

Through Videoconference

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT No. - I

*** **

IA No. 1818/MB/2020
in
CP (IB) No. 1833/MB/2017

(In the matter of an Application under Section 60(5) of the I&B Code, 2016)

J M Financial Asset Reconstruction Company Limited ... *Applicant*

V/s

Prasad Kamalakar Dharap ... *Liquidator / Respondent*

In the matter of

J M Financial Asset Reconstruction Company Ltd. ... Financial Creditor

V/s

Jejani Pulp and Paper Private Limited ... Corporate Debtor

Order Dated: 27.05.2021

CORAM:

Janab Mohammed Ajmal, Hon'ble Member (Judicial)

Shri V. Nallasenapathy, Hon'ble Member (Technical)

Appearance:

For the Applicant: Mr Charles De Souza, Counsel with Mr Vinod Kothari,
Ms Priyanka Shah & Ms Reshmi Nair, Advocates I/b
Apex Law Partners.

For the Respondent: Mr Pulkit Sharma and Mr Pranav Shah with Mr Prasad
Dharap, Advocates i/b Abhishek Adke.

Per: Janab Mohammed Ajmal, Member (Judicial)

ORDER

This is an Application by the Financial Creditor of the Corporate Debtor seeking direction to the Respondent/Liquidator of the Corporate Debtor to charge his fees under Regulation 4(1) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (the Regulations).

2. The short point as revealed from the Application is that the Applicant is the sole member of the Committee of Creditors (CoC) of the Corporate Debtor. This Authority by order dated 18.10.2019 in MA No. 1614 of 2018 directed liquidation of the Corporate Debtor. While passing such order the Authority appointed the Respondent as the Liquidator. The Respondent had furnished his consent to act as the liquidator of the Corporate Debtor.
3. It is submitted that the Respondent by email dated 14.12.2018 had forwarded the engagement letter to act as the liquidator of the Corporate Debtor. After the sale of the plants and machinery, the Respondent made a claim of ₹. 3,15,263/- in terms of Regulation 4(2)(b) of the Regulations.
4. It is contended by the Applicant that the Respondent ought to have charged the fees under Regulation 4(1) of the Regulations. The Applicant accordingly by its letter dated 12.09.2020 requested the Respondent to revise his fees / claims as per Regulation 4(1) of the Regulations. The Respondent however did not agree and insisted upon the fees already indicated. Hence this Application.
5. The Respondent in his reply refuted the averments. It is submitted that a relief contrary to the provisions of the Insolvency & Bankruptcy Code, 2016 (the Code) could not have been sought in the Application. Application essentially seeks a review of the earlier order and it cannot be permitted. It is further submitted that

the engagement letter given by the Respondent was never agreed to by the CoC. Besides the order dated 18.10.2019 of this Authority appointing the Respondent as the Liquidator would override any such arrangement or approval by the CoC. The Application is not maintainable and deserves to be dismissed.

6. Section 34 (8) & (9) of the Code specifies the fees to be charged by the liquidator. The same reads as under.

“34. Appointment of liquidator and fee to be paid. –

(1)...

.....

(8) An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be specified by the Board.

(9) The fees for the conduct of the liquidation proceedings under sub-section (8) shall be paid to the liquidator from the proceeds of the liquidation estate under section 53.”

7. In terms of sub-section (8) of section 34, the liquidator’s fees shall have to be guided by Regulation 4 of the Regulations and for better appreciation the Regulation is extracted below:

“4. Liquidator’s fee.

(1) The fee payable to the liquidator shall be in accordance with the decision taken by the committee of creditors under regulation 39D of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(2) In cases other than those covered under sub-regulation (1), the liquidator shall be entitled to a fee-

(a) at the same rate as the resolution professional was entitled to during the corporate insolvency resolution process, for the period of compromise or arrangement under section 230 of the Companies Act, 2013 (18 of 2013); and

(b) as a percentage of the amount realised net of other liquidation costs, and of the amount distributed, for the balance period of liquidation, as under:

<i>Amount of Realisation / Distribution (In rupees)</i>	<i>Percentage of fee on the amount realised / distributed</i>		
	<i>in the first six months</i>	<i>in the next six months</i>	<i>thereafter</i>
<i>Amount of Realisation (exclusive of liquidation costs)</i>			
<i>On the first 1 crore</i>	5.00	3.75	1.88
<i>On the next 9 crore</i>	3.75	2.80	1.41
<i>On the next 40 crore</i>	2.50	1.88	0.94
<i>On the next 50 crore</i>	1.25	0.94	0.51
<i>On further sums realized</i>	0.25	0.19	0.10
<i>Amount Distributed to Stakeholders</i>			
<i>On the first 1 crore</i>	2.50	1.88	0.94
<i>On the next 9 crore</i>	1.88	1.40	0.71
<i>On the next 40 crore</i>	1.25	0.94	0.47
<i>On the next 50 crore</i>	0.63	0.48	0.25
<i>On further sums distributed</i>	0.13	0.10	0.05

(3) Where the fee is payable under clause (b) of sub-regulation (2), the liquidator shall be entitled to receive half of the fee payable on realisation only after such realised amount is distributed.

Clarification: Regulation 4 of these regulations, as it stood before the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 shall continue to be applicable in relation to the liquidation processes already commenced before the coming into force of the said amendment Regulations.”

8. As per sub-regulation (1), the CoC under Regulation 39D of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) may in consultation with the Resolution Professional (RP) fix the fees payable to the liquidator. In case where no such fee is fixed by the CoC, the fee of the liquidator shall have to be guided by sub-regulation (2) of Regulation 4 of the Regulations.

9. This Authority while appointing the Respondent as the liquidator *inter alia* passed the following order:

“The Insolvency Professional appointed as the liquidator will charge fees for conduct of the liquidation proceedings in proportion to the value of the liquidation estate assets as specified under Regulation 4 of Insolvency and Bankruptcy (Liquidation Process) Regulations, 2016 and the same shall be paid to the Liquidator from the proceeds of the liquidation estate under Section 53 of the I&B Code”.

10. The CoC has not passed any resolution nor has fixed the fees of the liquidator in terms of Regulation 4(1) of the Regulations read with Regulation 39D of the CIRP Regulations. The correspondence dated 14.12.2018 between the RP and the Applicant was prior to the order of liquidation passed by this Authority. Besides the terms of engagement were neither approved by the CoC nor the format enclosed under letter dated 14.12.2018, was signed by both the parties. There is no material on record to show that the CoC had fixed the fees of the liquidator under Regulation 4(1) of the Regulations.
11. Besides the order appointing the Respondent as the liquidator is clear to indicate that the fees have to be worked out in terms of Regulation 4(2)(b) of the Regulations. Therefore, the prayer made in the Application cannot be allowed nor any deviation to the order dated 18.10.2019 of this Authority can be made. Hence ordered.

ORDER

The Application be and the same is dismissed on contest. The fees of the Respondent shall be guided by Regulation 4(2)(b) of the Regulations in terms of the order dated 18.10.2019 of this Authority in MA No. 1614 of 2018. There would however be no order as to costs.

Sd/-
V. Nallasenapathy
Member (Technical)

Sd/-
Janab Mohammed Ajmal
Member (Judicial)