

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-I**

**IA 628/2022 in CP (IB) 3558/MB/2018**

Under Section 36 r/w Section 60(5) of the Insolvency  
and Bankruptcy Code, 2016

**Yes Bank Limited**

Yes Bank House, Off Western Express Highway,  
Santacruz East, Mumbai - 400055

...Applicant

Versus

**Mr. Anil Mehta**

Liquidator of Pratibha Industries Limited & Anr

Having office at- Unit Nos. 1/B-56 and 1/B-57 Phoenix  
Paragon Plaza, Phoenix Market City, LBS Marg,  
Kurla (W), Mumbai – 400070

...Respondent 1

**FEMC- Pratibha Joint Venture**

Having its registered office at Universal majestic 14<sup>th</sup>  
floor, off eastern express highway, P.L. Lokhande  
Marg, Ghatkopar Mankurd Link Road, Opp. RBK  
International School, Govandi, Mumbai - 400043

...Respondent 2

*In the matter of*

Bank of Baroda

... Petitioner

Versus

Pratibha Industries Limited

...Respondent

**Order Delivered on 08.02.2023**

***Coram:***

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

***Appearances:***

For the Applicant : Mr. J P Sen, Sr. Counsel i/b Ms. Sukanya Bhaumik, Advocate  
For the Respondent : Mr. Sanjay Bhatt, Advocate

**ORDER**

***Per: Justice P.N. Deshmukh, Member (Judicial)***

1. The present Interlocutory Application is filed by Yes Bank Limited ("**the Applicant**"), under Section 36 r/w Section 60(5) of the Insolvency Bankruptcy Code, 2016 ("**the Code**"). The Applicant prays for the 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;
2. The Applicant further filed an Interlocutory Application on 12.04.2022, seeking an extension of relief granted vide order passed by this Tribunal

dated 21.03.2022 in I.A. 628 of 2022 (Original I.A.) filed in Company Petition (IB) No. 3558 of 2018.

3. By way of the DMRC Contract, Respondent No. 2 was inter alia awarded the design and construction of tunnels, stations and ramp between Motibagh and Lajpat Nagar stations (both excluding) for underground works on Mukundpur-Yamuna Vihar corridor of Delhi MRTS Project Phase III ("CC-18 Project").
4. The Applicant submits that Respondent No. 2 was incorporated as a separate legal entity as an "AOP" i.e. Association of Persons, for the purpose of execution of CC-18 Project. Considered in this respect, Respondent No. 2 is a distinct entity which is separate from both FEMC and PIL. Respondent No. 2 was assigned a separate PAN card (No: AAAAF2187Q) and has been operating separate bank accounts on its own accord. Respondent No. 2 also has its separate constitutional documents, audited financials and has been paying tax/claiming refund as separate entity basis its own financial transactions. A copy of audited financial statement is annexed as Exhibit-B to the Application.
5. Thereafter, Respondent No. 2 came to avail of working capital facilities from a consortium of banks including Allahabad Bank (now merged with Indian Bank), Central Bank of India, Lakshmi Villas Bank (now DBS Bank India Limited) and the present Applicant for the purpose of execution of the CC-18 Project. The consortium of banks further designated the Applicant as the lead bank of the consortium. For the sake of convenience, the consortium of banks is hereafter referred to as the "FEMC Consortium Lenders". A copy of the working capital loan document and facility letter are annexed hereto as Exhibit-C (colly).

6. In terms of the Working Capital Consortium Agreement (WCCA), the FEMC Consortium Lenders inter alia have a first ranking *pari passu* charge over all (i) moveable fixed assets of Respondent No. 2 and/or the 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.
7. One of the conditions for the grant of the said facilities to Respondent No. 2 is that the said facilities are to be secured at all times until the dues under the said facilities subsist by way of a first ranking *pari-passu* charge on the Charged Property (defined specifically in the Deed of Hypothecation) in favour of the FEMC Consortium Lenders. Charged Property inter alia included all banks accounts, including accounts maintained for the CC-18 Project with the said banks and all amounts lying to the credit of such account and all cash flows and receivables of Respondent No. 2 or for the benefit of Respondent No. 2 into such accounts. A copy of the Deed of Hypothecation is annexed as Exhibit – D to the Application.
8. In terms of the facility documents, Respondent No. 2 inter alia opened and operated account no. 005881400000085 (current/cash credit account) ("Account") and account no 005880200000012 (escrow account) with the Chembur, Mumbai branch of the Applicant.
9. Meanwhile, by an Order dated February 1, 2019, this Tribunal admitted the captioned Company Petition filed by Bank of Baroda under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("Code") and appointed Mr. Sunil Kumar Chaudhary as the Interim Resolution Professional of

Pratibha Industries Limited (“PIL”). A copy of the Order dated February 1, 2019 is annexed as Exhibit – E to the Application.

10. Subsequently, by an Order dated March 14, 2019, this Tribunal appointed Respondent No. 1 as PIL's Resolution Professional. A copy of the Order dated March 14, 2019 is annexed hereto as Exhibit - F. Pursuant thereto, by an Order dated February 8, 2021, passed in the captioned Company Petition, this Tribunal inter alia passed appropriate directions for the liquidation of PIL. A copy of the Order is annexed hereto as Exhibit - G.
11. The Liquidator has been managing, operating and maintaining the administrative affairs of Respondent No. 2 since his appointment first as PIL's Resolution Professional and thereafter its Liquidator.
12. Very recently, the Applicant has been given to understand that during the CIRP of PIL, Respondent No. 2 received from VAT Department an amount of Rs.32,11,62,907 (Rupees Thirty two crore eleven lac sixty two thousands nine hundred and seven only) on May 30, 2019 in its account being account no. 29100200000375 opened with the Bank of Baroda ("Transfer") which was separately opened by Respondent No. 1 for Respondent No. 2 on May 24, 2019. This amount was received in the above mentioned account of Bank of Baroda within a few days of the opening of the account. Further, on June 13, 2019 an amount of Rs.32,11,00,000,00 (Rupees Thirty-two Crore Eleven Lac Only) was transferred to PIL. The above mentioned new account with the Bank of Baroda was opened during CIRP without seeking the necessary NOC from the secured lenders of Respondent such as this Applicant by bypassing the existing accounts of Respondent No. 2 maintained with FEMC Consortium Lenders. A copy of the bank account statement

demonstrating the deposit and the transfer is annexed to the Application as Exhibit - H.

13. As per the FY20 Audited Balance Sheet of Respondent No. 2 (Clause 24.2. Disclosure of related party transactions), the Applicant has been given to understand that INR 11,45,95,402 (Rupees Eleven crore forty-five lacs ninety five thousand four hundred and two) has been utilized to repay loan from PIL, grossly undermining rights of FEMC Consortium Lenders. Further utilization of balance amount (INR 20 Crore) as per FEMC books has not been made available despite repeated requests. However, when enquired, the liquidator informed that pursuant to the transfer of the amount, a fixed deposit for around INR 23 crore has been made out of the proceeds and the balance amount was spent for various expenses of PIL during CIRP.
14. The Applicant states that the transfer was made by Respondent No. 1 without the consent of the FEMC Consortium Lenders despite being fully aware that the amounts are charged to the FEMC Consortium Lenders. Aggrieved by such acts of Respondent No. 1, the issue of illegitimate bank transfer was further discussed at the meeting of FEMC Consortium Lenders. A copy of the minutes of the FEMC Consortium Lenders dated November 30, 2021 is annexed as Exhibit I to the Application.
15. Aggrieved by this unilateral transfer of the amount out of Respondent No. 2's bank account, the Applicant addressed several correspondences to Respondent No. 1 enquiring about the transfer and the basis for the same. However, time and again, Respondent No. 1 failed to provide any cogent reason for transferring the VAT refund to the complete detriment of the FEMC Consortium Lenders. A request was also made to

Respondent No. 1 to refund the amount within a period of 7 days, which transfer request was not complied with. A copy of the email dated December 31, 2021 addressed by the Applicant to Respondent No. 1 is annexed as Exhibit – J to the Application.

16. The Applicant has relied on Section 36 of the Code. Section 36 of the Code provides as follows:

*"36. Liquidation estate. –*

*(1) For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor.*

*(2) The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.*

*(3) Subject to sub-section (6), the liquidation estate shall comprise all liquidation estate assets which shall include the following: -*

*any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;*

*(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:*

*(...)*

*(d) assets of any Indian or foreign subsidiary of the corporate debtor,*

*or*

17. Therefore, under Section 36 of the Code, only the assets of the Corporate Debtor i.e. PIL will form a part of the liquidation estate. The assets and the monies of Respondent No. 2 cannot and should not be a part of the liquidation estate. Infact the same has been provided in a legal opinion by the legal counsel of PIL Lenders in consortium meeting of March 16, 2021. It is therefore evident that Respondent No. 1 ought not to have utilized the VAT refund for the purpose of meeting the liquidation costs of PIL and hence the monies received into the bank account of Respondent No. 2 cannot be a part of the liquidation estate of PIL. A copy of the minutes of the consortium meeting is annexed as Exhibit – N to the Application.
18. The Applicant submits that the liquidation of PIL is in its advance stages and Respondent No. 1 is already in the process of considering bids of the successful bidders. The Applicant apprehends that in the event urgent reliefs are not granted by this Tribunal, the entire amount of the VAT refund will be lost and the benefit of the same cannot be obtained by the FEMC Consortium Lenders. The Applicant submits that Respondent No. 2 presently owes an amount of INR 75,94,06,832.86 as on Feb 08, 2021 (date of liquidation order passed by this Tribunal) along with applicable default interest till the date of payment to the Applicant, hence any receivables into the account of Respondent No. 2 can only be utilized for the satisfaction of the outstanding debts of Respondent No. 2.
19. The present Application has been filed at the earliest opportunity and there is no delay. The Applicant, even as on date, is unaware of Respondent No. 1's explanation and/or justification for misappropriating Respondent No. 2's receivables, despite being aware that the same are charged to the Applicant and other FEMC Consortium

Lenders. The Applicant has repeatedly sought to engage in several discussions and correspondence with Respondent No. 1, without any effect and results.

20. The Applicant has been constrained to approach the present Tribunal for the purpose of safeguarding its own interests on account of the complete lack of clarity and transparency in the manner in which the transfer has been carried out. It appears that Respondent No. 1 has failed to consider that Respondent No. 2 is separate and distinct entity and hence the proceeds for the benefit of Respondent No. 2 has been diverted for the benefit of PIL and/or Respondent No. 1. The Applicant also submits the transfer ought to be reversed at the earliest.

**Submissions filed by the Respondent by the way of Reply:**

21. The Corporate Debtor entered into a joint venture agreement dated 14.03.2012 with FEMC to form FEMC Pratibha JV (hereinafter, "**CC 18-Joint Venture Agreement**"). The said Agreement stipulated that the Joint Venture formed for the purposes of execution of CC 18 Project between the Corporate Debtor and FEMC shall be a non-partnership, therefore, by implication it being a merely contractual unincorporated joint venture, having no characteristic of a separate legal entity or juristic person.
22. The said Agreement came to be amended when the Corporate Debtor and FEMC entered a Supplementary Agreement dated 15.03.2012 (hereinafter, "**CC 18-1<sup>st</sup> Supplementary Agreement**") whereby the parties altered their roles and responsibilities and all the roles and responsibilities under the contract fell to the share of the Corporate Debtor exclusively. The only responsibility which fell to the share of FEMC was related to providing key personnel. Copy of 1<sup>st</sup>

Supplementary Agreement for CC 18 executed between the Corporate Debtor and FEMC has been annexed as Annexure R-2 to the Reply.

23. Further the responsibility and sharing was again re-arranged wherein the Corporate Debtor agreed to undertake 100% obligation to execute the entire defined scope of works given in the tender documents and FEMC had 0% zero responsibility and was only required to provide technical support if required.
24. It was clarified that in the event of award of contract, if the Corporate Debtor approaches any bank for working capital facility to be availed for then FEMC shall not have any objection and shall not owe any liability, responsibility for raising such loan by the Corporate Debtor, thereby, clarifying that the financial responsibility and liability for FEMC Pratibha JV was clearly the obligation of Corporate Debtor only.
25. FEMC Pratibha JV submitted its bid for CC 18 Project on 17.04.2012 and the same was awarded by DMRC vide Letter of Acceptance dated 19.06.2012 (hereinafter, "**CC 18-LOA**") for a total gross contract value (hereinafter, "**CC 18-GCV**") aggregating to INR 10,89,59,00,000 (Rupees One Thousand Eighty-Nine Crore and Fifty Nine Lakh Only). Pursuant thereto, a contract dated 22.08.2012 (hereinafter, "**CC 18-Contract Agreement**") was executed between FEMC Pratibha JV and DMRC. Copy of CC-18 LoA has been annexed as Annexure R-3 to the Reply. Copy of CC 18 Contract Agreement is annexed as Annexure-R-4 to the Reply.
26. By way of another Supplementary Agreement dated 01.09.2012 (hereinafter, "**CC 18-2<sup>nd</sup> Supplementary Agreement**") 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. to participate for

the purpose of submission of a request for proposal (hereinafter, "RFP") for the project. The agreement further stated that CC 18-1<sup>st</sup> Supplementary Agreement stands cancelled and is being superseded and replaced by the CC 18-2<sup>nd</sup> Supplementary Agreement. Copy of CC 18-2 Supplementary Agreement is annexed as Annexure-R-5 to the Reply.

27. The CC 18-2<sup>nd</sup> Supplementary Agreement was further amended vide Supplementary Agreement dated 28.01.2013 (hereinafter, "**CC 18-3<sup>rd</sup> Supplementary Agreement**"). This agreement had renegotiated consultancy fees and the same was fixed at the rate of 1.325% of the GCV. Copy of CC 18-3<sup>rd</sup> Supplementary Agreement is annexed as Annexure-R- 6 to the Reply.
28. It is submitted that for the purposes of execution of the CC 18 Project, FEMC Pratibha JV availed loan facilities from four banks namely the Applicant (Yes Bank), Allahabad Bank (now merged with Indian Bank), Central Bank of India and Lakshmi Vilas Bank. Subsequently, a working capital consortium agreement dated 17.05.2013 (hereinafter, "CC 18-WCCA") was executed between FEMC Pratibha JV and the consortium of banks, with the lead bank being the Applicant.
29. In terms of CC 18-WCCA, the following security interest was created in favour of the consortium over CC 18 Project specific assets:
  - First ranking *pari-passu* charge over all the moveable fixed assets of the 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 JV and or/ the Project including but not limited to the

Escrow Account opened or to be opened with the lead bank i.e. the Applicant;

- Guarantees from: (i) Mrs. Usha B. Kulkarni; (ii) Mr. Ajit B. Kulkarni; (iii) Mr. Vinayak B. Kulkarni and (iv) the Corporate Debtor.

30. CC 18 Project and another CC 23 Project came to be completed by the Corporate Debtor albeit in the name of FEMC Pratibha JV on 31.03.2018 and 31.05.2018 respectively with minor outsourcing works pending. Copy of completion certificate for CC 18 and CC 23 is annexed as Annexure-R-11 (Colly) to the Reply.
31. In the meantime, on an application filed under Section 7 of the Code by a financial creditor namely Bank of Baroda, seeking initiation of Corporate Insolvency Resolution Process (hereinafter, "CIRP") in respect of the Corporate Debtor, this Adjudicating Authority vide order dated 01.02.2019, directed initiation of the CIRP in respect of the Corporate Debtor and appointed Mr. Sunil Kumar Choudhary as the Interim Resolution Professional (hereinafter, "IRP"). Later in the first meeting of Committee of Creditors (hereinafter, "CoC") held on 01.03.2019, the Respondent No. 1 (now Liquidator) was appointed as the Resolution Professional and the same was approved by this Adjudicating Authority vide order dated 14.03.2019.
32. As no resolution plan came to be approved by the CoC during the CIRP, the CoC decided to liquidate the Corporate Debtor and instructed the Respondent No. 1 to file an application under Section 33 of the Code for initiation of the liquidation process in respect of the Corporate Debtor.
33. Before filing of the application under Section 33, the CoC in the fourteenth meeting of the CoC held on 31.10.2019, the CoC

recommended the Respondent No. 1 to explore the possibility of the sale of Corporate Debtor as 'going concern' in terms of Regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter, "CIRP Regulations") along with Regulation 32A of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (hereinafter, "Liquidation Regulations"). Copy of the fourteenth meeting minutes of the CoC held on 31.10.2019 is annexed as Annexure-R-12 to the Reply.

34. As instructed by the CoC, the Respondent No. 1 filed I.A. 3664 of 2019 under Section 33 of the Code seeking initiation of liquidation process in respect of the Corporate Debtor before this Adjudicating Authority. Vide order dated 08.02.2021, uploaded on 16.02.2021 (hereinafter, "Liquidation Order"), this Adjudicating Authority was pleased to direct initiation of liquidation process in respect of the Corporate Debtor and appointed the Respondent No. 1 as the Liquidator. Copy of the Liquidator Order passed by this Adjudicating Authority is annexed as Annexure-R-13 to the Reply.
35. Pursuant to the Liquidation Order, Respondent No. 1 made a Public Announcement on 18.02.2021 in terms of Regulation 12 of the Liquidation Regulations inviting claims from the stakeholders of the Corporate Debtor. In terms of Regulation 12(2)(b) of Liquidation Regulations, the last date for submission of claim was specified as 18.03.2021, i.e. 30 days from the receipt of the Liquidation Order. Copy of Public Announcement dated 18.02.2021 is annexed as Annexure-R-15 to the Reply.

36. The CC 18- WCCA consisting of the Applicant, Indian Bank (erstwhile Allahabad Bank), Central Bank of India and Lakshmi Vilas Bank submitted their respective claims under Form B wherein the Applicant and Indian Bank opted not to relinquish their security interest over FEMC Pratibha JV and Central Bank of India and Lakshmi Vilas Bank (now DBS Bank) opted to relinquish their security interest over FEMC Pratibha JV in terms of Section 52 of the Code.
37. In terms of the provisions of the Code and the Liquidation Regulations, Respondent No. 1 issued an invitation for expression of interest dated 10.06.2021 (hereinafter, "**First Public Notice**") inviting proposals for Scheme of compromise or arrangement under Section 230 of the Companies Act, 2013 Companies Act") for sale of the Corporate Debtor as a 'going concern' under Regulation 32A of the Liquidation Regulations.
38. However, the process for scheme of compromise or arrangement under Section 230 of the Companies Act did not result in receipt of any viable proposal and the Stakeholders' Consultation Committee (hereinafter, "**SCC**") constituted under the Liquidation Regulations in the meeting held on 27.09.2021, noted that the said process was considered to be closed.
39. Thereafter, Respondent No. 1 issued a fresh process document under Regulation 32A of the Liquidation Regulations for sale of the Corporate Debtor as a 'going concern' and issued public notice dated 23.10.2021 (hereinafter, "**Second Public Notice**"). However, no bids came to be received.
40. Thus, Respondent No. 1 again on issued public notice dated 21.01.2022 (hereinafter, "**Third Public Notice**") for sale of Corporate Debtor as a

'going concern' under Regulation 32A of the Liquidation Regulations. In the said notice, the assets of the Corporate Debtor were bifurcated in three packages: (i) Package A- Relinquished Assets"; (ii) Package B- "Deemed Relinquished Assets" and (iii) Package C- "Non-Relinquished Assets".

41. Since the Applicant and other members of the CC 18-WCCA have opted not to relinquish their security interest, no amount has been distributed to them. Further in terms of the interim order dated 21.03.2022 passed in the present matter by this Adjudicating Authority, Respondent No. 1 has also set aside an amount of INR 32.11 Crores out of cash balance available which shall be dealt with in accordance with further orders as may be passed in the present Application by this Adjudicating Authority.

#### **I. NO SEGREGATION OF FEMC PRATIBHA JV AND CORPORATE DEBTOR**

42. The claim of the Applicant that FEMC Pratibha JV is an incorporated entity and therefore is a separate, distinct legal entity from the Corporate Debtor and therefore, VAT Refund could not have been diverted to bank accounts of the Corporate Debtor is bereft of any merits, legal parlance and the same is liable to be rejected. As FEMC Pratibha JV is an unincorporated JV which does not have any separate status and is not a separate legal entity.
43. It was never the intention of the Corporate Debtor or FEMC to create any partnership or trust or to form any legal entity nor to be an act of incorporation. The joint venture was merely a temporary contractual arrangement between the Corporate Debtor and FEMC with a limited purpose of participating in the bid and completing the projects, if awarded.

44. Therefore, the contention raised by the Applicant in the instant application that the FEMC Pratibha JV is a separate legal entity and therefore falls under the category of assets provided under sub-section (4) of Section 36 of the Code is not only incorrect but misleading and therefore, is liable to be rejected.
45. Except for technical service, FEMC had no other role and obligation to perform under the CC 18 and the entire financing and repayment fell under the obligation of the Corporate Debtor only. Therefore, there was no requirement of any separate project wise segregation of any fund or proceeds for running the CIRP of the Corporate Debtor. Thus all the project assets and liabilities were included as a part of the CIRP/Liquidation Process.
46. Furthermore, the then IRP in the first CoC meeting held on 01.03.2019 while apprising the CoC members of the joint ventures of the Corporate Debtor categorically apprised the CoC members that the joint ventures are appearing to be unincorporated entities and the IRP would examine whether such JVs would be covered under the umbrella of moratorium under Section 14 of the Code. Copy of 1<sup>st</sup> CoC meeting held on 01.03.2019 is annexed as Annexure- R16 to the Reply.
47. After review of the agreements that were entered between the Corporate Debtor and FEMC, the IRP and thereafter the Liquidator, treated the unincorporated JV as a part of the common pool of assets and properties of the Corporate Debtor, which was an admitted position to which, no stakeholder including the Applicant at any time raised any objection during the course of CIRP or the Liquidation Process till the filing of the present application.

48. This position is also recognized and admitted by the Applicant its claim form under Form B dated 17.03.2021 submitted pursuant to the Public Announcement dated 18.02.2021 under Regulation 12 of the Liquidation Regulations, wherein the Applicant while providing information and description under the header of "Details of how and when debt incurred" categorically stated and admitted the following:

*"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/FL443/2012-2013 dated August 24, 2012 as amended and modified from time to time. As per the terms of formation of the Joint Venture, 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....."*

Copy of claim form under Form D dated 17.03.2021 received from the Applicant is annexed as Annexure-R-17 to the Reply.

49. On the other hand, the Applicant had invoked the corporate guarantee dated 17.03.2013 submitted by the Corporate Debtor, on 07.08.2018, pursuant to the CC18-WCCA as a part of the security charge towards the loan facilities availed by FEMC Pratibha JV for execution and completion of CC 18 Project and the same has been made a part of the claim filed by the Applicant in Form D dated 17.03.2021. Copy of the claim form filed by the Applicant during the liquidation process has already been annexed as Annexure-R19 to the Reply.
50. Therefore, there was never any objection or question raised by the Applicant or by any other stakeholder, since the insolvency

commencement date i.e. 01.02.2019 and also during the liquidation process which was underway since 08.02.2021 as regards the rights and liabilities of FEMC Pratibha JV to be part of and being dealt with as part of the CIRP/Liquidation Process of the Corporate Debtor.

51. Therefore, the present application at such a belated stage has been filed by the Applicant only with an intent to delay the process and extract undue and unmerited financial gains for itself and thus on account of the same, the present application is liable to be dismissed. As is evident various allegations have been levelled by the Applicant as regard the conduct of the process only to cause prejudice without any substance and therefore the present Application be dismissed with costs.

## **II. RESPONDENT NO. 1 INFORMED THE COC OF TRANSFER OF VAT REFUND OF INR 32.11 CRORE.**

52. In the fourth CoC meeting held on 06.06.2019, it was informed that the Consultant had recovered INR 32.11 Crore as per the Agreement toward refund of VAT. The same was discussed with the members of the CoC and clearly informed and no member including the Applicant raised any objections with respect to the VAT Refund. Copy of fourth minutes of the CoC held on 04.06.2019 is annexed as Annexure-R-21 to the Reply.
53. It is pertinent to mention that with the view to consolidate all funds into one account to ensure smooth functioning of the CIRP, the Respondent No. 1 transferred all funds to the bank account opened with Bank of Baroda during the CIRP and later continued with the same during the liquidation process. It is a settled position of law that on account of moratorium imposed under Section 14 of the Code during the CIRP of the Corporate Debtor, any escrow arrangement entered into by the Corporate Debtor with the creditors/stakeholders cannot have any

enforceability. Thus the contention of the Applicant about the transfer of the funds from the escrow account to the account of the Corporate Debtor is without any merit.

54. No queries or objection was raised by any of the members of the CoC nor by the Applicant during the course of meeting or thereafter.
55. Therefore, the Applicant was sleeping over this non-issue for almost three years and has filed the instant application only after the Respondent No. 1 on requests of the Applicant in good faith in bonafide vide email dated 29.10.2021 shared the documents including bank statements which provides the transfer of VAT Refund from FEMC Pratibha JV account to the account of the Corporate Debtor. Copy of email dated 29.10.2021 sent by the Respondent No. 1 to the Applicant is annexed as Annexure-R-22 to the Reply.
56. During the liquidation process, in the SCC meeting held on 28.03.2022 it was informed by Respondent No. 1 that expenses were incurred by the Corporate Debtor for the said CC-18 & CC-23 projects aggregating to Rs.9,02,23,199, thereby leaving an amount of Rs.23,09,39,707 and out of said amount Rs.13,50,15,626 pertains to CC 18 Project and Rs.9,59,24,082 pertains to CC 23 Project. However, despite the same it was misrepresented by the Applicant before the Adjudicating Authority that an amount of INR 32 crore is available and based on which this Adjudicating Authority passed the interim order by which the amount of INR 32 Crores stands blocked. This has caused delays in the distribution to stakeholders in terms of Section 53 of the Code.
57. It was Respondent No. 1 who provided the bank statements and the Financial Statements on which the Applicant is relying on in the instant application to allege that Respondent No. 1 has acted in an unfair and

mischievous manner. In any case, in terms of the provisions of the Code read with the Liquidation Regulations, the Liquidator was not obligated to share any information except what is provided under Regulation of the Liquidation Regulations.

58. Furthermore, the Applicant has even sought to contend in the instant application that Respondent No. 1 has utilized the VAT Refund for repayment of loans of the Corporate Debtor, which is farfetched and a clear attempt of the Applicant to misrepresent and mislead this Adjudicating Authority. It is submitted that VAT Refund which was transferred to the Corporate Debtor was merely an accounting treatment and apart from reimbursement of the expenses as stated above which have been incurred with respect to CC 18 and CC 23 Project, the said amount has not been used for any repayment whatsoever.
59. It is submitted that in 9<sup>th</sup> SCC meeting held on 22.02.2022, Respondent No. I categorically informed all the members of SCC including the Applicant that whatever funds are attributable to CC 18 Project lenders will kept aside and will not be distributed as a part of cash and bank balance among the stakeholders under Section 53 of the Code, as the security interest has not been relinquished by such lenders including the Applicant. Relevant extracts of the 9 SCC meeting are as follows:

*"Representative of YBL agreed with the views of CBI provided that money received from FEMC Pratibha JV has to be kept aside. The Liquidator Informed that whatever funds attributable to the CC 18 Project will be kept aside since the security interest thereof is not relinquished and the funds pertaining to CC 23 Project will form part*

*of the liquidation estate because the security interest thereof has been relinquished by the concerned secured creditor”*

Copy of 9<sup>th</sup> SCC meeting held on 22.02.2022 is annexed with the Reply as Annexure- R-23.

### **III. THE VAT REFUND HAS NOT UTILISED FOR THE PURPOSE OF REPAYING LOANS OF THE CORPORATE DEBTOR**

60. In the instant application, the Applicant has sought to allege that out of the total VAT Refund i.e. INR 32.11 Crore, Respondent No. 1 has utilized INR 11,45,95,402/- (Rupees Eleven Crore Forty Five Lac Ninety Five Thousand Four Hundred and Two Only) for repayment of loan of the Corporate Debtor. However, the same is incorrect and misleading statement as is evident from the minutes of SCC meeting as relied above and is liable to be rejected. It is pertinent to mention that the Liquidator has not used or disbursed any amount from VAT Refund except as stated above for reimbursement of expenses incurred and in financial statement for FY 2020, the book entry for transfer of funds is merely an accounting treatment.
61. Furthermore, out of total INR 32 Crore, INR 9.02 Crore has been incurred by the Liquidator for expenses incurred by the Liquidator pertaining to CC 18 and CC 23 Project only and the rest of INR 23.90 Crore has been deposited as fixed deposit with Bank of Baroda.
62. Since all the rights and liabilities vests with the Corporate Debtor and keeping in view the Corporate Debtor earlier was undergoing CIRP proceedings vide order dated 1.02.2019 and later liquidation proceedings vide order dated 08.02.2021, Respondent No. 1 is duty bound to preserve

and protect the assets and properties of the Corporate Debtor which inter alia included FEMC Pratibha JV in terms of Section 25 of the Code.

63. Had Respondent No. 1 not made payments for such expenses of FEMC Pratibha JV, it would have effect of threatening the viability of the entire project. Further, in any event if Respondent No. 1 had not made payments towards expenses, the lenders would have been compelled to disburse payments which would have further added to the woes of such lenders.
64. Therefore, the Respondent No. 1 made the payments to preserve the project in terms of duties envisaged under the Code and did not utilize the VAT refund to repay the loan obligations of the Corporate Debtor as is being alleged by the Applicant. In any case the amount received in the FEMC Pratibha JV account was transferred to the bank account of the Corporate Debtor to consolidate the funds in one bank account.
65. In view of the above, the Applicant has no locus standi to seek prayers that has been sought by way of the captioned application as although the Applicant has opted not to relinquish their security interest over FEMC Pratibha JV in terms of Section 52 of the Code, however the Applicants have 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 which consists of the CIRP Costs and the liquidation costs in full; and workmen's dues for the period of twenty-four (24) months preceding the liquidation commencement date within ninety (90) days from the commencement of the liquidation process in a manner as it would have paid in case the Applicant had relinquished their security interest. On account of the

above, the Liquidator has already filed an application bearing IA 615 of 2022 seeking deemed relinquishment of the security interest inter alia of the Applicant and 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 which is currently pending adjudication before this Adjudicating Authority.

66. Even otherwise all funds including available VAT refund of Rs.23,09,39,707/-shall be distributed to the lenders of both CC 18 Project and CC-23 in proportion to their respective claims in accordance with the provisions of Section 53 of the Code. Therefore, the Applicant in any case being part of the lenders of CC-18 has no right to claim interest over the entire VAT refund share of Rs. 32.11 crores received for both CC-18 & CC-23 projects.
67. Any kind of distribution of funds cannot be made to any of the stakeholders unless the assets of the Corporate Debtor have been liquidated in conformity with the provisions of the Code read with Regulations.

**Findings:**

68. We have heard both the parties and perused the records.
69. The Applicant has contended that the FEMC Pratibha JV was incorporated as a separate legal entity as an Association of Persons for the purpose of execution of CC-18 Project. However, there is no document placed on record to prove the same. Every document placed on record suggests that it is an unincorporated Joint Venture, hence there was no partnership between the entities. On the contrary, the Joint

Venture stands to be an unincorporated entity having no separate identity of itself. Thus, the contention of the Applicant stands baseless.

70. We also note that the Corporate Debtor and FEMC entered into a Supplementary Agreement dated 15.03.2012 which is referred to as "**CC 18-1<sup>st</sup> Supplementary Agreement**", whereby the parties altered their roles and responsibilities and all the roles and responsibilities under the contract fell to the share of the Corporate Debtor exclusively. The only responsibility which fell to the share of FEMC was related to providing key personnel for which it was to be paid a fees of 1.325% of the Gross Contract Value as per the "**CC 18-3<sup>rd</sup> Supplementary Agreement**". This shows that the entire responsibility for the borrowed funds and repayment of the same lied on the shoulders of Pratibha Industries Limited. Hence, any asset or liability shall also form part of Pratibha Industries Limited.
71. We consider in terms of the Working Capital Consortium Agreement (WCCA), the Applicant inter alia have a first ranking *pari-passu* charge over all (i) moveable fixed assets of Respondent No. 2 and/or the 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. 1 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.
74. Having considered the facts stated as aforesaid and totality of the circumstances this Bench is of the view that this Application deserves to be dismissed.
75. With the aforesaid observations Application bearing number **IA No. 628 of 2022**, stands disposed of as **Rejected**.
76. Ordered Accordingly.

**Sd/-**  
**SHYAM BABU GAUTAM**  
**Member (Technical)**  
08.02.2023  
SAM/DSB

**Sd/-**  
**JUSTICE P. N. DESHMUKH**  
**Member (Judicial)**