

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA**

**I.A. No. 883 of 2021
In
C.P (IB) No. 482 of 2017**

An application under Section 52(7) and Section 60(5) of the Insolvency and Bankruptcy Code, 2019;

And

In the matter of:-

Eastern Gases Limited – In Liquidation having its Registered Office at 43 Palace Court, 1 Kyd Street, Kolkata- 700016.

....Corporate Debtor – In liquidation

And

In the matter of

Kuldeep Verma, the Liquidator of Eastern Gases Limited

...Applicant

Versus

DBS Bank Limited, Express Towers, 19th Floor, Nariman Point, Mumbai-Maharashtra 4000021.

...Respondent

**Date of hearing: 11/03/2022
Date of pronouncement: 14/07/2022**

Coram:

Shri Rohit Kapoor, Member (Judicial)

Shri Harish Chander Suri, Member (Technical)

Appearances

For Liquidator : Mr. Rahul Auddy, Adv
Mr. Aditya Gooptu, Adv.

ORDER

Per: Rohit Kapoor, Member (Judicial)

1. The court convened through hybrid mode.
2. The instant application has been filed under Section 52(7) and Section 65(5) of Insolvency and Bankruptcy Code, 2016 seeking for the following reliefs;
 - i. *Necessary direction upon the Respondent to pay a sum of Rs. 1.84 crores to the Liquidation estate on account of the excess realized moneys as per Section 52(7) of the Code;*
 - ii. *Necessary direction of interest @12% should be paid by the respondent on the withheld amount of Rs. 1.84 crores from 1st April, 2021 till the date of payment of this amount by the Respondent to the Liquidation Estate.*
3. ***The contentions of applicant are summarized hereinbelow;***
 - i. Since there was no Resolution Plan at the end of CIRP period, the liquidation of Corporate Debtor was directed vide order dated 21st of August, 2018 and the applicant was appointed as liquidator.
 - ii. The applicant caused public announcement in Form- B on 26th of August, 2018 through newspapers.
 - iii. The respondent herein filed its claims with the applicant in Form- D on 18th of September, 2018.
 - iv. As per Form- D, on the date of commencement of liquidation date, respondent submitted a claim of Rs. 17.4162/-. Details of which are mentioned in paragraph 7 of this application.
 - v. In Form- D respondent stated that for long term loan, the respondent had exclusive charge over the fixed assets of the company situated at Bangalore and Hyderabad (land and building and plant and machinery) and *pari passu* charge along with other lenders for the

over draft and short-term loan facilities sanctioned by the Respondent to the Corporate Debtor.

- vi. The liquidator admitted a claim of Rs. 17,41,62,136/- of the respondent, being Rs. 7,73,48,285/- for the Long-Term Loan, Rs. 8,37,00,822/- for Short Term Loan and Rs. 1,31,13,029/- for over draft term loan. It was agreed to handover possession of the above referred properties to the respondent so that it could realize the same in accordance with Section 52(1) (b) of the Code read with Regulation 37 of Liquidation Regulations. A copy of e-mail dated 23rd of June, 2019 is annexed as Annexure- F with this application.
- vii. Respondent vide its letter dated 31st of July, 2020 informed the liquidator that they were intending to realize its secured interest at a reduced rate of Rs. 14.44 crores due to intervening circumstances (Covid-19 lockdown).
- viii. The buyer had negotiated and reduced the price from 15.25 Crores. The liquidator thereafter vide its e-mail dated 24th of August, 2020 confirmed the respondent that there was no purchaser who is willing to purchase the secured assets at a greater price than the price offered by respondent in the above referred letter. This e-mail dated 31st of July, 2020 in annexed as Annexure –H with this application.
- ix. Thereafter possession of Bangalore factory and the Hyderabad factory was transferred by liquidator to respondent around 28th of January, 2021 and 4th of November, 2020 respectively. The liquidator states that though the liquidation was confirmed in June, 2019 the respondent took possession on the above referred dates due to Covid-19 reasons and shortage of manpower. In the interim period, the liquidator took care of the aforesaid assets on behalf of the respondent and the respondent reimbursed the liquidator costs and other charges in this context to the liquidator.

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- x. Subsequently, the plants at bang lore and Hyderabad were sold by the respondent in March, 2021 and December, 2020 respectively for a consideration of Rs. 6.65 crores and 7.79 crores respectively aggregating to Rs. 14.40 Crores.
- xi. Since the amount realized by the respondent for its long term loan facilities was in excess to that of entire claim, the DBS made payment of excess amounts to the liquidator in a phased manner from March, 2021 till 30th July, 2021 as per scheduled mentioned at page 18 of this application.
- xii. The Stakeholders committee meeting was held on 10th of February, 2021. The respondent represented that sale proceeds of Rs. 14.40 crores of the 2 exclusive properties, the respondent will not only appropriate its long-term loan dues (inclusive of interest and charges) not till the liquidation commencement date but also interest and other charges till the sale and realization of assets by the respondent.
- xiii. The liquidator contested by stating the date has been crystallized on the liquidation commencement date on the basis of claims lodged by them. The proceeds are distributed on the basis of dues as on liquidation commencement date and not on the date of distribution.
- xiv. The applicant sought calculations of the amounts realized from the sale by the respondent and the amount paid/due to the liquidation Estate as per Section 52 of the Code. (Annexure-J with this application).
- xv. Respondent through its e-mail dated 11th of August, 2021 gave its detailed calculation. In the e-mail dated 11th of August, 2021 it transpires that the respondent is holding a sum of Rs. 20 lacs as future contingent liabilities and has not transferred the same to the liquidation Estate.

Respondent insisted they will charge interest till the date of the sale and there is no prohibition in the Code as such.

- xvi. The total amount of interest charged by the respondent for the period of liquidation commencement date till sale of assets is Rs. 1.64 Crores.
- xvii. Respondent has further withheld an amount of Rs. 20 Lacs as the future contingency funds and the same is without any basis.
- xviii. The respondent is required to pay an amount of Rs. 1.85 crores to the liquidator on account of the excess realized money along with 12% interest from the respondent.

4. *The contentions/submissions of the respondent are summarized hereinafter:*

- i. The respondent in accordance with Section 52 on the Insolvency and Bankruptcy Code, 2016 applied to the liquidator to realize its security with respect to the long-term loan facility and accordingly the Secured Creditor proceeded to realize its security in accordance with such provision.
- ii. Reference is made to Section 52 of Insolvency and Bankruptcy Code, 2016 while stating from a perusal of the said Section it is apparent that the Secured Creditor is entitled to realize its security interest and apply the proceeds to recover the debts due to it and tender to the liquidator any surplus funds which is in excess of the debts due. The Provision nowhere talks about the claim filed by the Secured Creditor with the liquidator but specifically provides for realization towards “debts due to it,”

The term “debt” has been defined in Section 3(11) of the Code as follows:

“debts means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt”

Furthermore “financial debt” has been defined under Section 5(8) which inter alia reads as follows:

“financial debt” means **a debt along with interest**, if any, which is disbursed against the consideration for the time value of money and includes-

- a. Money borrowed against the payment of interest;
- b. Any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;
- c. Any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- d. The amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- e. Receivables sold or discounted other than any receivables sold on non-recourse basis;
- f. Any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing.

- iii. The calculation of interest is part and parcel of the definition of debts as stated hereinabove, as such the Secured Creditor is at full liberty to charge interest while recovering its dues under Section 52 and there can be no contrary interpretation of the same.

Moreover, Section 35 of the Code, enumerates the Powers and Duties of the Liquidator. Sub-Clause (j) of the provision reads as follows:

“(j) to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of the Code”.

- iv. Reliance is also placed on Regulation 37 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation 2016 and it has been argued that it is undisputed that the procedure is laid down in the said

Regulation has been duly followed by the Respondent in realizing its security interest and that there are no lacunae in the same. It is stated that there is nothing wither in the Code or in the Regulation which states that the Secured Creditor is not entitled to recover its interest as accrued from the date of liquidation while realizing its security interest. Further, the Code neither provides for or empowers the liquidator to restrain a secured financial creditor from charging interest from the date of its filing its claim on the liquidation commencement date till such time the secured asset is sold by such financial creditor outside the liquidation estate in due adherence and compliance with the law.

- v. In course of the proceedings, the Respondent Bank has also brought on record various security and loan documents executed between the parties i.e. the Respondent Band and the Corporate Debtor, viz. the sanction letter, Term Loan Agreement, Demand Promissory Note as well as Deed of Hypothecation. The Respondent Bank, in course of its submissions has further highlighted and established before this Tribunal that the right of the bank, being a secured Financial Creditor, is envisaged in terms of the contracts executed by and between the parties, which are valid and enforceable. Neither does the Code regulate nor does the Code provide or delegate powers and/or authority to the liquidator to restrain or restrict the Creditor from charging interest for the period after filing of Form D and actually enforcing its security interest and realizing its debt due in accordance with law. It has been established that the Respondent Bank, under civil laws, are governed by the contractual obligations and is otherwise entitled to charge pre-suit interest, *pendente lite* interest as well as post-suit interest till such date the debts due and payable are repaid in their entirety unless specifically restricted by the Code or its Regulations laid down thereunder.
- vi. Reliance is placed on the judgment of the Hon'ble Supreme Court of India in C.K. Saskan vs. Dhanlakshmi Bank Limited [(2009) 11 SCC 60] [Paragraph Nos. 12 to 15] where the Hon'ble Supreme Court of

India had held that interest can be awarded in terms of an agreement or statutory provisions as well as by reason of usage, trade having the force of law or an equitable consideration and had further awarded interest *pendente lite* and future interest which it found, just proper and reasonable.

- vii. Regulation 21A of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 is not applicable in the present case as this Regulation was brought subsequent to Liquidation proceedings initiated in the present case on 21st of August, 2018.
- viii. It is also contended on behalf of the respondent the difference in amounts between form C and D is by way of interest that accrued in the meantime. The rate has been charged at the contractual rate of interest. The filing of a claim before the liquidator in form D does not preclude or prevent or stand in the way of respondent for claiming further interest. The claim in Form D was filed on 18th of September, 2018 together with up-to-date interest. The sale of secured assets of respondent took place on 22nd of October, 2020 in respect to the properties and the sale proceeds were received on 22nd of October, 2020 and 14th of January, 2021 respectively. The respondent during the interregnum period was entitled to continue charge interest charges and costs which the respondent has done in the present case. The interest charged by the respondent is period from date of filing form D till the date of realization of money by respondent. The Form D does not restrict in any manner or relation the future claims of the respondent on account of interest cost and charges.
- ix. The above contentions referred in paragraphs have been raised by respondent in its reply affidavit in paragraphs I, J, K and paragraph 8.
- x. In paragraph 10 of reply affidavit respondent has denied that the date has been crystallized on the liquidation commencement date and no other or future claim on account of interest was recoverable by the respondent.

5. *We have heard the Ld. Counsel for the parties and perused the application on the record produced before us along with the pleadings.* We find that:

- a. The issue that arises out the respective contentions of the parties as referred hereinafter is to see whether the plea of respondent, “*neither does the Code regulate nor does the Code provide or delegate powers and/or authority to the liquidator to restrain or restrict the Creditor from charging interest for the period after filing of Form D and actually enforcing its security interest and realizing its debt due*” is correct or not.
- b. According to the applicant as contended in paragraph 18, it could only be till the commencement of liquidation whereas as per the respondent which could raise its claims in the form of interest etc. till actual realization.
- c. For analysing submission on behalf of the Bank and to decide the issue in hand, it is relevant to refer to Chapter IV Regulation 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation 2016 reproduced hereinafter;

CHAPTER IV.

12. Public announcement by liquidator—(1) The liquidator shall make a public announcement in Form B of Schedule II within five days from his appointment.

[(2) The public announcement shall-

- (a) Call upon stakeholders to submit their claims or update their claims submitted during the Corporate Insolvency Resolution Process, as on the liquidation commencement date; and
- (b) Provide the last date for submissions or updation of claims, which shall be thirty days from the liquidation commencement date.]

6. We also notice, on the date of commencement of liquidation in present case on 21-08-2018, position of this part of Regulation prior to the substitution (On 27-07-2019) stood as hereinbelow.

“(2) The public announcement shall—

Call upon stakeholders to submit their claims as on the liquidation commencement date; and

Provide the last date for submission of claim, which shall be thirty days from the liquidation commencement date.” (*Emphasis supplied*).

7. Therefore, a plain reading of even the previous regulation, prior to 25-07-2019, makes clear that *it is the date of commencement of liquidation* and 30 days thereafter which is time limit and stage for submission of the claims by stakeholders. Admittedly, respondent submitted his claims in form D. Now we see from Form D (Proof of claims of Financial Creditors) or Form C (Proof of claim of operation creditor except workmen and employees), part of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, there is column 3 which prescribes

‘TOTAL AMOUNT OF CLAIM, INCLUDING INTEREST AS AT THE LIQUIDATION COMMENCEMENT DATE AND DETAILS OF NATURE OF CLAIM (WHETHER TERM LOAN, SECURED UNSECURED).’

8. From the above ***we conclude that:***
- a. All claims *including interest* have to be raised in Form C or D as applicable.
 - b. Further for raising any such claims by stakeholders, Regulation 12 Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, prescribes outer limit of *thirty days from the date of commencement of Liquidation*. This is further evident from Form B wherein the claims are invited by the Liquidator wherein time for submission of these claims is thirty days.
 - c. Thus, plea of respondent neither does the Code regulate nor does the Code provide or delegate powers and/or authority to the liquidator to

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restrain or restrict the Creditor from charging interest for the period after filing of *Form D* and actually enforcing its security interest and realizing its debt due is in-correct, contrary to provisions/regulations of the Code, indicated above and the same is, therefore, rejected.

- d. There are various stages of process of liquidation under the Regulations apart from inviting claims and for which time lines have been prescribed with a view to achieve objective of the Code.
9. For the foregoing reasons, we allow this IA and direct the respondent bank to pay an amount of Rs. 1.84 crores to the liquidation estate along with interest @ 6% on this amount from 1st of April, 2021, till the date of its actual payment by the respondent to the liquidation estate. IA 883/KB/2021 is disposed of and CP No.482/KB/2017 is listed for progress report on **29 August, 2022.**
10. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

Harish Chander Suri
Member (Technical)

Rohit Kapoor
Member (Judicial)

The Order is pronounced on 14th day of July, 2022

S, LRA