

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/198/2023

27th December 2023

ORDER

This Order disposes of the Show Cause Notice (SCN) No. IBBI/COMP/2022-23/00972 (IBBI/C/2022/00706)/716/290 dated 20.02.2023, issued to Mr. Vichitra Narayan Pathak, an Insolvency Professional, registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P01353/2018-2019/12063, who is a Professional Member of the Indian Institute of Insolvency Professionals of ICAI and having recorded residential address with IBBI as 120, Jharneshwar Colony, Madhuban Vihar, Near International Public School, Hoshangabad Road, Bhopal, Madhya Pradesh, 462047.

1. Background

- 1.1 The National Company Law Tribunal, Ahmedabad, (AA) had admitted the application under Section 7 of the Code filed by the financial creditor Arrow Engineering Limited, for corporate insolvency resolution process of M/s Golden Tobacco Limited (CD) vide order dated 07.06.2022 and Mr. Vichitra Narayan Pathak was appointed as Interim Resolution Professional (IRP) *vide* the same order.
- 1.2 The IBBI, in exercise of its powers under section 218 of the Code read with regulations 7(2) and 7(3) of IBBI (Inspection and Investigation) Regulations, 2017, appointed an Investigating Authority (IA) to conduct investigation for the role of the Mr. Pathak in the Corporate Insolvency Resolution Process (CIRP) of the CD. The notice of investigation was shared with the Mr. Pathak on 22.07.2022, and Mr. Pathak replied to the same *vide* e-mail dated 25.07.2022. The IA submitted the Investigation Report to IBBI on 16.09.2022.
- 1.3 The IBBI issued the SCN on 20.02.2023 based on findings in the Investigation Report in respect of his role as IRP/RP in CIRP of the CD. Mr. Pathak submitted his reply to the SCN on 06.03.2023. Mr. Pathak submitted additional submissions *vide* e-mail dated 13.07.2023.
- 1.4 The IBBI referred the SCN, response of Mr. Pathak 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. Mr. Pathak availed the opportunity of personal hearing through virtual mode before the DC on 06.07.2023 where he was represented by Advocate Mr. Anurag Bisaria.

2. Alleged Contraventions, Submissions of Mr. Pathak and Findings

The contraventions alleged in the SCN and submissions by Mr. Pathak are summarized as under:

2.1 Incorrect classification of claim as secured debt

- 2.1.1 It is noted that the CIRP of the CD was initiated by order dated 07.06.2022 by AA and by the same order Mr. Pathak was appointed as IRP. It is noted that in the discharge of his duties,

he admitted the claim of Arrow Engineering Limited (“Arrow”) as a secured financial creditor (FC) even though, the said creditor did not hold any security created by way of any mortgage or charge or lien on the properties of the CD.

- 2.1.2 It is noted that section 3(30) of the Code defines secured creditor as a creditor in favor of whom security interest is created and section 3(31) of the Code further defines security interest which means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person provided that security interest shall not include a performance guarantee. It is noted that regulation 21 of IBBI (Liquidation Process) Regulations, 2016 (Liquidation Regulations) provides that, the existence of a security interest may be proved by a secured creditor on the basis of- (a) the records available in an information utility, if any. (b) certificate of registration of charge issued by the Registrar of Companies; or (c) proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India.
- 2.1.3 It is noted on the basis of perusal of records of Information Utility (IU) that the claim of Arrow constitutes of sanctioned debt of Rs. 41,75,00,000 and after including the interest, the total default claim is of Rs. 23,63,33,00,000. It is noted that the said IU Certificate did not mention any details regarding security interest. It is further noted that the MCA record did not reflect any charge created in favour of Arrow Engineering Ltd. .
- 2.1.4 It is further noted that Mr. Pathak placed reliance on Hon’ble High Court of Bombay order dated 14.10.2019 to substantiate the claim of Arrow Engineering Ltd. as secured FC, wherein it was directed that: “... *This is a motion seeking relief under Order XXXVIII of the Code of Civil Procedure, I am of the view that the defendant has failed to disclose any defence to the plaint and the filing of the counter claim prima facie appears to be only a delaying tactics, in view of the express unqualified admission found on the pleadings, as aforesaid. In that view of the matter, I am of the view that an injunction in terms of prayer clause (a) would secure the interest of the plaintiff for the present....*”
- 2.1.5 It is noted that the said order was in the nature of granting injunction and that the mere use of words “... *secure the interest of the plaintiff* ----” in the High Court order dated 14.10.2019 could not be construed as creation of security interest in terms of definition of security interest provided in IBC framework. It is further noted that it is trite law that decree holder by itself does not become a secured creditor.
- 2.1.6 It is noted that section 18(b) of the Code enumerates the duty of the IRP to receive and collate all the claims and section 25(2)(e) provides that the RP shall undertake to maintain an updated list of claims. It is further noted that regulation 13 of the CIRP Regulations provides that IP shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their

claims admitted and the security interest, if any, in respect of such claims, and update it.

2.1.7 Accordingly, the Board was of the *prima facie* view that, that he had, *inter alia*, violated Sections 18(b), 25(2)(e), 208(2)(a) and 208(2)(e) of the Code, Regulation 13 of CIRP Regulations, 7(2)(a) and 7(2)(h) of the IP Regulations read with clause 2, 3, 12 and 14 of the Code of Conduct as specified in the First Schedule of IP Regulations (Code of Conduct).

Submissions by Mr. Pathak

2.1.8 Mr. Pathak submitted that the complainant in the matter, has since been discovered to be a related party of the Corporate Debtor (the "CD"), a fact that was dishonestly concealed by the said Complainant, and who, in apparent coordination with several other related parties (such as shareholders of CD, suspended directors, etc.) has doggedly been trying to derail the CIRP of CD by, *inter alia*, launching frivolous and vexatious proceedings at various fora against him among others.

2.1.9 He submitted that the true and correct interpretation of the term 'security interest', in the context and for the purposes of the Code, is manifestly a question of law. He submitted that a determination of the nature and effect of the Injunction granted by the Hon'ble High Court of Judicature (i.e., whether such an injunction would have the operation and effect of a 'security interest' for the purposes of the Code) is a mixed question of facts and law.

2.1.10 He submitted that in accordance with section 60(5)(b) of the Code, it is the AA that is lawfully vested with the jurisdiction to entertain or dispose of any question of law or facts arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the Code. He further submitted that in consonance with the said provision regarding jurisdiction, *vide* regulation 9 of the Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations) Regulation, 2018, the Board had expressly excluded determination of a question of fact or law from the ambit of its own jurisdiction while providing as follows: "**Guidance on law**- *The Board may provide for a scheme for general or specific clarification or guidance on the provisions of regulations made by it either on a request by a person or on its own, subject to the condition that such clarification or guidance shall not be construed as determination of any question of fact or law.*"

2.1.11 He submitted that the Complainant, before filing the instant Complaint before the Board had already moved the AA with primarily the same grievance including, among others, in respect of the classification of FC as a secured creditor which is currently pending adjudication before the AA bench at Ahmedabad [IA No 597(AHM) of 2022 in CP (IB)No. 268 of 2020].

2.1.12 He submitted that since the contested question of law is currently sub-judice before a competent forum, an adjudication of same issue, or any consequential proceedings thereto that are premised on a finding that is still at large before such forum, is not maintainable before this Disciplinary Committee. He further submitted that the Complainant had made a similar Complaint before the Indian Institute of Insolvency Professionals of ICAI (the "IIIPF") as well (GRC No. 148/2022-23/10), which, on 7 February 2023, was disposed of by the IIIPI where it observed as below: "*The allegation raised in the grievance has been duly examined and considered by the Grievance Redressal Committee (GRC) of IIIPI. After such consideration,*

based on information on record, the GRC notes that the identical allegations are sub-judice before the Hon'ble NCLT and outcome of which shall be binding on the respondent, Committee decided not to examine the merits of allegations involved. The grievance is accordingly closed."

2.1.13 He submitted that the concerned FC, Arrow Engineering Limited, is also arrayed as a party in the said matter before the AA whereby, in consonance with the principles of natural justice, it would only be fair and just that the said question of law which may likely affect the interest of the said FC, is more appropriately determined in a proceeding where the said FC is also duly represented and heard.

2.1.14 He submitted that the term 'security interest' is defined under section 3(31) of the Code which states as follows: "*(31) "security interest" means right, title or interest or a claim to property, created in favour of or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person: Provided that security interest shall not include a performance guarantee;*"

2.1.15 He submitted that the term 'security interest' which is defined under the Code, is to be broadly and expansively construed and, in accordance with the well settled principles for interpretation of statutes, the examples following the words 'include' are to be construed as merely illustrative, but not exhaustive. He submitted that the Hon'ble Supreme Court in the matter of *State Tax Officer vs Rainbow Papers Limited*' has held that such security interest could be created by operation of law.

2.1.16 He further submitted that as per section 100 of the Transfer of Property Act, 1882, a charge may be created either by act of parties or operation of law which is stated in the section as:

"100. Charges. — Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

2.1.17 He submitted that the injunction granted by the Hon'ble High Court of Judicature at Bombay *vide* order dated 14-10-2019 in Notice of Motion No. 68 of 2018 in Commercial Suit No. 782 of 2017 restraining the CD from disposing of, transferring, alienating, encumbering or parting with possession or creating any third-party rights in the suit land (the "Injunction") was for the express purpose of

securing the interests of the FC (i.e., ensuring the satisfaction of decree that may be passed in the said commercial suit). He submitted that the terms of the said Injunction are manifestly in the nature of a 'claim' and/or 'charge' and/or 'encumbrance' on the suit property and/or in the nature of '*an arrangement securing payment or performance of any obligation*', whereby its operation and effect may reasonably be construed to be in the nature of a 'security interest' as also is defined in, and for the purposes of, the Code.

- 2.1.18 He submitted that in accordance with regulation 1(3) of the Liquidation Regulations, the said regulations shall only apply to the liquidation process under Chapter III of Part II of the Code. He submitted that the said regulation, therefore, would not be applicable at a stage when the CD was evidently under CIRP (i.e., Chapter II of Part II) qua which the Board had issued a different set of regulations namely, the IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016 (the "CIRP Regulations"). He submitted that the CIRP Regulations do not provide for any regulation that would correspond to regulation 21 (*Proving security interest*) of the Liquidation Regulations and that it is trite law that a *casus omissus* cannot be supplied by construction. He submitted that such omission was entirely logical and appears to be deliberate as, during the CIRP stage, the Code does not provide for or confer any additional or superior rights or entitlements to a 'secured financial creditor' as compared to an 'unsecured financial creditor'. He submitted that such distinction was only material during the liquidation process.
- 2.1.19 He submitted that if in due course, liquidation proceedings are initiated with respect to a CD then the liquidator, who, unlike the RP is conferred with quasi-judicial powers and functions under the Code, is required to embark *de novo* upon the exercise to verify, admit (or reject, as the case may be), and determine the value of claims and, in doing so, he is not bound by the claims admitted by the RP during the CIRP.
- 2.1.20 He submitted that regulation 21 of the Liquidation Regulations cannot be imported or read into CIRP Regulations, and it is only a rule of evidence, whereas the substantive provisions in respect of 'security interest' are fully set forth under the Code. He submitted that it is couched in directory language where it states that 'it may be proved by..' rather than mandatory, i.e., 'shall', and being a subordinate legislation, it cannot be construed in a manner that would limit, restrict, amend, modify or curtail the substantive provisions of the Code.
- 2.1.21 He submitted that it is not true that FC '*does not hold any security created by way of any mortgage or charge or lien on the properties of CD*' considering that the operation and effect of the Injunction, both de facto and de jure, is in the nature of a charge and/ or encumbrance on the suit property of the CD, and that creation of 'security interest', for the purposes of the Code, is not just restricted to the modes of 'mortgage or charge or lien'.
- 2.1.22 He further submitted that insofar as the IU record is concerned, it is prima facie evidence of its contents and in accordance with regulation 8(2)(a) of the CIRP Regulations, it may only be used to prove the 'existence' of debt. He submitted that the Code or the CIRP Regulations do not mandate the use of IU records for the purpose of admitting the quantum or

ascertaining the nature of a debt, including the security interest, if any. He submitted that the IU Record annexed with the SCN indicated among other things, a sum of Rs 2,463.33 crores as the 'default amount' (against which the RP has only admitted a sum of Rs 265.97 crores, i.e., about 11% of the 'deemed to be authenticated' amount). He submitted that a reference to Injunction Order had also been made in the column 'Part-A Remarks' of the said IU record.

- 2.1.23 He submitted with reference MCA Company Master data, that the obligation of CD to register a charge under section 77 of the Companies Act, 2013 would only arise when a charge is created by the Company (i.e., by the act of parties) but not in instances where a charge is created otherwise, such as by operation of law. He further submitted that a 'security interest' for the purposes of the Code (which is defined in expansive and broad terms), may be created otherwise than by way of 'charge', which may not in all cases be suitably captured by MCA Company Master data. He submitted that the failure of a company to abide by its obligation to register a charge pursuant to section 77 of the Companies Act, 2013 is only a procedural lapse by the CD, who cannot seek to benefit from its own failures or rely on such failure/ omission/ negligence to deny and defeat the substantive rights of the beneficiary of a charge.
- 2.1.24 He submitted that the registration of a security interest merely serves the function of a public notice of the same and, any failure in that regard, would not impinge upon the legality or validity of such security interest. He further submitted that it is not true that the operation and effect of the Injunction order cannot be construed to have created a security interest in terms of the definition of security interest provided in IBC framework. He submitted that the modes provided under the definition of 'security interest' in the Code (i.e., following the word 'include') are not exhaustive, and the said definition is not merely limited to mortgage, charge, hypothecation, assignment and encumbrance as possible modes of creating a 'security interest', but also provides for the validity of any other agreement or arrangement securing payment or performance of any obligation of any person to be construed as having created a security interest for the purposes of the Code.
- 2.1.25 He further submitted that out of 19 Prospective Resolution Applicants, two resolution plans have been received pursuant to the invitation dated 29 March 2023 made under section 25(2)(h) and that both the said resolution plans were primarily based on monetization of immovable assets of the CD, of which the land parcel at Vile Parle, Mumbai was of particular interest to the prospective resolution Applicants, who intends to develop a real estate project thereon. He further submitted that in light of the Injunction granted by the Hon'ble High Court of Judicature at Bombay in favour of Financial Creditor, M/s Arrow Engineering Limited (AEL) the CD (and, therefore, the successful resolution applicant) would not be able to develop any project on the said suit land till such time that the said Injunction is in operation and effect. He submitted that due to this reason, the feasibility and viability of the available resolution plans premised as they are on the development of the suit land would be questionable from the very beginning.
- 2.1.26 He submitted that in the event Arrow Engineering Limited does not relinquish the protection granted to it by way of the Injunction, the resolution plans, as they stand today, would not

be viable or feasible. He submitted that AEL can only be required to relinquish the protection of aforesaid Injunction if they are categorized as a 'secured creditor' for the purposes of the Code.

- 2.1.27 He submitted that section 52(1) of the Code provides that 'A secured creditor in liquidation proceedings may- (a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or'
- 2.1.28 He submitted that whilst there is admittedly no such corresponding provision with respect to insolvency resolution process, Section 30(4) of the Code inter alia provides that the CoC when approving a resolution plan may, among other things, consider if the manner of distribution proposed under a resolution plan takes into account the priority and value of the security interest of a secured creditor. He submitted that in light of this it is not only in accordance with the letter of the Code that AEL is and be classified as a secured creditor, but also necessary and expedient so as to maximize the value of the assets of the CD in line with the object and purpose of the Code. He submitted that misinterpretation, if any, of law is not *ipso facto* misconduct.
- 2.1.29 He submitted that even if his contention that the aforesaid injunction is effectively in the nature of a 'security interest' as defined under the Code, is held to have wrongly interpreted the law, such inadvertent mistake would not ipso facto attract the wrath of disciplinary proceedings. He submitted that wrong exercise of jurisdiction by a quasi-judicial authority or mistake of law or wrong interpretation of law cannot be the basis for initiating disciplinary proceeding, as has been consistently held by the Hon'ble Supreme Court over a long line of judgments. He submitted that the said principle of law is embedded in regulation 12(2) of the IBBI (Inspection and Investigation) Regulations, 2017.

Analysis and Finding

- 2.1.30 In view of section 220 of the Code read with regulation 13 of IBBI (Inspection and Investigation) regulations, 2017, the DC notes the fallacy in the submission of Mr. Pathak on the ground of exclusion of the powers of the DC for determination of issues arising under the Code or incidental issues arising in the process thereto. With regard to issue in hand, the DC notes that decision of the Hon'ble High Court in Para 14 is in the following terms: "*In that view of the matter, I am of the view that an injunction in terms of prayer clause (a) would secure the interest of the plaintiff for the present.*"
- 2.1.31 The DC further notes the submission of Mr. Pathak wherein he has stated that "*the injunction granted by the Hon'ble High Court of Judicature at Bombay vide order dated 14-10-2019 in Notice of Motion No. 68 of 2018 in Commercial Suit No. 782 of 2017 restraining the CD from disposing of, transferring, alienating, encumbering or parting with possession or creating any third-party rights in the suit land (the "Injunction") was for the express purpose of securing the interests of the FC (i.e., ensuring the satisfaction of decree that may be passed in the said commercial suit). He submitted that the terms of the said Injunction are manifestly in the nature of a 'claim' and/or 'charge' and/or 'encumbrance' on the suit property and/or in the nature of 'an arrangement securing payment or performance of any obligation',*

whereby its operation and effect may reasonably be construed to be in the nature of a 'security interest' as also is defined in, and for the purposes of, the Code."

2.1.32 Upon a conjoint reading of section 3(31), section 3(30) of the Code with the judgement of the Hon'ble Bombay High Court as stated above, the DC is of the view that 'Injunction' provided to the plaintiff was in the nature of a relief provided and not as creation of security interest. Therefore, based on the materials available on record, the submissions made by Mr. Vichitra Narayan Pathak are not acceptable and contravention is made out.

3. Order

3.1 In view of the forgoing discussion, the DC, in exercise of the powers conferred under Section 220 of the Code read with Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and Regulation 13 of IBBI (Inspection and Investigation) Regulations, 2017:-

- (i) directs Mr. Vichitra Narayan Pathak to undergo pre-registration educational course specified under regulation 5(b) of the IP Regulations from the IPA where he is registered. Mr. Vichitra Narayan Pathak shall not accept any new assignment under the Code till the successful completion of pre-registration education course.
- (ii) also directs Mr. Vichitra Narayan Pathak to be more careful and cautions while dealing with assignments under the Code and Regulations made thereunder.

3.2 This Order shall come into force immediately in view of Para 3.1 of the Order.

3.3 A copy of this order shall be sent to the Committee of Creditors (CoC)/ Stake Holders Consultation Committee (SCC) of all the Corporate Debtors in which Mr. Vichitra Narayan Pathak is providing his services, and the respective CoC/SCC, as the case may be, will decide about continuation of existing assignment of Mr. Vichitra Narayan Pathak.

3.4 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Pathak is enrolled as a member.

3.5 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal.

3.6 Accordingly, the show cause notice is disposed of.

Sd/-
(Jayanti Prasad)
Whole Time Member, IBBI

Dated: 27th December 2023

Place: New Delhi