

ICSI Institute of Insolvency Professionals

(Disciplinary Committee)

ICSI IIP/DC/01/2018

28th August 2018

ORDER

(Under Part II of Disciplinary Policy read with Clause 24(1)(g) of IBBI(Model Bye Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016)

Sub: Complaint received from Edelweiss Asset Reconstruction Company Limited (EARC) against Ms. Mamta Binani

The Disciplinary Committee in its fourth meeting held on August 20, 2018, deliberated in detail the complaint received from Edelweiss Asset Reconstruction Company Limited (EARC) against Ms. Mamta Binani, Insolvency Professional dated 01/09/2017 addressed to the Chairperson, IBBI, New Delhi, which was subsequently forwarded on 12th September, 2017 to the ICSI IPA. The complaint raises allegations against the Resolution Professional for allegedly contravening the provisions of the IBC, 2016 in terms of the following:

- i. That SCL, a related party in relation to the Corporate Debtor within the meaning of Section 5 (24) of the Code had assigned a major portion of its debt holding in the Corporate Debtor, to a third party called MFL on November 24, 2016 i.e. just a day prior to the date of the Notification No S.O 3568 (E) pursuant to which the SICA (Repeal) Act came into force on December 1, 2016 and one week before the operationalisation of the Code;
- ii. That one of the proposed agendas in the meeting of the Committee of Creditors was to "take note and approve the possession, control and custody of the assets of the corporate debtor and necessary delegation of authority to Synergies Castings Limited."; the issue being with regard to SCL being a related party of the Corporate Debtor as per Section 5(24) of the Code.

- iii. That the request of Edelweiss Asset Reconstruction Company Limited (EARC) for permitting inspection of the following viz. various documents, including the financial facility documents submitted by MFL, several crucial documents including the loan sanction documents for the several of the loans availed by the Corporate Debtor, etc. which was declined by IRP on 17-03-2017.
- iv. That the appointment of Libord Advisors Private Limited as one of the registered valuers as well as the Merchant Banker is a conflict of interest situation.

The Directorate of ICSI IPA apprised the Disciplinary Committee that on 2nd August, 2017 the Ld. NCLT, Hyderabad Bench had adjudicated on a petition filed by the complainant on the issues noted above among other issues. The learned Tribunal passed its order on 02.08.2017 in said complaint C.A. 57/2017 by observing the following:

(i) That all the three assignment agreements were duly registered with the District Registrar, Anakapalli on 28th April, 2017 on payment of fine for a delay of 1 month, 1 day in presentation of the documents under section 25 and Section 34 of the Registration Act, 1908.

(ii) That the documents were duly executed with all the concerned authorities and are not questioned by any party to those proceedings. EARC, being similarly situated like SCL and MFL, does not have any *locus standi* to question the veracity of those documents on mere apprehensions. A subsequent assignee would only get the rights which the original assignor would get from the original lender.

(iii) As regards the question whether assignment agreements were executed without referring to BIFR, it was observed that as long as the assignment agreement deeds were valid and legally enforceable, EARC had no *locus standi* to question its object, modus operandi behind its execution.

(iv) With regard to the timing of execution of assignment agreements, that the promulgation of the Code was widely discussed/debated/publicized in various media and not out of the blue. The assignment deeds between the two entities are legal and permissible. "At the most, it can be said to be

similar to "tax planning" rather tax avoiding. Because of this assignment deed, not only the applicant's share in total debt is reduced, but other financial creditors/assignees share also proportionately reduced and they did not object to same but only the applicant agitates with oblique motive/reasons best known to it. Therefore, a fraudulent attempt made to reduce the applicant's share in the total voting rights is not a plausible plea by the applicant."

It is further noted that EARC has preferred to challenge the NCLT order/s before the NCLAT while application and the same stands pending.

It was simultaneously pointed out that on 15th May, 2017 the issue relating to inspection of documents was also agitated before the NCLT and the learned tribunal permitted the said inspection. The relevant part of order reads as under:

"13. In the result, the Company application bearing CA No. 70 of 2017 in CP (IB) No. 01/HDB/2017 is disposed of with the following directions:

a) Mrs. Mamta Binani, Respondent No 1 is directed to share Information Memorandum as per Regulations 36 of IBBI (CIRP) Regulations, 2016 with the applicant, as communicated to the applicant vide her letter dated 14th February, 2017 at the earliest possible time, at registered office of Company at Hyderabad"

The Directorate also brought to the notice of the Disciplinary Committee that the Minutes of meeting of the Committee of Creditors dated 22nd February, 2017 include an agenda item".....*to take note and approve the possession, control and custody of the assets of Corporate Debtor and necessary delegation of authority to Synergies Casting Limited (SCL) under an existing lease agreement."* The said Agenda item was duly approved in the same meeting of the Committee of Creditors.

The directorate further pointed out the IBBI circular no. IP/003/2018 dated 3rd January, 2018, in Para 2 states as follows:

"2. It has been observed that a few insolvency professionals are advising the prospective resolution applicants to submit a certificate from another person to the effect that they are eligible to be resolution

applicants. This requirement amounts to outsourcing responsibilities of an insolvency professional to another person. Further, this adds to cost of the resolution applicant and delays submission of resolution plans. The Code read with regulations do not envisage such a certification from a third person."

Additionally, the Directorate placed before the Committee order dated 13th Nov 2017 of the NCLT Mumbai Bench in the case of Fortune Pharma with respect to assignment of debts by a Financial Creditor who is a related party to the Corporate Debtor. Applicable finding reads as under:

"The summum bonum of the above discussion is that by an assignment the assignee does not get the right to change its status. If the assignor is a 'related party' then the assignee shall also be treated in the same status as 'related party' vis-a-vis to the impugned debt. Yet another example is that if the assignor is an 'operational creditor' then as a result of assignment the assignees shall be treated as 'operational creditor' and its status must not for a moment be considered as 'financial creditor'

I hereby hold that the Insolvency Professional went wrong in changing the status of the assignees as non-related party on transfer of debt from a related party creditor. The debt belonged to a 'related party financial creditor' hence on transfer its status shall remain unchanged. The assignee shall also be considered as 'related-party financial creditor' while convening the meeting of creditors to commence resolution process. Learned Insolvency Professional shall take note of the findings of this order and act accordingly."

The Disciplinary Committee observes the following:

1. The main issues of the present complaint placed before it appears to have already been adjudicated by NCLT and there is nothing on record in the said NCLT order dated 2nd August, 2017 against the Resolution Professional.
2. EARC has not furnished the Complaint to ICSI IPA, the original petition as well as the complete proceedings and pleadings of the case. This is required by the Committee to help ascertain what

were the issues raised and agitated by EARC and also to examine the replies by the Resolution Professional and other Respondents.

3. The Committee specifically noted that the issues raised in the complaint appear to have been substantively adjudicated before a judicial forum i.e. Ld. NCLT, Hyderabad Bench. In such circumstance, it would be impermissible for a quasi-judicial proceeding to permit reagitation of the same issues on which a judicial forum i.e. Ld. NCLT, Hyderabad Bench has already pronounced an order.
4. On the same principle the Fortune Pharma judgement cannot be relied upon by the Disciplinary Committee, given the fact that the Hyderabad Bench of the NCLT has already directly adjudicated on the issue.
5. With regard to the circular dated 3rd January, 2018, circular No. IP/003/2018, the same would not be relevant to the context of the case and further, it cannot be retrospectively applicable. Its applicability is only prospective and so it would not apply to the facts of the case.

In light of the above, the Disciplinary Committee specifically directs the Directorate to seek the complete records of the Petition filed by EARC before the NCLT on which the orders dated 15.05.2017 and 02.08.2017 were pronounced. The record to be submitted by EARC should include the copy of the original plaint, the Response of the RP and other Respondents as well as the rejoinder of the Complainant. These records are to be placed before the Disciplinary committee within four (4) weeks from the date of this order to help ascertain if there is any requirement of this Committee, to further proceed on the Complaint or not.

Sd/-

Mr. Nalin Kohli (Chairperson)

Sd/-

CS Ahalada Rao Vummenthala (Member)

Sd/-

Dr. S. P. Narang (Member)