

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No. 946 of 2021

IN THE MATTER OF:

**JM Financial Asset Reconstruction Company Ltd.
7th Floor, Cnergy Appasaheb Marathe Marg
Prabhadevi, Mumbai – 400 025**

...Appellant

Vs.

**Mr. Pradeep Kumar Kabra
Liquidator
For Pacific Pipe Systems Pvt. Ltd.
M-19/20, Metro Tower
Ring Road, Surat - 395002**

...Respondent

Present:

**For Appellant : Shri Abhishek Anand, Mr. Kunal Godhwani and
Mr. Mohak Sharma, Advocates.**

**For Respondents : Mr. Ravi Raghunath and Ms. Aakash Lodha,
Advocates.**

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The appeal has been filed by the 'Appellant' – 'JM Financial Asset Reconstruction Company Limited' under Section 61 of the 'Insolvency and Bankruptcy Code, 2016' (in short 'Code') against the impugned order dated 04.10.2021 passed by the 'Adjudicating Authority' (National Company Law Tribunal), Ahmedabad Bench in IA No.118 (AHM) of 2021 in CP(IB) No. 305 of 2018.

2. It is the case of the Appellant that the 'Financial Asset' in question pertaining to Corporate Debtor (CD) together with all the underlying 'Security interest' created, with all the rights, title & interest therein were assigned in favour of the Appellant under the provisions of the 'Securitization And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002' (SARFAESI Act, 2002) under an 'Assignment Agreement' dated 28.03.2016 by 'Karur Vysya Bank Limited' as 'Assignor' and thereby the Appellant has become the 'Secured Financial Creditor' to the 'Pacific Pipe Systems Pvt. Ltd' (CD). The CD availed financial assistance from 'Karur Vysya Bank Limited' etc. in terms of 'Sanction Letter' dated 11.06.2008 (*Annexure A-2 appearing at page 31 of the Appeal Paper Book*) and further enhanced the 'credit facilities' vide its letter dated 04.03.2014 (*Annexure A-3 appearing at page 38 of the Appeal paper Book*). The Appellant is aggrieved that it should have been paid at the interest of 19.40% in terms of 2015 circular issued by the Bank page 2 para 2.ii. wherein maximum lending rate were defined as 19.75% p.a whereas it has been paid at the 'Cash Credit' rate applicable to the utilization of the Cash Credit facilities and accordingly, seeking the relief of setting aside the impugned order dated 04.10.2021 passed by the 'Adjudicating Authority' in the IA and CP as stated above and is also asking the direction to 'admit' the entire claim at higher rate of interest, has filed by the Appellant in the 'Liquidation Process' of the CD etc.
3. The Ld. Counsel for the Appellant has submitted that the CD has availed the financial facilities from the said bank which has been assigned to the Appellant by an 'Assignment Agreement' dated 28.03.2016 and the same is at Annexure A-5 appearing at page 65 of the Appeal Paper Book. The 'Corporate Insolvency Resolution Process' (CIRP) was initiated on 18.12.2019 by the 'Adjudicating Authority' vide its order in CP(IB) No. 305 of 2018.

The IRP appointed by the Adjudicating Authority, was changed in the 1st meeting of the Committee of Creditors (COC) of the CD on 03rd February, 2020 and Mr. Pradeep Kumar Kabra was appointed as 'Resolution Professional' (RP) during CIRP, the Appellant filed its claim of Rs. 51,50,74,531/- and the RP admitted an amount of Rs. 31,56,84,503/-. The Appellant being aggrieved approached the 'Adjudicating Authority' for reduction in the claim. However, in the 6th meeting of the CoC of the CD held on 10th September, 2020, the CoC resolved by 100% vote to liquidate the CD as no resolution plan was received by the RP in the CIRP of CD. The liquidation process of the CD was allowed by the 'Adjudicating Authority' vide its order dated 04th November, 2020 and appointed the same RP – Mr. Pradeep Kumar Kabra as 'Liquidator' of the CD. The Appellant filed its further enhanced claim of Rs.58,39,13,336/- as on 04th November, 2020 to the 'Liquidator' and the 'Liquidator' of the CD informed the Appellant on 29th December, 2020 that the claim of the Appellant to the tune of Rs.48,36,69,967/- has been accepted out of the total claim so filed as stated above. The Appellant sought clarification for rejection of partial claim by the 'Liquidator' vide email dated 04th January, 2021 (appearing at page 136 Annexure A-11 of the Appeal Paper book). The 'Liquidator' submitted the details of reduction of claim, particularly, charging of interest rate of 20% plus penal interest (a very higher rate of interest) on over due for developed 'Letter of Credit' (LC). The 'Liquidator' has admitted the claim based on working capital loan plus penal interest (appearing at Annexure A-12 page 137 of the Appeal paper book). What the Appellant has stated that the rate of interest will be charged as per bank circular and sanction letter dated 11th June, 2008 which should be for a maximum lending rate of 20% p.a plus penal interest. The Appellant, thereafter, approached the Adjudicating Authority challenging partial reduction of its claim and its

claim has been rejected vide impugned order dated 04th October, 2021 of the Adjudicating Authority and, accordingly, the Appellant has preferred the instant appeal.

4. The Adjudicating Authority in its impugned order dated 04.10.2021 vide para 3, 4 & 9 as depicted below has substantiated its stands on rejections of their balance claim resulting from reasons including charging of such anormal high rate of interest:

“3. The reason for acceptance of partial claim is that the rate of interest charged by the Financial Creditor was much higher than agreed interest rate for Ld. Counsel between lender and the CD. Hence, the liquidator admitted the claim by accepting interest at the rate applicable to working capital loans/ term loan plus penal interest. In response, the Applicant provided the copy of the sanction letter, bank circular and statement of accounts for developed LC in respect of which interest rate was mentioned. However, the Liquidator did not accept this contention of the Appellant.

4. The Ld. Counsel for the Applicant appeared and drew our attention to page 18 of the paper book and contended that for ILC/FLC sub limit under the term loan the rate of interest was to be applied as per circulars. Thereafter, he drew our attention to page 156 of the paper book wherein the methodology for working

out the interest rate had been mentioned and it was claimed that the maximum lending rate would be 20% p.a. Our attention was also drawn to page 136 containing copy of the statement of accounts of the CD from 01.01.2014 to 03.12.2020 wherein interest was charged at the rate of 20%. The Learned counsel pleaded that such statement was available to the CD and no disagreement of whatsoever nature had been shown by the CD at any stage. Hence, now the Liquidator is bound to accept this rate of interest and workout the claim made by the Applicant. It was also claimed that Liquidator was only to verify claims and was not competent to substitute his own view/ calculation on the ground that the claim is too high despite the proof for the basis of charging interest on such rate given to the Liquidator.

9.The short dispute involved in this application is regarding rate of interest which is to be applied to compute the amount of claim. It is noted that the amount of loan given by the Original Financial Creditor has been assigned to one ARC. The Applicant has relied on the terms and conditions mentioned in sanction letter dated 11.06.2008 wherry various credit facilities have

been sanctioned in respect of the Cd. As per this letter, the rate of interest to be charged on developed LCs which is to be determined as per circular(s) which means that the rate of interest would be applicable as per circulars issued from time to time. It is to be noted that at the relevant point of time rate of interest was much higher and gradually the rate of interest has decreased. The use of worded "Circulars" itself indicates that rate may be revised from time to time both upward and downward. The circular dated 17.08.2013 is in relation to upward revision in base rate. The rate of interest payable in 2008 has not been brought on record. Further, no other circular has been brought on record to show that the circular dated 17.08.2013 is only binding and applicable to all times to come. Thus, reliance on one circular by the Appellant is not sufficient to justify its claim. Even on the bank Statement no counter signature or acceptance by CD exists. Financial statements of the CD have also not been brought on record. In these circumstances, we are of the view that the Applicant has failed to establish its claim for charging interest on such a high rate without bringing any corroborative material to substantiate the

same. As per Rule 8(2)(b)(i) of CIRP Regulations, 2016, apart from loan agreement, Financial Statements are required to establish the fact of debt which essentially would include accrued interest thereon. In absence of such agreement and denial of RP on behalf of CD, it is incumbent upon the Applicant to prove its claim by adducing necessary evidence.”

5. The Liquidator has submitted that it has complied with Regulation 16(2) of the IBBI (Liquidation Process) 2016 which deals submission of claim and also to prove its claim and has followed Regulation 18(2)(b) of the IBBI (Liquidation Process) 2016 which requires the manner in which existence of due to the Financial Creditor requires to be provided and has also complied with Regulation 23 of the IBBI (Liquidation Process) 2016 which requires the ‘Liquidator’ to call for clarification for substantiating the claim and also Regulation 30 of the IBBI (Liquidation Process) 2016 for verification of the claim. The ‘Liquidator’ based on above ‘Regulations’ have alleged that the Appellant failed to provide the reasons for charging high rate of interest as also the citations of the circulars to supplement their case. The ‘Liquidator’ has also submitted that the sanction letters are silent on the point of rate of interest/commission except that bank will keep cash margin of 10% and rate of interest/commission percentage will as per circulars etc. The circular cited by the Appellant dated 17th August, 2013, 21st January, 2015 & 03rd October, 2015 provide for a maximum lending rate and do not state that they are applicable to the LC facilities and the circulars also requires an acknowledgment of the borrower and there is no document or material to show that this requirement was complied with. The Appellant has

failed to produce any document which shows that the CD had agreed the rate of interest i.e. 20%. The Ld counsel for the Liquidator has orally submitted that it has considered around 13 % p.a interest rate while admitting claim when queried by the bench & if the Appellant is to be paid at that higher rate of interest as alleged by them in the form of entire claim amount which is in the range of 20% p.a. or so , the same is required to be disgorged from the payment already made to the other creditors and accordingly has submitted through its counsel to dismiss the present appeal with exemplary cost.

6. We have carefully gone through the submissions made by the Ld. Counsels for the parties /pleadings available on record and are having the following observations: -

- a. Letter of Credit is a non-fund based facilities which is not to carry any rate of interest but bank charges of Letter of Credit for issuance commission. When Letter of Credit is debited by the bank and if the fund is not available in the current account of the customer, then in that case, a forced debit is made in the cash credit account / overdraft in the current account of the customer/CD and naturally the rate of interest applicable to the cash credit facilities are made applicable to the Letter of Credit overdue amounts. Accordingly, the 'Liquidator' has allowed the rate of interest applicable to the Cash credit facilities to Letter of Credit facilities.
- b. It is not a case of providing term loan or other temporary non -fund based facilities to be guided by rates provided in the sanction letter and for Letter of Credit facilities no such rate of interest was provided specifically to be charged at a higher rate of interest of 20% p.a plus

penal interest or so. The Appellant being an ‘Assignor’ is only producing the ‘Ledger Account’ of the Karur Vysya Bank who is the ‘Assignor’ of the Agreement and the same is not supported by the requisite authority letters. It is reflected at page 230 of the appeal paper book that the Appellant is charging upto 23% p.a. which is irrational. Section 39 of the Code empowers the Liquidator to verify the claim and he has full authority to ask for production of any other documents or evidence which he feels necessary for the purpose of verification of the claim. In the corresponding period as per details provided at page 230 of the Appeal paper book the base rate was 9% p.a and that over base rate a spread of 4% p.a. was provided with maximum lending rate of 20% p.a.

- c. We also do not agree with the Appellant that Liquidator has no power to reduce the claim of the Appellant and his duty is only to verify the claim. It is made clear vide Section 39 of the Code that the Liquidator is suppose to verify the claim and Section 35 of the Code empowers it to verify the claims. For brevity and clarity Section 35 & 39 of the I&B Code, 2016 are reproduced below for ease of reference:

“Section 35: Powers and duties of liquidator:

(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:—

(a) to verify claims of all the creditors;

(b) to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;

(c) to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report;

(d) to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary;

(e) to carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary;

(f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified;

[Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.]

(g) to draw, accept, make and endorse any negotiable instruments including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with

the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business;

(h) to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself;

(i) to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities;

(j) to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;

(k) to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of or on behalf of the corporate debtor;

(l) to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions;

(m) to take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator;

(n) to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board; and

(o) to perform such other functions as may be specified by the Board.

(2) The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds under section 53:

Provided that any such consultation shall not be binding on the liquidator: Provided further that the records of any such consultation shall be made available to all other stakeholders not so consulted, in a manner specified by the Board.

Section 39: Verification of claims.

39. (1) The liquidator shall verify the claims submitted under section 38 within such time as specified by the Board. (2) The liquidator may require any creditor or the corporate debtor or any other person to produce any other document or evidence which he thinks necessary for the purpose of verifying the whole or any part of the claim.”

- d. For ease of convenience, Regulations 16, 18, 23 & 30 of the IBBI (Liquidation Process) 2016 are reproduced below:

Regulation 16 : Submission of claim.

(1) A person, who claims to be a stakeholder, shall submit its claim, or update its claim submitted during the corporate insolvency resolution process, including interest, if any, on or before the last date mentioned in the public announcement.

(2) A person shall prove its claim for debt or dues to him, including interest, if any, as on the liquidation commencement date.]

Regulation 18 : Claims by financial creditors.

(1) A person claiming to be a financial creditor of the corporate debtor shall submit proof of claim to the liquidator in electronic means in Form D of Schedule II.

(2) The existence of debt due to the financial creditor may be proved on the basis of-

- (a) the records available in an information utility, if any; or*
- (b) other relevant documents which adequately establish the debt, including any or all of the following-*
 - (i) a financial contract supported by financial statements as evidence of the debt;*
 - (ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;*
 - (iii) financial statements showing that the debt has not been repaid; and*
 - (iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.*

Regulation - 23. Substantiation of claims.

The liquidator may call for such other evidence or clarification as he deems fit from a claimant for substantiating the whole or part of its claim

Regulation 30. Verification of claims:

The liquidator shall verify the claims submitted within thirty days from the last date for receipt of claims and may either admit or reject the claim, in whole or in part, as the case may be.”

- e. In view of the above provisions of law, the available banking practices as also such exorbitant maximum high rate of interest alleged by the Appellant is not justifying the allowing of appeal. Hence, we uphold the order of the

Adjudicating Authority dated 04.10.2021 as it does not require any review.

We are thus dismissing the Appeal. However, no order as to costs.

Pending application, if any, stands disposed of.

Interim order, if any, passed by this Tribunal stands vacated.

(Justice Ashok Bhushan)
Chairperson

(Dr. Ashok Kumar Mishra)
Member (Technical)

28th February, 2022

New Delhi

Raushan.K