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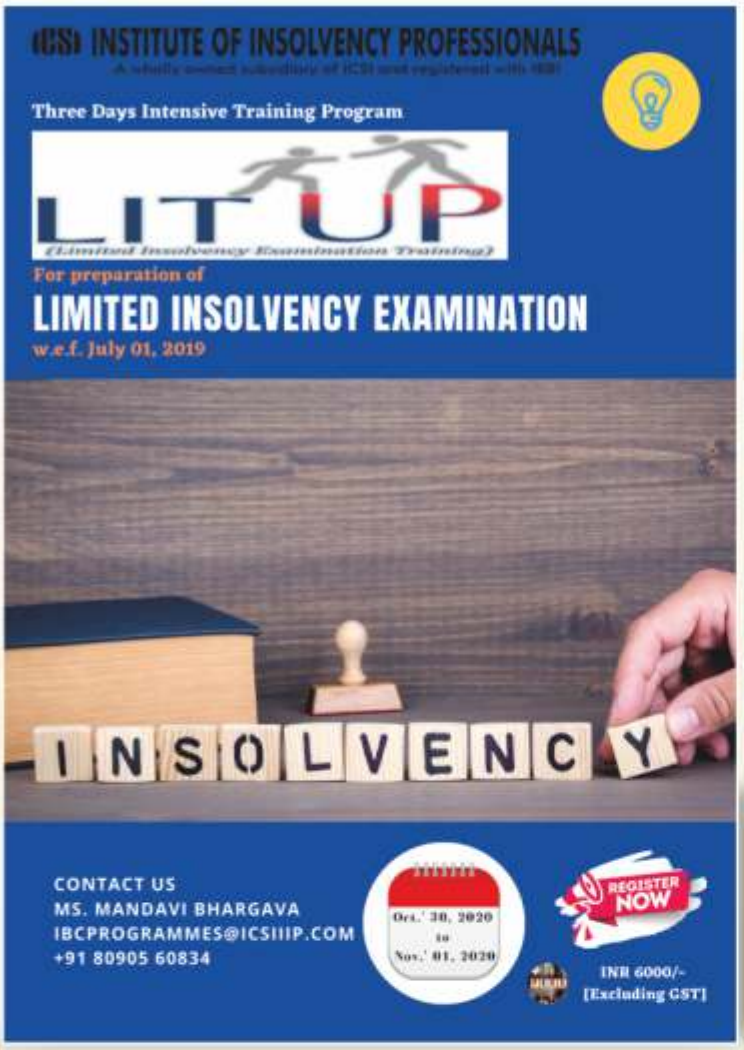
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At a Glance

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Section 14, read with sections 29A and 31, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - Whether as per provisions of section 14(3)(b), prohibition on institution or continuation of suits and other proceedings against corporate debtor do not extend to a surety, however, liability of surety is co-extensive with that of principal debtor unless it is otherwise provided by contract - Held, yes - Whether therefore, when a default is made in making repayment by principal debtor, banker will be able to proceed against guarantor/surety even without exhausting remedies against principal debtor - Held, yes - Whether further, argument that section 29A or 31 would provide a shield against operation of section 14(3)(b) and that petitioners would come under immunity-blanket of section

14 was contrary to law governing insolvency resolution process and RBI guidelines for dealing with wilful defaults of corporate entities - Held, yes (Paras 7 and 8)

- **B. Rajesh** *v.* **Union of India**
  (2020) 121 taxmann.com 17 (Madras) • P-334

Section 196 of the Insolvency and Bankruptcy Code, 2016 - Board - Powers and functions of - CIRP application under section 9 was admitted against corporate debtor declaring it as insolvent - Petitioner, who was managing director of corporate debtor, having found lacunae and inordinate delay in commencement and implementation of CIRP, approached NCLT by filing MA/498/2018 seeking relief to exclude period of alleged delay (120 days) on part of Interim Resolution Professional from 270 days period and direction to RP and CoC to consider resolution plan filed by applicants - Application was dismissed by NCLT - Simultaneously, MA/460/2018 was filed by the Resolution Professional (RP) and corporate debtor against operational creditor, which was disposed off with passing of liquidation order under section 33 - Petitioner filed complaint against order in MA/498/2018 with Insolvency Board - In meanwhile, appeals against order of NCLT in MA/460/2018 under section 33 for liquidation of corporate debtor and order in MA/498/2018, rejecting plea to exclude 120 days from CIRP period, and plea to reconsider two resolution plans by CoC were dismissed by NCLAT - Petitioner filed writ petition praying to issue a writ of Mandamus directing Board to dispose off his complaint - Whether writ petition was infructuous for reason that NCLAT on an appeal preferred by petitioner had disposed of both petitions filed by him against orders of NCLT with direction to liquidator to follow liquidation rules - Held, yes (Para 10)

- **Vachaspati** *v.* **Insolvency and Bankruptcy Board of India**
  (2020) 119 taxmann.com 304 (Delhi) • P-339

Section 208, read with section 22, of the Insolvency and Bankruptcy Code, 2016 and regulation 7 of the Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) Regulations, 2017 - Insolvency professionals - Functions and obligations of - Petitioner had filed a complaint before IBBI against Insolvency Professional under Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) Regulations, 2017 - Whether complainant has to be informed as to whether IBBI has formed a prima facie opinion in favour of complainant or against it - Held, yes - Whether since IBBI had already formed an opinion in favour of petitioner/complainant and further action thereon in terms of Regulation 7(7) was under its consideration, IBBI was directed to expedite decision under Regulation 7(7) and communicate such decision to petitioner as well - Held, yes (Para 1)

- **V. Selvaraj** ***v.*** **Reserve Bank of India**
  (2020) 120 taxmann.com 8 (Madras) • P-343

Section 149 of the Companies Act, 2013 - Directors - Company to have Board of - Petitioner was non-executive independent director on board of respondent-company - Reserve Bank of India during annual inspection conducted in year 2013 into books of account of respondent-company, found accounting malpractices in company and issued various directors in order to protect public interest - Petitioner had been classified as a wilful defaulter - Petitioner filed writ petition for direction to respondents to declassify petitioner from list of wilful defaulters - Petitioner stated that he had no role in either verifying accounts or in maintaining accounts of company - Whether no materials had been brought on record to show that petitioner actively participated in day-to-day affairs of company or in board meeting and commissions and omissions alleged against company had taken place with knowledge, consent or connivance of petitioner to satisfy ingredients of section 149(12) - Held, yes - Whether since there was absolutely no evidence available to declare petitioner as a wilful defaulter, petitioner was to be declassified from list of wilful defaulters - Held, yes (Paras 17, 19 and 20)

- **Ajay Kumar, *In re***
  (2021) 123 taxmann.com 78 (IBBI) • P-352

Section 208 of the Insolvency and Bankruptcy Code, 2016, read with regulations 7(2)(a), 7(2)(h) and 7A, of the IBBI (Insolvency Professionals) Regulations, 2016 - Insolvency professionals - Functions and obligations of - Whether regulation 7A of IP regulations requires every Insolvency Professional (IP) to have Authorisation For Assignment (AFA) before undertaking any assignment after 31-12-2019 - Held, yes - Whether without an AFA, an IP is not eligible to undertake assignments or conduct various processes thereof as it is an essential condition for undertaking any assignment by an IP - Held, yes - Whether further, section 208 also casts an obligation to abide by code of conduct and comply with all requirements and terms and conditions specified in byelaws of insolvency professional agency of which he is a member - Held, yes - Whether where IP had accepted assignment as Voluntary Liquidator without holding a valid AFA in matter of Sambodh Helathcare Private Limited and Modern Cold Storage Limited, it was in express contravention of regulation 7A of IP Regulations and in consequence also contravention of code of conduct under section 208(2)(a) and (e) of Code and regulations 7(2)(a) and (h) of IP Regulations - Held, yes - Whether however, since disciplinary action had already been taken against said IP for undertaking assignment as voluntary liquidation without holding a valid AFA in matter of Sambodh Healthcare Private Limited and Modern Cold Storage Limited after 31-12-2019 and penalty had also been imposed, show cause notice was to be disposed without any direction against him - Held, yes (Paras 4.2, 4.5, 4.7, 4.8 and 5)

- **Arun Rajabhau Joshi, *In re***
  (2021) 123 taxmann.com 60 (IBBI) • P-357

Section 208 of the Insolvency and Bankruptcy Code, 2016, read with regulations 7(2)(a), 7(2)(h) and 7A, of the IBBI (Insolvency Professionals) Regulations, 2016 - Insolvency professionals - Functions and obligations of - Whether regulation 7A of IP regulations requires for any Insolvency Professional (IP) to hold Authorisation for Assignment (AFA) before undertaking any assignment after 31-12-2019 - Held, yes - Whether having a valid AFA is an essential condition for undertaking any assignment by an IP and without AFA, an IP is not eligible to undertake assignments or conduct various processes thereof after 31-12-2019 - Held, yes - Whether further, section 208(2) casts an obligation to abide by code of conduct, take reasonable care and diligence while performing his duties and comply with all requirements and terms and conditions specified in byelaws of insolvency professional agency of which he is a member - Held, yes - Whether where show cause notice was issued by IBBI to IP alleging that it had accepted assignment of CIRPs in matter of Govindam Metals and Alloys Private Limited and Rajit Rolling Mills Private Limited without holding a valid AFA, however, since disciplinary action had already been taken against said IP for undertaking assignment by his IPA and fact that IP was more than 70 years of age and thus ineligible to apply for AFA, show cause notice was to be disposed of without any direction against him - Held, yes (Paras 4.1, 4.2, 4.4 and 5)

- **Kishan Gopal Somani, *In re***
  (2021) 123 taxmann.com 79 (IBBI) • P-361

Section 208 of the Insolvency and Bankruptcy Code, 2016, read with regulation 7A, of the IBBI (Insolvency Professionals) Regulations, 2016 and Clause 12A(*2*)(*e*) of Schedule to IBBI (Model Bye-laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 - Insolvency professionals - Functions and obligations of - Whether regulation 7A of IP regulations requires every Insolvency Professional (IP) to have Authorisation For Assignment (AFA) before undertaking any assignment after 31-12-2019 - Held, yes - Whether without AFA, an IP is not eligible to undertake any assignments or conduct various processes thereof - Held, yes - Whether an IP who is more than 70 years of age is ineligible to make an application for AFA under clause 12A (2)(e) of Model Bye-laws - Held, yes - Whether section 208 also casts an obligation to abide by code of conduct and

comply with all requirements and terms and conditions specified in byelaws of insolvency professional agency of which he is a member - Held, yes - Whether however, since disciplinary committee in context of age bar under clause 12A (2) (e) and also written consent being filed by IP with NCLT to act as Liquidator, prior to coming into effect of requirements of AFA, Disciplinary Committee did not find any lapse on part of IP, and show cause notice was to be disposed without any direction against him - Held, yes (Paras 4.1, 4.5, 5.2 and 6)

- **Pranav Kumar, *In re***
  (2021) 123 taxmann.com 57 (IBBI) • P-367

Section 208 of the Insolvency and Bankruptcy Code, 2016, read with regulations 7(2)(a), 7(2)(h) and 7A, of the IBBI (Insolvency Professionals) Regulations, 2016 - Insolvency professionals - Functions and obligations of - Whether regulation 7A of IP regulations requires for any Insolvency Professional (IP) to hold Authorisation for Assignment (AFA) before undertaking any assignment atfter 31-12-2019 - Held, yes - Whether having a valid AFA is an essential condition for undertaking any assignment by an IP and without AFA, an IP is not eligible to undertake assignments or conduct various processes thereof after 31-12-2019 - Held, yes - Whether further, section 208(2) casts an obligation to abide by code of conduct, take reasonable care and diligence while performing his duties and comply with all requirements and terms and conditions specified in bye-laws of Insolvency Professional Agency (IPA) of which he is a member - Held, yes - Whether where show cause notice was issued to IP alleging that it had accepted assignment of Corporate Insolvency Resolution Process (CIRP) of Crayons Advertising Private Limited (CD) after 31-12-2019 without holding a valid AFA by his IPA, however, ICSI Institute of Insolvency Professionals had already taken disciplinary action against IP for accepting said assignment, show cause notice against IP was to be dismissed without any direction against him - Held, yes (Paras 4.1, 4.2, 4.4 and 5)

P.K. Malhotra
ILS (Retd.) and Former
Law Secretary
(Ministry of Law & Justice,
Govt. of India)

From Chairman's Desk

Push yourself, because no one else is going to do it for you.

There are many phases in the life of a legislation. Generally, a landmark legislation, like the IBC, which symbolises and is a reflection of nation's resolve to implement a long awaited reform and make a departure from the unyielding erstwhile legal regime, is always met with initial challenges of finding acceptability with those who have vested interest in continuation of the previous legal rules (and the arrangements thereof). In the face of such challenges, it is the determination of the Government, the Regulator and other stakeholders which finally helps the legislation to sail smoothly. As with all good steps, in case of IBC, the Government's resolve to stay determined onto the path finally payed, and merits of this new legal regime started getting recognition from all stakeholders (including those who were earlier opposed to it).

With a firm establishment and support from all stakeholders, the Code started yielding results even in the early days of its implementation. The results, perhaps, exceeded the expectations of even the Government and the Regulator. However, as the proverb goes, *the Road to Success is always under construction,* the challenges did not end. With further

progress made, challenges kept emerging. The biggest challenge currently being faced is in the form of spread of COVID-19 pandemic which has impacted not just the Indian Economy, but economies across the Globe. While immediate measures were adopted to minimise the impact of the pandemic on our health, the inevitable consequence thereof was substantial reduction in the economic activity. The Government of India, realising the need to introduce immediate measures to revive the economy, came up with a huge financial package which is intended to play the role of a market mover. It was realised that credit has to be provided to the companies in order to add liquidity to the Economy. Steps were further taken to minimise cases of job loss by people (especially in the rural sector). For this, a huge additional sum was allocated under the MGNREGA scheme intending to provide a boost to employment. To minimise the impact of the pandemic on the industry, the minimum threshold limit (for invocation of IBC provisions) was enhanced from 1 lakh INR to 1 Crore INR which did prevent some of the unintended consequences of the Code i.e. pushing companies to CIRP process when the default by them is attributable to the disruptions caused by the pandemic. Further, a provision was introduced into the Code (s. 10A) whereby the right to file application for initiation of CIRP for defaults (of payment) taking place from 25th March 2020 was taken away for an initial period of 6 months (i.e., till 24th September 2020), which was further extended for another 3 months (i.e., till 24th December 2020). This essentially means that insolvency proceedings could not be initiated against a CD for defaults committed on or after March 25, 2020, and while the suspension has been extended by further three months (until the last week of December), the Government has the option to further extend IBC suspension period by another three months, if it considers it fit and proper to do so.

While an overwhelming majority of stakeholders have understood and appreciated the rationale for the decision (IBC suspension), there are some (especially from the Banking industry) who have expressed concerns suspecting invitation of some unwanted consequences following the decision which is likely to lead to a rise in stress. Some Experts have also claimed that *"if we don't have any debt restructuring possibilities, there is no possibility to resolve debt in bankruptcy and debt burdens keep rising…"* The

Regulator (IBBI) has clarified on the concerns raised informing that the decision to suspend "*reinforces the prime objective of the Code, that is, to rescue the lives of companies from market pressure, but also endeavours to rescue companies having stress from force majeure circumstances.*" It is thus clear, that, under the Ordinance CD is not absolved of its COVID-19 defaults, rather such defaults have been merely excluded from the purview of CIRP, to provide an assurance of protection to CDs from legal troubles flowing from default of payment under IBC. However, such defaults can be used as a trigger to initiate proceedings against Personal Guarantors to CDs (PG to CD). Therefore, there are clear checks and balances in place to discourage cases of wilful defaults (though possibility of some cases taking place cannot be completely ruled out).

Policy decisions are taken for the larger public good and necessarily involves a balancing exercise. Some remote possibility of misuse of a protection granted under a law cannot be the reason to not legislate it. Criticism has also come questioning the decision on the issue of differential treatment being given to COVID-19 defaults (from the normal ones). The clear answer thereof is that there is an intelligible differentia between the two cases. Law allows differential treatment to be given to different cases provided there is a clear and rationale nexus between the basis of classification and the object intended to be achieved through it. The requirements of Article 14 of the Constitution of India are thus clearly satisfied in the present case.

There are also some comments made perceiving the move to suspend IBC as some kind of a setback to the insolvency reforms in India, and the IBBI has been very forthright in denouncing such a perception and clearing the air with its remarks: *"COVID-19 crisis is not the first crisis that has hit the world. The world has fought and overcome many battles in the past. This too shall pass!"*

On 1st October, 2020, as IBBI completed 4 glorious years of its existence, the Annual Day was celebrated in the gracious presence of Hon'ble Minister of State for Finance and Corporate Affairs, Shri Anurag Singh Thakur. In his speech, Hon'ble Minister sounded very optimist on revival of Indian Economy emphasising the rising demand of goods and services, and increased domestic and foreign investment.

Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

Managing Director's Message

"If something is important enough, even if the odds are stacked against you, you should still do it." – Elon Musk

For the Insolvency and Bankruptcy law space in India, the month of October carries its own importance. The Chief Regulator under the Code, the IBBI, which has the mandate to not spearhead different stakeholders and pave their way, is also vested with the responsibility to ensure that the spirit of the Code is maintained and does not get either lost or sidelined, was founded on 1st October 2016. This year, the IBBI celebrated its 4th Annual Day in the august presence of Hon'ble Minister of State for Finance and Corporate Affairs, **Shri Anurag Singh Thakur.** In his address, the Minister, while appreciating the role played by the IBBI, also highlighting the challenges posed by the pandemic, and the key measures adopted by the Government to deal with them. Elaborating on these measures, the Minister outlined the need and objective behind recent amendment made to the Insolvency and Bankruptcy Code, 2016 which concerns suspension of certain provisions of

the Code in respect of COVID-19 defaults. While the Economy gets *back on rails* on the back of increasing domestic demand in the country, the need for bringing in amendment is clearly to avoid any premature closure of businesses. In his lecture, **Mr. Girish Chandra Murmu, the Comptroller and Auditor General of India** (**CAG**), emphasised *inter alia* on the behavioural shift that has taken place in the debtor-creditor relationship resulting in some substantial recoveries for creditors under (and even outside) the IBC framework. Elaborating on the way forward, the CAG spoke about the need to bring in legal framework *vis-à-vis* Group Insolvency and Cross-border Insolvency, and implementing various provisions related to Individual Insolvency.

The challenges in the path of IBC are far from over, but what reassures and strengthens our belief in the success of this new legal regime is the fact that despite all the road-blocks that are thrown in its way, the legislation always emerges triumph, and the reason thereof certainly includes the solemn objective that is being sought to be achieved. For an economic legislation, like the IBC, which has introduced some path-breaking reforms and also succeeded in substantially altering the *status quo,* some initial resistance coming from those who had a vested interest in the erstwhile legal regime is quite understandable. With the coming into force of provisions concerning the subject of "*personal guarantors to corporate debtors*" *vide* MCA notification dt. 15th November 2019 (enforced from 1st December, 2019), filing of writ petitions in different High Courts challenging the constitutional validity of the provisions was only to be expected. Though a dictum coming from the Constitutional Courts is always conducive to the progression of a legislation, especially when it concerns issues like constitutional validity, it does not add to the clarity of law, if the same question is posed before different High Courts to be decided by each of them independently. The chances of different interpretations coming from different High Courts cannot be ruled out in such a scenario, and therefore, Hon'ble Supreme Court's jurisdiction (Article 139A, Constitution of India) was invoked by the IBBI seeking orders for transfer of all such writ petitions (involving a common question of law) to itself for a final decision on the common question(s) of law which shall not only add to the clarity of law, but also avoid chances of any confusion, thus settling the law authoritatively. The petition was allowed by Hon'ble Supreme Court vide its order dt. 29th Oct 2020, and thus the Apex Court is now *in seisin* of the matter.

A further judicial development in the IBC space that surfaced this month pertains to a landmark decision delivered by Hon'ble Securities Appellate Tribunal (SAT) while disposing-off an appeal challenging legality of a SEBI order imposing penalty of 20 lakhs INR (for some non-compliance under SEBI (ILDS) Regulations and SEBI (LODR) Regulations) on a Housing Finance Company (HFC) which is undergoing CIRP. The question posed before Hon'ble SAT was *if the order imposing penalty falls foul of the moratorium provision u/s. 14, IBC*. While it was argued by SEBI that the moratorium would not prevent it from determining company's liability arising from the alleged non-compliance, and that the moratorium applies to enforcement or recovery only, and that SEBI's officer would only determine the liability, and not seek recovery thereof during the period, the Appellate Authority made it clear that any action or proceeding under the SEBI Act will not be sustainable in law.

The IBBI, *vide* its circular dt. 29th October 2020, has notified the IPs/IPEs and IPAs on availability of facility on its website (@ https://www.ibbi.gov.in/intimation-applications/iaaa) regarding the requirement of serving of a copy of the application online to the Board (as required under Rules 4, 6 and 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016). A detailed guide thereof (*i.e.* a step-by-step procedure) has also been provided with the circular for the convenience of all professional members.

Your Institute (ICSI IIP) has continued with its tradition of taking different initiatives for professional development of its members, and though, presently, physical sessions/meetings have been replaced with virtual (online) sessions, the success thereof is clearly visible in the increasing participation and interest displayed by the members. We are grateful for all your appreciations thereof!

I wish you all the very best for all your endeavours, and looking forward to meet you all when the situation gets better.

Please take a good care of your health!

Meetings of the Committee of Creditors – Effective participation - Minutes - Voting and E-Voting – under Insolvency & Bankruptcy Code, 2016 - FAQs

S. Rajendran
Director, CGRF

M.S. Elamathi
Research Bureau, CGRF

1. Preamble:

During the corporate insolvency resolution process (CIRP) of a corporate entity under the provisions of **Insolvency & Bankruptcy Code, 2016** (**IBC**), the Interim Resolution Professional constitutes a Committee of Creditors (CoC). Normally, the CoC comes into picture in the first 30 days of the CIRP. The CoC is a body consisting of independent financial creditors (mostly banks and financial institutions) who will be generally represented by the officials of the bank who work in stressed assets recovery branches, in the cadre of Chief Manager, AGM or DGM. Occasionally, the GM of a bank also participates in a CoC. In rare cases a CoC may even have only operational creditors where there is no financial creditor(s).

The matters placed before a CoC meeting varies according to the stages of CIRP. In the first meeting, the common items of agenda are like:

(*a*) Taking note of the List of Creditors

(*b*) Taking note of the constitution of the CoC

(*c*) Appointment of Resolution Professional (RP)

(*d*) Operations of the corporate debtor, etc.

In the subsequent CoC meetings, the agenda items may be like:

(*a*) Criteria for expression of interest

(*b*) Availing interim finance

(*c*) Approval for CIRP costs

(*d*) One time extension of CIRP period

(*e*) Approval of resolution plan

(*f*) Decision on liquidation of the corporate debtor

When a matter is listed for approval of the CoC, the IRP / RP is required to place the item in the agenda notes for discussion, facilitate the exchange of points of view and thereafter take a vote of the members. It is also required of the IRP / RP to announce the decision of the CoC, at the conclusion of the vote at the meeting. He is also required to announce the names of the members of the Committee who voted for or against the decision or abstained from voting.

In practice, most of the subjects requiring voting are discussed at length in the CoC meeting but when it comes to decision and voting, the members come up with a request to the IRP / RP to go for e-voting stating that they need to take approval from their higher-ups and therefore the resolutions may be placed for e-voting process. This happens invariably in the case of resolution plans coming up for consideration and approval by the CoC members.

2. Decisions by CoC and e-voting:

Reg.25(5) of IBBI (IRPCP) Regulations state that the RP shall circulate the minutes of the meeting by electronic means to all the members within forty-eight hours of the conclusion of the meeting and seek a vote of the members who **did not vote at the meeting** on the matters listed for voting, by electronic voting system, where the voting shall be kept open for at least twenty-four hours from the circulation of the minutes. The resolution professional shall announce and make a written record of the summary of the decision taken on a relevant agenda item along with the names of the members of the CoC who voted for or against the decision or abstained from voting. The intent of the IBBI Regulation may be construed like the members who did not attend the meeting alone should be given an opportunity to vote by way of e-voting.

3. E-voting under Insolvency and Bankruptcy Code, 2016:

The provisions in relation to e-voting are governed by Regulation 25 and Regulation 26 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

It may be noteworthy that the provisions relating to e-voting have undergone several changes.

After the amendment on 4th July 2018 in Reg.25(5)(b), the provision states that the RP shall seek a vote, of the members who **"did not vote"** at the meeting on the matters listed for voting, by electronic voting system in accordance with Reg.26.

Prior to this amendment, the Reg.25(5) provided that , "if all the members are not present at a meeting, a vote shall not be taken at such meeting and the RP shall circulate the minutes of the meeting within 48 hours and seek a vote on the matters listed for voting in the meeting, by electronic voting system."

From the reading of the above provisions, it appears that the IBBI has applied its

mind to a situation where for instance only one or two members of the CoC were not present at the meeting but the remaining members present constituted more than the requisite majority for approving a resolution. In such a case, going for e-voting did not make any sense. The author himself has faced similar situations in many CoC meetings when a prudent decision was recorded in the Minutes that the CoC members present constituted so much per centage and therefore, there is no requirement to go for e-voting as going for such e-voting entailed only additional cost and did not make any effect on the decision already taken at the CoC meeting by the members present.

However, even after the said amendment in Reg.25(5), there is still a situation happening wherein the members are present in the CoC meeting but not taking part in the voting process will still have an opportunity to vote by e-voting process thanks to the words "**who did not vote at the meeting"** in the amended Reg.25(5).

This goes against the provision of Reg. 25(3) and (4) whereby the RP is required to take a note of the members on any item for voting and announce at the conclusion of the voting, the names of members of CoC who voted for or against or abstained from voting.

Financial creditors, particularly banks and financial institutions, have a hierarchy in their management and therefore they seek their higher authority's approval before taking a decision by themselves. They now have a handy tool to say that we did not vote in the CoC meeting and therefore we have the right to vote in the e-voting process.

Well, having seen the provisions relating to CoC meetings, circulation of minutes and e-voting, the CoC members encounter several practical questions. The author has tried to list them down here and also offer, based on his experience, some independent views as to how those situations can be handled.

Q1: Should the representatives of CoC attending meetings be authorized or empowered to take a decision in the meeting itself on all the matters listed for voting?

A1: In this context, it would be pertinent to refer to the Circular No.IBBI/CIRP/016/2018 dated 10th August 2018 issued by IBBI. The Circular refers to matter of *Jindal Saxena Financial Services (P.) Ltd. V. Mayfair Capital (P.) Ltd.* (2018) 96 taxmann.com 633 (NCLT-New Delhi) in which the Hon'ble Adjudicating Authority noted that there were four financial creditors who attended the first meeting of the CoC. In the said meeting, the CoC did not approve appointment of IRP as RP since two of the four Financial creditors, having aggregate voting rights of 77.97% required internal approvals from that competent authorities. It observed: "*We deprecate this practice. The Financial Creditors/Banks must send only those representatives who are competent to take decisions on the spot. The wastage of time causes delay and allows depletion of value which is sought to be contained. The IRP/RP must in the communication addressed to the Banks/Financial Creditors require that only competent members are authorized to take decisions should be nominated on the CoC. Likewise, Insolvency and Bankruptcy Board of India shall take a call on this issue and frame appropriate Regulations.*"

IBBI went on to the extent of directing the IRP/RPs that they shall in every notice of the meeting of the CoC and any other communication addressed to the financial creditors other than creditors under Sec.21(6A)(b) require that they must be represented in the CoC or in any meeting of the CoC by such persons who are competent and are authorized to take decisions on the spot and without deferring decisions for want of any internal approval from the financial creditor.

The role of Committee of Creditors in a corporate insolvency resolution process is very crucial. In fact, they decide the very fate of the corporate debtor, be it a decision to revive or liquidate the corporate debtor. As financial creditors' journey with the corporate debtor, in most of the cases, dates back to the initial stages of setting up the project, they possess an "intelligible differentia" over operational creditors. IBC has bestowed upon their shoulders a very significant responsibility to weigh various things in right perspective and take appropriate decisions.

A decision on a voting item should be taken after reasonable discussion on the matter by the members. RP should facilitate to moderate the views of the CoC members and other participants like the directors of the corporate debtor or any other invitee. This would help the CoC to take a proper and timely decision. This is the hall-mark of IBC as the resolution process has to be completed within a definite time-frame.

The e-voting should be resorted to only when the required percentage of voting threshold could not be achieved with the voting of the members present in the meeting and the voting share of persons who were not present in the meeting would be critical to reach the threshold and pass the resolution. Further e-voting option should be given only to those members who did not attend the meeting and hence could not vote.

Q2: Even if all the CoC members are present in a CoC meeting, can any member or all members seek e-voting option from the RP?

A2: This practice should be strongly discouraged. This gives an impression that the agenda notes have not been properly circulated or the CoC members are unprepared for a decision in the CoC meeting. In several cases, the CoC members resort to this option and request the RP to put up the matter for e-voting as they would not have got the clearance from their competent authority to say Yes or No for a resolution. However, in matters like approval of a resolution plan

or decision for liquidation, it would be advisable to go for e-voting if there were new inputs in the CoC meeting in respect of a resolution plan.

Q3: Can RP insist on the CoC members that as all of them are present, there is no need to go for e-voting?

A3: The provisions of Reg.25(5)(b) state that the RP shall seek a vote, of the members who **"did not vote"** at the meeting on the matters listed for voting, by electronic voting system in accordance with Reg.26.

Prior to this amendment, the Reg.25(5) provided that , if all the members are not present at a meeting, a vote shall not be taken at such meeting and the RP shall circulate the minutes of the meeting within 48 hours and seek a vote on the matters listed for voting in the meeting, by electronic voting system. Therefore, presently it is mandatory on the part of the RP to seek a vote of the CoC members who did not vote at the meeting, irrespective of the fact whether they were present in the meeting or not.

The author suggests that excepting for a decision on resolution plan, all other matters should be decided in the meeting itself when all the members whose voting share is mandatory for approval are present.

Q4: A few of the CoC members are not present in the CoC meeting; but their aggregate voting share is say less than 30%; whereas a resolution requires 66% voting share of the CoC members. The members present in the CoC meeting, having 70% voting share, decide unanimously on the resolution to approve the action. Is there any anomaly in the resolution passed? Does it violate the provisions of the IBC and Regulations? Would such a decision taken by the CoC be invalid?

A4: In the author's view, this is a clear case of the requisite majority of the members being present and taking a decision in the meeting itself and hence there should not be any anomaly. However, considering the extant provisions of Reg.25, not going for e-voting for the members who did not vote at the meeting would be viewed as a non-compliance. There should be a suitable amendment to build a provision that the members having adequate voting share taking a decision in a CoC meeting, there should be no further need to go for e-voting.

Q5: E-voting window is required to be kept open at least for 24 hours after circulation of the minutes. Is there any upper limit for the time-frame to vote in the e-voting process? In other words, can e-voting process be kept open for more than 24 hours?

A5: In exceptional cases, the e-voting window may be kept open for more than 24 hours, say for 2-3 days but not more than this period. However, it is noticed that in several cases, the CoC members want to buy more time for getting their competent authority approval. This practice should be discouraged keeping in view the need to speed up the resolution process.

Q6: The circulation of the CoC meeting minutes is to be done within 48 hours of the conclusion of the meeting. In practice, the minutes is being shared before the end of two days after the date of the meeting. Is this a desirable practice?

A6: Generally, the minutes should be circulated within 48 hours of the conclusion of the CoC meeting. There is another view that "a draft minutes" should be circulated within 48 hours seeking the comments of the participants. The author strongly feels that there is no requirement to share a draft minutes as this would open up a long process of seeking comments from all the participants. Instead, the RP should take adequate care and caution to record the factual summary of the meeting proceedings and send the minutes to all the participants within 48 hours. Thereafter any member having comment or correction shall send his comments, which can be discussed in the next CoC meeting for suitable modification or correction of the minutes. It is broadly accepted practice that the minutes should be shared within the next two days of the CoC meeting rather than the strict interpretation of 48 hours from the conclusion of the CoC meeting.

Q7: If there is a public holiday or a Sunday following immediately after the CoC meeting, the time limit of 48 hours should be considered excluding the holidays? Or irrespective of any holiday or Sunday, the minutes should be sent to the participants within 48 hours?

A7: Regarding the question of intervening holidays after the CoC meeting is held and whether minutes can be sent within 48 hours after the conclusion of the meeting after excluding intervening holidays, the author is of the view that it is only reasonable and should be permissible to circulate the minutes after the intervening holidays and for the purpose of the deadline, the intervening holidays should be excluded. This is the practical view because nothing would move during the holidays and there is no point in circulating the minutes on a Sunday for the CoC meeting held on Friday. However, from the standpoint of the RP, it would be prudent for him not to schedule a meeting on Thursdays/Fridays, depending upon the organisation.

Q8: The CoC members usually insist on a longer window – not just 24 hours – for e-voting. Sometimes, it may even be a week. Is there any upper limit on the number of days the e-voting window to be kept open?

A8: There is no upper limit. Please refer to A5.

Q9: In the event of some of the CoC members abstaining from e-voting, whether the voting share of remaining members participating in e-voting could be taken as 100% for the purpose of ascertaining if a resolution has been passed with say 51% or 66% or 90% voting share?

A9: This view has been taken by some of the Adjudicating Authorities in order to objectively see if the requisite majority of CoC members (other than those abstaining from voting or who did not attend the CoC meeting) either approve or reject a resolution. In this context, it may be pertinent to refer to the provisions of Companies Act, 2013 where in an annual general meeting, the members present and voting will be taken as the basis to decide on voting a resolution.

In the above context, it is very important as to how the CoC members take their decisions in the CoC meetings. Whether the CoC members present should take

decisions in the meeting itself or they can go back, mull over the item, consult his bosses and then register their decision by means of e-voting is a question debated in many forums. The directions given by Tribunals / Courts in this regard also merit our attention inasmuch as the IBC itself is a time-bound legalised process of resolution and the CoC members cannot take their own sweet time by sending officers just to attend the meeting and take decisions later on by higher officials.

In the matter of *IDBI Bank Ltd. V. Jaypee Infratech Ltd.* (2018) 93 taxmann.com 308 (NCLT-All.) before the Hon'ble NCLT, New Delhi (in reference), IBBI submitted that according to the amended sub-regulation 25(3) of the CIRP Regulations, the RP shall take a vote of the members of the committee present and voting. The Board stated that the stakeholder who with adequate notice and opportunity to participate, does not do so, should be deemed to have given his or her assent to the other stakeholder to decide on the matter at hand. This presumption is necessary to prevent decisions being stalled as a result of non-participation.

In the above matter, the adjudicating authority referred to the matter of *Shailesh Manubhai Parmar V. Election Commission of India (Writ Petition No. 631 of 2017, dated 21-8-2018)* in relation to voting, albeit by elected representative for candidates to the Upper House of the Parliament, wherein referring to the decision in *Lily Thomas V. Speaker, Lok Sabha* (1993) 4 SCC 234 has stated that "*voting is a formal expression of will or opinion by the person entitled to exercise the right on the subject or issue in question and that right to vote means the right to exercise the right in favour of or against the motion or resolution and such a right implies right to remain neutral as well. This principle equally applies herein as well, as a financial creditor has been given a choice to remain neutral for whatever reasons best known to him and that his neutral vote or abstaining voting share cannot be taken as a choice of affirming, as now touted by IBBI, or as a voting share in rejecting a particular resolution as was sought to be previously done by inclusion of the definition of 'dissenting financial creditor' contained in Section 2(f) in the CIRP Regulations, which definition stood subsequently omitted on and from 31.12.2017.*"

4. Conclusion

CoC has several responsibilities on its shoulders. Therefore, it goes without saying that the persons who sit in the CoC should be empowered to take decisions or adequate authority should have been delegated to the persons who represent the financial creditors in the CoC meeting. It is a practical issue in banks where delegation of certain powers are given to various levels of officers. In some cases like approval of a resolution plan involving substantial hair-cut, the decision may have to be taken by a committee or the board of directors. In such cases, how the representatives attending the CoC meeting could take such decisions is a question. In the author's view, there has to be certain delegation and authorization in keeping with the urgency of the matter and the CIRP of the company in question particularly as the agenda notes for the CoC meetings would have been circulated in advance.

In foreseeable issues, conveying a decision in the meeting itself would not be an issue. Where critical decisions are required after a discussion in the CoC meeting, then in such cases, e-voting would be the last option.

Further, it is strongly suggested that IBBI Regulations should be amended to ensure that where all the members are present in a CoC meeting, all decisions on voting items should be taken in the meeting itself and there should be no need to go for e-voting. Further, where the requisite majority of CoC members have already voted for or against a resolution, there should be no further need to go for e-voting by members who did not attend the CoC meeting. In fact, the absence of such CoC members who either abstain themselves from voting or who do not even attend the meeting should be a good reason to exclude their voting share from the total voting share and the remaining creditors' voting share should be reckoned as 100% for the purpose of deciding whether requisite majority has voted for or against a resolution.

Pre-Packs: A New Regime of Insolvency In India

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1. Introduction

A huge backlog of cases at National Company Law Tribunal (NCLT) benches have stretched resources and led to delays in resolution of cases. The current Covid-19 crisis has only added to the delays. A pre-pack resolution will help shorten the long-winded court process.

2. What is Pre-Pack?

In a pre-pack, "a troubled company and its creditors conclude an agreement in advance of statutory administration procedures" which "allows statutory procedures to be implemented at maximum speed".

3. Initiation of Pre-Pack

The essence of the pre-pack is that the terms of restructuring/ resolution plans are formulated before the insolvency commencement. Pre-pack can be initiated in two ways:

(i) A pre-pack is undertaken by a corporate debtor before the occurrence of an event of default of a creditor then it would be the corporate debtor who would be in a position to purpose the commencement of the pre-pack.

(ii) A pre-pack is undertaken when the corporate debtor had defaulted or triggered the potential event of default or even when the creditor is aware of the distress of the corporate debtor then the creditor may seek its debt restructured as pre-pack.

Whether the process is creditor driven or debtor driven is an important factor for determining the pre-pack. In an event the corporate debtor seeks to initiate the pre-pack, it would have to ensure that the necessary shareholders' resolutions and board resolutions have been passed. For a creditor to initiate a pre-pack, the crucial factor is the *inter se* understanding of all the creditors of the debtor company.

4. Why pre-pack is needed in India?

The Code has a positive impact on the promoters of the corporate debtors in terms of repayment, liquidation is a grave threat to Corporate Insolvency Resolution Process (CIRP). If the CIRP fails that would lead to liquidation which is not good for our economy's health and it might be seen as the best option in the short-run but will have a deep devastating effect for the corporates in the long-run. This problem will further escalate when it is a Micro, Small, and Medium Enterprise (MSME) at the receiving end due to lack of resolution applicants' interest in the assets of MSMEs and viable resolution plans most of these MSMEs which is the backbone of Indian economy are forced to such corporate deaths. Time and costs, even after big companies and ongoing concerns undergoing CIRP, a huge factor creates an aversion towards CIRP.

The necessity of the pre-pack is that, there is a possibility that before the pre-pack stage the corporate debtor may enter into management buyout for the transferring of the assets to another entity. However, such buyout would not have the approval of Court or Adjudicating Authority and it would be open to challenge by the creditors if it subjects itself to such transactions that are prohibited under the Code to safeguard the interests of the creditors.

The risk of the aforementioned situation would not arise if the pre-pack is approved by the Adjudicating Authority. By proposing mandatory approval of Adjudicating Authority for the execution of the pre-pack, another advantage which fears the creditors, investors, and other stakeholders would be about the safeguarding the rights against the corporate debtor in the recovery process in other forums as the pre-pack transaction would be final and binding on all the creditors of the corporate debtor.

5. Framework of Pre-Packs in India

The working of pre-packs in India would be different from the rest of jurisdictions (UK & US) as it would need to be broader in its usage to utilize the various tools to revive corporate debtor and to rectify the ongoing financial stress. In the Indian context, change in management, sale of assets of the corporate debtor to another company, interim financing and refinancing, assignment of debt of the corporate debtor to asset reconstruction companies and turnaround funds are a few tools that a corporate debtor and creditors possess while undertaking the corporate rescue of such corporate debtor. These tools are also available to a bidder (resolution applicant) once a debtor company is subject to CIRP. It would be interesting to blend the aspects of the IBC with such corporate rescue tools, prior to the corporate debtor undergoing CIRP itself.

The three effective frameworks of pre-packs are:

- Pre-packaged Insolvency Resolution Process (PPIRP)
- Pre-arranged Insolvency Resolution Process (PAIRP)
- Pre-arranged Sale (PAS)

The procedure of the abovementioned frameworks of pre-packs are explained below:

(*a*) **Pre-packaged Insolvency Resolution Process (PPIRP)**

(1) Appointment of Insolvency Professional by:

(*a*) Existing management if no default has occurred or

(*b*) By Financial Creditors post occurrence of default.

(2) Constitution of Committee of Creditors (COC).

(3) Assessment of the financial position of the corporate debtor and preparation of information memorandum.

(4) Independent Valuation of the Corporate Debtor.

(5) Invitation of resolution plan.

(6) Plan consideration should exceed the enterprise value of corporate debtor.

(7) Approval by COC.

(8) Application to Adjudicating Authority.

(9) Public Announcement.

(10) Submission and Verification of claims.

(11) Approval of resolution plan by Adjudicating Authority.

(12) Distribution of plan proceeds as per liquidation waterfall mechanism.

(*b*) **Pre-arranged Insolvency Resolution Process (PAIRP)**

(1) Appointment of Insolvency Professional by:

(a) Existing management if no default has occurred or

(b) By Financial Creditors post occurrence of default.

(2) Assessment of the financial position of the corporate debtor and preparation of information memorandum.

(3) Invitation of resolution plan.

(4) Selection of most value maximising resolution plan by the insolvency professional.

(5) Application to Adjudicating Authority along with selected resolution plan.

(6) Public Announcement.

(7) Collection and verification of claims.

(8) Approval of COC.

(9) Approval by the Adjudicating Authority.

(c) **Pre-arranged Sale (PAS)**

(1) Determination regarding the necessity for conducting a PAS

(2) Appointment of Insolvency Professional by:

(a) Existing management if no default has occurred or

(b) By Financial Creditors post occurrence of default.

(3) Replacement of the existing management with IP

(4) Preparation of Information Memorandum

(5) Invitation of resolution plan

(6) Determination of the highest bidder

(7) References to independent body of experts

(8) Conclusion of sale

(9) Public disclosure of the sale

(10) Collection and verification of claims

(11) Distribution of plan proceeds as per liquidation waterfall mechanism.

(12) Amounts due to IP to be withheld till objectives (if any) are disposed by the Adjudicating Authority.

6. Advantages of Pre-packs

Speed: A pre-pack process is typically less time-consuming and cheaper than formal proceedings, as the resolution is negotiated and agreed before initiating the statutory resolution framework. The speedy disposal of a pre-packaged case decreases the total cost involved in the process, which is often key to saving small businesses that cannot withstand the costs of prolonged insolvency and helps in maximizing the value of the corporate debtor.

Confidentiality: This element of confidentiality prevents destruction of value that takes place on the proclamation of insolvency and is arguably one of the key advantages of pre-packs over formal proceedings, as it can contribute to preserving the going-concern value of the company.

Sanction of appropriate authority under the statute: The other forms of restructuring do not possess sanctions from appropriate authority but pre-packs work within the fold of statutory schemes, which makes the outcome binding on all the

stakeholders. This certainly increases the investor's confidence and prevents the threat of non-compliance.

Reduction of cost & time in litigation: The pre-pack process has recognition across the globe and the need for a pre-pack process in India is necessary to revive the debt-ridden corporates. The Government has acknowledged that it may help in "reducing litigation cost and delays" and may "decongest the overburdened Court/ NCLTs.

7. Pre-packs : Global experience/ practice

(**A**) **PRE-PACK IN US** - In the US, the Bankruptcy Code recognizes three forms of proceedings:

1. Pre-packaged bankruptcy proceedings;
2. Pre-arrange Bankruptcy proceedings; and
3. Pre-plan sales.

Pre-Packaged Bankruptcy Proceedings is provided under Chapter 11 of the Bankruptcy Code which allows a debtor to negotiate a bankruptcy resolution plan before the chapter 11 proceedings are filed with the competent court.

Steps Involved in Pre-Packaged Bankruptcy proceedings:

1. Negotiation and solicitation of acceptance of resolution plan.
2. Acceptance of Plan by Creditors or all interested parties.
3. Filing before the court.
4. Confirmation of the Plan.

The pre-packaged bankruptcy proceedings take substantially lesser time to be confirmed by the courts than traditional Chapter 11 proceedings.

(B) PRE-PACK IN UK

In UK, the typical term used for Pre-Pack Insolvency or Bankruptcy proceedings is "Pre-Packaged Administration". Unlike US, there is no legal provisions for pre-packs in the UK, and it has been developed out of practice (we all know that there is no written constitution in UK). But pre-packs are equally prevalent in UK, e.g., in the year 2017, 356 pre-packaged administrations were reported.

Steps Involved in Pre-Packaged Administration:

1. Appointment of Insolvency Professional as a business advisor.
2. Appointment of Insolvency Professional as an administrator by parties without the approval of the Court.
3. Consent of Secured Creditors for sale of assets by administrator as per resolution plan.

(C) PRE-PACK IN SINGAPORE

On 22 January 2018, the Singapore High Court ("Court") sanctioned the first "pre-packaged" scheme of arrangement under Singapore's new restructuring and insolvency regime that was unveiled in 2017.

The amendments to the Singapore's Companies Act ("Companies Act"), which came into force on 23 May 2017, introduced

the new mechanism known as a "pre-packaged" scheme of arrangement by way of Section 211 of the Companies Act. This process allows the applicant company to dispense with both the court hearing to convene a meeting of creditors and the meeting itself, thereby truncating the normal scheme of arrangement process.

8. Classification of creditors

(a) secured creditors for the value of the restructured debts ("Secured Creditors"); and

(b) unsecured creditors for the value of the remaining debts ("Unsecured Creditors")

9. Issues for the Court

In the present case, the Court had to determine the following issues:

(a) whether the statutory requirements of Section 211 of the Companies Act had been complied with;

(b) whether adequate notice was provided to the Scheme creditors; and

(c) whether the Scheme creditors were properly classified for the purpose of voting

The most important advantages of a "pre-packaged" scheme are the cost and time savings, compared to the regular scheme process which requires two court applications and a meeting of creditors to be conducted. Another benefit is that a "pre-packaged" scheme minimises damage to public image and a loss of goodwill that could result from a more drawn-out and potentially contentious normal scheme process. This benefit is especially important for public listed companies.

10. Conclusion

The framework of the pre-pack being proposed to enable the swift resolution under the Code. However, the framework cannot be implemented without amending the Code and the rules and regulations prescribed under it. Once the framework is implemented then it would reduce the burden on Adjudicating Authority under the Code resolving the financial distress of the company in a timely and cost-effective manner. However, more responsibility will be on the Insolvency Professionals for balancing the interest of stakeholders and ensuring that no undue advantages are given to the secured creditors and the promoters by misusing the framework such as PPIRP, PAIRP, PAS.

(2020) 119 taxmann.com 301 (Calcutta)

HIGH COURT OF CALCUTTA

Sandip Kumar Bajaj *v.* State Bank of India

MOUSHUMI BHATTACHARYA, J.

I.A. AND G.A. NO. 1 OF 2020
W.P.O. NO. 236 OF 2020
OLD G.A. NO. 1062 OF 2020

SEPTEMBER 15, 2020

Section 14, read with sections 29A and 31, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - Whether as per provisions of section 14(3)(b), prohibition on institution or continuation of suits and other proceedings against corporate debtor do not extend to a surety, however, liability of surety is co-extensive with that of principal debtor unless it is otherwise provided by contract - Held, yes - Whether therefore, when a default is made in making repayment by principal debtor, banker will be able to proceed against guarantor/surety even without exhausting remedies against principal debtor - Held, yes - Whether further, argument that section 29A or 31 would provide a shield against operation of section 14(3)(b) and that petitioners would come under immunity-blanket of section 14 was contrary to law governing insolvency resolution process and RBI guidelines for dealing with wiful defaults of corporate entities - Held, yes (Paras 7 and 8)

CASES REFERRED TO

Atlantic Projects Ltd. v. *Allahabad Bank* (W.P. No. 7471 (W) of 2019, dated 3-5-2019) (para 3), *Union of India* v. *Sudhir Kumar Patodia* (CAN No. 5340 of 2019, dated

13-2-2020) (para 4), *Maharashtra State Mining Corpn.* v. *Sunil* (2006) 5 SCC 96 (para 4), *National Institute of Technology* v. *Pannalal Choudhury* (2015) 11 SCC 669 (para 4), *State Bank of India* v. *Jah Developers (P.) Ltd.* (2019) 105 taxmann.com 189/154 SCL 72 (SC) (para 8), *Secretary, Ministry of Defence* v. *Prabhash Chandra Mirdha* (2012) 11 SCC 565 (para 15) and *Marathwada University* v. *Seshrao Balwant Rao Chavan* AIR 1989 SC 1582 (para 18).

Sabyasachi Chowdhury, Sr. Adv. and **Ms. Sanjukta Ray**, Adv. *for the Petitioner.* **Om Narayan Rai**, Adv. *for the Respondent.*

ORDER

1. The challenge in this writ petition is to a notice issued by the respondent State Bank of India to the petitioners by which the petitioners have been called upon to show cause and make submissions in writing within 30 days from the date of receipt of the notice as to why their names should not be included in the list of wilful defaulters as per the Reserve Bank of India (RBI) Guidelines. The Show Cause Notice dated 14th November, 2019 was followed by correspondence between the parties culminating in a notice for personal hearing dated 6th August, 2020 by which the petitioners were called upon to personally appear before the Wilful Defaulter Identification Committee on 24th August, 2020 at a specific time. Both these notices have been challenged in this writ petition and the petitioners seek cancellation of these notices.

2. The petitioners claim to be the erstwhile promoters/directors of Mohan Motors Udyog Private Limited (the Company) which is presently in a Corporate Insolvency Resolution Process (CIRP) under the relevant provisions of The Insolvency and Bankruptcy Code 2016 (IBC). The insolvency proceedings commenced on 17th March, 2020 by an order of the National Company Law Tribunal, Kolkata Bench.

3. The contentions of Mr. Sabyasachi Chowdhury, learned counsel appearing for the petitioners, are two-fold. Counsel submits that by reason of the moratorium under section 14 of the IBC being operational in respect of the Company, proceedings under the master circular of the RBI for being declared as wilful defaulters should be stayed during the operation of the moratorium period. The second limb of Mr. Chowdhury's argument is that the impugned Show Cause Notice dated 14th November, 2019 and the notice of hearing dated 6th August, 2020 are bad by reason of the fact that they have not been issued by the committee which is empowered to do so under the RBI Master Circular on Wilful Defaulters, 2015. Counsel submits that a notice was initially given on 13th September, 2019 on an "appropriate committee" examining the conduct of the account of the Company and concluding that a wilful default has been committed. The notice had the heading "Gujarat NRE Coke Ltd.". On the mistake being pointed out to the Bank by the Company by its letter dated 31st October, 2019, the respondent No. 1 (State Bank of India) issued a fresh notice dated 14th November, 2019 which is the impugned notice in this case. Counsel submits that the notice does not disclose the particulars of the "appropriate committee" which has allegedly examined the conduct of the account and the credit facilities of

the Company and also fails to disclose the particulars of the alleged meeting where the conduct of the Company has been examined. It is submitted that the notices do not disclose the satisfaction of the Identification Committee and is not in consonance with the relevant clause of the RBI circular. Counsel relies on a decision of a learned Single Judge of this court in *Atlantic Projects Ltd.* v. *Allahabad Bank* (W.P. No. 7471 (W) of 2019, dated 3-5-2019) where the court held that the requirement of clause 3(*b*) of the Master Circular must be discharged by the Identification Committee before a show-cause notice can be issued. According to counsel, Atlantic Projects held that clause 3(*b*) requires application of mind by the Identification Committee "at all stages" before a show-cause notice can be issued on a defaulting borrower.

4. Mr. Om Narayan Rai, learned counsel appearing for the respondents/SBI and its Deputy General Manager, relies on a Division Bench judgment of this Court in *Union Bank of India* v. *Sudhir Kumar Patodia* (CA No. 5340 of 2019, dated 13-2-2020) which, according to counsel, has overruled the Single Bench decision in Atlantic Projects by implication. Counsel submits that the Division Bench held that even if the power to issue a show cause notice has been delegated, the notice itself would not be invalidated. It is also argued that the petitioners have not pleaded any prejudice consequent to issue of the show cause notice and the challenge thereto must therefore fail. Counsel points to the delay in filing of the writ petition as the impugned notice is dated 14th November, 2019. Counsel raises the additional point of ratifying an act subsequent to its commission in that the show cause notice can be approved anytime by the Identification Committee. In this connection, *Maharashtra State Mining Corpn.* v. *Sunil* (2006) 5 SCC 96 and *National Institute of Technology* v. *Pannalal Choudhury* (2015) 11 SCC 669 are relied on.

5. I have considered the contentions urged on behalf of the parties. But first, a brief explainer on the RBI guidelines contained in the Master Circular. The scheme framed by the RBI was to identify events of wilful default by borrowers where the particular unit has defaulted in its payment obligations to the lender despite having a capacity to pay or has diverted the borrowed funds for some other purpose other than the specific purpose for which the funds were made available. The scheme evolved a mechanism of identifying such defaults by various methods of monitoring and prevention. The first point in this writ petition is whether the Company and the petitioners can be subjected to proceedings for identification of Wilful Defaulters under the RBI Master Circular, 2015 in the face of the ongoing CIRP under the Insolvency and Bankruptcy Code, 2016. Section 14 of the IBC is relevant. Paragraph 1 of the writ petition describes the petitioners as the erstwhile directors as well as the erstwhile promoters and guarantors of the Company, Mohan Motor Udyog Private Limited, which is presently undergoing CIRP by virtue of an order dated 17th March, 2020 passed by the NCLT, Kolkata Bench. By the said order, Moratorium was declared for the purposes as referred to under section 14 of the IBC. The order of

Moratorium is to remain effective from the date of admission till the completion of the CIRP.

6. The second issue is validity of the impugned Show-Cause Notice on the ground that the said notice does not comply with the RBI guidelines relating to wilful defaults by an entity as expressed in the Master Circular which is binding on the respondent Bank. According to the petitioner, the impugned show-cause notice belies not only the formation and constitution of the "Committee" under clause 3(*a*) of the Master Circular but also sub-clause (*b*) which requires formation of opinion by the Committee before a show-cause notice is issued to the intended party.

7. I will first deal with the preliminary issue which is that any proceedings initiated against the petitioners as guarantors of the Company would meet a roadblock in the form of section 14 of the IBC under which Moratorium has been declared against the Company. The argument sought to be urged on behalf of the petitioners is that after declaration of the Moratorium on 17th March, 2020, subjecting the petitioners to initiation of proceedings under the Master Circular by way of the impugned Show-Cause Notice issued subsequent to the declaration of Moratorium would be contrary to the provisions of the IBC. For testing the strength of this submission, the relevant part of section 14 of the IBC is required to be set out;

> "14. *Moratorium*. — (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely :—
>
> (*a*) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any Court of law, tribunal, arbitration panel or other authority;
>
> ** ** **
>
> (3) The provisions of sub-section (1) shall not apply to -
>
> *(a) such transaction as may be notified by the Central Government in consultation with any financial regulator;*
>
> *(b) a surety in a contract of guarantee to a corporate debtor.*
>
> (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:
>
> **Provided** that where at any time during the corporate insolvency resolution period, if the Adjudicating Authority approves the resolution plan under sub-section 1 of section 31 or passes an order liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order as the case may be."

It is clear from section 14(3)(*b*) that the prohibition on institution or continuation of suits and other proceedings against the corporate debtor do not extend to a surety. It is undisputed that both the petitioners are erstwhile guarantors of the Company, namely, the corporate debtor. Since counsel for the petitioners has also relied on sections 29A and 31 of the IBC, these provisions should also be seen in the context of what the petitioners seek. Section 29A (Persons not eligible to be Resolution Applicant) lists the categories of persons who are not eligible to submit a resolution plan and includes a wilful defaulter under the RBI guidelines (clause (*b*)) as well as "a connected person" enumerated under clause (*j*) including a promoter of the resolution applicant (the Company in this case). Against these provisions, the case sought to be made out on behalf of the petitioners is that the petitioners would altogether be excluded from participating in the resolution process despite being inextricably linked to the fate of the corporate debtor. In other words, the petitioners would suffer a double-whammy as it were and be left to fend for themselves even when a moratorium is declared under section 14 while being deprived of the fruits of a successful resolution process. However attractive this argument may be in the context of the apparent unfair treatment meted out to promoters of a corporate debtor, section 128 of the Indian Contract Act, 1872 must be kept in mind where the liability of the surety is co-extensive with that of the principal debtor unless the contract provides to the contrary. This also finds place in clause 2.6 of the Master Circular which is extracted below:

"2.6 Guarantees furnished by individuals, groups companies & non-group companies

While dealing with wilful default of a single borrowing company in a Group, the banks/FIs should consider the track record of the individual Company, with reference to its repayment performance to its lenders. However, in cases where guarantees furnished by the companies within the Group on behalf of the wilfully defaulting units are not honoured when invoked by the banks/FIs, such Group companies should also be reckoned as wilful defaulters.

In connection with the guarantors, in terms of section 128 of the Indian Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. Therefore, when a default is made in making repayment by the principal debtor, the banker will be able to proceed against the guarantor/surety even without exhausting the remedies against the principal debtor. As such, where a banker has made a claim on the guarantor on account of the default made by the principal debtor, the liability of the guarantor is immediate. In case the said guarantor refuses to comply with the demand made by the creditor/banker, despite having sufficient means to make payment of the dues, such guarantor would also be treated as a wilful defaulter. This treatment of non-group corporate and individual guarantors was made applicable with effect from September

9, 2014 and not to cases where guarantees were taken prior to this date. Banks/FIs may ensure that this position is made known to all guarantors at the time of accepting guarantees."

8. Hence the argument that section 29A or 31 would provide a shield against the operation of section 14(3)(*b*) and that the petitioners would come under the immunity-blanket of section 14 is contrary to the law governing insolvency resolution process and the RBI guidelines for dealing with wilful defaults of corporate entities. Although *State Bank of India* v. *Jah Developers (P.) Ltd.* (2019) 105 taxmann.com 189/154 SCL 72 (SC) threw a light on the harsh consequences of being declared a wilful defaulter, it was a decision on whether legal representation can be permitted before a declaration of wilful default is made. The Supreme Court held that the proceedings under the Master Circular, being essentially in the nature of in-house proceedings and of an administrative character, cannot permit legal representation.

9. The next issue urged is that the Show Cause Notice is against the mandate of the Master Circular in terms of the composition/constitution of the Committee which has been empowered to identify wilful defaulters. The petitioner has urged that the requirements of clause 3 of the Master Circular have not been complied with. To put the argument in context, the relevant part of clause 3 is set out below:

"3. Mechanism for identification of Wilful Defaulters

The mechanism referred to in paragraph 2.5 above should generally include the following:

(*a*) The evidence of wilful default on the part of the borrowing company and its promoter/ whole-time director at the relevant time should be examined by a Committee headed by an Executive Director or equivalent and consisting of two other senior officers of the rank of GM/ DGM.

(*b*) If the Committee concludes that an event of wilful default has occurred, it shall issue a Show Cause Notice to the concerned borrower and the promoter/whole-time director and call for their submissions and after considering their submissions issue an order recording the fact of wilful default and the reasons for the same. An opportunity should be given to the borrower and the promoter/whole-time director for a personal hearing if the Committee feels such an opportunity is necessary.

(*c*) The Order of the Committee should be reviewed by another Committee headed by the Chairman/Chairman & Managing Director or the Managing Director & Chief Executive Officer/CEOs and consisting, in addition, to two independent directors/non-executive directors of the bank and the Order shall become final only after it is confirmed by the said Review Committee.

> However, if the Identification Committee does not pass an Order declaring a borrower as a wilful defaulter, then the Review Committee need not be set up to review such decisions."

Clause 3(*a*) specifies the composition of the Committee which is entrusted with the task of first identifying and then examining the evidence of wilful default. The petitioners' case is that the Show Cause Notice which was issued by the Deputy Managing Director and signed by the Deputy General Manager, falls short of clause 3(*a*) and that any deviation from the prescribed composition would warrant quashing of the Show Cause Notice. To test this contention, it would help to reproduce the relevant paragraph from the impugned Show Cause Notice;

You are hereby called upon to show cause and make submissions in writing within 30 days from the date of receipt of this letter as to why your name should not be included in the list of wilful defaulters as per RBI guidelines.

10. The question which would arise is whether the post of Deputy Managing Director (mentioned as the head of the `appropriate committee' in the impugned notice) is equivalent to that of the Executive Director (under clause 3(*a*)) of the Master Circular. The stress on equivalence would be justified from the use of this very expression in clause 3(*a*) which allows for a loosening of the composition of the Committee by prescribing "...headed by an Executive Director or equivalent..." (underlined for emphasis). It is also significant that the show cause notice clarifies that the composition of the Committee- or the departure from the recommended composition- is "as approved by RBI". It is also significant that clause 3 of the Master Circular slackens the rigour of the requirements by using the expression "...should generally include the following" and puts the stress more on a pyramidal power structure of the Committee of a head who is ranked higher than the two senior officers of the rank of GM/ DGM who form the base of the structure. This court also takes judicial notice of the fact that there are presently no Executive Directors on the Board of the State Bank of India which is comprised of a Chairman, Managing Directors and Directors. As on 7th September, 2020, the Board of Directors of SBI comprises of a Chairman, 2 Managing Directors, 2 Shareholder Directors and 2 Nominee Directors. The State Bank of India Act of 1955 also does not contemplate a post of Executive Director. Therefore, the first contention with regard to an improperly constituted Committee under a Deputy Managing Director instead of the recommended Executive Director, fails.

11. The next issue is of the appointed Committee not applying its mind or making such non-application evident in the Show Cause Notice thus rendering it vulnerable. Clause 3(*b*) starts with "If the Committee concludes that an event of wilful default has occurred..." thereby implying that the condition precedent to issuing a Show Cause Notice to the concerned borrower is of the Committee forming an opinion on the basis of available evidence as to whether there has been a "wilful default" under clause 3(*a*). The petitioners contend that the impugned Notice is devoid of any

indication that the 'appropriate Committee' has indeed done what it is supposed to do under clause 3, namely apply its mind to the materials which would identify the petitioners for the purposes of the Show Cause Notice. For assessing the worth of this contention, the impugned Notice should be seen against the mandate of clause 3(*b*). While it is correct that the first page of the Notice is opaque in terms of making the workings of the Committee's mind known to the petitioners/recipients of the Notice, the lacuna is addressed by the Annexure to the Notice stating the "Justification/ Reasons for declaring the Borrower as Wilful Defaulter". The accompanying tabulated statement lists the criteria for classification as Wilful Defaulter as per the RBI Master Circular dated 1st July, 2015 with further references to the "Events of Default" and "Evidences and documents substantiating each event of wilful default". It should also be mentioned that the respondent has furnished a Resolution of the Wilful Defaulter Identification Committee dated 17th June, 2019 in relation to the Company which contains a Proposal "For approval for identification of Wilful Defaulters and issuance of Show Cause Notices". The Resolution further encloses "Agenda Item No. 2080" followed by factual events of default corresponding to the relevant clauses of the Master Circular. The Resolution bears the signatures of the Deputy Managing Director as the Chairman of the "Wilful Defaulter Identification Committee-I" and two General Managers as the other Members of the said Committee. The Resolution was filed later in court on behalf of the respondents and forwarded to the petitioners on the same day.

12. In this background, the questions which would naturally arise are:

(a) It is necessary for a Show Cause Notice to disclose the basis of the conclusion arrived at by the Committee under clause 3(a)? and

(b) If yes, how can such application of mind/formation of opinion be made apparent on the face of the Show Cause Notice?

13. Both these questions can be answered from a plain reading of clause 3 of the Master Circular. First, the clause does not mandate that the Show Cause Notice must disclose the basis of the satisfaction of the concerned Committee or the conclusion arrived at from the evidence before it. What clause 3(*a*) requires is that the Committee and its members must "examine" the evidence of wilful default of a borrower before proceeding to sub-clause (*b*). Clause 3(*b*) comes at the stage of completion of examination of the available evidence whereupon the Committee may or may not conclude that an event of default has occurred. If it does, only then will it take steps for issuing a Show Cause Notice under the said clause.

14. In the facts of the present case, the contention of the petitioners of the impugned Notice being devoid of any indication of application of mind by the Committee is not acceptable on two grounds. First, the Master Circular does not require it and more important, the Annexure to the Show Cause Notice coupled with the Resolution of the Committee dated 17th June, 2019 provides sufficient material (and particulars specific to the Company

of which the petitioners are guarantors) to satisfy that the Committee had indeed fulfilled its mandate under both sub-clauses (*a*) and (*b*) of clause 3. One of the most obvious ways in which working of the mind or some sort of deliberation by the persons concerned can be shown is by articulation of the findings arrived at with reference to a meeting (including of minds) where such deliberation palpably took place and the findings being relatable to the materials/evidence before the Committee entrusted with the duty to sift through the evidence to come to the conclusions.

15. Now to the decisions cited in support of the arguments advanced. Atlantic Projects, decided on 3rd May, 2019 was on a challenge to a Show Cause Notice in which the petitioner had contended that the function of issuing a Show Cause Notice cannot be delegated to a person who is not a member of the Identification Committee. The Learned Single Judge held that an identified administrative authority cannot delegate its power to issue a Show Cause Notice under clause 3 of the Master Circular. The finding in that case was that the Identification Committee must apply its mind at all stages to the materials before it before arriving at a conclusion pertaining to the wilful default and further that the borrower (described as 'the delinquent' in the decision) must have the entire material that was before the Identification Committee for the purpose of giving a complete response. The Division Bench judgment in Sudhir Kumar Patodia/Pawan Kumar Patodia pronounced on 28th February, 2020 was also concerned with a challenge to a Show Cause Notice on the ground of improper constitution of the Identification Committee and non-application of mind in classifying the writ petitioner as a wilful defaulter. The Division Bench construed the RBI Guidelines and held that there had not been any delegation of the functions of the Identification Committee as the power only involved identifying a wilful defaulter and a final order in that regard would have to be made by the Review Committee. The decision proceeded on the basis that identifying a wilful defaulter is essentially a fact-finding exercise followed by an administrative decision. The Division Bench accordingly was of the view that the Regional Office of the appellant/ respondent being delegated the task of issuing the Show Cause Notice would not by itself invalidate the proceedings which had been initiated under the Master Circular for declaring the petitioners as wilful defaulters. Relying on *The Secretary, Ministry of Defence* v. *Prabhash Chandra Mirdha* (2012) 11 SCC 565, it was additionally held that a Show Cause Notice does not give rise to a cause of action unless a strong case of abuse of process is made out.

16. The decision in Pawan Kumar Patodia is relevant for the present case for the following reasons. First, the challenge mounted to the Show Cause Notice is on the same plank, namely that the issuing authority lacked jurisdiction under the governing guidelines and that there had been delegation of power to a lesser authority. Second, the aspect of a decision having been taken by the concerned committee implying application of mind to the material at hand was considered by the court. The Court, however, held that omission to refer to the decision of

the identification committee would not render the Show Cause Notice vulnerable to challenge. Third, the question of prejudice consequent to a Show Cause Notice was addressed by the Division Bench and it was held that the purpose of such a notice was to make the charges known to the borrower so that it could give a comprehensive explanation to and defend the same in the form of a hearing etc. Besides these, Pawan Kumar Patodia is a later decision compared to the Single Bench decision in Atlantic Projects and considered the same issues which were canvassed in the latter. It is significant that in Pawan Kumar Patodia, the Division Bench refused to interfere with the Show Cause Notice despite finding that the Notice was issued by an entity not prescribed under clause 3(*a*) of the Master Circular. The fact that the Division Bench was also of the view that the Show Cause Notice need not reflect the decision taken by the concerned committee effectively takes care of both the points urged by the petitioners in this case with regard to clause 3 of the Master Circular. It should also be pointed out that the Division Bench considered *Jah Developers* (relied on by the petitioners here) and expressed its reservations on the decision being of assistance to the writ petitioners/respondents before the Division Bench.

17. The conduct of the petitioners as would appear from the facts of the present case would further lend credence to the `prejudice' point as considered in Pawan Kumar Patodia; or in other words, whether the petitioners have suffered any prejudice by issuance of the impugned Show Cause Notice. The scheme of clause 3 of the Master Circular (Mechanism for Identification of Wilful Defaulters) contemplates a two-tier system of identification where the decision of the first Committee under clause 3(*b*) would be subject to review by a second Committee under clause 3(*c*). Hence, no finality is attached to the decision of the first/identification Committee and more so at the stage of a Show-Cause Notice. Further, the Petitioners in this case received the impugned show-cause notice dated 14th November, 2019 together with the Annexure on 18th November, 2019. The date of receipt would appear from the reply of the petitioners dated 19th December, 2019 to the Show-Cause Notice. In the said letter, the petitioners contended, *inter alia*, that the appropriate Committee had not been formed in keeping with the RBI guidelines and called for withdrawing of the Show-Cause Notice. The respondent Bank thereafter issued a "Notice for Personal Hearing" dated 17th July, 2020 calling upon the petitioners to appear before the "Wilful Defaulter Identification Committee" on 29th July, 2020 at 11 a.m. for making appropriate submissions. The petitioners were given the option to make submissions through video conferencing on the specified date. On receiving the notice for personal hearing, a chain of correspondence followed between the parties on 28th July, 2020 whereby the respondents asked the petitioners to be present for the personal hearing on 17th July, 2020 to which the petitioners requested to keep the meeting after August due to the prevailing lockdown in the State. The petitioners sent another e-mail on 29th July, 2020 to the respondents stating that it would be inconvenient for the petitioner No. 2 to attend the personal hearing. This was followed by a reply from

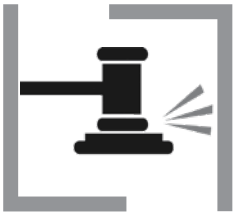
the respondent attaching a copy of the revised letter for personal hearing dated 6th August, 2020 by which the petitioners were given the opportunity to make their submissions through video conferencing before the concerned Committee on 24th August, 2020 at 12.15 p.m. The present writ petition was filed on 17th August, 2020. From the trail of correspondence, it is evident that the petitioners were initially not averse to appearing before the concerned Committee for making their submissions with regard to the impugned show-cause notice. The reason given for the petitioners' inability to appear on 29th July, 2020 was the pandemic and the petitioners requested for a date in August 2020. The correspondence indicates that the petitioners were not averse to a personal hearing, *per se*.

18. A few decisions have been cited on behalf of the respondent on whether an improper act/decision can be cured by subsequent ratification, including *Marathwada University* v. *Seshrao Balwant Rao Chavan* AIR 1989 SC 1582. Since this Court is of the view that there was no defect in the act of issuing the impugned Show Cause Notice by reason of the composition of the issuing authority under the guidelines, this court refrains from dealing with the decisions as it would become an academic exercise.

19. For the reasons as stated above, the challenge to the impugned Show Cause Notice dated 14th November, 2020 and the Notice dated 6th August, 2020, fails. The petitioners are not entitled to the reliefs claimed in WPO 236 of 2020 which is accordingly dismissed without any order as to costs.

20. I.A. No. G.A. 1 of 2020 (Old No. G.A. 1062 of 2020) is disposed of by this judgment.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.



(2020) 121 taxmann.com 17 (Madras)

HIGH COURT OF MADRAS

B.Rajesh *v.* Union of India

M.M.SUNDRESH AND MRS. R. HEMALATHA, JJ.

WP. NOS. 31140 AND 31432 OF 2019

WMP. NOS. 31608, 31609 AND 31263 OF 2019

SEPTEMBER 3, 2020

Section 196 of the Insolvency and Bankruptcy Code, 2016 - Board - Powers and functions of - CIRP application under section 9 was admitted against corporate debtor declaring it as insolvent - Petitioner, who was managing director of corporate debtor, having found lacunae and inordinate delay in commencement and implementation of CIRP, approached NCLT by filing MA/498/2018 seeking relief to exclude period of alleged delay (120 days) on part of Interim Resolution Professional from 270 days period and direction to RP and CoC to consider resolution plan filed by applicants - Application was dismissed by NCLT - Simultaneously, MA/460/2018 was filed by the Resolution Professional (RP) and corporate debtor against operational creditor, which was disposed off with passing of liquidation order under section 33 - Petitioner filed complaint against order in MA/498/2018 with Insolvency Board - In meanwhile, appeals against order of NCLT in MA/460/2018 under section 33 for liquidation of corporate debtor and order in MA/498/2018, rejecting plea to exclude 120 days from CIRP period, and plea to reconsider two resolution plans by CoC were dismissed by NCLAT - Petitioner filed writ petition praying to issue a writ of Mandamus directing Board to dispose off his complaint - Whether writ petition was infructuous for reason that NCLAT on an appeal preferred by petitioner had disposed of both petitions filed by him against orders of NCLT with direction to liquidator to follow liquidation rules - Held, yes (Para 10)

CASES REFERRED TO

State Bank of India v. V. RamaKrishnan (2018) 96 taxmann.com 271/149 SCL 107 (SC) (para 6).

N.L. Rajah, Sr. Counsel and **E. Jayashankar** *for the Petitioner.* **M.L. Ganesh** *for the Respondent.*

ORDER

R. Hemalatha, J. - Both the writ petitioners are connected to M/s. Everon Castings Private Limited. The petitioner, Mr. Rajesh in WP.No.31140 of 2019 is the founder director of the company and the petitioner in WP.No.31432 of 2019, Mrs. Dhanalakshmi is a third party guarantor who offered one of the collateral securities for the company to avail credit facilities from State Bank of India. In brief, the company, M/s. Everon

Castings Pvt. Ltd. (hereinafter referred to as Corporate Debtor) was promoted in 2008. It was a manufacturing unit for large size steel castings. By 2010, it commenced the operations and was supplying big fortune 500 companies and had a strength of 300 employees. According to the petitioner in WP.No.31140 of 2019, in 2014-15, when the crude oil prices crashed, the trouble started and company stared at a severe cash crunch. The respondent in WP.No.31432 of 2019, State Bank of India, took over the existing loan facilities of the company from Karur Vysya Bank in 2017. The company had availed many credit facilities from State Bank of India.

2. One of the operational creditors of the company, M/s. Precision Machine and Auto Components Pvt. Ltd. moved a petition CP/666/IB/2017 under section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy Code, 2016 in National Company Law Tribunal (NCLT) which admitted the company to the Corporate Insolvency Resolution Process (CIRP) on 29-12-2017 after declaring it as insolvent. The petitioner in WP.No.31140 of 2019, who is also the Managing Director of the company (Corporate Debtor) having found lacunae and inordinate delay in the commencement and implementation of CIRP approached the NCLT by filing MA/498/2018 in CP/666/IB/2017 seeking the following reliefs.

(a) Exclude 120 days of the CIRP Process from the date of commencement of the CIRP *viz.*, 29-12-2017 and direct the continuation of the CIRP Process for a further period of 120 days;

(b) Set aside the decision of the COC dated 26-7-2018 whereby the Applicant No. 1 was held disqualified under section 29A (g);

(c) Set aside the decision of the COC dated 18-9-2018 whereby the Applicant No. 2 was held disqualified under section 29A (g);

(d) Consequent to the above, direct the Resolution Professional and COC to consider the Resolution Plan submitted by these applicants jointly and severally afresh without being influenced by their previous biased decisions;

(e) Declare the decision of the 2nd respondent to treat the Corporate Debtor as an NPA on 26-3-2018 as being illegal;

(f) Such other orders in the interests of justice.

But the petition was dismissed. One of the important reliefs sought was to declare the decision of the State Bank of India to treat the Corporate Debtor as Non-Performing Asset on 26-3-2018 as illegal. Another plea to exclude the period of alleged delay (120 days) on the part of Interim Resolution Professional from the 270 days period, also failed. Both the resolution plans submitted to the Committee of Creditors (CoC) by the petitioner on behalf of the Corporate Debtor were also rejected. Simultaneously, MA/460/2018 in CP/666/IB/2017 was filed by the Resolution Professional (RP) and the Corporate Debtor, M/s. Everon Castings Pvt. Ltd. against the operational creditor, M/s. Precision Machine and Auto Components Pvt. Ltd., and

the Managing Director of the Corporate Debtor, Mr. Rajesh Balasubramanian which was disposed off with the passing of the liquidation order. The petitioner in WP.No.31140 of 2019 preferred a complaint against the said order in MA/498/2018 with the Insolvency & Bankruptcy Board of India. In the meanwhile, the appeals against the order of NCLT in MA/460/2018 under section 33(1) of the Insolvency and Bankruptcy Code, 2016 for liquidation of the company, M/s. Everon Castings Pvt. Ltd., (the Corporate Debtor) and the order in MA/498/2018, rejecting the plea to exclude 120 days from the CIRP period, and the plea to reconsider the two resolution plans by COC were dismissed by the National Company Law Appellate Tribunal (NCLAT).

3. In the other petition, WP.No.31432 of 2019, the petitioner Mrs. S. Dhanalakshmi is a guarantor to the loans availed by the Corporate Debtor and also has provided her property as one of the collateral securities for the credit facilities availed from State Bank of India (the respondent) by the company, M/s. Everon Castings Pvt. Ltd. (the Corporate Debtor). She had pleaded that the declaration of Non-Performing Asset when the CIRP was in process, is illegal and that therefore all proceedings including the sale notice be declared *void ab initio*. Her contention also was that she was in no way connected with the decision making process of the company (Corporate Debtor) and therefore, this aspect also needs to be considered by this Court.

4. On the part of both the petitioners, the learned Senior counsel Mr. N.L. Rajah assisted by Mr. E. Jayashankar made the following submissions:

(a) The financial creditor (State Bank of India) who is the common respondent in both the petitions was without any jurisdiction, while proceeding against the Corporate Debtor as the CIRP was in progress and consequent moratorium imposed.

(b) The declaration of Non-Performing Asset by the financial creditor even when the petitions with NCLT and the appeals with NCLAT were pending was totally illegal and against the basic tenets of Insolvency and Bankruptcy Code, 2016.

(c) The pendency of the complaint by the Managing Director of the Corporate Debtor under Sub-Regulation (3) of Regulation (3) of the Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) Regulation 2017 was not considered by the NCLAT while dismissing the appeal.

(d) Notwithstanding the aforesaid submissions, the financial creditor is restricted by the moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016.

5. The learned counsel further relied on the decision in *Union of India* v. *Infrastructure Leasing and Financial Services Ltd.* and others decided by NCLAT, New Delhi in which it was held that "Non-Performing Asset relates to an Asset, *i.e.*, loan or advance which becomes non-performing when it ceases to generate income for

the Bank. Thus, it relates to the Banks and we are satisfied that declaration of Non Performing Asset by the Bank in no manner will affect the Corporate Debtor to continue as a going concern".

6. The learned counsels for the respondent bank, State Bank of India, M/s. M.L. Ganesh and S. Arunkumar would contend that the moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016, would not apply to a personal guarantee of a Corporate Debtor as settled by the Hon'ble Apex Court in *State Bank of India v. V. Ramakrishnan* (2018) 96 taxmann.com 271/149 SCL 107 Thus their contention was that the assets of the surety are separate from those of the Corporate Debtor and therefore the recourse against the guarantor was outside the liquidation proceedings and had no restrictions under Insolvency and Bankruptcy Code, 2016. It is their further contention that section 14 clearly applies only to the security interests over the assets of the Corporate Debtor.

7. It was also pointed out by them that the declaration of Non-Performing Asset of the account of the Corporate Debtor during the moratorium was challenged in NCLT in MA/498/2018, but, the latter did not buy the argument when dismissing the petition and it remained unchallenged in NCLAT.

8. Moreover, the learned counsels of the respondent bank further contended that the respondent bank had sold the property belonging to Mrs. Dhanalakshmi on 5-10-2019 and the sale was already confirmed by the Debt Recovery Tribunal (DRT), Coimbatore as provided for under section 17 of the SARFAESI Act. Their further contention was that neither the notice under section 13(2) of SARFAESI Act nor the possession notice under section 13 (4) of SARFAESI Act and the subsequent sale notices were challenged by the guarantor Mrs. Dhanalakshmi.

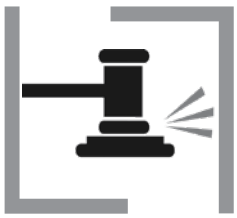
9. The learned senior counsel for the petitioner has relied on the prevailing conundrum surrounding the moratorium under section 14 of Insolvency and Bankruptcy Code, 2016 and the personal guarantor's liability. His further contention is that it is true that Insolvency and Bankruptcy Code, 2016 primarily envisages a resolution process for a Corporate Debtor, and only if it is unsuccessful contemplates an adversarial process. Thus any claims made by individual creditors must not be allowed to supercede the process of resolution *i.e.*, when CIRP is underway. According to him, Corporate Debtor is obliged to repay dues of all the creditors in due proportion and its capacity. Such liberties given to the creditors to enforce guarantee is a clear violation of equality to be maintained *inter se* amongst the creditors.

10. This contention raises a major question as to whether creditors can independently proceed against the guarantor. The Hon'ble Apex Court had laid to rest this argument about whether the moratorium on the Corporate Debtor will apply to the guarantor or not. It has categorically held that moratorium does not apply to the personal guarantor. However, unlike in most of the cases, in the instant case, the guarantor is not directly involved in the management of the company. She is a third party. It is also observed in the instant case that the securitization notice

under section 13(2) is dated 13-2-2019 and is not an independent notice. It is not only for the guarantors property when the appeal of the company under NCLAT was pending, but for all the properties taken as collateral securities for the credit facilities to the corporate Debtor. The final order of the NCLAT is dated 25-2-2019 and this in fact marked the culmination of the proceedings under the Insolvency and Bankruptcy Code, 2016, though technically speaking the CIRP was over on 24-9-2018. The outcome of the appeal in NCLAT was crucial because the petitioner/appellant had wanted further extension of time. Moreover, the financial creditor, State Bank of India did not proceed against the personal guarantor separately. It was only by way of the securitization notice dated 13-2-2019 issued to the Corporate Debtor with copies to all the guarantors. Notwithstanding the aforesaid observations made by this Court, the petitioner in WP.No.31432 of 2019 is permitted to approach the DRT/NCLT for any relief in this regard as alternative efficacious remedy is available for the petitioner. The WP.No.31432 of 2019 is disposed of with these directions. The prayer in the WP.No.31140 of 2019 is filed for writ of mandamus directing the Insolvency and Bankruptcy Board of India to dispose of the complaint dated 23-1-2019 submitted by the petitioner to them in `Form A' against the orders in NCLT in MA/498/2018 and MA/460/2018 in CP/666/IB/2017. Mr. M.L. Ganesh, learned counsel appearing for the 7th respondent/State Bank of India, contended that the writ petition itself has become infructuous since the 4th respondent had already considered the complaint dated 9-1-2019 (and not 23-1-2019 as mentioned in the writ petition) and the same has been closed after verification of records submitted by the IRP/RP. He would further contend that the 4th respondent had also directed the RP to follow the liquidation rules. This writ petition is also infructuous for the reason that the NCLAT on an appeal preferred by the petitioner in this writ petition had disposed of both the petitions filed by him against the orders of NCLT with the following observation.

> "In view of the aforesaid decision, we are of the view that the liquidator should act in terms of the aforesaid directions of the Appellate Tribunal and take steps under section 230 of the Companies Act. If the members of the `Corporate Debtor' or the `creditors' approach the company through the liquidator for compromise or arrangement by making proposal of payment to all the creditor(s), the Liquidator on behalf of the company will move an application under section 230 of the Companies Act, 2013 before the National Company Law Tribunal, in terms of the observations as made in `*S.C. Sekaran* v. *Amit Gupta-Company* Appeal (AT)(Ins.) Ns. 495 & 496 of 2018'. On failure, as observed above, steps should be taken for outright sale of the `corporate debtor' so as to enable the employees to continue in service on such outright sale."

11. In the result, WP.No.31140 of 2019 is closed and WP.No.31439 of 2019 is disposed of accordingly. Consequently, the connected Miscellaneous Petitions are closed. No costs.



(2020) 119 taxmann.com 304 (Delhi)

HIGH COURT OF DELHI

Vachaspati *v.* Insolvency and Bankruptcy Board of India

NAVIN CHAWLA, J.

W.P.(C) NO. 5711 OF 2020

SEPTEMBER 10, 2020

Section 208, read with section 22, of the Insolvency and Bankruptcy Code, 2016 and regulation 7 of the Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) Regulations, 2017 - Insolvency professionals - Functions and obligations of - Petitioner had filed a complaint before IBBI against Insolvency Professional under Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) Regulations, 2017 - Whether complainant has to be informed as to whether IBBI has formed a prima facie opinion in favour of complainant or against it - Held, yes - Whether since IBBI had already formed an opinion in favour of petitioner/complainant and further action thereon in terms of Regulation 7(7) was under its consideration, IBBI was directed to expedite decision under Regulation 7(7) and communicate such decision to petitioner as well - Held, yes (Para 1)

FACTS

- The petitioner had filed a complaint against Insolvency Professional under Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) Regulations, 2017.
- The petitioner was aggrieved by the communication of the IBBI that allegations made in the complaint had been duly examined by the Board and the appropriate action was being initiated in the matter.
- The petitioner filed writ petition for issuance of direction to IBBI to initiate disciplinary proceedings thereby furnishing show cause notice to the Insolvency Professional under Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and also to dispose off the complaint/ representation filed by the petitioners against the Insolvency Professional.

HELD

- A reading of the Regulation 7 of the Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) Regulations, 2017 would clearly show that the complainant has to be informed as to whether IBBI has formed a *prima facie* opinion in favour of the complainant or against it. In case the opinion is against the complainant, the complainant has

a right under the sub-regulation (5) of Regulation 7 to seek a review on the said decision. Merely informing the petitioner as has been done in the instant case that appropriate action is being initiated in the matter, would not, therefore, satisfy the requirements of Regulation 7. The complainant was never informed whether respondent no. 1 has formed an opinion in favour of the complainant or against him, on such complaint. (Para 8)

- The respondent No. 1 should therefore, in future keep the mandate of Regulation 7 in mind while sending such communications to the complainants. (Para 9)

- As far as the instant case is concerned, the respondent No. 1 has already formed a *prima facie* opinion in favour of the complainant and further action thereon in terms of Regulation 7(7) is under its consideration. The respondent no. 1 is directed to expedite the decision under Regulation 7(7) and communicate such decision to the petitioner as well. (Para 10)

Siddharth Sharma and **Ms. Charu Tyagi**, Advs. *for the Petitioner.* **Jagjit Singh**, SPC, **Abhishek Anand** and **Viren Sharma**, Advs. *for the Respondent.*

ORDER

1. This hearing has been held by video conferencing.

2. This petition has been filed by the petitioners praying for the following reliefs:

"a. Issue a Writ of Mandamus or any other Writ, Order or direction of similar nature directing the Respondent No. 1 to initiate disciplinary proceedings thereby furnishing show cause notice to the Respondent No. 2 under Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 read with Regulation 12 of the IBBI (Inspection and Investigation Regulation), 2017;

b. Issue a Writ of Mandamus or any other Writ, Order or direction of similar nature directing the Respondent No. 1 to provide the copy of the show cause notice to the Petitioners, thereby, allowing the Petitioners to participate in the disciplinary proceedings against the Respondent No. 2;

c. Issue a Writ of Mandamus or any other Writ, Order or directions of similar nature directing the Respondent No. 1 to dispose off the complaint/representation filed by the Petitioners against the Respondent No. 2."

3. The petitioners were primarily aggrieved of the communication dated 13-8-2020 from the respondent No. 1, which reads as under:

"This is in reference to the Form-A complaint dated 25-6-2020 filed by you against Mr. Anil Kohli, IP, in the subject matter under IBBI (Grievance and Complaint Handling Procedure) Regulations, 2017.

2. The allegations made in the

complaint have been duly examined by the Board and the appropriate action is being initiated in the matter."

4. Relying upon Regulation 7(3) of the Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) Regulations, 2017 (hereinafter referred to as the 'Regulations'), the petitioner submits that the respondent No. 1 has to form a *prima facie* opinion on whether the complaint makes out a case within 45 days of the receipt of the complaint. The petitioners asserted that the Impugned Communication does not reflect whether the respondent no. 1 found any *prima facie* case to have being made out against the respondent No. 2.

5. The respondent No. 1 has filed a short affidavit wherein it has been asserted that a *prima facie* case has been found to be made out against the respondent No. 2 and the complaint is now pending with the respondent No. 1 for consideration of orders under Regulation 7(7) of the said Regulations.

6. I have considered the submissions made by the learned counsels.

7. In various cases before this Court, it is found that the complainant is being informed about the status of the complaint by way of a cryptic order like in the present case reproduced hereinabove. In my opinion, this is not in compliance with the Regulations. Regulation 7 of the Regulations is reproduced hereinbelow:

> "7. *Disposal of complaint.* — (1) The Board may seek additional information and records from the complainant and information and records from the concerned service provider to form a *prima facie* view whether the contravention alleged in the complaint is correct.
>
> (2) The complainant and the service provider shall submit the information and records sought under sub-regulation (1) within fifteen days thereof.
>
> (3) *The Board shall form an opinion whether there exists a prima facie case within forty-five days of the receipt of the complaint.*
>
> (4) The Board shall close the complaint where it is of the opinion under sub-regulation (3) that there does not exist a *prima facie* case and communicate the same to the complainant.
>
> (5) *If the complainant is not satisfied with the decision of the Board under sub-regulation (4), he may request a review of such decision.*
>
> (6) The Board shall dispose of the review under sub-regulation (5) within thirty days of the receipt of the request for review by an order with an opinion whether there exists a *prima facie* case.
>
> (7) *Where the Board is of the opinion under this regulation that there exists a* prima facie *case, it may order an inspection under sub-regulation (3) of regulation*

3, order an investigation under sub-regulation (2) of regulation 7 or issue a show cause notice under sub-regulation (2) of regulation 11 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017, as may be warranted.

(8) *Where the Board is of the opinion that the complaint is not frivolous, it shall refund the fee of two thousand five hundred rupees received under sub-regulation (3) of regulation 3."*

(*Emphasis Supplied*)

8. A reading of the above would clearly show that the complainant has to be informed as to whether the respondent No. 1 has formed a *prima facie* opinion in favour of the complainant or against it. In case the opinion is against the complainant, the complainant has a right under the Sub-Regulation 5 of Regulation 7 to seek a review on the said decision. Merely informing the petitioner as has been done in the present case that appropriate action is being initiated in the matter, would not, therefore, satisfy the requirements of Regulation 7. The complainant was never informed whether respondent No. 1 has formed an opinion in favour of the complainant or against him, on such complaint.

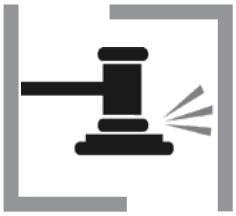
9. The respondent No. 1 should therefore, in future keep the mandate of Regulation 7 in mind while sending such communications to the complainants.

10. As far as the present case is concerned, the respondent no. 1 has already formed a *prima facie* opinion in favour of the complainant and further action thereon in terms of Regulation 7(7) is under its consideration. The respondent no. 1 is directed to expedite the decision under Regulation 7(7) of the Regulations and communicate such decision to the petitioner as well.

11. Another issue raised by the learned counsel for the petitioners relates to the right of the complainant to participate in the proceedings that may be initiated by the respondent No. 1 on such complaint.

12. List for hearing on the above issue on 01st December, 2020.

13. The petitioners shall file a brief synopsis of its arguments along with supporting Regulations and judgments within a period of four weeks from today. Similar exercise shall be done by the respondents within four weeks thereafter.



(2020) 120 taxmann.com 8 (Madras)

HIGH COURT OF MADRAS

V. Selvaraj *v.* Reserve Bank of India

K. KALYANASUNDARAM J.

W.P. NO. 43433 OF 2016
W.M.P. NO. 37294 OF 2016

AUGUST 29, 2019

Section 149 of the Companies Act, 2013 - Directors - Company to have Board of - Petitioner was non-executive independent director on board of respondent-company - Reserve Bank of India during annual inspection conducted in year 2013 into books of account of respondent-company, found accounting malpractices in company and issued various directors in order to protect public interest - Petitioner had been classified as a wilful defaulter - Petitioner filed writ petition for direction to respondents to declassify petitioner from list of wilful defaulters - Petitioner stated that he had no role in either verifying accounts or in maintaining accounts of company - Whether no materials had been brought on record to show that petitioner actively participated in day-to-day affairs of company or in board meeting and commissions and omissions alleged against company had taken place with knowledge, consent or connivance of petitioner to satisfy ingredients of section 149(12) - Held, yes - Whether since there was absolutely no evidence available to declare petitioner as a wilful defaulter, petitioner was to be declassified from list of wilful defaulters - Held, yes (Paras 17, 19 and 20)

G. Masilamani, Sr. Counsel and **Mani Sundaragopal** *for the Petitioner.* **Chevanan Mohan** and **S. Sethuraman** *for the Respondent.*

ORDER

1. The petitioner has come forward with this Writ Petition for issuance of Writ of Certiorarified Mandamus to call for the records relating to the letter bearing Reference No. IFBC: ADV: FLCIL, dated 10-5-2016 of the third respondent and quash the same and consequently direct the respondents to declassify the petitioner from the List of Wilful Defaulters.

2. The petitioner would state that he is a retired IAS Officer of 1964 Batch and he held several posts in the State Government and the Central Government. He was also connected with several International Organizations and took voluntary retirement from the Government in the year 1989 and thereafter, he was in the Board of several Companies, Educational Institution and Non-Profit Philanthropic Institutions.

3. The petitioner would further state that the fourth respondent is a Public Limited Company, incorporated under the provisions of the Companies Act, 1956 on 10-9-

1973. The Company was engaged in the business of leasing, hire purchase and financing. The concept of establishing a leasing Company was the brain child of one Mr. Farouk Irani, who was the Founder Member and Managing Director of the fourth respondent. He was in absolute control of the entire affairs and working of Company right from its inception. The day-to-day operations of the Company are looked after by the said Mr. Farouk Irani and he also acted as a heads of all the Departments, *viz.*, financial, accounting and etc., and no other Officer of the Company interfered in the over all control of the company by the Managing Director. The petitioner states that he was invited to join the Board of the fourth respondent-Company in the year 2012 and he joined as a Non-Executive Independent Director on 14-8-2012.

4. The petitioner further states that the Reserve Bank of India during annual inspection conducted in the year 2013 into the books of account of the fourth respondent-Company, found accounting malpractices in the Company and issued various direction in order to protect the public interest. Thereafter, on 16-9-2013, the fourth respondent had taken a decision to appoint a Former Director, Central Bureau of Investigation Dr. R.K. Raghavan, to carry out Forensic Audit into the affairs of the Company and also appointed a Special Audit Team. The first respondent also appointed M/s. N.C. Rajagopal & Company, Chartered Accountants to carry out Special Audit into the books of account of the Company for its transaction between 1-4-2002 and 31-2-2013. The consortium of Bankers had appointed M/s. Maharaj, N.R. Suresh & Co., Chartered Accountants in the meeting held on 25-11-2003 and they submitted a final report on 24-1-2014.

5. The petitioner would allege that the said Farouk Irani and his Team developed a software to create fictitious data/entries in the Companies account. The Forensic Audit conducted by Dr. R.K. Raghavan, submitted a final report on 28-7-2014, stating that the Managing Director of the Company has been identified for all the misdeeds and recommended to lodge criminal action to unearth the fraud committed by him and his team of employees.

6. The petitioner would state that during the check period, he attended 4 Board meetings of the Company. When the Managing Director and the Company's Statutory Auditors reported that financial results of the Company was very good and accounts were certified to be maintained properly as per the accounting standards by the Statutory Auditors, neither the petitioner nor the Board of Director had reason to suspect any foul play and only after the Special Audit conducted by the Reserve Bank of India and other Agencies, the misdeeds of the Managing Director and his chosen Officers of the Company came to light only during September, 2013.

7. It is a case of the petitioner that he had no role in either verifying the accounts or in maintaining accounts of the Company. He had no knowledge about the fabrication of accounts and he had also no way of knowing the window dressing of the accounts of the Company. While so, the State Bank of Mysore, one of the creditors of the fourth respondent-Company had declared the assets of the fourth respondent as a non-performing on 31-12-

2013. Subsequently, the said bank issued a letter dated 30-9-2014 to the Company and its Directors, stating that an appropriate committee of the Bank had examined the violations of the terms and conditions and had approved the proposal for inclusion of the name(*s*) of the Company and it is Directors/Guarantors in the Reserve Bank of India/Credit Information Bureau of India Limited (CIBIL) list of Wilful Defaulters and in case of any grievance, they can send a representation within a period of 15 days to the Grievance Redressal Committee of the Bank at their Headquarters. In response to the letter, the petitioner submitted a detailed reply dated 11-10-2014, stating that the petitioner's name is not to be included in the list of wilful defaulters. He also sent another representation dated 14-1-2015, categorically stating that since he neither a Whole-Time Director nor a Promoter of the Company, he cannot be declared as a wilful defaulter.

8. The petitioner would claim that the third respondent sent another letter dated 26-11-2015 to include the name of the Directors in the list of wilful defaulters, for which, the petitioner submitted a representation on 9-12-2015 and also participated in the enquiry and gave a detailed explanation about his non-involvement in the alleged illegalities committed by the Company, however without considering the same, by the impugned letter dated 10-5-2016, the petitioner has been classified as a wilful defaulter on 25-4-2016.

9. Mr. G. Masilamani, learned Senior Counsel appearing on behalf of the petitioner would urge that admittedly the petitioner joined in the fourth respondent-Board as Non-Executive Independent Director of the Company. The learned Senior Counsel by referring section 149(6) and 149(12) of the Act, submitted that an Independent Director shall be held liable, only in respect of such acts of omission or commission by a Company which had occurred with his knowledge, consent or connivance; that the petitioner never involved in the day-to-day affairs of the Company and no material is available to hold that the illegality of the company has taken place with his consent and connivance, the petitioner cannot be declared as a `wilful defaulter'. The learned Senior Counsel relies on the Master Circular issued by the Reserve Bank of India, dated 1-7-2015 in support of the above contentions.

10. It is further submitted that by declaring a person as a `wilful defaulter' has a serious consequences and it also causes social stigma. He further added that on the same set of materials, the State Bank of India, by its letter dated 13-7-2016, intimated that the Wilful Defaulter Identification Committee decided not to include the name of the petitioner in CICs list of Wilful Defaulters. The State Bank of Mysore has now been merged with the State Bank of India and that the impugned cryptic order has been passed in a mechanical manner, without considering the provisions of law, Statute, and the replies submitted by the petitioner, hence, the impugned order is to be quashed.

11. Mr. C. Mohan, learned counsel for the first respondent submitted that the Master Circular relied on by the petitioner has been issued under the Reserve Bank of India Act, and hence, it is a Statutory Notification. It is further contended by the learned counsel that the Circular has been upheld by the Hon'ble Apex Court.

12. The learned counsel for the third respondent would state that during the pendency of the Writ Petition, the State Bank of Mysore has been merged with the State Bank of India and thereafter, the petitioner gave a representation as per the order of this Court, but so far no final decision could be taken due to the non-convening of the Committee.

13. Heard both sides and perused the materials available on record.

14. The relevant provisions of the Act and Circular are extracted hereunder for ready reference:—

Sections 149(6) of the Companies Act:—

(6) An independent director in relation to a company, means a director other than a managing director or a whole-time director or a nominee director,—

(*a*) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;

(*b*) (*i*) who is or was not a promoter of the company or its holding, subsidiary or associate company;

(*ii*) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;

(*c*) who has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;

(*d*) none of whose relatives has or had pecuniary relationship or transactions with the company, its holding, subsidiary or associate company, or their promoters, or directors, amounting to two per cent, or more of its gross turnover of total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;

(e) who, neither himself nor any of his relatives—

(*i*) holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed;

(*ii*) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of—

(A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or

(B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent. or more of the gross turnover of such firm;

(*iii*) holds together with his relatives two per cent. or more of the total voting power of the company; or

(*iv*) is a Chief Executive or director, by whatever name called, of any non-profit organisation that receives twenty-five per cent. or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds two per cent. or more of the total voting power of the company; or

(f) who possesses such other qualifications as may be prescribed.

Section 149(12) of the Companies Act:—

"12. Notwithstanding anything contained in this Act,—

(*i*) an independent director;

(*ii*) a non-executive director not being promoter or key managerial personnel, shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently."

Clauses 2.5 and 3 of Master Circular:—

2.5 *Penal measures*:—

"The following measures should be initiated by the banks and FIs against the wilful defaulters identified as per the definition indicated at paragraph 2.1.3:

(a) *No additional facilities should be granted by any bank/FI to the listed wilful defaulters. In addition, such companies (including their entrepreneurs/ promoters) where banks/FIs have identified siphoning/ diversion of funds, misrepresentation, falsification of accounts and fraudulent transactions should be debarred from institutional finance from the scheduled commercial banks, Financial Institutions, NBFCs, for floating new ventures for a period of 5 years from the date of removal of their name from the*

list of wilful defaulters as published/ disseminated by RBI/ CICs.

(b) The legal process, wherever warranted, against the borrowers/ guarantors and foreclosure of recovery of dues should be initiated expeditiously. The lenders may initiate criminal proceedings against wilful defaulters, wherever necessary.

(c) Wherever possible, the banks and FIs should adopt a proactive approach for a change of management of the wilfully defaulting borrower unit.

(d) A covenant in the loan agreements, with the companies to which the banks/FIs have given funded/ non-funded credit facility, should be incorporated by the banks/FIs to the effect that the borrowing company should not induct on its board a person whose name appears in the list of Wilful Defaulters and that in case, such a person is found to be on its board, it would take expeditious and effective steps for removal of the person from its board.

It would be imperative on the part of the banks and FIs to put in place a transparent mechanism for the entire process so that the penal provisions are not misused and the scope of such discretionary powers are kept to the barest minimum. It should also be ensured that a solitary or isolated instance is not made the basis for imposing the penal action."

3. *Mechanism for identification of Wilful Defaulters:—*

"The mechanism referred to in paragraph 2.5 above should generally include the following:—

(a) The evidence of wilful default on the part of the borrowing company and its promoter/whole-time director at the relevant time should be examined by a Committee headed by an Executive Director or equivalent and consisting of two other senior officers of the rank of GM/DGM.

(b) If the Committee

concludes that an event of wilful default has occurred, it shall issue a Show Cause Notice to the concerned borrower and the promoter/ whole-time director and call for their submissions and after considering their submissions issue an order recording the fact of wilful default and the reasons for the same. An opportunity should be given to the borrower and the promoter/whole-time director for a personal hearing if the Committee feels such an opportunity is necessary.

(c) *The Order of the Committee should be reviewed by another Committee headed by the Chairman/ Chairman & Managing Director or the Managing Director & Chief Executive Officer/ CEOs and consisting, in addition, to two independent directors/ non-executive directors of the bank and the Order shall become final only after it is confirmed by the said Review Committee. However, if the Identification Committee does not pass an Order declaring a borrower as a wilful defaulter, then the Review Committee need not be set up to review such decisions.*

(d) *As regard a non-promoter/non-whole-time director, it should be kept in mind that Section 2(60) of the Companies Act, 2013 defines an officer who is in default to mean only the following categories of directors:*

(*i*) Whole-time director

(*ii*) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;

(*iii*) every director, in respect of a con-

travention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings and who has not objected to the same, or where such contravention had taken place with his consent or connivance. Therefore, except in very rare cases, a non-whole time director should not be considered as a wilful defaulter unless it is conclusively established that

I. he was aware of the fact of wilful default by the borrower by virtue of any proceedings recorded in the Minutes of the Board or a Committee of the Board and has not recorded his objection to the same in the Minutes, or,

II. the wilful default had taken place with his consent or connivance.

The above exception will however not apply to a promoter director even if not a whole-time director.

(*iv*) As a one-time measure, Banks/FIs, while reporting details of wilful defaulters to the Credit Information Companies may thus remove the names of non-whole time directors (nominee directors/independent directors) in respect of whom they already do not have in-

formation about their complicity in the default/ wilful default of the borrowing company. However, the names of the promoter directors, even if not whole-time directors, on the board of the wilful defaulting companies cannot be removed from the existing list of wilful defaulters.

(e) A similar process as detailed in sub-paragraps (a) to (c) above should be followed when identifying a non-promoter/non-whole time director as a wilful defaulter."

15. A plain reading of the above provisions would reveal that section 149(6) prescribes the qualification of the Independent Director of a Company and it further distinguishes the Independent Director from the Managing Director or Whole-time Director or a Nominee Director of a Company. Section 149(12) deals with the responsibility and liability of the Independent Director. Clause 2.5 of the Master Circular of Reserve Bank of India, dated 1-7-2015, refers to penal measures to be initiated by the banks and financial institutions, after a person is declared as a `wilful defaulter'. Clause 3, prescribes, mechanism for identification of Wilful Defaulters.

16. In the present case, it is not disputed that the check period was from 1-4-2002 to 31-2-2013 and out of the 11 years, the petitioner acted as an Independent Non-Executive Director for a period of seven months, *i.e.*, between 14-8-2012 and 31-3-2013 and during that period, he participated in 4 Board Meetings of the Company. It is the specific case of the petitioner that the fourth respondent-Company was incorporated in the month of September, 1973 and Mr. Farouk Irani was the Founder Member and Managing Director of the Company and he was heading all the Departments of the Company, including Finance and accounts and his decision was final and nothing is available to implicate the petitioner for the misdeeds committed by the Managing Director of the Company.

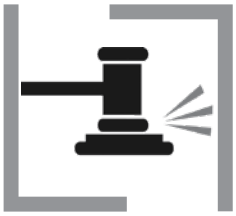
17. Section 149(12) of the Act makes it very clear that an Independent Director shall be held responsible only in respect of such acts of commission or omission by a Company which occurred with his knowledge, consent or connivance, but in the matter on hand, it is apposite to note that no materials have been brought on record to show that the petitioner actively participated in the day-to-day affairs of the Company or in the Board Meeting and the commissions and omissions alleged against the Company had taken place with the knowledge, consent or

connivance of the petitioner to satisfy the ingredients of section 149(12) of the Act. The learned Senior Counsel pointed out that the investigation report of Dr. R.K. Raghavan, Former Director, CBI, supports the case of the petitioner.

18. It is to be seen that the persons identified as wilful defaulter have to meet the consequence of the subsequent proceedings to be initiated by the Banks and Financial Institutions in tune with the Master Circular 2.5, referred *supra*. Therefore, unless the allegations are supported by material documents, no one can be declared as a 'wilful defaulter'. It is settled position of law that the penal provisions requires strict proof and it cannot be permitted to be exercised in a casual manner.

19. It is to be further seen that the Wilful Defaulter Identification Committee of the State Bank of India, after perusing the entire records came to the conclusion that they are not sufficient to declare the petitioner as a 'wilful defaulter'. In the case on hand, as observed above, there is absolutely no evidence available to declare the petitioner as a 'wilful defaulter'. Moreover, the explanation offered by the petitioner was not considered and the decision was taken against the provisions of the Act and clause 3 of the Master Circular issued by the Reserve Bank of India.

20. Taking note of the facts of this case and the discussions *supra*, in the considered opinion of this Court, the petitioner is entitled to succeed in this Writ Petition. In that view, the order impugned in this Writ Petition is *set aside* and the Writ Petition is allowed as prayed for. There is no order as to costs. Consequently, connected miscellaneous petition is closed.



(2021) 123 taxmann.com 78 (IBBI)

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Ajay Kumar, *In re*

DR. MUKULITA VIJAYAWARGIYA, WHOLE TIME MEMBER

NO. IBBI/DC/33/2020

OCTOBER 13, 2020

Section 208 of the Insolvency and Bankruptcy Code, 2016, read with regulations 7(2)(a), 7(2)(h) and 7A, of the IBBI (Insolvency Professionals) Regulations, 2016 - Insolvency professionals - Functions and obligations of - Whether regulation 7A of IP regulations requires every Insolvency Professional (IP) to have Authorisation For Assignment (AFA) before undertaking any assignment after 31-12-2019 - Held, yes - Whether without an AFA, an IP is not eligible to undertake assignments or

conduct various processes thereof as it is an essential condition for undertaking any assignment by an IP - Held, yes - Whether further, section 208 also casts an obligation to abide by code of conduct and comply with all requirements and terms and conditions specified in byelaws of insolvency professional agency of which he is a member - Held, yes - Whether where IP had accepted assignment as Voluntary Liquidator without holding a valid AFA in matter of Sambodh Helathcare Private Limited and Modern Cold Storage Limited, it was in express contravention of regulation 7A of IP Regulations and in consequence also contravention of code of conduct under section 208(2)(a) and (e) of Code and regulations 7(2)(a) and (h) of IP Regulations - Held, yes - Whether however, since disciplinary action had already been taken against said IP for undertaking assignment as voluntary liuidation without holding a valid AFA in matter of Sambodh Healthcare Private Limited and Modern Cold Storage Limited after 31-12-2019 and penalty had also been imposed, show cause notice was to be disposed without any direction against him - Held, yes (Paras 4.2, 4.5, 4.7, 4.8 and 5)

ORDER

1. This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/MON/2020/23 dated 28th August, 2020 issued to Mr. Ajay Kumar, A Kumar & Associates, I/J-1, First Floor, Chandi Vyapar Bhawan, Exhibition Road, Patna, Bihar-800001, who is a Professional Member of the ICSI Institute of Insolvency Professionals (IPA) and an IP registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-002/IP-N00354/2017-2018/11004.

1.1 The IBBI had issued the SCN to Mr. Ajay Kumar on 28th August, 2020, for accepting the assignment of the voluntary liquidation of Sambodhi Healthcare Private Limited and Modern Cold Storage Limited after 31st December, 2019 under the Code without holding a valid Authorization for Assignment (AFA) issued to him by his IPA.

1.2 Mr. Kumar submitted reply to the SCN dated 2nd September, 2020. The IBBI referred the SCN, response of Mr. Kumar to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder. A personal e-hearing was scheduled on 10th September, 2020, however, the IP did not avail the opportunity of personal hearing before the DC.

Show Cause Notice

2. The SCN issued by IBBI alleged contraventions of sections 208(2)(*a*) and 208(2)(*e*) of the Insolvency and Bankruptcy Code, 2016 (Code), regulations 7(2)(*a*), 7(2)(*h*) and 7A of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clauses 1, 2, 11, 12 and 14 of the Code of Conduct contained in the First Schedule of the IP Regulations for accepting the assignment of the voluntary liquidation of-

(i) Sambodhi Healthcare Private Limited after 31st December, 2019 for which public announcement was made on 8th March, 2020 without holding a valid AFA from the IPA;

(ii) Modern Cold Storage Limited after 31st December, 2019 for which public announcement was made on 16th March, 2020 without holding a valid AFA from the IPA.

Written submissions by Mr. Ajay Kumar

3. Mr. Kumar's submissions made in his written reply are summarized as follows.

(i) The promoters/suspended directors of the both the companies contacted the IP in November 2019 with objective of initiation of voluntary liquidation. However, it was only around first week of March, 2020 that the decision to voluntary liquidate was finalized;

(ii) He was under the impression that application for AFA has been made by his office and it was beyond his knowledge that due to some technical errors the submission of the application was not successful;

(iii) Due to onset of COVID-19 lockdown, it was impossible to retrieve any documents from his office;

(iv) He has stated that his actions are unintentional and without any *mala fide*;

(v) He has confirmed that beyond public announcement he has not taken any further steps in the assignments and has not accepted any fee for the said assignments.

Analysis and Findings

4. The DC after taking into consideration the SCN, the reply to SCN, the written submission of Mr. Ajay Kumar and also the provisions of the Code, rules and the regulations made thereunder finds as follows.

4.1 The DC notes that the provisions of the Code and regulations are spelt out in a plain and unambiguous language. Regulation 7A of IP regulations requires for any IP to have AFA before undertaking any assignment after 31st December 2019. Regulation 7A reads as follows:

> *"7A. An insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid authorisation for assignment on the date of such acceptance or commencement of such assignment, as the case may be: Provided that provisions of this regulation shall not apply to an assignment which an insolvency professional is undertaking as on—*
>
> (*a*) 31st December, 2019; or
>
> (*b*) the date of expiry of his authorisation for assignment."

4.2 Thus, it is clear from the said Regulation that one of the essential conditions for undertaking any assignment by an IP is that he should have a valid AFA which

is issued by the IPA with which he is enrolled. In other words, without AFA, an IP is not eligible to undertake assignments or conduct various processes thereof. This requirement applies to undertaking of processes/assignments under the Code including voluntary liquidation. 'Assignment' is defined under regulation 2(*a*) of the IP Regulations as "any assignment of an insolvency professional as interim resolution professional, resolution professional, liquidator, bankruptcy trustee, authorised representative or in any other role under the Code". Regulation 7A was inserted in the IP Regulations *vide* notification dated 23rd July 2019, much before 31st December, 2019. Adequate time was given to the professionals to obtain AFA from respective IPAs.

4.3 The bye-laws of ICSI Institute of Insolvency Professionals defines in para 4(1)(aa) the expression "authorisation for assignment" as an authorisation to undertake an assignment, issued by an insolvency professional agency to an insolvency professional, who is its professional member, in accordance with its bye-laws regulation. An application for grant of AFA can be made to the IPA under para 12A of said bye-laws.

4.4 Further, Section 208 of the Code also casts an obligation to abide by the code of conduct and comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member. Section 208(2) provides as follows:

> "208. *Functions and obligations of insolvency professionals.*—(2) Every insolvency professional shall abide by the following code of conduct: -
>
> (*a*) to take reasonable care and diligence while performing his duties;
>
> (*b*) to comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member; and
>
> (*e*) to perform his functions in such manner and subject to such conditions as may be specified."

4.5 The DC further notes that the certificate of registration granted to an IP is subject to the condition that he should follow at all times the provisions of the Code and Regulations and the bye-laws of Insolvency Professional Agency of which the IP is a member and also follow the Code of Conduct specified in the First Schedule to the IP Regulations. In this regard, clauses (*a*) and (*h*) of regulation 7 (2) of the IP Regulations provide as follows:

> "7. Certificate of registration.
>
> (2) The registration shall be subject to the conditions that the insolvency professional shall -
>
> (*a*) at all times abide by the Code, rules, regulations, and guidelines thereunder and the bye-laws of the insolvency professional agency with which he is enrolled;
>
> (*h*) abide by the Code of Conduct specified in the First Schedule to these Regulations;"

4.6 The credibility of the processes under the Code depends upon the observance of the Code of conduct by the IRP/ RP during the process. Section 208(2) of the Code provides that every IP shall take reasonable care and diligence while performing his duties and to perform his functions in such manner and subject to such conditions as may be specified. Further, the Code of Conduct specified in the First Schedule of the IP regulations enumerates a list of code of conduct for insolvency professionals including maintaining of integrity and professional competence for rendering professional service, representation of correct facts and correcting misapprehension, not to conceal material information and not to act with *mala fide* or with negligence.

4.7 In the present matter, Mr. Kumar accepted the assignment of voluntary liquidation in matter of Sambodhi Healthcare Private Limited and Modern Cold Storage Limited without holding valid AFA after 31-12-2019 which is in express contravention of regulation 7A of IP Regulations, which is applicable to voluntary liquidation as well. In consequence, he also contravened code of conduct under section 208(2)(*a*) and(*e*) of the Code and regulations 7(2) (*a*) and (*h*) of the IP Regulations read with clauses 1, 2, 11, 12 and 14 of the Code of Conduct contained in the First Schedule of the IP Regulations.

4.8 The DC finds that an order has been passed against Mr. Kumar on 7-9-2020 by the Disciplinary Committee of IPA for accepting assignment as Voluntary Liquidator after 31-12-2019 without holding a valid AFA in the matter Sambodhi Healthcare Private Limited and Modern Cold Storage Limited, and imposed penalty of Rs. 10,000/- for contravention of regulation 7A of IP Regulations.

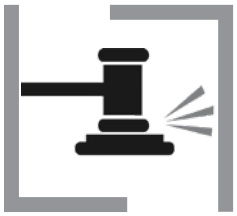
ORDER

5. In view of the fact that ICSI Institute of Insolvency Professionals has already taken disciplinary action against the IP, Mr. Ajay Kumar, for accepting assignment as Voluntary Liquidator after 31st December, 2019 without holding a valid AFA in the matter of Sambodhi Healthcare Private Limited and Modern Cold Storage Limited, the DC, in exercise of the powers conferred under Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, disposes of the SCN without any direction against Mr. Ajay Kumar.

5.1 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Ajay Kumar is enrolled as a member.

5.2 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, New Delhi, for information.

6. Accordingly, the show cause notice is disposed of.



(2021) 123 taxmann.com 60 (IBBI)

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Arun Rajabhau Joshi, *In re*

DR. MUKULITA VIJAYAWARGIYA, WHOLE TIME MEMBER, IBBI

NO. IBBI/DC/31/2020

OCTOBER 1, 2020

Section 208 of the Insolvency and Bankruptcy Code, 2016, read with regulations 7(2)(a), 7(2)(h) and 7A, of the IBBI (Insolvency Professionals) Regulations, 2016 - Insolvency professionals - Functions and obligations of - Whether regulation 7A of IP regulations requires for any Insolvency Professional (IP) to hold Authorisation for Assignment (AFA) before undertaking any assignment after 31-12-2019 - Held, yes - Whether having a valid AFA is an essential condition for undertaking any assignment by an IP and without AFA, an IP is not eligible to undertake assignments or conduct various processes thereof after 31-12-2019 - Held, yes - Whether further, section 208(2) casts an obligation to abide by code of conduct, take reasonable care and diligence while performing his duties and comply with all requirements and terms and conditions specified in bye-laws of insolvency professional agency of which he is a member - Held, yes - Whether where show cause notice was issued by IBBI to IP alleging that it had accepted assignment of CIRPs in matter of Govindam Metals and Alloys Private Limited and Rajit Rolling Mills Private Limited without holding a valid AFA, however, since disciplinary action had already been taken against said IP for undertaking assignment by his IPA and fact that IP was more than 70 years of age and thus ineligible to apply for AFA, show cause notice was to be disposed of without any direction against him - Held, yes (Paras 4.1, 4.2, 4.4 and 5)

ORDER

Background

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/MON/2020/22 dated 28th August, 2020 issued to Mr. Arun Rajabhau Joshi, AR Joshi & Associates, 1st Floor, E-Wing, Bharat Bazar Complex, API Corner, Chikalthana MIDC, Aurangabad, Maharashtra-431006, who is a Professional Member of the ICSI Institute of Insolvency Professionals (IPA) and an IP registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-002/IP-N00350/2017-2018/11000.

1.1 The IBBI had issued on 28th August, 2020, the SCN to Mr. Arun Rajabhau Joshi for accepting the assignment in the capacity of Insolvency Resolution Professional (IRP)

in the matter of the Corporate Insolvency Resolution Process (CIRP) of M/s Govindam Metals and Alloys Private Limited and M/s Rajit Rolling Mills Private Limited after 31st December, 2019 without holding a valid Authorisation for Assignment (AFA) from his IPA.

1.2 Mr. Joshi submitted reply to the SCN dated 29th August, 2020. The IBBI referred the SCN, response of Mr. Joshi to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder. The IP availed an opportunity of personal hearing *via* video conferencing before the DC on 10th September, 2020.

Show Cause Notice

2. The SCN issued by IBBI alleged contraventions of sections 208(2)(*a*) & (*e*) of the Insolvency and Bankruptcy Code, 2016 (Code), regulations 7(2)(*a*) & (*h*) and 7A of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clauses 1, 2, 11, 12 and 14 of the Code of Conduct contained in the First Schedule of the IP Regulations for accepting the assignment in the CIRP of—

(i) M/s Govindam Metals and Alloys Private Limited after 31st December, 2019 for which public announcement was made on 24th January, 2020 without holding a valid AFA from the IPA;

(ii) M/s Rajit Rolling Mills Private Limited after 31st December, 2019 for which public announcement was made on 4th March, 2020 without holding a valid AFA from the IPA.

Written and oral submissions by Mr. Arun Rajabhau Joshi

3. Mr. Joshi's submissions made in his written reply and in the course of personal hearing are summarized as follows:

3.1 Mr. Joshi submitted as follows:

(i) He has given consent to act as an IRP in the CIRP of M/s Govindam Metals and Alloys Private Limited on 30th September, 2019 and in the CIRP of M/s Rajit Rolling Mills Private Limited on 8th November, 2019 in Form No. 2 under rule 9 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, which is prior to 31st December, 2019.

(ii) Due to administrative problem, the application for CIRPs of M/s Govindam Metals and Alloys Private Limited and M/s Rajit Rolling Mills Private Limited were admitted on 17th January, 2020 and 25th February, 2020 respectively, which is after 31st December, 2019.

(iii) Prior authorization is applicable only to assignments taken after 31st December, 2019 and same is not applicable in his case.

(iv) He has diligently completed both the assignments and submitted various disclosures to his IPA as well as to the IBBI, therefore, he totally denied and disagreed with the allegations.

(v) He has already attained age of 74 years and cannot apply for an

AFA. Further, he will not take any assignment under the Code.

(vi) Show Cause Notice was issued to him by his IPA in this regard vide letter dated 24th July, 2020 and he replied to the same on 27th July, 2020.

Analysis and Findings

4. The DC after taking into consideration the SCN, the reply to SCN, the oral and written submission of Mr. Arun Rajabhau Joshi and also the provisions of the Code, rules and the regulations made thereunder finds as follows:

4.1 The DC notes that the provisions of the Code and regulations are spelt out in a plain and unambiguous language. Regulation 7A of IP regulations requires for any IP to hold AFA before undertaking any assignment after 31st December, 2019. Regulation 7A reads as follows:

> "7A. An insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid authorisation for assignment on the date of such acceptance or commencement of such assignment, as the case may be:
>
> **Provided** that provisions of this regulation shall not apply to an assignment which an insolvency professional is undertaking as on-
>
> (*a*) 31st December, 2019; or
>
> (*b*) the date of expiry of his authorisation for assignment."

4.2 Thus, it is clear from the said Regulation that one of the essential conditions for undertaking any assignment by an IP is that he should have a valid AFA which is issued by the IPA with which he is enrolled. In other words, without AFA, an IP is not eligible to undertake assignments or conduct various processes thereof after 31st December, 2019. Regulation 7A was inserted in the IP Regulations *vide* notification dated 23rd July, 2019, much before 31st December, 2019. The same was widely publicized in various programmes. Adequate time was given to the professionals to obtain AFA from respective IPAs. This information was made available on the websites of the IBBI as well as the IPAs.

4.3 The bye-laws of ICSI Institute of Insolvency Professionals defines in para 4(1)(aa) the expression "authorisation for assignment" as an authorisation to undertake an assignment, issued by an insolvency professional agency to an insolvency professional, who is its professional member, in accordance with its bye-laws regulation. An application for grant of AFA can be made to the IPA under para 12A of said bye-laws. Every professional member of the IPA with which he is enrolled should keep himself abreast with new professional developments.

4.4 The credibility of the processes under the Code depends upon the observance of the Code of conduct by the IRP/RP during the process. Section 208(2) of the Code casts an obligation to abide by the code of conduct, take reasonable care and diligence while performing his duties and comply with all requirements and terms and conditions specified in the

byelaws of the insolvency professional agency of which he is a member. Section 208(2) provides as follows:

> "208. Functions and obligations of insolvency professionals.—
>
> (2) Every insolvency professional shall abide by the following code of conduct: —
>
> (*a*) to take reasonable care and diligence while performing his duties;
>
> (*b*) to comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member; and
>
> (*c*) to perform his functions in such manner and subject to such conditions as may be specified."

4.5 The DC further notes that the certificate of registration granted to an IP is subject to the condition that he should follow at all times the provisions of the Code and Regulations and the bye-laws of Insolvency Professional Agency of which the IP is a member and also follow the Code of Conduct specified in the First Schedule to the IP Regulations. In this regard, clauses (*a*) and (*h*) of regulation 7(2) of the IP Regulations provide as follows:

> "7. Certificate of registration.
>
> (2) The registration shall be subject to the conditions that the insolvency professional shall —
>
> (*a*) at all times abide by the Code, rules, regulations, and guidelines thereunder and the bye-laws of the insolvency professional agency with which he is enrolled;
>
> (*h*) abide by the Code of Conduct specified in the First Schedule to these Regulations;"

4.6 The Code of Conduct specified in the First Schedule of the IP regulations enumerates a list of code of conduct for insolvency professionals including maintaining of integrity and professional competence for rendering professional service, representation of correct facts and correcting misapprehension, not to conceal material information and not to act with *mala fide* or with negligence.

4.7 In the present matter, the DC notes that Mr. Joshi accepted the assignment of CIRPs in matter of Indian M/s Govindam Metals and Alloys Private Limited on 30th September, 2019 and M/s Rajit Rolling Mills Private Limited on 8th November, 2019, which is evident from the consent form (Form 2) submitted along with the application for initiating CIRPs. However, due to administrative issues, the CIRPs commenced after 31st December, 2019, *viz.*, 17th January, 2020 and 25th February, 2020. It is also noted that he is more than 70 years of age, is ineligible to apply for AFA and does not intend to take further assignments under the Code.

4.8 The DC finds that an order has been passed against Mr. Joshi on 7th September,

2020 by the Disciplinary Committee of IPA with respect to the issue raised in this SCN, *i.e.*, accepting assignment as an Interim Resolution Professional after 31st December, 2019. The Disciplinary Committee of IPA has issued warning to Mr. Joshi in view of the fact that the date of commencement of the CIRPs is after 31st December, 2019 but the acceptance for the assignments has been given by Mr. Joshi prior to 31st December, 2019.

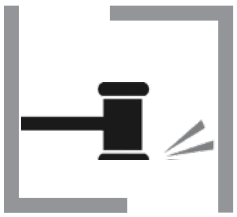
Order

5. In view of the fact that Mr. Arun Rajabhau Joshi being more than 70 years of age is ineligible to apply for AFA under the Code and that Disciplinary Committee of ICSI Institute of Insolvency Professionals has already taken disciplinary action against Mr. Joshi with regard to the issue of undertaking assignments without holding valid AFA, the DC, in exercise of the powers conferred under Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, disposes of the SCN without any direction against Mr. Arun Rajabhau Joshi.

5.1 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Arun Rajabhau Joshi is enrolled as a member.

5.2 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, New Delhi, for information.

6. Accordingly, the show cause notice is disposed of.



(2021) 123 taxmann.com 79 (IBBI)

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Kishan Gopal Somani, *In re*

DR. MUKULITA VIJAYAWARGIYA, WHOLE TIME MEMBER

NO. IBBI/DC/34/2020

OCTOBER 15, 2020

Section 208 of the Insolvency and Bankruptcy Code, 2016, read with regulation 7A, of the IBBI (Insolvency Professionals) Regulations, 2016 and Clause 12A(2)(e) of Schedule to IBBI (Model Bye-laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 - Insolvency professionals - Functions and obligations of - Whether regulation 7A of IP regulations requires every Insolvency Professional (IP) to have Authorisation For Assignment (AFA) before undertaking any assignment after 31-12-2019 - Held, yes - Whether without AFA, an IP is not eligible to undertake any assignments or conduct various processes thereof - Held, yes - Whether an IP who is more than 70 years of age is ineligible to make an application for AFA under

clause 12A(2)(e) of Model Bye-laws - Held, yes - Whether section 208 also casts an obligation to abide by code of conduct and comply with all requirements and terms and conditions specified in bye-laws of insolvency professional agency of which he is a member - Held, yes - Whether however, since disciplinary committee in context of age bar under clause12A(2)(e) and also written consent being filed by IP with NCLT to act as Liquidator, prior to coming into effect of requirements of AFA, Disciplinary Committee did not find any lapse on part of IP, and show cause notice was to be disposed without any direction against him - Held, yes (Paras 4.1, 4.5, 5.2 and 6)

CASES REFERRED TO

Phoenix ARC (P.) Ltd. v. *Limtex Agri Udyog Ltd.* (CP (IB) No. 1496 (KB) of 2018, dated 26-2-2020) (para 3.1) and *K.G. Somani* v. *Union of India* (Civil No. 230 of 2020) (para 3.1)

ORDER

1. This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/MON/2020/4 dated 27th August, 2020 issued to Mr. Kishan Gopal Somani, 4th Floor, 3/15 Asaf Ali Road, New Delhi, National Capital Territory of Delhi ,110002 who is a Professional Member of the Indian Institute of Insolvency Professionals of ICAI (IPA) and an IP registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P00300/2017-2018/10544.

Background

1.1 The IBBI had issued on 27th August, 2020, the SCN to Mr. Kishan Gopal Somani for accepting the assignment as the Liquidator in Liquidation process of Advance Surfactants India Limited (CD) after 31st December 2019 without holding a valid Authorisation for Assignment (AFA) from his IPA. The Order of Liquidation was passed by the National Company Law Tribunal (NCLT), Principal Bench on 14th January 2020 due to the failure of the Corporate Insolvency Resolution Process (CIRP) of CD.

1.2 Mr. Somani submitted reply to the SCN, dated 4th September, 2020. The IBBI referred the SCN, response of Mr. Somani to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder. The IP availed an opportunity of personal hearing before the DC on 24th September 2020.

Show Cause Notice

2. The SCN issued by IBBI alleged contraventions of sections 208(2)(*a*) & (*e*) of the Insolvency and Bankruptcy Code, 2016 (Code), regulations 7(2)(*a*) & (*h*) and 7A of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clauses 1, 2, 11, 12 and 14 of the Code of Conduct contained in the First Schedule of the IP Regulations for accepting the assignment as the Liquidator in Liquidation process of Advance Surfactants India Limited after 31st December 2019 for which public announcement was made on 21st January 2020 without holding a valid AFA from the IPA.

Written and oral submissions by Mr. Kishan Gopal Somani

3. Mr. Somani's submissions made in his written reply and in the course of personal hearing are summarized as follows.

3.1 Mr. Somani has submitted that—

(*i*) as per the decision of CoC, he had given his 'Written Consent' to CoC in its meeting held on 22nd November 2019 to act as Liquidator in terms of section 34(4) and accordingly the same was filed with NCLT on 28th November 2019 itself, much before the cut-off date of 31st December 2019. As per Regulation 7A of IP Regulations it is clearly mentioned that provisions of the regulation shall not apply to an assignment which an insolvency professional is undertaking as on 31st December 2019.

(*ii*) in terms of express provisions contained in Section 34 of the Code, the Resolution Professional of the CD shall be appointed as Liquidator, unless replaced and as such in the present case, the application seeking liquidation of CD along with IP's written consent was filed before Hon'ble NCLT before the cut-off date. Hence, it is not a new assignment and the bar under Regulation 7A of IP Regulations would not be applicable in this case.

(*iii*) He was appointed as an IP by Hon'ble NCLT Kolkata Bench in the matter of Phoenix ARC Pvt. Ltd. v. Limtex Agri Udyog Ltd. CP (IB) No. 1496/KB/2018 *vide* order dated 26-2-2020 but he did not accept for want of AFA from the IPA, as that would have been a new assignment .

(*iv*) The SCN has also been issued to him in this regard and matter is pending with the Disciplinary Committee of the IPA. IPA is the authority for granting the AFA, the present proceedings cannot and should not continue.

(*v*) He had also filed a writ before Hon'ble Supreme Court of India in Writ Petition (Civil) No. 230/2020 in the matter of K.G.Somani v. Union of India challenging the said Regulations 7A of IP Regulations read with Regulation 12A of IBBI (Model Bye-laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 for fixing the upper age limit as 70 years for obtaining AFA. Hence, the matter is sub-judice and the present proceedings should not continue.

(*vi*) During personal hearing, he had submitted that he is a practicing IP and had passed the Limited Insolvency Examination at the age of 78 and till date he has conducted 10 assignments diligently and has unequivocally followed the Code and any rules and regulations made thereunder. At present his age is more than 80 years. He had spent significant amount of time, money and training to become an IP, the subsequent ineligibility of IP above 70 years from obtaining AFA is arbitrary.

(*vii*) He also submitted that he has not

taken/accepted any assignment after 31st December 2019 and will not be able to take due to this restriction of age bar.

Analysis and Findings

4. The DC after taking into consideration the SCN, the reply to SCN, the oral and written submission of Mr. Somani and also the provisions of the Code, rules and the regulations made thereunder finds as follows.

4.1 The DC notes that the Regulation 7A of IP regulations requires every IP to have AFA before undertaking any assignment after 31st December 2019. Regulation 7A reads as follows:

> "7A. An insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid authorisation for assignment on the date of such acceptance or commencement of such assignment, as the case may be: Provided that provisions of this regulation shall not apply to an assignment which an insolvency professional is undertaking as on—
>
> (a) 31st December, 2019; or
>
> (b) the date of expiry of his authorisation for assignment."

4.2 Thus, it is clear from the said Regulation that one of the essential condition for undertaking any assignment by an IP is that he should have a valid AFA which is issued by the IPA with which he is enrolled. In other words, without AFA, an IP is not eligible to undertake any assignments or conduct various processes thereof. Regulation 7A was inserted in the IP Regulations *vide* notification dated 23rd July 2019.

4.3 The IBBI (Model Bye-laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 provides under clause 12A(2)(*e*) of its Schedule that the age-limit for obtaining AFA is 70 years. Clause 12A (2) reads as follows:

> "12A. Authorisation for Assignment.
>
> (1) ** ** **
>
> (2) A professional member shall be eligible to obtain an authorisation for assignment, if he-
>
> (*a*) is registered with the Board as an insolvency professional;
>
> (*b*) is a fit and proper person in terms of the Explanation to clause (g) of regulation 4 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016;
>
> (*c*) is not in employment;
>
> (*d*) is not debarred by any direction or order of the Agency or the Board;
>
> (*e*) has not attained the age of seventy years;
>
> (*f*) has no disciplinary proceeding pending against him before the Agency or the Board;
>
> (*g*) complies with requirements,

as on the date of application, with respect to-

(i) payment of fee to the Agency and the Board;

(ii) filings and disclosures to the Agency and the Board;

(iii) continuous professional education; and

(iv) other requirements, as stipulated under the Code, regulations, circulars, directions or guidelines issued by the Agency and the Board, from time to time."

4.4 The bye-laws of Indian Institute of Insolvency Professionals of ICAI defines in para 4(1)(aa) the expression "authorisation for assignment" as an authorisation to undertake an assignment, issued by an insolvency professional agency to an insolvency professional, who is its professional member, in accordance with its bye-laws regulation. An application for grant of AFA can be made by the IPs to the IPA under para 12A of said bye-laws. An IP who is more than 70 years of age is ineligible to make an application for AFA under para 12A(2)(*e*) of the said bye-laws.

4.5 Further, Section 208 of the Code also casts an obligation to abide by the code of conduct and comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member. Section 208(2) provides as follows:

"208. Functions and obligations of insolvency professionals.-

(2) Every insolvency professional shall abide by the following code of conduct: -

(*a*) to take reasonable care and diligence while performing his duties;

(*b*) to comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member; and

(*e*) to perform his functions in such manner and subject to such conditions as may be specified."

4.6 The DC further notes that the certificate of registration granted to an IP is subject to the condition that he should follow at all times the provisions of the Code and Regulations and the bye-laws of Insolvency Professional Agency of which the IP is a member and also follow the Code of Conduct specified in the First Schedule to the IP Regulations. In this regard, clauses(*a*) and (*h*) of regulation 7 (2) of the IP Regulations provide as follows:

"7. Certificate of registration.

(2) The registration shall be subject to the conditions that the insolvency professional shall -

(*a*) at all times abide by the

Code, rules, regulations, and guidelines thereunder and the bye-laws of the insolvency professional agency with which he is enrolled;

(*h*) abide by the Code of Conduct specified in the First Schedule to these Regulations;"

4.7 Section 208(2) of the Code provides that every IP shall take reasonable care and diligence while performing his duties and to perform his functions in such manner and subject to such conditions as may be specified. Further, the Code of Conduct specified in the First Schedule of the IP regulations enumerates a list of code of conduct for insolvency professionals including maintaining of integrity and professional competence for rendering professional service, representation of correct facts and correcting misapprehension, not to conceal material information and not to act with *mala fide* or with negligence.

5. In the present matter, the DC notes that, Mr. Somani had given his written consent to CoC in its meeting held on 22nd November 2019 to act as Liquidator in terms of Section 34(4) and accordingly the same was filed with NCLT on 28th November 2019 prior to the requirement of AFA for accepting or undertaking assignment under Regulation 7A of the IP Regulations which came into effect from 1st January 2020, *i.e.*, after 31st December 2019. The Hon'ble NCLT, Principal Bench, had passed the Liquidation

Order dated 14-1-2020 due to failure of CIRP in this matter. Mr. Somani's appointment was confirmed as Liquidator based on his "Written Consent to act as Liquidator" and also on the recommendation of CoC.

5.1 The DC further notes that an IP who is more than 70 years of age cannot make an application for the grant of AFA. Therefore, he could not apply for obtaining grant of AFA and hence, could not hold AFA.

5.2 In the aforesaid backdrop, especially in the context of age bar under clause 12A(2) (*e*) of the Schedule to the IBBI (Model Bye-laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 and also the written consent being filed by Mr. Somani with the NCLT on 28th November 2019 prior to the coming into effect of the requirements of AFA, the DC does not find any lapse on the part of Mr. K.G. Somani.

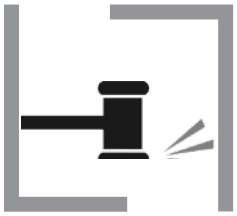
ORDER

6. In view of the above, the DC in exercise of the powers conferred under Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, disposes of the SCN without any direction against Mr. Kishan Gopal Somani.

6.1 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Kishan Gopal Somani is enrolled as a member.

6.2 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, New Delhi, for information.

7. Accordingly, the show cause notice is disposed of.



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INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Pranav Kumar, *In re*

DR. MUKULITA VIJAYAWARGIYA, WHOLE TIME MEMBER, IBBI

NO. IBBI/DC/32/2020

OCTOBER 12, 2020

Section 208 of the Insolvency and Bankruptcy Code, 2016, read with regulations 7(2)(a), 7(2)(h) and 7A, of the IBBI (Insolvency Professionals) Regulations, 2016 - Insolvency professionals - Functions and obligations of - Whether regulation 7A of IP regulations requires for any Insolvency Professional (IP) to hold Authorisation for Assignment (AFA) before undertaking any assignment atfter 31-12-2019 - Held, yes - Whether having a valid AFA is an essential condition for undertaking any assignment by an IP and without AFA, an IP is not eligible to undertake assignments or conduct various processes thereof after 31-12-2019 - Held, yes - Whether further, section 208(2) casts an obligation to abide by code of conduct, take reasonable care and diligence while performing his duties and comply with all requirements and terms and conditions specified in bye-laws of Insolvency Professional Agency (IPA) of which he is a member - Held, yes - Whether where show cause notice was issued to IP alleging that it had accepted assignment of Corporate Insolvency Resolution Process (CIRP) of Crayons Advertising Private Limited (CD) after 31-12-2019 without holding a valid AFA by his IPA, however, ICSI Institute of Insolvency Professionals had already taken disciplinary action against IP for accepting said assignment, show cause notice against IP was to be dismissed without any direction against him - Held, yes (Paras 4.1, 4.2, 4.4 and 5)

Order

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/MON/2020/19 dated 28th August, 2020 issued to Mr. Pranav Kumar, 3F, CS-70, Third Floor, Ansal Plaza, Sector-1,Vaishali, Ghaziabad - 201010, Uttar Pradesh, who is a Professional Member of the ICSI Institute of Insolvency Professionals (IPA) and an IP registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-002/IP-N00263/2017-2018/10776.

1.1 The IBBI had issued the SCN to Mr. Pranav Kumar on 28th August, 2020 for accepting the assignment of the Corporate Insolvency Resolution Process (CIRP) of Crayons Advertising Private Limited (CD) after 31st December, 2019 without holding a valid Authorisation for Assignment (AFA) by his IPA.

1.2 Mr. Kumar submitted reply to the SCN dated 7th September, 2020. An opportunity of personal hearing was scheduled on 9th September, 2020, however, he did not avail

such opportunity. The IBBI referred the SCN, response of Mr. Kumar to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder.

Show Cause Notice

2. The SCN issued by IBBI alleged contraventions of section 208(2)(*a*) and 208(2)(*e*) of the Insolvency and Bankruptcy Code, 2016 (Code), regulations 7(2)(*a*), 7(2)(*h*) and 7A of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clauses 1, 2, 11, 12 and 14 of the Code of Conduct contained in the First Schedule of the IP Regulations for accepting the assignment of the CIRP of CD after 31st December, 2019 for which public announcement was made on 23rd March, 2020 without holding a valid AFA from the IPA.

Written submissions by Mr. Pranav Kumar

3. Mr. Kumar's submissions made in his written reply are summarized as follows:

(i) He had accepted and given consent to the assignment of CD in September, 2019, as a result of which he was of the view that need for AFA was not applicable as the assignment was not accepted or undertaken after 31st December, 2019.

(ii) The NCLT took 6 months to decide the application and make the appointment of Mr. Kumar as an Interim Resolution Professional, as proposed by the creditors in their application.

(iii) It is a matter of record and also noted in the order of NCLT dated 19-3-2020, just four days prior to lockdown, that his name was proposed by the petitioner/ applicant in the petition which was admitted for hearing on 14-9-2019. His consent to act as an insolvency professional in Form 2 was given prior to the date of admission of the petition and the same was attached as part of the petition.

(iv) Since his consent to act was given prior to the 31st December, 2019 and the same was confirmed by NCLT in March, 2020, he assumed that NCLT has taken clearance from IBBI for his appointment before confirming his appointment and thus, IPA as well as IBBI must be aware of his appointment in the matter.

(v) On the date of appointment, he was otherwise eligible for appointment and not in any default. In fact, during more than 19 years of his practice, he has been upholding the spirit of the professional in highest possible standards, helping institutions in possible measures such as peer reviewer, resource person, quality reviewer and he is strongly committed to maintaining high ethical standards and code of conduct of the institution he is a member of.

(vi) This lapse of non-filing of AFA form is on account of a different understanding of the provision and no intent of default is involved. He

has also made an application for AFA on the portal which is pending.

(vii) Consideration may also be given to the fact that sudden lockdown has created difficulty in operations of the office. He received the order passed by Hon'ble NCLT on 21st March, 2020 and on 23rd March 2020, a lockdown was announced. He had very little time to make public announcement and performed his duties under mental pressure, resource crunch and constraints.

(viii) On the same cause of action/ perceived default, he has also received a SCN from his IPA and has also received the order passed by them.

(ix) He reassured that he will be more diligent and seek a relief from any punitive action as this is a first case of default caused by a difference of opinion with no intent of defying the authority or non-obedience to the code of conduct for IP.

Analysis and Findings

4. The DC after considering the SCN, written submissions of Mr. Kumar and also the provisions of the Code and the regulations made thereunder proceeds to dispose of the SCN.

4.1 The DC notes that the provisions of the Code and regulations are spelt out in a plain and unambiguous language. Regulation 7A of IP regulations requires an IP to have AFA before undertaking any assignment after 31st December 2019. Regulation 7A reads as follows:

"7A. An insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid authorisation for assignment on the date of such acceptance or commencement of such assignment, as the case may be:

Provided that provisions of this regulation shall not apply to an assignment which an insolvency professional is undertaking as on-

(*a*) 31st December, 2019; or

(*b*) the date of expiry of his authorisation for assignment."

4.2 Thus, it is clear from the said Regulation that one of the essential conditions for undertaking any assignment by an IP is that he should have a valid AFA which is issued by the IPA with which he is enrolled. In other words, without AFA, an IP is not eligible to undertake assignments or conduct various processes thereof. Regulation 7A was inserted in the IP Regulations *vide* notification dated 23rd July, 2019, much before 31st December, 2019. Adequate time was given to the professionals to obtain AFA from respective IPAs.

4.3 The bye-laws of ICSI Institute of Insolvency Professionals defines in para 4(1)(aa) the expression "authorisation for assignment" as an authorisation to undertake an assignment, issued by an insolvency professional agency to an insolvency professional, who is its professional member, in accordance with its bye-laws regulation. An IP who intends to obtain AFA can make an application to the IPA under para 12A of said bye-laws.

4.4 Further, Section 208 of the Code also casts an obligation to abide by the code of conduct and comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member. Section 208(2) provides as follows:

> "208. Functions and obligations of insolvency professionals.—
>
> (2) Every insolvency professional shall abide by the following code of conduct: -
>
> (*a*) to take reasonable care and diligence while performing his duties;
>
> (*b*) to comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member; and
>
> (*c*) to perform his functions in such manner and subject to such conditions as may be specified."

4.5 The DC further notes that the certificate of registration granted to an IP is subject to the condition that he should follow at all times the provisions of the Code and Regulations and the bye-laws of Insolvency Professional Agency of which the IP is a member and also follow the Code of Conduct specified in the First Schedule to the IP Regulations. In this regard, clauses (*a*) and (*h*) of regulation 7(2) of the IP Regulations provide as follows:

> "7. Certificate of registration.—
>
> (2) The registration shall be subject to the conditions that the insolvency professional shall :—
>
> (*a*) at all times abide by the Code, rules, regulations, and guidelines thereunder and the bye-laws of the insolvency professional agency with which he is enrolled;
>
> (*h*) abide by the Code of Conduct specified in the First Schedule to these Regulations;"

4.6 An IP is a special professional who is dealing with a CD in distress. The credibility of the processes under the Code depends upon the observance of the Code of conduct by the IRP/ RP during the process. Section 208(2) of the Code provides that every IP shall take reasonable care and diligence while performing his duties and to perform his functions in such manner and subject to such conditions as may be specified. Further, the Code of Conduct specified in the First Schedule of the IP regulations enumerates a list of code of conduct for insolvency professionals including maintaining of integrity and professional competence for rendering professional service, representation of correct facts and correcting misapprehension, not to conceal material information and not to act with *mala fide* or with negligence.

4.7 In the present matter, Mr. Kumar gave consent for the CIRP of Crayons Advertising Private Limited on 2nd September, 2019 which was prior to 31st December, 2019. However, due to administrative issues the

CIRP commenced *vide* order of admission passed by Adjudicating Authority (NCLT, New Delhi), dated 19th March, 2020.

4.8 The DC finds that SCN was issued to Mr. Kumar with respect to the issue of accepting assignment as Interim Resolution Professional without holding AFA after 31st December, 2019 and an order has been passed against Mr. Kumar by the Disciplinary Committee of IPA on 7th September, 2020. The Disciplinary Committee of IPA has issued a warning to Mr. Kumar in view of the fact that the date of commencement of the CIRPs is after 31st December, 2019 but the acceptance for the assignments has been given by Mr. Kumar prior to 31st December, 2019.

Order

5. In view of the fact that ICSI Institute of Insolvency Professionals has already taken disciplinary action against Mr. Pranav Kumar for accepting assignment as Interim Resolution Professional after 31st December 2019 without holding a valid AFA in the matter of Crayons Advertising Private Limited, the DC, in exercise of the powers conferred under Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, disposes of the SCN without any direction against Mr. Pranav Kumar.

5.1 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Pranav Kumar is enrolled as a member.

5.2 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, New Delhi, for information.

6. Accordingly, the show cause notice is disposed of.

Practical Questions

Q.1. Can a secured creditor claim preference over another secured creditor at the stage of distribution arising out of resolution plan, only on the ground it dissenting or assenting to the resolution plan?

Ans. No, such a preference cannot be claimed. S. 30(2)(b)(ii), IBC has been amended only to ensure that the dissenting Financial creditor does not get anything less than the liquidation value.

(NCLAT judgment dt. 18th November 2019 passed in *DBS Bank Ltd. v. Shailendra Ajmera (2020)113 taxmann.com 552*)

Q.2. Can a resolution plan which is for an amount less than the liquidation value and which does not even stipulate for any infusion of money for maximization of value of assets of CD be considered to be in accordance with s. 30(2), IBC?

Ans. No, such a resolution plan cannot be taken to be in accordance with s. 30(2).

(NCLAT judgment dt 13th November 2019 passed in B.R. Traders *v. Venkataramanarao Nagarajan (2020)115 taxmann.com 235*)

Q.3. Can a creditor whose claim has been duly considered and same treatment has been provided in the resolution plan as provided to other similarly situated financial creditor apply to pursue its legal remedies of suit or arbitration proceedings?

Ans. No, such a legal route is not available.

(NCLAT judgment dt 13th November 2019 passed in *Kotak Mahindra Prime Ltd. v. Binay Murmuria (2020)115 taxmann.com 217*)

Q. 4. Can the Provident Fund or pension fund or gratuity fund dues payable to employees be included as forming a part of liquidation estate?

Ans. No, such amounts cannot be included as liquidation estate.

(NCLAT judgment dt. 15th November 2019 passed in *Employees of Indus Fila v. SPG Macrocosm Ltd (2021)123 taxmann.com 74*)

Q.5. Can a secured financial creditor who has opted out of liquidation proceedings sell off the secured assets to any of the persons prohibited u/s 29A, IBC?

Ans. No, even though such a secured Financial Creditor has opted out of liquidation proceedings, the secured assets cannot be sold-off to persons prohibited u/s 29A.

(NCLAT judgment dt. 15th November 2019 passed in *State Bank of India v. Anuj Bajpai, Liquidator (2020)115 taxmann.com 15*)

Learning Curves

- **The undisputed debt is a *sine qua non* of initiating CIRP as also the debt should be due and payable.**

(NCLAT order dt. 30th Sep 2020 passed in *Anshul Vashistha v. Jayhind Steel Traders (2021)123 taxmann.com 64*)

- **There is no provision in the IBC entitling the Successful Resolution Applicant to seek withdrawal after its Resolution Plan stands approved by the Committee of Creditors**

(NCLAT order dt. 30th Sep 2020 passed in *Kundan Care Products Ltd. v. Mr. Amit Gupta (2021)123 taxmann.com 86*)

- **The Demand Notice in Form 3 requires the date of default to be explicitly mentioned in the notice so that the debt amount and the date of default could be ascertained**

(NCLAT order dt. 25th Sep 2020 passed in *Kodeboyina Srinivas Krishna v. PVM Innvensys Pvt. Ltd., (2021)123 taxmann.com 66*)

- **There is no requirement that the Resolution Plan should match the maximised asset value of the Corporate Debtor**

(NCLAT, decision dt. 30th Sep 2020 passed in *Singh Raj Singh v. SRS Meditech Ltd. (2021)123 taxmann.com 59*)

- **Dues, if any, arising from the 'Leave and Licence Agreement' is construed as an 'Operational Debt'**

(NCLAT order dt. 7th Oct 2020, passed in Anup Sushil Dubey v. National Agriculture Co-operative *(2021)123 taxmann.com 70*)

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