such dues.

7. With this, we may now deal with the merits of the dues demanded by the dissenting workmen. It must be clarified, though, at the outset that this order determines the issues in principle. Based on this determination, evidence will have to be placed by the dissenting workmen before the Official Liquidator, who shall then adjudicate individual dues in the light of this order.

8. The first question is of the applicable date upto which the wages need to be calculated for the purpose of ascertaining dues under Sections 529 and 529A. The registered Union, in the consent terms, has taken '31 December 2002' as the date upto which wages ought to be calculated. That was presumably on the footing that the substratum of the Company no longer subsisted after the sale of its assets under orders of the Court. (The consent order for sale of all movable and immovable assets of the Company at Mumbai and Bangalore was passed by this Court in Writ Petition No.1512 of 2002 on 20 December 2012.) On the other hand, the dissenting workmen root for '24 October 2008' as the relevant date, contending that the contract of employment between a company and its workmen subsists till the date of the winding up order and that is the date upto which the wages ought to be computed. (The Company Court ordered the company to be wound up on 24 October 2008.)

9. On the relevant date upto which workmen's dues in winding up need to be calculated, it is to be noted that under Section 445(3) of the Companies Act, 1956, the contract of the Company (in liquidation) with its employees comes to an end on the passing of the winding up order. No discharge of workmen at any time earlier can be shown in the facts of the present case. It is not possible to accept the contention of Ms.Doshi that since the winding up order relates to the date of presentation of the petition, a similar relation-back obtains in the case of notice of discharge under Section 445(3). A learned Single Judge of this Court in

Vishwanath Namdeo Patil vs. Official Liquidator of Swadeshi Mills[1] has held that the only provision concerning discharge of workmen in case of winding up is contained in Section 445(3) of the Companies Act, on the plain reading of which a winding up order is a deemed notice of discharge to all employees of the company in liquidation except when business of the company is continued beyond the date of the order. This decision binds me. But then such winding up order would operate as a notice of discharge only to those workmen who continue in service as on the date of the winding up order. If any workman has ceased to be in the employment of the company at any time prior, there is no question of the winding up order operating as a notice of discharge in his case. There are two important events which transpired before the winding up order in this case, which have a vital bearing on the employment of workmen of the Company. Firstly, there was a lock-out declared in the Company in 1991. Following this lock-out, a suo motu reference came to be registered before BIFR in respect of the company under the Sick Industrial Companies Act ("SICA"). Secondly, in 1993, units of the Company at Mumbai and Bangalore were restarted under orders of BIFR through a workers' co-operative. There were specific provisions of the scheme sanctioned by BIFR about employment of workmen under the workers' co-operative and the wages of workmen during 1991 and 1993. Between the years 1993 and 1998, the Company was run and its workmen worked with it under the sanctioned scheme. Since January 1999, the Company could not be run and wages since January 1999 remained unpaid. Finally, on 6 September 2000, BIFR recommended winding up of the company. On 7 February 2002, an appeal from that order was dismissed by AAIFR. In the writ petition filed by the company, challenging the AAIFR order, on 20 December 2002, a consent order was passed for sale of all assets of the company through an Assets Sale Committee constituted on the lines of the order earlier passed by AAIFR for sale of assets.

10. In these circumstances, it is only those workers, who became members of the workers' co-operative by fulfilling the terms of the scheme such as conversion into equity of 50 per cent wages due from the year 1991 and waiver of balance 50 per cent and payment of amounts of Rs.20,000/- (for the

1 **[2013] 181 Comp Cas 133 (Bom)**

Mumbai unit) and Rs.15,000/- (for the Bangalore unit), who are entitled to wages under the scheme. The others, who did not become such members and who did not work, cannot claim to have continued as workmen of the Company. A scheme sanctioned by BIFR under SICA has the effect of altering contracts of the Sick Industrial Company with its shareholders, creditors, guarantors and employees. Under Section 18(8) of SICA, such scheme is binding on the shareholders, creditors, guarantors and employees. The Company in the present case offered to provide employment to those workmen who agreed to join the Workers' co-operative on the terms of the sanctioned scheme. Those who did not so join must be treated as having refused to offer themselves for service and accordingly, ceased to be workmen. They cannot now demand wages after 20 September 1991, i.e. the date of closure of the factory. Even the Principal Labour Court, Bangalore has, on an application of the rival union whom Mr.Naidu represents, held in its award of 22 March 2004 that there was no refusal of employment on the part of the company to those workmen who did not join the Worker's co-operative and work for the Company under the Workers' co-operative.

11. In view of the foregoing discussion, only such of the dissenting workmen of the Company who became members of the Workers' co-operative in terms of the scheme sanctioned by BIFR and actually worked with the Company till 31 December 1998 are entitled to be paid wages upto the date of the winding up order. Others are not entitled to any wages with effect from 20 September 1991.

12. We may now take up other items such as (i) notice pay, (ii) leave wages, (iii) bonus and (iv) gratuity and (v) interest.

13. The dissenting workmen claim notice pay of three months on the basis of Section 25-N of the Industrial Disputes Act. The submission is that under Section 25-O of that Act, as applicable in Maharashtra, every workman of an undertaking is entitled to notice and compensation specified in Section 25-N, as if the workman had been retrenched under that section. Section 25-N provides for a three months' notice prior to retrenchment or wages in lieu thereof. By

Maharashtra Act No.3 of 1982, Section 25-O of the Industrial Disputes Act was substituted. The substituted Section 25-O provides for notice and compensation as specified in Section 25-N. The amending Act (Act No.3 of 1982) has received Presidential assent and is deemed to have come into force from 27.10.1981. The Parliament, however, has thereafter substituted Section 25-O by Act No.46 of 1982. The substitution has come into effect on 21.8.1984. The State law on a subject forming part of the concurrent list to the extent of its repugnency with a central law on the same subject does not hold good and it is the law made by the Parliament, which shall prevail over the same. The constitutional scheme in this behalf is explained by the Supreme Court in several cases. We may merely note the case of **T. Barai Vs Henry Ah Hoe**[2]. Whilst it is true, as held by the Supreme Court in that case, that the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union Law on a concurrent subject would be that the State Act will prevail in the State, the predominance of such State law may, however, be taken away if the parliament thereafter legislates under the proviso to Clause (2) of Article 254. The proviso empowers the Union legislature to repeal or amend a repugnant State law even though it has become valid by virtue of the President's assent. Parliament may repeal or amend a repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the 'same matter'. In that case, the State law would become void as soon as the subsequent law of Parliament creating repugnancy is made even though such subsequent law does not expressly repeal a State law. The question which would always arise in such case is whether the subsequent law is with respect to the 'same matter'. Mr Naidu submits that Section 25-O of the Act applicable in Maharashtra, which confers an additional benefit on the workmen of a closed undertaking, is not in any event repugnant to the subsequently enacted Section 25-O of the Union law. I am afraid that is not quite correct. As held by a Full Bench of our Court in the case of **Britannia Industries Ltd. Vs Maharashtra General Kamgar Union**[3], the amended provisions of Section 25-O (introduced by the Central Act, i.e. Act No.46 of 1982) are a complete and self-contained code. If it is so, that means it covers the whole field

2 **(1983) 1 SCC 177**
3 **2009 II CLR 536**

on the subject, namely, closure of an industrial undertaking, and any provision in the State law on the subject, which is at variance with it, is necessarily repugnant to it. In that view of the matter, there is no question of the workmen getting any notice pay under Section 25-N of the Industrial Disputes Act by virtue of Section 25-O introduced by the Maharashtra amendment.

14. On leave wages or PL encashments, it is submitted by Mr.Naidu and Mr.Ganguli for the dissenting workmen that under Section 25-O(6) of the Industrial Disputes Act such wages or encashments are due and payable. Section 25-O(6) provides that where no application for closure under Sub-section (1) of that section is made, workmen of the undertaking shall be entitled to all benefits under any law for the time being in force as if the undertaking had not been closed down. That brings us to the question – whether leave wages or PL encashments are due in the present case under any law for the time being in force. Mr.Naidu and Mr.Ganguli rely upon Section 79 of the Factories Act for claiming such wages or encashments. Section 79 of the Factories Act deals with annual leave with wages. Sub-section (1) of Section 79 provides that every worker who has worked for 240 days or more in a factory in a calender year shall be entitled to leave at the rate of one day for every twenty days of work performed during the previous calender year. There is no provision in Sub-section (1) to enable the worker to take wages in lieu of the leave which he has earned. All that he is entitled is to take that leave without his wages being cut. The provision regarding entitlement of wages in lieu of leave is contained in Sub-section (3) and is subject to conditions provided therein. In the first place, that provision deals with a case where the worker is discharged or dismissed or quits etc. from the employment during the calender year. These eventualities lead to two consequences : One, the worker not meeting the criterion of eligibility for annual leave, namely, work of 240 days or more in a calender year, and two, the worker not being able to take the leave accumulated during the part of the year that he actually worked. Sub-section (3) deals with both these consequences. It provides that notwithstanding the fact that such worker did not work for the entire period specified in Sub-section (1) and to the extent he had not actually availed of such leave, he will be entitled to wages in lieu of the unavailed leave. Sub-section (3)

does not provide for wages in lieu of leave generally, but only in the contingencies referred to therein. So far as accumulation of unavailed leave is concerned, Sub-section (5) enables a maximum accumulation of leave of thirty days by carrying forward earned leave. The leave that can, thus, be encashed under Section 79 of the Factories Act is only the earned or accumulated leave during the calender year upto a maximum of thirty days under conditions of Sub-section (3). The rate of such wages has to be as per Section 80 of the Factories Act.

15. As held by this Court in the case of **Swadeshi Mills** (supra), bonus is not included in the category of wages under Sections 529 and 529A of the Companies Act and cannot be accorded any priority. The dissenting workmen in the present case accept this position, though they would like to keep their option to claim bonus in the event of availability of surplus funds so as to satisfy non-priority debts of the Company (in liquidation).

16. On gratuity, all parties including the Official Liquidator agree that gratuity would be payable. The consent terms provide for such gratuity. So does the adjudication made by the Official Liquidator. The dissenting workmen would accordingly have to be paid gratuity in accordance with law.

17. That leaves the question of interest payable on these dues. Mr.Ganguli submits that interest would be payable on wages under Rules 156 and 157 of the Companies (Court) Rules upto the date of winding up order and subsequent interest would be payable under Rule 179. On delayed payment of gratuity, he relies on the decision of **H. Gangahanume Gowda vs. Karnataka Agro Industries Corporation Ltd.**[4] and submits that such interest would be due and payable. Under Rule 156 of the Companies (Court) Rules, where interest is not reserved or agreed for, a creditor may prove for interest in winding up at a rate not exceeding four per cent per annum upto the date of the winding up order for an overdue debt. Such interest may be proved either if the debt is payable by virtue of a written instrument at a certain time or in any other case, a notice for claiming interest from the date of the demand is given. Wages being payable at

4 **(2003) 3 SCC 40**

certain times under a contract of employment and interest thereon not being reserved or contracted for, interest is provable from the respective due dates of such wages at the rate of four per cent per annum upto the date of the winding up order. As far as gratuity is concerned, the Supreme Court in **H.G. Gowda's** case (supra) did hold that there is a clear mandate of Section 7 of the payment of Gratuity Act for payment of gratuity within time and to pay interest on the delayed payment of gratuity at the stipulated rate. Such gratuity, however, in the present case has become due and payable only at the date of the winding up order. Any interest post winding up order is governed by Rule 179 of the Companies (Court) Rules. Such interest at a rate not exceeding four per cent per annum is payable only in the event of there being a surplus after payment in full of all claims admitted to proof. There is no question of awarding any interest on gratuity, in the premises, as preferential payment under Sections 529 and 529A of the Companies Act. If and when there is a surplus, a claim for interest on gratuity can be considered, but not otherwise. The same reasoning would apply to other items such as notice pay and leave wages.

18. Before we conclude, it must be clarified that since the majority of workmen of the Company (in liquidation) have taken their dues in accordance with the consent terms taken on record in the writ petitions referred to above and accepted by the Company Court, an option needs to be given to the dissenting workmen to accept their respective dues in accordance with the consent terms.

19. In the light of the foregoing discussion, the following order is passed :

(i) The Official Liquidator is directed to adjudicate the claims of the Applicants in the Company Applications herein on the basis of this order and after taking into account the documentary evidence available on record and verifying the respective claims;

(ii) The Official Liquidator shall enlist the assistance of

any advocate and / or chartered accountant on his panel for the purpose of such adjudication. The costs of such advocate and / or chartered accountant shall be defrayed from the funds of the Company (in liquidation) available with the Official Liquidator;

(iii) At any time during the course of such adjudication or after adjudication but before disbursal of payment on the basis thereof, the Official Liquidator shall give an option to each of the Applicants to accept their dues in accordance with and on the principles of the consent terms taken on record in Writ Petition Nos.285 of 2006, 196 of 2006 and 459 of 2007 in full and final settlement of their claims against the Company (in liquidation);

(iv) The Official Liquidator shall complete the exercise of adjudication of dues in terms of this order within a period of three months from today and make payment to the Applicants on the basis thereof within four weeks thereafter after adjusting payments,if any, already made to them during the pendency of these Company Applications;

(v) The Company Applications are disposed of accordingly;

(vi) No order as to costs.

(S.C. Gupte, J.)