NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No.153/2024
(IA Nos.406 & 407/2024)

In the matter of:

M/s. Lanco Infratech Employees Welfare Association
R/o Plot No. 397, Udyog Vihar, Phase 3,
Gurgaon, Haryana-122016, D
uly represented by its Authorized Signatory
Mr. Vishwanaath Tulasi **… Appellant**
V
Ms. Anuradha Bisani, Liquidator of
Lanco Infratech Ltd.
3-6-106/A, Om Sri Sai Towers,
Flat No. 102, St No. 19,
Near Vijaya Diagnostic Centre,
Himayatnagar, Hyderabad-500029 **...Respondent**

Present :

For Appellant : Mr. Mayank Pandey & Mr. Ashish Kumar Pandey, Advocates
For Respondent : Ms. Anuradha Bisani, Liquidator

JUDGMENT
(Hybrid Mode)

[Per: Justice Sharad Kumar Sharma, Member (Judicial)]

The instant company appeal, engages consideration of a very short question, as to, whether the members of the Appellant Association, which is a registered body in the name of M/s. Lanco Infratech Employees Welfare Association, who are 212 in number, are entitled to be paid with the **"retention allowance"** or not. They had raised a claim for, payment of the retention allowance, along with payment of salary for the month of June 2017, which they contend, that since they being an Operational Creditor, in the capacity of Operational Creditor were entitled to be paid with the salary for the month of June 2017, and the retention allowance too. It is not in controversy, and rather admitted too, that the salary for the month of June 2017 had been paid to the members of the Appellant Association. The only controversy which is now confined to be considered by this Appellate Tribunal is the payment and the entitlement for the payment of the remittance of the retention allowance.

2. In the company appeal in question, the challenge, which has been given, by the Appellant is, to the Impugned Order of 11.03.2024, which was passed by the NCLT Hyderabad bench, where it has rejected the IA No. 251/2022, as preferred in CP (IB) No. 111/7/HDB/2017, wherein the appellant in the representative capacity has sought for the following relief: -

(a) To direct the liquidator to pay the applicant's salary for the month of June 2017.

(b) To direct the liquidator to pay the retention allowance which was committed by the Erstwhile Management of the Corporate Debtor (CD), being an incentive for the employees to continue with the employment of the Corporate Debtor.

3. The said claim of the payment of the retention allowance has been rejected, by the Ld. Adjudicating Authority, on the ground, that the internal note made by the officials of the Corporate Debtor, approving the payment of retention

allowance cannot be taken as to be the basis, for the payment of the retention allowance, as retention allowance does not constitute or form part of the salary.

4. The Ld. Counsel for the Appellant has submitted, that the Ld. NCLT, has observed that merely a noting made by the Managing Director on an internal note, does not in itself confer a statutory right, to be paid with the retention allowance, and we find it to be logical too because any emolument, which is likely to be paid to the employee of an organization, since it would be having a financial implication on the employer , it has to be backed by a legal sanction, meaning it has to be an allowance or a wage or a salary, which is payable under the applicable rules, policies or standing orders of the employer Company. Since the Appellant, who on behalf of the employees was claiming for payment of the retention allowance, then it became all the more necessary, on part of the Appellant to establish, by law and by evidence, to sustain the said claim for grant of such claim. In fact, the Tribunal has observed that, there was nothing on the record, brought by the Appellant, to show that the retention allowance is part of salary which alone is payable during the CIRP period, for the reason being, that until and unless the said fact is established, under the law regarding its payability, the retention allowance cannot be treated as to be a salary or a part of the salary. The aforesaid contention finds support, from the fact that, the salary in its literal connotation, would mean a total monthly emolument and which is in exclusion of the

allowances declared, exempted from attachment to the salary under the provisions of law.

5. The salary, under Law Lexicon of P. Ramanatha Aiyar 6th Edition, has been described as, pay allowances or bonus or commission payable monthly or otherwise, or any legally sustainable monetary payment. What is relevant herein is, that an allowance will become a part of the salary only when, its entitlement falls due every month, owing to, some explicit element of 'quid pro quo'. In the entire pleading or the case as it has been addressed by the Ld. Counsel for the Appellant before the Ld. NCLT and even before this Appellate Tribunal, he has utterly failed to establish by any evidence or documents on record, that the "retention allowance", was, a financial liability payable by the Corporate Debtor each month. In that case, when it was not a monthly amount, which was accruing to the members of the association of the Appellant, it would not constitute to be the part of the salary.

6. The Appellant has rather based its claim, on the basis of one of the communications made by the then Managing Director of the Corporate Debtor on 18.05.2017, where the head of HR department of the Corporate Debtor, M/s. Lanco Infratech Limited, put up an internal note and the Managing Director has made an endorsement in the same note to the following effect, ***"let us agree, on paying retention allowance of 7% to employees continuing roles till March 2018"***, if this particular endorsement which is the basis of claim as made in the

correspondence on 18.05.2017, is considered in its entirety, it cannot be taken as a conclusive decision, because it was simply an expression and exchange of a privileged communication, between the two officials of the Corporate Debtor, where the scope of agreeing for the payment of retention allowance, was yet to be considered to be granted in terms of the policy of the Corporate Debtor. Thus the very basis of claim of retention allowance is not based upon any sound material which could be supported by any law as such. It is not the case of the Appellant that, based upon this endorsement of 18.05.2017, any further decision was taken by the Corporate Debtor or its officials, for the payment of the retention allowance and therefore the endorsement relied upon, will be only in the shape of a proposal, and not a decision. A proposal in itself is not an entitlement and therefore, the said endorsement cannot be derived to be a basis to sustain the claim raised by the members of the Appellant Association, for the purposes of payment of the retention allowance.

7. There is another important aspect, which is required to be considered. The endorsement of 18.05.2017, as extracted above, if it is read further, it was carving out a distinction that, the proposal for paying the retention allowance at the rate of 7 percent was to the, "***employees continuing in role***" and "***till March 18***", meaning thereby, it engaged once again a determination which was to be made as to who were the employees continuing in their assigned roles of the Corporate Debtor, which was not a fact ever endeavored to be established by the Appellant,

in the proceedings before the Ld. NCLT, while pressing their IA No. 251/2022. Besides this, if the language of the said endorsement is taken into consideration, its payability was limited to March 2018, and not for a period thereafter, or prior to the 18.05.2017. Thus, for the intervening period of 18.05.2017 till March 2018, the retention allowance will not constitute to be a segment of salary, which could be claimed by the Appellant before the liquidator by filing the Interlocutory Application, which has been rejected by the impugned Order.

8. The Ld. Counsel for the Appellant, in support of its contention, has relied upon a **Judgment as reported in 1981 (volume 2), SCC page 147, in the matter of Managing Director, Chalthan Vibhag Sahakari Khand Udyog, Chalthan Vs. Government Labour Officer**, and he has referred to the observations, which has been made, by the Hon'ble Apex Court while dealing with the implications of **"salary"** and **"wages"** in relation to the retention allowance question. What we will have to bear in mind is, that the controversy in the said case, was in relation to the payment of wages for the purposes of the Employees Provident Fund and Miscellaneous Provisions Act, 1952, and not for the purposes of the payment of Bonus Act 1965, where the salary itself was defined under Section 2 (21). In the said case, the retention allowance, was being paid to the "seasonal workers", who are employed in a sugar factory, who will not have regular work in the non-crushing season when the sugar factory closes and hence retention allowance was being paid to them during such non-crushing season to ensure their

job continuity. It is altogether under a different senario, the said judgment has been rendered and it has got no relevance to the instant case. The Ld. Counsel for the Appellant, has yet again referred to another **Judgment as reported in 2022 volume 7 SCC page 540, in the matter of Sunil Kumar Jain and Others Vs. Sundaresh Bhatt and Others**, particularly he has particularly embarked upon Para 19 and 22 of the said Judgment, in support of his contention. Para 19 & 22 of the said Judgment is extracted hereunder:-

> *"19. Therefore, while considering the claims of the workmen/employees concerned towards the wages/salaries payable during CIRP, first of all it has to be established and proved that during CIRP, the corporate debtor was a going concern and that the workmen/employees concerned actually worked while the corporate debtor was a going concern during the CIRP. The wages and salaries of all other workmen/employees of the corporate debtor during the CIRP who actually have not worked and/or performed their duties when the corporate debtor was a going concern, shall not be included automatically in the CIRP costs. 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 they shall have the first priority over all other dues as per Section 53(1)(a) IBC. Any other dues towards wages and salaries of the employees/workmen of the corporate debtor shall have to be governed by Section 53(1)(b) and Section 53(1)(c) IBC. Any other interpretation would lead to absurd consequences and violate the scheme of Section 53 read with Section 5(13) IBC. If any other interpretation, more particularly, the interpretation canvassed on behalf of the appellants is accepted, in that case, the wages/salaries of those workmen/employees who had not worked at all during CIRP shall have to be treated and/or*

included in the CIRP costs, which cannot be the intention of the legislature.

22. If on adjudication of the claims made by the respective workmen/ employees, if it is established and proved that during CIRP, the corporate debtor was a going concern and the workmen/employees concerned actually worked during the CIRP when the corporate debtor was a going concern, the wages and salaries of such workmen/employees to be included in the CIRP costs as defined under Section 5(13) IBC and they will have to be paid such wages/ salaries as per Section 53(1)(a) IBC as part of the CIRP costs in full before making any payment as per priorities mentioned in Section 53(1) IBC."

9. If we analyse the said Judgment from the perspective of Section 53 of the IBC code, it was rendered in those circumstances where, the issue that came up for consideration before the Hon'ble Apex Court, was pertaining to the claim of the workmen employees towards their wages, salary, during CIRP proceedings. It was not a case which was dealing with, any of the aspect of payment of the retention allowance which is a subject altogether, alien to the one which was under consideration in the matter of Sunil Kumar Jain and others (supra). Hence, the observation made in Para 19, where the determination was being made for the entitlement of salary and wages for the workers who worked during the CIRP proceedings, was based upon a case with a marked distinction, than to the one at hand, where the Appellant claims for the retention allowance which is yet to be established as part of wages and salary. After having scrutinized the Impugned order of, the Ld. Adjudicating Authority, after considering the rival contentions, and particularly the stand taken by the Appellant, based upon the endorsement of

18.05.2017, pertaining to the denial of payment of the retention allowance amounting to Rs. 2,80,36,076/- (Rupees Two Crores Eighty Lakhs Thirty-Six Thousand Seventy-Six Only), we determine it to be non-payable as, no service conditions were placed on record, based upon the terms of the appointment, that the retention allowance did ever form as to be part of an emolument, which was ever made payable to the members of the Appellant association, based upon the service contract entered into with them. The payment slip placed on record and the endorsement of the then Managing Director on which the Ld. Counsel for the Appellant has relied heavily, will not establish the case for making the retention allowance as part of salary in itself in the absence of there being any supporting documents, about its legal enforceability. Accordingly, the Appellant and its members would not be entitled for, the payment of the 'retention allowance', for the period of claim since not being part of the salary and since not being a fact established by the Appellant before the Ld. NCLT. Thus, the logic which has been assigned by the Ld. NCLT, while rendering the Impugned Order dated 11.03.2024, does not suffer from any apparent error as such, which could call for any interference, in so far as the aspect and entitlement of, the retention allowance is concerned. But having said so, as far as the amount pertaining to the determination of salary for the month of June 2017 is concerned, that will be considered to be paid as per the decision dated 11.03.2024, subject to the condition that it has not already been paid or it is subjected to a challenge before any superior forum.

10. Subject to aforesaid, the **Company Appeal (AT) (CH) (Ins) No.153/2024**, would stand ‘dismissed’. The Impugned Order dated 11.03.2024, does not suffer from any apparent error as such, which could call for interference in the exercise of our Appellate jurisdiction. The appeal lacks merit and the same is ‘dismissed’.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

13.12.2024
SN/TM/MS