

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/244/2024

14 August 2024

ORDER

This Order disposes of the Show Cause Notice (SCN) COMP-11012/47/2023-1BBI/767/784 dated 04.07.2023, issued to Mr. Brijendra Kumar Mishra, an Insolvency Professional, registered with the Insolvency and Bankruptcy Board of India (IBBI) with registration no. IBBI/IPA-002/IP- N00109/2017-2018/10257 and a Professional Member of ICSI Institute of Insolvency Professionals, having residential address recorded with IBBI as Flat No. 202, 2nd Floor, Bhoj Bhavan, Plot No. 18-D, Shivpuri, Sion- Tromboy Road, Chembur (East), Mumbai City, Maharashtra- 400071.

1. Background

- 1.1 The National Company Law Tribunal, Mumbai Bench, (AA) vide its order dated 23.09.2019 admitted application filed by an operational creditor, Mahavir Interchem, under Section 9 of the Insolvency And Bankruptcy Code, 2016 (Code) for initiation of Corporate Insolvency Resolution Process (CIRP) of Lakeland Chemicals (India) Limited (“CD”) and appointed Mr. Rajiv Bhatia as Interim Resolution Professional (IRP). Later, the AA *vide* its Order dated 24.01.2020 replaced Mr. Rajiv Bhatia and appointed Mr. Brijendra Kumar Mishra as the Resolution Professional.
- 1.2 The IBBI, in exercise of its powers under Section 218 of the Code read with Regulations 7(2) and 7(3) of the IBBI (Inspection and Investigation) Regulations, 2017 (Inspection & Investigation Regulations) appointed the Investigating Authority (IA) to investigate in the matter of the CD. Accordingly, the IA issued a notice to Mr. Brijendra Kumar Mishra with a request to clarify the observations made by the Hon’ble NCLAT Delhi Bench vide order dated 20.04.2023. Mr. Brijendra Kumar Mishra submitted reply to the investigation notice vide e-mail dated 13.05.2023. Thereafter the Investigation Report was submitted by the IA to the Board.
- 1.3 The IBBI perused the investigation report and formed a *prima facie* view that Mr. Brijendra Kumar Mishra had contravened provisions of the Code and Regulations framed thereunder and issued the SCN on 04.07.2023. Mr. Brijendra Kumar Mishra submitted his reply to the SCN on 18.07.2023. The IBBI referred the SCN and the response of Mr. Brijendra to the

SCN to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder. Mr. Brijendra Kumar Mishra availed opportunity of personal hearing before the DC on 31.01.2024 through virtual mode.

2. Alleged Contraventions, Submissions, and Findings

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

2.1 Contravention: Failure to issue notice to Operational Creditors for a meeting of Committee of Creditors.

- 2.1.1. It was observed on perusal of Hon'ble NCLAT order dated 20.04.2023 that despite cumulative admitted claims of operational creditors (OCs) being more than 10% of the total admitted claims, notices were not issued to the OCs by Mr. Brijendra Kumar Mishra for attending the meeting of the Committee of Creditors (CoC). In this regard, the Hon'ble NCLAT vide its order dated 20.04.2023 made following observations:

"Thus, keeping in view of the aforesaid facts and circumstances, it is held that it is incumbent upon the RP to serve notice of each meeting of the CoC to the Operational Creditors or their representatives if the amount of the aggregated due is not less than 10% of the debt. Since, in this case, we have found that no notice was given by the RP to the Operational Creditors, therefore, in our considered opinion, it is a dereliction of duty on his part for which he deserves to be burdened with costs. The cost is assessed at Rs. 1 Lakh which shall be paid by the RP to the Operational Creditors (Appellants), who are three members, in equal proportion, by way of bank draft within a period of 30 days from the date of receipt of the certified copy of this order."

- 2.1.2. On perusal of the details of the claims filed by Mr. Brijendra Kumar Mishra to the Board, it was noticed that total admitted claims was Rs. 222.95 crore out of which claim of the OCs was Rs. 33.62 crore which comes out to 15.08% of the total admitted claims. However, it was observed that the RP did not issue notice to any of the OCs. The NCLAT in its order dated 20.04.2023 took notice of the claims of appellant OCs (other than Workmen and Employees and Government Dues) whose cumulative admitted claim amounted to Rs. 24.98 crore which was 11.20% of the total admitted debt of the CD.
- 2.1.3. In his reply to the IA, Mr. Brijendra Kumar Mishra admitted non-issue of notice to the OCs stating that none of the individual OCs had aggregate dues more than 10%, whereas claims of OCs in aggregate exceeded the minimum threshold of 10%, making it mandatory for Mr.

Brijendra Kumar Mishra as RP to issue notice to OCs to attend the CoC meetings.

- 2.1.4. Section 24(3)(c) of the Code provides that RP shall give notice of each meeting of the CoC to OCs or their representatives if the amount of their aggregate dues is not less than ten percent of the debt. The provision clearly states that aggregate claims of OCs as a whole should exceed more than ten percent to be eligible to attend the CoC meeting. Further, Section 24(4) of the Code provides that the directors, partners and one representative of OCs, may attend the meetings of the CoC, but shall not have any right to vote in such meetings. However, in the present case Mr. Brijendra Kumar Mishra failed to issue notice to the OCs to attend CoC meeting and thereby curtailed the rights of the OCs to take part in the meeting of the CoC for the CIRP of the CD.
- 2.1.5. In view of the above, the Board was of the *prima facie* view that Mr. Brijendra Kumar Mishra had contravened Sections 24(3) & (4) and 208(2)(a) of the Code, Regulations 7(2)(a) & (h) of the IP Regulations read with Clauses 2 and 14 of the Code of Conduct.

2.2 Submission made by Mr. Brijendra Kumar Mishra

- 2.2.1 Mr. Brijendra Kumar Mishra in his reply submitted that the present issue pertains to interpretation of provisions of the Code and the CIRP Regulations and therefore his actions are in line with the observations of the Hon'ble Supreme Court at paragraph 58 of *Committee of creditors of Essar Steel V. Satish Kumar Gupta, (2020) 8 SCC 531*.
- 2.2.2 Mr. Brijendra Kumar Mishra further submitted that the NCLAT in *Rahul Khilani & Anr. V. Atul Kumar Jain and Ors. CA (AT) (Ins) No. 586/2021* held that the Resolution Professional could not be faulted with under Section 24(3)(c) in the absence of any nomination of an authorised representative by Operational Creditors during the subsistence of CIRP. Since in the present case also, the OCs have failed to communicate an authorised representative to Mr. Brijendra Kumar Mishra, he cannot be held to have acted in dereliction to his duties as the Resolution Professional. Also, none of the OCs had dues over 10% of the total admitted debt of the CD which would entitle them to receiving notice under Section 24(3) (c) since issuing notice of the CoC meeting to every OC would not be in accordance with the scheme of the Code as only a single representative is allowed in the CoC meeting as per Section 24(4) of Code.
- 2.2.3 Mr. Brijendra Kumar Mishra further submitted that he had issued notice of the CoC meeting to the five OCs who were also Financial Creditors ("FCs") i.e Chemical Corp. Pvt Ltd., Trade Link, N.N. Sales, Dhruvin Pharma and Divine Oleo Formulations, during the CIRP of the CD. Therefore, the observation of the NCLAT that notices were not issued to any of the OCs is not

correct.

- 2.2.4 Mr. Brijendra Kumar Mishra brought to notice of the DC that he has challenged the order dated 20.04.2023 passed by the Hon'ble NCLAT, before the Hon'ble Supreme court and has taken ground therein that the Hon'ble Appellate Tribunal vide its order dated 20.04.2023 could not have passed adverse comments on his conduct as an RP in view of the earlier judgment passed by it in *Rahul Khilnani & Anr v. Atul Kumar Jian & Ors, CA (AT) (Ins) No. 586/2021*, without referring the matter to a larger bench. The said appeal is currently pending.
- 2.2.5 Mr. Brijendra Kumar Mishra further submitted that the Code has not [neither in Section 24(3)(c) nor in Section 24(4)] mandated the presence of all the OCs in the CoC meeting of the Corporate Debtor. From a bare perusal of both the sub-sections, presence of the OCs in the CoC meeting is conditional under Section 24(3)(c). While, under Section 24(4), only one representative of OCs may attend the CoC meeting, that too if condition of Section 24(3) (c) is complied with. Not issuing notice to all the OCs is matter of interpretation of law and even if assuming the interpretation adopted by him is wrong, it should not be treated as contravention of provisions of the Code and dereliction of duties on his part.
- 2.2.6 Mr. Brijendra Kumar Mishra asserted that his interpretation of Section 24(4)(c) of the Code to the effect that the notice of meeting of the CoC be issued only to those OCs or their authorised representatives who had aggregate dues of not less than ten percent of the debt, is endorsed by the NCLT, Mumbai Bench in the matter of *Bheron Corporation v. B.K Mishra, RP of Lakeland Chemicals (India) Limited and Anr. I.A. No. 2524/2021* vide its order dated 19.09.2022 at Page no.9 as under:
- “It is very clear from the plain reading clause (c) of the above Section that a creditor be it a financial or Operational or the representative in order to claim seat in the CoC shall fulfil the aggregate dues of 10% of the debt. As per the reply filed by the RP, the Applicant is having merely a claim of 0.191% of the total debt of the Corporate Debtor. Therefore, as rightly contented by the Resolution Professional the question of giving any notice to the Petitioner dose not arise in this case as he is not entitled to”.*
- 2.2.7 Mr. Brijendra Kumar Mishra put forth his arguments with respect to Section 24 of the Code as follows:
- a) Section 24(3)(c) and 24(4) of the Code do not include the word “claims” nor the word “as a whole”. Contrary to the conclusion of Investigating Authority (IA), Mr. Brijendra Kumar Mishra believes that there is sufficient room for arriving at different interpretations of both the sub-sections [Section 24(3) (c) & Section 24(4)].

- b) Section 24(3)(c) deals with the obligation of a resolution professional in relation to persons/entities to whom notice of the CoC meeting is required to be issued whereas sub-section 24(4) refers about persons/entities who are entitled to attend CoC meeting.

2.2.8 Mr. Brijendra Kumar Mishra analysed sub-sections 3(c) and (4) of Section 24 of the Code as follows:

- (i) Sub-section 3(c) of Section 24 provides that –

“Operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt”.

From the above contents of provision, it was asserted by Mr. Brijendra Kumar Mishra that:

- a) Firstly, notice of the CoC meeting is required to be issued to one or more than one OCs or their representative on complying with the condition that their aggregate dues should not be less than ten percent of the debt.
- b) Secondly the contents of Section 24(3) (c) nowhere mention that notice of the CoC meeting is required to be issued to all their representatives, and
- c) Thirdly the condition of ten percent is related to “aggregate due “, and not to “aggregate claims”.

Therefore, in view of the submission mentioned above, it was not necessary to calculate percentage of total claims of all OCs with respect to total debt. Instead, as per word used in sub-section (3)(c) the aggregate dues of an individual OC should be calculated as percentage of the total debt. In this connection, it is also important to mention that word “claims” has been defined in the Code under Section 3(6) whereas “dues” has not been defined.

- (ii) Sub-section 4 of Section 24 provides as follows:

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings

The abovementioned content of the Section 24(4) clarifies that:-

- a) A meeting of the CoC can be attended by one or more than one Director or Partner.
- b) Meeting of the CoC may be attended by only representatives of OCs.

2.2.9 Mr. Brijendra Kumar Mishra submitted that from the above interpretation, the Code has no intention of allowing participation of all the OCs irrespective of their amount of claim. Under the circumstances if both the Section i.e. 24(3)(c) and 24(4) are read together then the compliance of both these provisions will be ensured as under:

- a) A notice of the CoC meeting will be required to be issued to more than one OCs means those

whose aggregate debt has touched or crossed the limit of ten percent of total debt and:

b) The CoC meeting will be attended by any one representative of (all such) OCs, as referred in clause (a) above

2.2.10 Mr. Brijendra Kumar Mishra submitted that with the above interpretation we may not only abide by both provisions but also ensure valuable contribution by the active participation of all OCs having adequate stake in the Corporate Debtor in from of their aggregate dues. On the other hand, in case the interpretation of the Hon'ble NCLAT *vide* their order dated 20.04.2023 is accepted then following situation is likely to occur:

a) As per Section 24(3)(c), notice will be issued to all the OCs (which are 272 in the instant case and may be more in case of large CD) every time for each CoC and;

b) As per Section 24(4), the CoC meeting may be attended by one representative of all such OCs.

2.2.11 Mr. Brijendra Kumar Mishra further submitted that if notices were to be issued to all these 272 OCs, RP couldn't select one of them to attend each CoC meeting as one representative of all such 272 OCs or coordinate with such OCs to appoint their authorized representative (to whom notice was served). Particularly when there is no provision in the Code nor in the CIRP Regulations for selection of one representative out of 272 OCs to attend the each CoC meeting during CIRP. This would have been the case in many of the CIRPs. Considering this, with reasonable and careful interpretation of the Code as an RP, he framed an opinion for participation of those OCs only who are having aggregate dues of not less than ten percent of total debt.

2.3 Analysis and Finding

2.3.1 Section 24(4) of the Code provides as follows:

“24. Meeting of committee of creditors. –

(1).....

.....

(3) The resolution professional shall give notice of each meeting of the committee of creditors to-

(a) members of committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of Section 21 and sub-section (5);

(b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

(c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent. of the debt...

(4) *The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:*

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

(5).....”

2.3.2 Mr. Brijendra Kumar Mishra averred that there lies ambiguity in interpretation of Section 24(3)(c) that whether notice be given to those operational creditors whose individual due crosses the threshold of 10% of total debt or whether to all operational creditors if the aggregate dues of all the operational creditors taken together crosses the said threshold. Mr. Brijendra Kumar Mishra interpreted it in the former manner that only such operational creditors be invited for the CoC meeting whose individual due exceeds the threshold limit of 10% of total debt of CD. Mr. Brijendra Kumar Mishra placed reliance on various judgments to justify his version of interpretation. The DC notes that:

a) Mr. Brijendra Kumar Mishra submitted that his actions are in line with the observations of Hon’ble Supreme Court at paragraph 58 of *Committee of creditors of Essar Steel V. Satish Kumar Gupta, (2020) 8 SCC 531*. However, on perusal of the said portion of the judgment, the DC finds that it does not deal with the present issue at hand. Rather, it deals with commercial wisdom of the CoC under the scheme of Code.

b) Mr. Brijendra Kumar Mishra placed reliance on Hon’ble NCLAT judgment in the case of *Rahul Khilnani & Anr v. Atul Kumar Jian & Ors, CA (AT) (Ins) No. 586/2021* where OCs had approached the Hon’ble NCLAT to reject the resolution plan *inter alia* on ground that they were not represented in the CoC meetings. However, Hon’ble NCLAT refused to interfere with the NCLT Order approving the resolution plan. The Hon’ble NCLAT had observed that there was no documentary evidence to prove that the name of representative of the Operational Creditors was given to the Resolution Professional and he chose to ignore the same. The NCLAT gave regard to the fact that the resolution plan has already been approved more than a year ago and the fact that the Operational Creditors do not have any voting rights in the CoC.. The NCLAT, while rendering the said judgment, was inclined not to interfere with the resolution plan just on the basis of non-representation of OCs in the CoC meetings. Even in the present case, the Hon’ble NCLAT in its Order dated 20.04.2023 did not interfere with the resolution plan even when it passed adverse observation regarding non-representation of OCs

by Mr. Brijendra Kumar Mishra. The DC is of the opinion that the judgment of the NCLAT in the matter of *Rahul Khilnani & Anr v. Atul Kumar Jian & Ors*, is limited to the facts of that particular case owing to the peculiarity of the factual situations and is not applicable to the instant matter of Mr. Brijendra Kumar Mishra. In any case, the judgment is not on the issue, whether an OC having dues of more than 10% of total debt be represented in the CoC meeting or whether notice be given to all operational creditors if the aggregate dues of all the operational creditors taken together crosses the said threshold of 10%.

2.3.3 In the case of *Consolidated Engineering Company and Anr. v. Golden Jubilee Hotels Pvt. Ltd* Company Appeal (AT) (Insolvency) No. 501 of 2018, Hon'ble NCLAT has observed as follows:

“Prima facie we are of the view that the Adjudicating Authority has rightly held that 10% of total debt for the purpose of representation in ‘Committee of Creditors’ is to be calculated on the basis of the claim as collated and noticed by the ‘resolution professional’. It cannot be based on amount claimed by all the ‘Operational Creditors’, till it is verified and compared. If the claim of ‘Operational Creditors, on verification is found to be less than 10%, the ‘Operational Creditors’ have no right to claim representation in the meeting of the ‘Committee of Creditors’.”

2.3.4 The DC finds that the view of the NCLAT in the matter of *Consolidated Engineering Company and Anr. v. Golden Jubilee Hotels Pvt. Ltd*, though *prima facie*, was taken as early as 2018 and was available for the guidance to Mr. Brijendra Kumar Mishra. Hence the DC finds no reason why Mr. Brijendra Kumar Mishra should not have followed this view of the NCLAT.

2.3.5 The DC finds that Section 24(3)(c) clarifies that notice of the CoC meeting is required to be sent to the OCs or their representatives when aggregate dues of all OCs exceed ten percent of the debt. Sub-section (4) further clarifies sub-section (3)(c) of Section 24, which states that “*one representative of operational creditors*” may attend the meeting but shall not have voting rights. The reading of the above provisions does not point to any single OC and clearly reflects the intent of law that it meant claim of OCs ‘as a whole’ should exceed more than ten percent for their representation in the CoC meeting. If the interpretation of Mr. Brijendra Kumar Mishra that all such OCs whose individual claims exceeds 10% of total claims shall be allowed in the CoC meeting, then there will be more than one representative in the CoC meeting as different representatives will be representing different individual OC. This situation is inconsistent with sub-section (4) of Section 24 which provides for “*one representative of operational creditors.*” So, when one reads Section 24(3)(c) along-with Section 24(4), it becomes clear that the representatives of the OCs have to be given notice when their aggregate dues exceed 10% of

total debt. They may then nominate one representative who will represent them in the CoC meetings.

2.3.6 Further, in the matter of *Committee of Creditors of Essar Steel India Limited Through Authorised Signatory Vs. Satish Kumar Gupta & Ors.* Civil Appeal No. 8766-67 of 2019 and Ors. in its judgement dated 15.11.2019 the Hon'ble Supreme Court observed as follows:

“Section 24 of the Code deals with meetings of the Committee of Creditors. Though voting on the approval of a resolution plan is only with the financial creditors who form the Committee of Creditors, yet the resolution professional is to conduct the aforesaid meeting at which members of the suspended board of directors may be present, together with one representative of operational creditors, provided that the aggregate dues owed to all operational creditors is not less than 10% of the entire debt owed – see Sections 24(2),(3) and (4) of the Code....”

2.3.7 The DC finds that even the above-mentioned observation of the Hon'ble Supreme Court was available for guidance to Mr. Brijendra Kumar Mishra during the CIRP of the CD.

2.3.8 Further, the submission of Mr. Brijendra Kumar Mishra with respect to representation of some OCs in the CoC meeting by virtue of them having some financial debts is misleading, as such OCs were having admitted dues to the tune of less than 0.5% of the total admitted debts and less than 5% of the total admitted debts of all OCs. Hence, clearly those were not representing the OCs.

2.3.9 In view of the foregoing, the DC finds that Mr. Brijendra Kumar Mishra erred in interpreting provisions of Sections 24(3) and (4) of the Code, hence contravention alleges in the SCN is sustained. However, given the fact that Hon'ble Apex Court has taken cognizance in the case and stayed the direction of the NCLAT on requiring RP to deposit Rs 1,00,000 as cost for his non-compliance, imposition of any penalty/punishment by DC will not be proper at this stage.

3. Order

3.1 An Insolvency Professional is the main driving force of processes under the Code who is entrusted with the primary duty of conducting the processes in a manner to achieve the objectives under the Code, *inter alia*, balancing the interests of the stakeholders. Therefore, it becomes imminent for the Insolvency Professional to implement and comply with the provisions of the Code, rules and Regulations in letter and spirit. This DC finds that in the instant matter Mr. Brijendra Kumar Mishra has wrongly interpreted Section 24(3)(c) of the Code which resulted in denial of participation of operational creditors in the CoC meetings.

However, there is no material on record available to suggest *malafide* on the part of Mr. Brijendra Kumar Mishra in this regard.

- 3.2 However, matter being *sub-judice*, DC is not inclined to issue any directions in the instant case and SCN stands disposed of with the direction to the Board to re-examine the case on receipt of order of the Hon'ble Supreme Court and take consequent action as deemed fit.
- 3.3 This Order shall come into force immediately in view of paragraph 3.2 of the order.
- 3.4 A copy of this order shall be sent to the CoC/Stakeholders Consultation Committee (SCC) of all the Corporate Debtors in which Mr. Brijendra Kumar Mishra is providing his services, if any, and the respective CoC/SCC, as the case may be, may decide about continuation of existing assignment of Mr. Brijendra Kumar Mishra.
- 3.5 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Brijendra Kumar Mishra is enrolled as a member.
- 3.6 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal.
- 3.7 Accordingly, the show cause notice is disposed of.

Sd/-
Sandip Garg
Whole Time Member
Insolvency and Bankruptcy Board of India

Sd/-
Jayanti Prasad
Whole Time Member
Insolvency and Bankruptcy Board of India

Date: 14 August 2024

Place: New Delhi