

# INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

## (Disciplinary Committee)

No. IBBI/DC/243/2024

14 August 2024

### ORDER

This Order disposes of the Show Cause Notice (SCN) No. COMP-11012/85/2023-IBBI/818/1456 dated 27.10.2023, issued to Mr. Hari Babu Thota, an Insolvency Professional registered with the Insolvency and Bankruptcy Board of India (IBBI/Board) with Registration No. IBBI/IPA-002/IP-N00084/2017-2018/10225, who is a Professional Member of the ICSI Institute of Insolvency Professionals and having residential address recorded with IBBI as #41/1, 2nd Floor, A Wing, 11<sup>th</sup> Cross, 8th Main 2nd Block, Jayanagar, Bangalore, Karnataka - 560011.

#### 1. Background

- 1.1 The Adjudicating Authority (National Company Law Tribunal, New Delhi Bench) (hereinafter referred as “AA”) vide its Order dated 16.03.2018, admitted the application filed by Gozoop Online Private Ltd. under Section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) for initiating Corporate Insolvency Resolution Process (CIRP) of the Om Pizzas and Eats India Private Limited (“Corporate Debtor / CD”). Mr. Sanjay Sahni was appointed as the Interim resolution Professional (IRP) vide order of the AA dated 18.03.2018. He was replaced by Mr. Hari Babu Thota as Resolution Professional vide order of the AA dated 31.05.2018.
- 1.2 The Board in exercise of its powers under Section 218 of the Code, read with Regulation 7(2) and 7(3) of Insolvency and Bankruptcy Board of India (Inspection and Investigation), Regulations, 2017 (Inspection and Investigation Regulations), appointed an Investigating Authority (IA) to investigate into the CIRP of the CD. The notice of investigation was served to Mr. Hari Babu Thota on 18.07.2023. Thereafter, Mr. Hari Babu Thota replied by the written submissions vide mail dated 24.07.2023.
- 1.3 Based on the findings of the investigation, as mentioned in the Investigation Report submitted by the IA, the IBBI formed a *prima facie* view that Mr. Hari Babu Thota has contravened several provisions of the Code, the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (CIRP Regulations), and the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations).and therefore issued the SCN to Mr. Hari Babu Thota on 27.10.2023. The reply of Mr. Hari Babu Thota on the SCN was received by the Board on 10.11.2023.
- 1.4 The SCN and the response of Mr. Hari Babu Thota to the SCN were referred to the Disciplinary Committee (DC) for disposal of the SCN. Mr. Hari Babu Thota availed an opportunity of personal hearing before the DC through virtual mode on 03.05.2024 where he was assisted by advocate Mr. Arun Srikumar. Mr. Hari Babu Thota submitted further submissions to DC on 06.05.2024.

#### 2. Alleged Contraventions, Submissions of Mr. Hari Babu Thota and Findings of DC.

The contraventions alleged in the SCN, submissions by Mr. Hari Babu Thota and findings

of the DC are summarized as follows:

**Issue related to resolution plan submitted by resolution applicant who is ineligible under Section 29A:**

- 2.1 The SCN states that the resolution plan in the matter of CIRP of CD was jointly submitted by two applicants, namely Avan Logistics Technology Lab Pvt. Ltd. and Credence Logistics Ltd. The said resolution plan was approved by the CoC and filed by Mr. Hari Babu Thota before the AA for approval. Also, a memo had been filed by Mr. Hari Babu Thota before the AA on 12.07.2019 regarding the verification of eligibility of resolution applicants under Section 29A of the Code. It has been observed from the said memo that Avan Motors Private Limited is wholly owned subsidiary of Avan Projects Private Limited, which is also holding company of the CD. Avan Motors Private Limited vide letter dated 19.07.2016 had informed ROC Mumbai that the proposed company name “Avan Logistics Technology Private Limited/ Avan Logistics Technologies Private Limited/ Avan Logistics Technology Lab Private Limited” is being promoted by Avan Motors Private Limited, which is wholly owned subsidiary of Avan Projects Private Limited.
- 2.2 The SCN therefore found it clear from the said memo that Avan Logistics Technology Lab Pvt. Ltd., one of the joint resolution applicants, was promoted by Avan Motors Private Limited, which is wholly owned subsidiary of Avan Projects Private Limited, the holding company of the CD. Further, Mr. Atulya Mittal, Director of the CD, along with his father, Mr. Vinod Kumar Mittal, holds 100% equity capital in M/s. Avan Projects Private Limited (as mentioned in the Memo dated 12.07.2019).
- 2.3 Further, the AA in its order dated 03.01.2020 relied on the affidavit filed by RoC Mumbai and observed that:

*“The ROC (Mumbai), vide an affidavit, has given the information that Mr. Atulya Mittal, s/o Mr. Vinod Kumar Mittal, was a Director on the Board of Avan Projects Ltd., a group company of the Corporate Debtor till 19.08.2017. He however continues to hold a majority stake in the company. Mr. Atulya Mittal was also the promoter of Avan Logistics Lab Pvt. Ltd. This is based on information filed in Form INC -I with the ROC, Mumbai. Further Mr. Atulya Mittal is connected to Credence Logistics Ltd. (the Joint Resolution Applicant) as its Director and is also a Director of the shareholder of the Corporate Debtor viz. OM Pizzas and Eats India Private Limited.”*

- 2.4 The SCN mentions the relevant provisions of Section 29A as under:

*“A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—*

*...*

*(c) at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset...*

*...*

(j) *has a connected person not eligible under clauses (a) to (i).*

*Explanation [I]. — For the purposes of this clause, the expression "connected person" means—*

*(i) any person who is the promoter or in the management or control of the resolution applicant; or*

*(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or*

*(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):*

*... ”*

2.5 Further, the relevant provisions of Section 30 of the Code provides as under:

***“30. Submission of resolution plan. -***

*(1) A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under section 29A to the resolution professional prepared on the basis of the information memorandum.*

*(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –*

*...*

*(e) does not contravene any of the provisions of the law for the time being in force.*

*...*

*(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).*

*... ”*

2.6 Considering the above, it was observed that Avan Logistics Technology Lab Pvt. Ltd., one of the joint resolution applicants, was promoted by Avan Motors Private Limited, which is wholly owned subsidiary of Avan Projects Private Limited, the holding company of the CD. Hence, Avan Logistics Technology Lab Private Limited is covered under “connected person” under clause (j) of Section 29A as both the CD and one of the joint resolution applicant is controlled by Avan Projects Limited by virtue of being a holding or subsidiary company. It may be further noted that they are also connected through Mr. Atulya Mittal, who is a majority shareholder in Avan Projects Limited and Director of CD.

2.7 Even the AA vide order dated 03.01.2020 considered the above-mentioned facts and rejected the said resolution plan on the ground that the resolution applicant was ineligible under Section 29A of the Code. While rejecting the resolution plan, the AA also passed the following adverse observations against you:

*“6. Before we part with this case, we are constrained to note the Resolution Professional should have been diligent enough to have brought the aforesaid facts to our notice. Mt. Atulya Mittal, being a person in common management of the Resolution Applicants and the Corporate Debtor, as a promoter or being directly in control through its*

*holding/subsidiary or associate company, is a “connected person”, making Resolution Applicant ineligible to put forth a resolution plan. It is clearly a move to take over the assets of the Corporate Debtor by a back-door entry after having defaulted in its various financial obligations. A defaulter cannot be permitted to gain control of the defaulting body through its associate or group companies.”*

- 2.8 In view of the above, the Board was of the prima facie view that Mr. Hari Babu Thota has contravened Section 30(2)(e), 30(3), 208(2)(a) & (e) of the Code, Regulation 39(2) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), Regulation 7(2)(a) & (h) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with Clause 1, 2, 12 and 14 of the Code of Conduct specified thereunder.

#### **Submissions by Mr. Hari Babu Thota**

- 2.9 Mr. Hari Babu Thota has referred to relevant provision of Section 29A of the Code and has asserted that it should follow logically from a reading of Section 29A(c) that:

(i) where the account of the corporate debtor has not been classified as a non-performing asset; or

(ii) a period of at least one year has not elapsed since the date of such classification,

the promoter of a corporate debtor should not be precluded from being a resolution applicant. The inference of an inherent bar on promoters from submitting resolution plans would render these nuances meaningless.

- 2.10 Mr. Hari Babu Thota has submitted that as on the CIRP commencement date, the Corporate Debtor had only the following financial creditors:

(i) Ispat Corp Pvt Ltd – Related Party

(ii) Mr. Vinod Mittal – Related Party

Since all the financial creditors were the related parties to the Corporate Debtor, the CoC was formed with the Operational Creditors.

- 2.11 Mr. Hari Babu Thota further submitted that there being no loan from the financial institutions, none of the bank accounts of the Corporate Debtor was classified as Non-Performing Asset in accordance with the RBI Regulations. Further, the information relating to the classification of any account as NPA is not available in public domain. Therefore, he relied on the affidavit provided by the resolution applicants. Further, considering the above provisions, Mr. Hari Babu Thota was of the opinion that promoters or any of the related parties to the promoters do not fall under the ineligibility criteria as prescribed under Section 29A(c) of the Code.

- 2.12 Mr. Hari Babu Thota has further submitted that Section 29A(g) debars the promoter of a corporate debtor in which a preferential transaction, undervalued transaction, fraudulent

transaction or extortionate credit transaction (together “PUFE transactions”) has taken place and in respect of which an order has been made by the Adjudicating Authority from being a resolution applicant. The disqualification would not apply in respect of a promoter of a corporate debtor in which a PUFE transaction has not taken place or where the Adjudicating Authority has not made any order to this effect.

- 2.13 Mr. Hari Babu Thota has apprised the DC that he had filed an application under Section 43,45,50 and 66 of the Code for treating related party of director of the director of CD, Mr. Vinod Kumar Mittal (father of Mr. Atulya Mittal, director of the CD) to be treated as equity shareholder instead of secured financial creditor. Although, the AA vide its Order dated 14.02.2020 allowed the said application and treated Mr. Vinod Kumar Mittal on par with other equity shareholders, however the same has come up after the submission of resolution plan by the resolution applicants and after rejection of the resolution plan by the AA.
- 2.14 Mr. Hari Babu Thota has asserted that the provisions of the Code does not bar/restrict the promoters or any related party of the CD to submit the resolution plan provided that such person does not fall under the disqualifications as specified under Section 29A of the Code.

### **Analysis and Findings of the DC**

- 2.15 The DC notes that the AA on 15.05.2019, noted the objection of the Income Tax Department with respect to the eligibility of one of the Resolution Applicant, i.e. Avan Logistics Technology Lab Pvt Ltd. On 06.06.2019, the AA directed Mr. Hari Babu Thota to reverify the eligibility of the Resolution Applicant in view of Section 29A of the Code. The AA also directed Assistant Registrar of Companies (AROC) to submit report with respect to whether Avan Logistics Technology Lab Pvt Ltd., one of the Resolution Applicant is connected to Avan projects Pvt. Ltd., the holding company of the CD. On 27.08.2019, report of the AROC was taken on record. Accepting the report of the AROC, the AA held that Resolution Applicant is related to the CD. The DC is of the view that Mr. Hari Babu Thota failed to explain/clarify before the AA that whether the Resolution Applicant is connected to the CD as per the provisions of Section 29A of the Code. As an officer of the court, the RP is expected to maintain the highest standards of transparency and accountability. This includes proactively investigating and disclosing any information that may impact the eligibility of resolution applicants under Section 29A of the Code. It is the duty of Mr. Hari Babu Thota explained to the AA and to bring all material information related to the Resolution Applicant before the AA. The RP bears a significant responsibility to conduct thorough due diligence and present accurate and complete information to the AA. This duty is fundamental to the integrity of the CIRP. Under the Code, it is the duty of the RP to discharge his duties diligently, with utmost integrity, objectivity, independence, impartiality and should make earnest efforts to make complete disclosures to ensure transparency and accountability. The RP should not conceal any material information which has a bearing on decision making or misrepresent any facts or situations. In the instant matter, it is observed that Mr. Hari Babu Thota has failed to provide complete set of information before the AA particularly with respect to resolution applicant of the CD. The SCN mentions that the resolution plan was submitted jointly by Avan Logistics Technology Lab Pvt Ltd and Credence Logistics Ltd. The major issue in the SCN is that one of the co-resolution applicants namely, Avan

Logistics Technology Lab Pvt Ltd is a related party to the CD. The chain of relation goes in a way that Avan Logistics Technology Lab Pvt Ltd was promoted by Avan Motors Private Limited, which is a subsidiary company of Avan Projects Private Limited which is the holding company of CD. Also, the director of the CD alongwith his father holds 100% equity in this holding company i.e. Avan Projects Private Limited.

- 2.16 The issue under consideration is whether any person connected with the promoter is ineligible under Section 29A or whether the Section 29A prohibits only ineligible persons or their connected persons to participate as resolution applicant. This issue came up for consideration before the NCLAT in Vishram Narayan Panchpor, RP of Blue Frog Media Pvt. Ltd. Vs. Committee of Creditors of Blue Frog Media Pvt. Ltd. In that matter, the NCLAT has held as under:-

*“Thus, the question to be answered is as to whether a mere fact that the person submitting a Resolution Plan has been promoter or director makes ineligible to submit a Resolution Plan.*

*The Hon’ble Supreme Court had occasion to consider Section 29A in reference to promoters of the Corporate Debtor in ‘Hari Babu Thota’ (supra). In the above case, a plan proposed by the promoter was approved by the Committee of Creditors and the application was filed by the Resolution Professional for approval of the plan which was dismissed on the ground that the promoters could not have presented the plan. The Appeal was filed by the Resolution Professional challenging the order of the Adjudicating Authority. One of the questions which was considered in the case was as to whether Resolution Applicant who was promoter was disqualified under Section 29A. The Hon’ble Supreme Court in the above case has held that there is no per se disqualification under Section 29A. In the above case, MSME certificate was issued after commencement of the CIRP, hence, Section 240A was not relied by the Adjudicating Authority. The Hon’ble Supreme Court after considering the ILC Report 2018 and Section 240A laid down following in paragraphs 23 to 25:-*

*“23. Thus, even on this count, the plan submitted in question will not incur the disqualification. We may also note that the aforesaid intent is reflected in the statutory provision itself that in Section 29A (c) which begins with "at the time of submission of the resolution plan".*

*It is also pointed out that even if it was an NPA, the defect can be cured as set out in proviso (1) before submission of the plan, making the submission of the plan the crucial date.*

*We are thus, setting aside the impugned orders of the NCLT dated 28.02.2023 and NCLAT dated 02.06.2023 and allow the appeal leaving parties to bear their own costs.”*

*The present is not a case where any of the clauses of Section 29A are being pressed for ineligibility of Respondent No.2. Ineligibility is being held only on the ground that Respondent No.2 was promoter of the Corporate Debtor till 2018 when he resigned. The view taken by the Adjudicating Authority is not as per the true and correct interpretation of Section 29A. **Section 29A does not make per se promoters and directors ineligible to submit a plan unless they are ineligible under clauses (a) to (g). Since in the present case, it is not the case that any of the clauses (a) to (g) are attracted on Respondent No.2, the mere fact that Respondent No.2 was promoter and director shall not make him ineligible to submit a Resolution Plan.***

*We, thus, are of the view that the Adjudicating Authority committed error in holding that the Respondent No.2 is ineligible to submit a Resolution Plan. The rejection of IA No.2828 of 2021 is thus, unsustainable.”*  
*(Emphasis added)*

2.17 This decision squarely applies to the facts of the case in hand. Since in the present case, it is not the case that any of the clauses (a) to (g) are attracted on the PRAs, the mere fact that one of the PRAs was connected with the promoters shall not make him ineligible to submit a Resolution Plan. Therefore, in view of the order of the NCLAT, the DC does not uphold the contravention.

### **3. ORDER**

- 3.1. In view of the foregoing, the SCN is disposed of.
- 3.2. This Order shall come into force immediately in view of paragraph 3.1 of the order.
- 3.3. A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Hari Babu Thota is enrolled as a member.
- 3.4. 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.

Sd/- (Sandip Garg) Whole Time Member Insolvency and Bankruptcy Board of India	Sd/- (Jayanti Prasad) Whole Time Member Insolvency and Bankruptcy Board of India
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Dated: 14 August 2024

Place: New Delhi