

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 330 of 2023

[Arising out of order dated 08.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-I in IA 628/2022 in CP (IB) No.3558/MB/2018]

IN THE MATTER OF:

J.C. Flowers Asset Reconstruction Private Limited

Acting in its capacity as trustee of
JCF YES TRUST 2022-23/18
12th floor, Dr. Annie Besant Road,
Worli, Mumbai-400030
teamjcfarc@jefarc.com

...Appellant

Versus

1. Mr. Anil Mehta,

Liquidator of Pratibha Industries Limited
Unit Nos. 1/B-56 and 1/B-57
Phoenix Paragon Plaza, Phoenix Market City,
LBS Marg, Kurla (W), Mumbai-400070
liquidator.pratibha@gmail.com

2. FEMC-Pratibha Joint Venture

Universal Majestic 14th floor,
Off Eastern Express Highway, P.L. Lokhande Marg,
Ghatkopar Mankurd Link Road,
Opp. RBK International School, Govandi,
Mumbai - 400043

...Respondents

Present:

**For Appellant: Mr. Chitranshul A. Sinha and Ms. Pallavi Kumar,
Advocates.**

For Respondents: Ms. Prachi Johri, Mr. Dhruvad Vaghani and Ms. Abhipsa Sahu, Advocates for R-1.

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J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by the Assignee of the Financial Creditor has been filed challenging the order dated 08.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-1 in I.A. No.628 of 2022 filed by the Yes Bank Ltd. By the impugned order the application filed by the Yes Bank has been rejected. Brief facts of the case necessary to be noticed for deciding the appeal are:

- (i) Delhi Metro Rail Corporation (DMRC) in the year 2011 invited bids for Contract CC-18 for design and construction of tunnels at New Delhi and Contract CC-23.
- (ii) Pratibha Industries Ltd., the Corporate Debtor herein being an Engineering, Procurement and Construction company entered into a Joint Venture Agreement dated 14.03.2012 with FEMC to form FEMC Pratibha JV for the purpose of submission of expression of interest in the tender issued by DMRC and participating in the said tender and executing the aforesaid project.
- (iii) The JV Agreement came to be amended on 15.03.2012 by First Supplementary Agreement whereby the parties altered their roles and responsibilities and all the roles and responsibilities under the contract fell on Corporate Debtor whereas FEMC was to provide key personnel.

- (iv) FEMC Pratibha JV submitted bid for CC-18 project on 17.04.2012 and same was awarded by DMRC vide letter dated 19.06.2012.
- (v) Another Supplementary Agreement was entered dated 01.09.2013 where it was agreed that FEMC would be paid 1.25% of CC-18 GCV as consultancy service fee for providing the requisite technology, support, etc.
- (vi) By Third Supplementary Agreement dated 28.01.2013, the consultancy fee was renegotiated and fixed @ 1.325% GCV.
- (vii) With regard to another project CC-23 another JV Agreement dated 21.05.2012 was entered between the Corporate Debtor and FEMC, which project was also allotted to FEMC Pratibha JV.
- (viii) For execution of CC-18 project, the FEMC Pratibha JV availed loan facility from four banks namely the Yes Bank, Allahabad Bank, Central Bank of India and Lakshmi Vilas Bank. Subsequently, a working capital consortium agreement dated 17.05.2013 was executed between the FEMC Pratibha JV and the consortium of banks, with the lead bank being the Yes Bank.
- (ix) A security interest was created in favour of consortium towards CC-18 project specific assets being first ranking pari pasu charge over all the moveable fixed assets of FEMC Pratibha and/ or the project both present and future; first ranking pari passu charge over all current assets of the borrower and/or the Project both present and future; first ranking pari passu charge over all the bank accounts of FEMC Pratibha and/or the Project including but not limited to

the Escrow Account opened or to be opened with the lead bank. Guarantee was also given by the Corporate Debtor and Personal Guarantor. Corporate Debtor has also obtained loan facility from consortium of lenders for CC-23 project and subsequently security interests were created. CC-18 and CC-23 Project came to be completed on 31.03.2018 and 31.05.2018, respectively.

- (x) An application was filed under Section 7 of the IBC by Bank of Baroda against the Corporate Debtor seeking initiation of Corporate Insolvency Resolution Process (CIRP). The Adjudicating Authority by order dated 01.02.2019 directed for initiation of CIRP against the Corporate Debtor. Subsequently, by order dated 01.03.2019, the Respondent No.1 was appointed as Resolution Professional. The Adjudicating Authority by order dated 08.02.2021 directed for initiation of liquidation process in respect of the Corporate Debtor. In CC-18 project, WCCA consisting of Yes Bank, Indian Bank, Central Bank of India and Lakshmi Vilas Bank submitted their respective claims under Form B wherein the Appellant and Indian Bank opted not to relinquish their security interest over FEMC Pratibha JV and other two banks opted to relinquish their security interest.
- (xi) In the Liquidation Proceeding, an I.A. No.628 of 2022 was filed by the Yes Bank praying for following reliefs:

“(a) Pass an order and/or direction that Respondent No.1 refund amount of Rs.32.11 crore to the account of Respondent No.2, held with the Applicant;

(b) Pass an order and/ or direction that Respondent No. 1 complete necessary KYC norms to operationalize the aforesaid mentioned account of Respondent No.2;

(c) That pending the hearing and final disposal of the said Application, pass an order and/or direction to Respondent No.1 to disclose on oath all bank accounts belonging to Respondent No.2 and details of transactions and transfers made in relation to the amounts of Respondent No.2 since the appointment of Respondent No.1.”

(xii) An interim order was passed in the I.A. and the Liquidator set aside an amount of Rs.32.11 Crores in pursuance of interim order dated 21.03.2022.

(xiii) The application I.A. No.628 of 2022 was opposed by the Liquidator and a reply was filed by the Liquidator. The amount of Rs.32.11 Crores was the amount which was received as VAT refund, which amount was transferred by the Liquidator to the designated bank account of the Corporate Debtor. The application was filed by the Yes Bank praying for reliefs, as noticed above. The Adjudicating Authority after hearing the parties dismissed the application. Aggrieved by which order this Appeal has been filed.

2. We have heard Shri Chitranshul A. Sinha, learned counsel for the Appellant and Ms. Prachi Johri, learned counsel for the Respondent – Liquidator.

3. Learned counsel for the Appellant submits that the Liquidator has received VAT refund of Rs.32.11 Crores for DMRC Project on 30.05.2019 in the bank account opened by Respondent No.2. Thereafter, Respondent No.2 transferred the entire VAT refund to the account of the Corporate Debtor. I.A. No.628 of 2022 was filed by the Appellant praying for VAT refund which should be brought back to the bank account of Respondent No.2. It is submitted that FEMC Pratibha JV is a separate legal entity and the VAT refund was for FEMC Pratibha JV and the VAT refund ought to come to FEMC Pratibha JV in favour of the consortium lenders. It is submitted that there was no requirement for the Appellant to comply with Regulation 21A of Liquidation Process Regulations, 2016. Appellant was lender of FEMC Pratibha JV, hence, there was no requirement of compliance of Regulation 21A since FEMC Pratibha JV is not undergoing liquidation and assets of JV cannot be considered as assets of the Corporate Debtor. Appellant has filed its claim in the liquidation process as an independent lender of the Corporate Debtor PIL, and also because PIL was a Corporate Guarantor for the facilities advanced to FEMC Pratibha JV. Liquidator has unlawfully diverted VAT refund of PIL from the Bank Account of FEMC Pratibha JV to the bank account of Corporate Debtor. The Borrower vide Deed of Hypothecation dated 17.05.2013 has created a charge over all its bank accounts. The Adjudicating Authority committed error in rejecting the application filed by the Appellant for transfer of VAT refund to the account of FEMC Pratibha JV.

4. Learned counsel for the Respondent refuting the submission of the Appellant submits that under the JV Agreement read with first, second and third Supplementary Agreements, FEMC was only entitled for consultation fee towards providing requisite technology support and all other part of contract including finances was borne by the Corporate Debtor. FEMC Pratibha JV is not incorporated entity and has no legal status. All pecuniary liabilities and rights are of the Corporate Debtor in the project CC-18 and CC-23. In the application form which was submitted by Yes Bank, it was clearly noticed that FEMC was only technical partner and all pecuniary liabilities was of the Corporate Debtor and it was the Corporate Debtor who has discharged all VAT liabilities, hence, VAT refund has rightly been submitted by the VAT Department in the account as intimated by the Liquidator to the VAT Authorities. The claim filed by the Yes Bank was without any merit and in the meeting of Committee of Creditors all facts were brought into the notice of all Financial Creditors including the Appellant. The VAT refund was also brought into notice of the Committee of Creditors and no objection of any kind was raised by the Appellant in the Committee of Creditors meeting. It is submitted that the Liquidator has informed in the meeting of Committee of Creditors held on 01.03.2019, no member including the Yes Bank raised any objection with respect to VAT refund. At time of filing of VAT Return, details of account were provided with Bank of Baroda which was subsequently freezed by bank officials on 01.01.2018. The Liquidator opened another bank account in the same bank and intimated the same to the VAT Authorities for

processing the VAT refund and on 30.05.2019 an aggregate of Rs.32.11 Crore had been remitted by the VAT Authorities in the aforesaid bank account. In the Secured Creditor's meeting, the Liquidator has informed about the expenses incurred by the Corporate Debtor for the said CC-18 and CC-23 Projects and in the claim form submitted by the Yes Bank, they informed that bank is not relinquishing its Security as part of liquidation estate. Liquidator issued notice dated 02.11.2021, requesting the lead bank to make payment. No response was given to notice dated 02.11.2021, hence, the security interest was treated to have been relinquished by the Yes Bank.

5. We have considered the submissions of learned counsel for the parties and perused the record.

6. Before we proceed to enter into the respective submissions of the parties, it is required to notice certain Clauses of the JV Agreement dated 14.03.2012. The JV Agreement provided that JV formed for the purposes of execution of CC-18 Project between the Corporate Debtor and FEMC, which was a non-partnership and JV was only a contractual incorporated joint venture, having no characteristics of a separate legal entity. Clause 9 of the JV Agreement is as follows:

"9. Non-Partnership

Nothing in this Agreement is intended to or shall be construed as creating a partnership at law between the Parties. The JV shall have no

other function or operation than those described in this JVA. No Party shall act on behalf of or hold itself out to any third party as representing the other Party or the JV in any matter not directly related to the Works or this JVA.”

7. First Supplementary Agreement was executed on 15.03.2022. Clause 1(a) provides as follows:

“1. Joint Venture Agreement Purpose, Name and Address

a) The Parties have formed an exclusive Joint Venture ("The Joint Venture") for the purpose of jointing together to submit the bid for the Contract and the proper execution of the project. It is neither the intention of the parties, through this Joint Venture, to create a co-operation or partnership or trust or any form to legal entity, nor to be an act of incorporation, nor to constitute any party to be a partner, agent, representative or trustee of the other party vis-à-vis the third parties.

The parties agree that any liabilities of any sort whatsoever which one party may incur towards or on behalf of the other Party shall be in accordance with this Agreement.”

8. On responsibility and sharing, the Supplementary Agreement provides as follows:

“Responsibility & Sharing

If FEMC wishes to act only as Technical Service Partner, then participation of the Parties in the fully integrated Joint Venture shall be re-arranged as given here below and PRATIBHA shall execute the entire defined scope of works given in the tender documents accordingly:

a) FEMC : 0% (Zero Per cent)

b) PRATIBHA : 100% (Hundred Per cent)”

9. The Second Supplementary Agreement dated 01.09.2012 provided that FEMC would be paid @ 1.25% of CC-18 as consultancy service fee. With regard to consultancy service fee, the agreement provides as follows:

“Party of First Part shall pay to the Nominee, a lump sum total "Consultancy Services Fees" (Success Fee) @ 1.25% (One Point Two Five Percent Only) of the Contract Amount. These Fees shall be exclusive of service tax and exclusive of Income Tax payable in India as per applicable laws. The total amount payable by party of First Part to the party of Second Part or its Nominee shall be Rs.13,61,98,750/- (Indian Rupees Thirteen Crore Sixty-One Lakh Ninety-Eight Thousand Seven Hundred Fifty Only) which is calculated as under:

<i>Contract Amount</i>	<i>Consultancy Services Fees (1.25% of Contract Amount)</i>
<i>Rs.10,89,59,00,000/-</i>	<i>Rs.13,61,98,750/-</i>

10. Further, it provides:

“FEMC shall not have any interest whatsoever in the shareholdings in Joint Venture and physical execution of the Works, payments/monies received from client. FEMC shall also have no claim whatsoever, on the payments/monies so received from the client except for the Consultancy Services Fees stipulated in the table hereinabove.”

By Third Supplementary Agreement, consultancy fee was renegotiated as @ 1.325%.

11. In the CIRP of the Corporate Debtor, Yes Bank has filed its claim in Form B. In Form B which was filed by the Yes Bank, Yes Bank has clearly acknowledged that in the JV, FEMC was only technical partner and pecuniary liability was of the Corporate Debtor only. In Column 5 of Form B, following has been stated:

“1. Pratibha Industries Limited – *The Financial Creditor has sanctioned multiple credit facilities to the Corporate Debtor (as detailed in the Annexures) vide Facility Letter bearing YBL/DEL/FL/824/2014-15 no. dated September 30, 2014 as amended and modified from time to time. In addition to the same, a Short Term Loan was also sanctioned by the Financial Creditor to the Corporate Debtor, which was disbursed in due course pursuant to a disbursement request from the Corporate Debtor.*

2. FEMC-Pratibha Joint Venture –

a) *The Financial Creditor has sanctioned credit facilities to FEMC-Pratibha Joint Venture (as detailed in the Annexures) vide Facility Letter bearing no. YBL/MUM/FL/443/2012-2013 dated August 24, 2012 as amended and modified from time to time. As per the terms of formation of the Joint Venture, FEMC was only a technical partner and the pecuniary liability was to be that of the Corporate Debtor only.”*

12. The claim filed by the Yes Bank, thus, clearly mentioned that FEMC was only technical partner and pecuniary liability was that of Corporate Debtor only. Both projects were completed prior to initiation of insolvency proceeding against the Corporate Debtor. As per the JV Agreement and the Supplementary Agreements entered between the parties, it is clear that it was the Corporate Debtor who was to carry out all obligations under the contract including pecuniary liabilities and FEMC was only technical partner. Under the JV Agreement all liabilities including VAT liabilities were discharged by the Corporate Debtor, hence, the refund made by the VAT Department transferred to the account of Corporate Debtor is in accordance with the rights and obligations of the parties as per the JV Agreement.

13. The Adjudicating Authority in the impugned order has noted the First Supplementary Agreement and Third Supplementary Agreement. The Adjudicating Authority has also further held that Yes Bank having failed to comply with Sub-regulation (2) of Regulation 21A of the Liquidation

Regulation, secured assets became part of the liquidation assets. In Para 71, 72 and 73 following has been held:

“71. We consider in terms of the Working Capital Consortium Agreement (WCCA), the Applicant inter alia have first ranking pari passu charge over all (1) movable fixed assets of Respondent No. 2 and/or CC-18 Project, both present and future, (ii). current assets of Respondent No. 2 and/or the CC-18 Project, both present and future, and (iii) all bank accounts of Respondent No. 2 including but not limited to the accounts opened for the CC-18 Project, we note that this security was not relinquished in terms of Section 52 of the Code, the Applicant has failed to comply with sub-regulation (2) of Regulation 21A of the Liquidation Regulations, under which the Applicant was required to make payments in terms of clause (a) of sub-section (1) and sub-clause (i) of clause (b) of Section 53 of the Code.

72. Failure to comply with sub-regulation (2) of Regulation 21A of the Liquidation Regulations automatically leads to inclusion of the assets secured with the Applicant to be part of the liquidation estate of the Corporate Debtor in terms of sub regulation (2) and sub-regulation (3) of Regulation 21A of the Liquidation Regulations.

73. Hence, the liquidator was correct in including the refund amount of VAT of Rs. 32.11 crore in liquidation estate of the Corporate Debtor. We hereby vacate the earlier interim order dated 21.03.2022 passed in the present matter, wherein

the Respondent No. I was ordered to set aside an amount of INR 32.11 Crores out of cash balance available. The said amount to be distributed in terms of section 53 of the Code.”

14. In the Reply filed by the Liquidator, the Liquidator has clearly mentioned notice dated 02.11.2021 which was issued by the Liquidator to the Lead Bank – Yes Bank. In the notice which was issued by the Liquidator, the Yes Bank was asked to make the payment of proportionate share payable by Yes Bank. The notice dated 02.11.2021 is a detailed notice which mentions all details including the share which was required to be paid by the Yes Bank. It is useful to extract notice dated 02.11.2021:

“Dear Sir/Madam,

As you are aware that the Pratibha Industries Limited (in Liquidation) (“Corporate Debtor”) is undergoing liquidation process as a going concern under the provisions of the Insolvency & Bankruptcy Code, 2016 (“IBC”) read with Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016, (“Liquidation Regulations”) pursuant to order dated 08.02.2021 read with order dated 01.03.2021.

In pursuance to the Public Announcement made by the Liquidator inviting claims from the stakeholders of the Corporate Debtor, you vide your claim dated 17.03.2021 submitted your claim and in terms of Section 52 of the IBC, conveyed your decision not to relinquish the security interest to the liquidation

estate formed by the Liquidator pertaining to assets as under:

- 1) FEMC Pratibha CC18: On Project Specific facilities (1) Pari passu charge on project specific current assets and project specific bank accounts.*
- 2) Tunnel Boring Machine: Exclusive charge on tunnel boring machine*
- 3) E-10 Delhi property: Exclusive charge on E-10, Defence colony, New Delhi along with servant quarter and two parking space.*
- 4) B-85 First Floor property: Exclusive charge on first floor of B-85, defence colony*

As you opted to realise your security interest on your own, in terms of sub-regulation (2) of Regulation 21A of the Liquidation Regulations, you were required to pay as much towards the amount payable under clause (a) and sub-clause (i) of clause (b) of the sub-section (1) of Section 53 of the IBC as you would have shared in case you had relinquished your security interest, to the Liquidator within a period of ninety days from the liquidation commencement date viz. the insolvency resolution process costs i.e. CIRP Costs and the liquidation costs paid in full; and workmen's dues for the period of twenty-four months preceding the liquidation commencement date.

The details of the CIRP Costs and the Liquidation costs were shared by the then Resolution Professional of the Corporate Debtor with all the members of the Committee of Creditors ("CoC") of the

Corporate Debtor including you in the 25th meeting of the CoC held on 08.01.2021. However, it is a matter of record that till date you have not paid any amount to the Liquidator in respect of sub-regulation (2) of the Regulation 21A of the Liquidation Regulations was INR 52,01,032/-. It is further pertinent to mention that the has incurred substantial amount aggregating to INR 14,15,82,244/- as costs in preserving and protecting the assets, properties, actionable claims, including secured asset charged to you, of the Corporate Debtor and carrying on the business of the Corporate Debtor as a going concern till 29th October 2021 which does not includes project specific cost.

Sub-Regulation (3) of Regulation 21A of the Liquidation Regulations provides that where a secured creditor fails to comply with sub-regulation (2), the asset, which is subject to security interest, shall become part of the liquidation estate.

In view of the aforesaid, as more than ninety days' time has lapsed from the liquidation commencement date, you are requested to show cause within seven (7) days from the date of this email as to why the asset over which you have not relinquished security interest should not be deemed to be part of the liquidation estate of the Corporate Debtor.

Regards,

*Mr. Anil Mehta
Liquidator
For Pratibha Industries Limited”*

15. We, thus, are of the view that there are two main reasons due to which we do not find any fault in the impugned order passed by the Adjudicating Authority rejecting application filed by the Appellant. Firstly, as per the terms of the JV Agreement between the parties, all contractual liabilities including pecuniary liabilities were to be discharged by the Corporate Debtor. Both the projects were completed prior to initiation of insolvency resolution process and all the liabilities including the VAT liabilities were discharged by the Corporate Debtor, hence, the VAT refund which was made by the VAT Authorities in the account as communicated by the Liquidator cannot be held to be erroneous.

16. Secondly, as held by the Adjudicating Authority, the Yes Bank who has not relinquished its security interest having not complied with Regulation 21A, the said asset became part of the liquidation assets. Regulation 21A of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 is as follows:

“21A. Presumption of security interest.

(1) A secured creditor shall inform the liquidator of its decision to relinquish its security interest to the liquidation estate or realise its security interest, as the case may be, in Form C or Form D of Schedule II:

Provided that, where a secured creditor does not intimate its decision within thirty days from the liquidation commencement date, the assets covered under the security interest shall be presumed to be part of the liquidation estate.

(2) Where a secured creditor proceeds to realise its security interest, it shall pay -

(a) as much towards the amount payable under clause (a) and sub-clause (i) of clause (b) of sub-section (1) of section 53, as it would have shared in case it had relinquished the security interest, to the liquidator within ninety days from the liquidation commencement date; and

(b) the excess of the realised value of the asset, which is subject to security interest, over the amount of his claims admitted, to the liquidator within one hundred and eighty days from the liquidation commencement date:

Provided that where the amount payable under this sub-regulation is not certain by the date the amount is payable under this sub-regulation, the secured creditor shall pay the amount, as estimated by the liquidator:

Provided further that any difference between the amount payable under this sub-regulation and the amount paid under the first proviso shall be made good by the secured creditor or the liquidator, as the case may be, as soon as the amount payable under this sub-regulation is certain and so informed by the liquidator.

(3) Where a secured creditor fails to comply with sub-regulation (2), the asset, which is subject to security interest, shall become part of the liquidation estate.

[Explanation.- It is hereby clarified that the requirements of this regulation shall apply to the liquidation processes commencing on or after the date of the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019.]”

17. The Liquidator having sent the email and asked the Bank to provide its share and the Yes Bank having failed to provide its share, which was required to be discharged by it, no error was committed in treating the assets as part of the liquidation assets.

18. In view of the above, we do not find any error in the impugned order passed by the Adjudicating Authority rejecting I.A filed by the Yes Bank. There is no merit in the Appeal. Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

NEW DELHI

16th May, 2024

Archana