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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 379/2023**

M/S R KRISHNAMURTHY AND CO Petitioner
Through: Mr. Sandeep Bajaj, Ms. Honey
Satpal, Mr. Vipul Jai & Mr. Mayank
Bajaj, Advocates.
versus

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA AND
ANR. Respondents
Through: Mr. Ashish Verma & Arnab Sanyal,
Advocates. (M: 9871603434)

CORAM:

JUSTICE PRATHIBA M. SINGH

ORDER
% **12.01.2023**

1. This hearing has been done through hybrid mode.
2. The Petitioner- M/s Krishnamurthy & Co., who was a complainant before Respondent No.1- IBBI, is aggrieved by some portions of the impugned order dated 28th October, 2022. Thus, it has filed the present petition seeking removal of the said portions which consist of submissions of Respondent No.2, an insolvency professional, recorded in the order.
- 3 The background facts of the matter are that the Petitioner had made a complaint dated 27th January, 2021 against Respondent No.2, who was appointed as a liquidator of M/s Pratibha Industries International Ltd. The said complaint was considered by the IBBI after issuing notice to Respondent No.2. After hearing the said Respondent, the IBBI vide the impugned order imposed a penalty of Rs.5,00,000/- and passed certain other directions against Respondent No.2. However, in the present petition, the

Petitioner's grievance is not against the final directions issued in the said order but against the contents of the order which consists of certain allegations raised by Respondent No.2 against the Petitioner. The apprehension of the Petitioner is that the said portion can be misconstrued by third parties as findings against the Petitioner as the order is available in public domain.

4. The submission of Id. Counsel is that since the Petitioner was merely a complainant, he was not heard by the IBBI and, thus, the allegations made by Respondent No.2 which are recorded in the form of submissions could not have been controverted by the Petitioner. The Petitioner's claim is that it is a government contractor and the arguments and allegations of the Respondent No.2 are having an adverse impact on its commercial interest. Id. Counsel for the IBBI submits that the order makes it clear that the paragraphs which are complained against are merely the submissions of Respondent no.5 and not the findings of the Board.

5. The Court has perused the order dated 28th October, 2022. It is clear that some paragraphs of the impugned order notes certain allegations made by Respondent No.2 against the Petitioner, however, they are under the heading '**Submissions made by the IP**'. In the opinion of the Court, on a cursory reading it may not be clearly evident that the said allegations are in the form of submissions. If a third party reads this order there is a likelihood that the same could be misconstrued as an observation or finding by IBBI against the Petitioner.

6. It is accordingly directed that paragraphs 3.8.1, 3.8.2 and 3.8.7 of the impugned order shall be only construed as submissions on behalf of Respondent No. 2, and not as observations and findings of the IBBI.

Clarified accordingly.

7. The other grievance of the Petitioner is that the allegations made by the Petitioner of siphoning of funds by Respondent No.2 have not been considered by the IBBI at all.

8. Issue notice to the Respondents to the said limited extent, i.e., relating to the allegation of siphoning of funds, which is stated in paragraph 14 of the present writ petition under the heading '*Siphoning of funds*'.

9. Let notice be served. Counter affidavit be filed within six weeks. Rejoinder, be filed within four weeks.

10. List before Registrar on 24th April, 2023.

11. List before Court on 3rd August, 2023.

12. The present order shall be uploaded by IBBI on its website along with the impugned order dated 28th October, 2022.

PRATHIBA M. SINGH, J.

JANUARY 12, 2023

dj/sk

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/136/2022

28th October, 2022

ORDER

This Order disposes the Show Cause Notice (SCN) No. IBBI/IP/INSP/2021/106/4004 dated 07.09.2022 issued to Mr. Anil Mehta, Insolvency Professional under section 220 of the Insolvency and Bankruptcy Code, 2016 (Code) read with regulation 13 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017 (Inspection Regulations). Mr. Anil Mehta is a Professional Member of Insolvency Professional Agency of the Indian Institute of Insolvency Professionals of ICAI (IIP-ICAI) and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board/IBBI) with registration No. IBBI/IPA-001/IP-P00749/2017-18/11282.

1. Developments in relation to resolution/liquidation of the CDs

- 1.1. The Hon'ble NCLT, Mumbai Bench (AA) *vide* order dated 01.02.2019 admitted the application under section 7 of the Code for initiating Corporate Insolvency Resolution Process (CIRP) of Pratibha Industries Limited (CD). Mr. Anil Mehta was appointed as the Resolution professional (RP) on 14.03.2019. Since no resolution plan was approved by Committee of Creditors (CoC), the CD was ordered into liquidation on 08.02.2021 and Mr. Anil Mehta was appointed as liquidator.
- 1.2. As per the Progress Report for the quarter June-September, 2022, the e-auction notice for sale of the CD as a going concern was put on 21.01.2022 which was conducted on 15.02.2022 wherein M/s VDB Projects Private Limited emerged as the highest bidder. The Letter of Intent was issued on 07.03.2022. In accordance with Schedule I of the IBBI (Liquidation Process) Regulations, 2016, the balance sale consideration was to be paid within 90 days, however the same was not deposited. Hence, the sale process was cancelled and the bank guaranteed, submitted in lieu of EMD, was invoked. On 13.06.2022, M/s VDB Projects Private Limited filed IA No. 1517/2022 and IA No. 1718/2022 before the AA seeking stay on invocation of EMD and the same in *sub judice*.

2. Issuance of Show Cause Notice (SCN) and hearing before DC

- 2.1. The Board, in exercise of the powers conferred to it under section 218 of the Code read with the Inspection Regulations, appointed an Inspecting Authority (IA) to conduct the inspection of Mr. Anil Mehta *vide* order dated 23.11.2021. A draft inspection report (DIR), prepared by the IA, was shared with Mr. Anil Mehta on 11.05.2022, to which Mr. Mehta submitted his comments *vide* email dated 28.05.2022. The IA submitted the Inspection Report to Board on 16.06.2022.

- 2.2. Based on the material available on record including the Inspection Report, the Board issued the SCN to Mr. Anil Mehta on 07.09.2022. The SCN alleged contravention of section 14(1)(b), section 208(2)(a), 208(2)(e), regulation 7(2)(a), Regulation 7(2)(h) of IBBI (Insolvency Professional) Regulations, 2017 (IP Regulations) read with Clause 1, 2, 3, 14 and 15 of the Code of Conduct as specified in the First Schedule of the IP Regulations. Mr. Anil Mehta replied to the SCN on 22.09.2022.
- 2.3. The Board referred the SCN, written and oral submissions of Mr. Anil Mehta, 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.
- 2.4. Mr. Anil Mehta availed an opportunity of personal hearing before DC on 11.10.2022 physically where he was represented by Mr. Abhinav Vasisht, Senior Advocate, Mr. Ashish Rana, Advocate, Mr. Anurag Singh, Advocate and Mr. Akshita Sachdeva, Advocate. Mr. Mehta submitted further written submissions on 14.10.2022.

3. Alleged contraventions and submissions of the IP

Contraventions alleged in the SCN and Mr. Anil Mehta's submissions thereof are summarized below:

Contravention – I

3.1. Breach of Moratorium by RP

- 3.1.1. Section 14(1)(b) prohibits transferring, encumbering, alienating or disposing of by the CD any of its assets or any legal right or beneficial interest therein. After perusal of details provided by Mr. Mehta during the inspection, it has been observed that he made payment to the tune of Rs. 3.89 crore for expenses such as internet charges, salary dues, fuel expenses, rent and certain payment to contractors, pertaining to the period prior to CIRP commencement date.
- 3.1.2. As per the scheme of code and IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) and IBBI (Liquidation Process) Regulations, 2016 (Liquidation Regulation), any dues pertaining to pre-CIRP period must be admitted as a claim. Mr. Mehta was duty bound to act in accordance with the provisions of the Code and regulations made thereunder. However, by making the payment of pre CIRP dues from account of CD during the CIRP, moratorium as required has been breached.
- 3.1.3. In view of the above, the Board is of the *prima facie* view that Mr. Mehta has *inter alia* violated section 14(1)(b) and 208(2)(a) of the Code, regulation 7(2)(a) and 7(2)(h) of IP Regulations read with Clause 1, 2, 3 and 14 of the Code of Conduct as specified in the First Schedule of IP Regulations (Code of Conduct).

3.2. Submissions made by the IP

- 3.2.1. Mr. Mehta submitted that he was appointed as RP only on 14.03.2019 and signed the first Bank payment on 20.03.2019. Thus, all the payments made prior to 20.03.2019 were made by the Interim Resolution Professional (IRP) Mr. Sunil Kumar Choudhary, a partner at EY assisted by EY Restructuring LLP as the IPE. Out of the amount of Rs 3.89 Crores, an amount of Rs. 0.90 Crores has been paid by the IRP on account of the Salary of a few on the sites (Rs. 78.13 lakhs), internet connection charges (Rs 2.75 lakhs) and payment for AMC of back-up systems (Rs. 8.84 lakhs, TDS). He stated that Rs.2.99 crores were paid towards the pre-CIRP expenses, whereas the total claim of operational creditors was approximately 800 crores. Payments were made only towards expenses which were critical and necessary to maintain the CD as a going concern and maximise its value for its resolution. It is for this reason alone that the CoC did not raise any objections against the said payments being made. The only assets of the CD were its existing projects and its employees and therefore, it was imperative to keep the said projects running and to complete them as well as to retain the employees.
- 3.2.2. Mr. Mehta submitted that the Code does not define assets however, what is meant by assets is reflected in section 18 of the Code which states about duties of Interim Resolution Professional.
- 3.2.3. Further, as far as money is concerned, it has been specifically defined as part of the definition of property in section 3(27) of the Code and states that the property includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property.
- 3.2.4. Mr. Mehta submitted that he has never violated the provision of section 14(1)(b) of the Code, as neither any asset of the CD nor any legal right or beneficial interest has been transferred, encumbered, alienated, or disposed of by him. The expenses such as interest charges, salary dues, fuel expenses, rent, and certain payments to contractors pertaining to the period prior to CIRP were paid only when such payments were considered very critical in nature, and which ensured continuity of business operations of the CD. In case if such payments were not made then it would have led to a default in the contractual obligations of the CD. Further, non-payment for these services may have led to the termination of the contract by the client. Moreover, non-payment would have required the replacement of specialized vendors/employees engaged in a specialized construction project and the same was and is not only difficult but was fraught with value destruction and derailment of the construction process considering the sector of EPC in which the CD was operating, and any delay would have meant ending with the levy of huge liquidated damages by the clients and that would have caused more losses to the CD instead of maximization of its value and further loss by way of encashment of Bank Guarantee. Thus, the payments made were in the best interest of the CD and in order to avoid any hiccups in the continuity of its business operations, and the same was in

compliance with discharging of the duties by Mr. Mehta in terms of section 20(2)(e) of the Code and the same can no way be termed as in conflict with provisions of section 14(1)(b) of the Code. Further, he submitted that he had acted in good faith while discharging duties under the Code and was very much conscious and concerned about the moratorium declared.

- 3.2.5. Mr. Mehta further submitted that the payments were made in good faith and only for the benefit of the CD to keep it as a going concern. The CoC was aware that pre-CIRP expenses are not to be ordinarily made and it always kept informed in respect of these payments and never expressed any disagreement with the same. He always kept the CoC in loop in respect of payment towards these dues and the CoC in its commercial wisdom has never expressed any disagreement with the same. In the 15th meeting of CoC it was discussed and expressly recorded that the pre-CIRP expenses were being incurred to keep the CD running as a going concern. It helped bolster the CD's cash flow which increased to Rs. 82.24 Crores as on bid-date in the liquidation process from a balance of Rs. 8 lakhs as on CIRP date.
- 3.2.6. He further submitted that bank guarantees issued by the CD for various projects were live, in around 21 Projects aggregating to Rs. 533.50 crores of which only Bank Guarantee's worth Rs. 76.41 crores were encashed by the client and Bank Guarantees worth Rs. 126.42 Crores were brought back, whereas bank guarantees worth Rs. 330.67 Crores are still outstanding as on date. If these expenses were not incurred, the value of the assets of the CD would have suffered hugely because of the invocation of the live bank guarantee to the tune of Rs. 533.50 Crores which needed to be protected. Since the CD was engaged in the business of engineering, procurement, and construction (EPC) and therefore, contracts payments to contractors, employees were in the nature of essential services for CD without which value maximization could not have been achieved and thus non-payment to contractors would have meant termination of contracts by government authorities and invocation of bank guarantees, since the projects being executed were impacting public at large, not much time would have been taken by the authorities for terminating the contracts, which would have meant huge losses for the stakeholders and also reduction in the realizable value of the CD. Further, non-payment to employees, would have meant that the RP and its team would have been deprived of the data and knowledge of various ongoing projects (at least 25) apart from the data of claims filed with various authorities, litigations raised, deposits and retentions to be recovered from the authorities etc.
- 3.2.7. Mr. Mehta submitted that contractual payments were made majorly for one project i.e. Phulera project, which involved change of multiple contractors (three changes in all). In the process of keeping the project alive, the CD has been able to generate revenue of Rs. 18 crores approximately. and further save the performance bank guarantee given to the client of Rs. 22,69,50,770/-. Hence, not only the project was saved in the interest of CD but also the bank guarantees were safeguarded to add value to the assets and interest of the CD.

- 3.2.8. He further submitted that in order to ensure completion and continued operation of the said projects, and particularly the Phulera Project, it was necessary to make payments to the vendors and contractors of the CD. It is important to state that the CD had furnished performance bank guarantees to the tune of Rs. 62.70 crores approximately for its existing projects to Public Health Engineering Department (PHED), Government of Rajasthan. In the event the CD would have failed to carry out the works, PHED would have encashed the said bank guarantees seriously jeopardising the CD. The performance bank guarantees fall outside the purview of section 14 of the Code and therefore, no moratorium is applicable to them.
- 3.2.9. Further, PHED had already terminated 5 out of 10 projects and by its letter dated 30.10.2018 had directed recovery of dues of Rs. 209 crores from balance projects. As such it was critical that the remaining projects were kept running to avoid the termination of other projects. Failure of even one project would have led to a cascading effect of termination of other projects by PHED and all other Government agencies, encashment of performance bank guarantees amounting to Rs. 533 crores approximately furnished by the CD for its projects all across India, and consequently, the CD losing all its value. Additionally, the segment of pipelines once completed and closed needs to carry water. Else the closed sections would have caused vacuum inside leading to upliftment and collapse of the PVC pipes leading to damage of the completed sections of projects. The contractors if not paid would have resulted in the damage of works already completed of Rs. 174.60 Crores.
- 3.2.10. The termination of projects and recovery of monies by PHED was challenged by the CD before the Hon'ble High Court of Rajasthan, and an advocate had been engaged for the said purpose. It was imperative to defend the case for the CD, else the CD would have suffered considerable financial difficulty. Therefore, the fee of the advocate of Rs.10,80,000/- had to be cleared to ensure representation before the court. Relevantly, the Hon'ble High Court of Rajasthan granted stay of recovery to the tune of Rs. 91,32,72,294/- from the CD on 16.04.2019. The advocate had refused to appear without payment of fees and no other lawyer could be engaged without his no Objection. As per the Bar Council of India rules no lawyer can work without a no objection from the previous lawyer.
- 3.2.11. Furthermore, the said amount was paid out of the project receipts received from the clients of the CD. Hence, it was not an actual outflow of the CD. In order to keep the projects running, it was imperative to pay the salaries of the employees of the CD who were the real assets and were working even after initiation of the CIRP. The employees were critical for the running of the CD and its projects. The employees were threatening to stop all work if their pending salaries were not cleared and therefore, their salaries for the month of December 2018 were paid by Mr. Anil Mehta. As the salary for month of January 2019 had been already paid by Mr. Sunil Kumar Chaudhary prior to engagement of Mr. Mehta to a few of the employees, and the salary of the said month aggregating to

Rs. 24.32 lakhs approximately were paid by myself. Out of Rs.2.99 crores approximately paid, only Rs.20,000 was paid inadvertently towards pre-CIRP courier expenses. The remaining expenses were critical and necessary expenses

- 3.2.12. Mr. Mehta submitted that section 14(1) of the Code is subject to provisions of sub-section (2), which provides that the supply of essential goods or services to the CD as may be specified shall not be terminated or suspended or interrupted during moratorium period. Attention is invited to section 17(1) which vests the management of the CD in the IRP and section 17(2) which further authorises the IRP to act and execute in the name and on behalf of the CD all deeds, receipts and other documents, for and on behalf of the CD. Further section 19, obliges the personnel of the CD to cooperate and extend all assistance and cooperation to the IRP. Further section 20 requires the IRP to make all endeavours to protect and preserve the value of the property of the CD and manage the operations of the CD as a going concern and section 20(2)(e) and section 25(1) further authorises IRP to take all actions as are necessary to keep CD as a going concern.
- 3.2.13. Section 14 (1) provides for moratorium to protect the assets of the CD on one hand and section 14(2) read with section 20 and section 25(1) provides for maintaining the CD as a going concern so as to preserve the assets and property of the CD and thus achieving the purpose and object of Code i.e. “maximisation of the value of the assets” as provided in the preamble. Therefore, the scheme of the Code, does impose moratorium under section 14 to preserve the assets of the CD but such protection cannot be read to defeat the object and purpose of the Code i.e. the requirement of maintaining the CD as a going concern, by making section 14(1) subject to section 14(2). The emphasis of keeping the going concern is also seen from the various powers and authorisation which have been bestowed on the IRP, especially section 18, 19 and 20 which gives a free hand to the IRP to maintain the CD as a going concern and thus preserve and protect the value of the property of the CD. Therefore, section 14 (1) is not an absolute bar on IRP so as to restrict its powers and authorisations to maintain the CD as a going concern. Section 14(2) read with section 20 and section 25(1) in fact, operates as an exception to section 14(1), to maintain the CD as a going concern. The powers under section 14(2) read with section 20 and 25(1) was exercised by me to undertake the following actions so as to preserve the property of the CD and maintain it as a going concern.
- 3.2.14. Mr. Mehta finally submitted that the alleged contravention as regard violation of moratorium is not correct and deserves to be viewed leniently. He also beseeches that if the quantum of amount spent and benefits reaped in adding value to the assets of the CD in undertaking that is compared, the same would not be even comprise of a drop in ocean. In any case the law as regard the provisions of the Code was not well settled back in 2018-19 and therefore the contravention, if any deserves to be leniently viewed.

3.3. Summary Findings

- 3.3.1. Section 14(1)(b) of the Code provides as follows :-

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: -

...

(b)transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;

3.3.2. The provision on ‘Moratorium’ envisages prohibition on transfer, alienation or disposal of any of the assets or legal right or beneficial interest of the CD. The moratorium under the Code refers to the period wherein no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, can be instituted or continued against the CD. The moratorium mechanism facilitates the continued operation of the business and allows the debtor a breathing space for re-organising its affairs. The BLRC in its report has made following observations:

“...One of the goals of having an insolvency law is to ensure the suspension of debt collection actions by the creditors, and provide time for the debtors and creditors to re-negotiate their contract. This requires a moratorium period in which there is no collection or other action by creditors against debtors.”

3.3.3. The adjudicating authority is required to declare moratorium under section 14(1) of the Code which commences with the commencement of the CIRP. The purpose of instant stay is to prevent fleecing of the debtor’s assets before orderly distribution to creditors can be affected.

3.3.4. In present case, the DC notes the submission of Mr. Mehta that Rs. 2.99 crores were paid towards the pre-CIRP expenses, whereas the total claim of operational creditors was approximately 800 crores. The payments were made towards expenses such as internet charges, salary dues, fuel expenses, rent and certain payment to contractors, pertaining to the period prior to CIRP commencement date.

3.3.5. The minutes of 14th CoC meeting dated 31.10.2019 recorded as follows:

“The RP then apprised the CoC that one of the salient duties of the Resolution Professional is to ensure the continued business operations of the corporate debtor and to take all such actions as are necessary to keep the corporate debtor running as a going concern. This being so, Resolution Professional may take a call if the payments (i.e. pre CIRP dues) are necessary for maintaining going concern status of the corporate debtor. The RP further informed the CoC that while maintaining the going concern status of the Company, he was required to make certain payments pertaining to the pre CIRP period, details of which shall be presented in the next CoC meeting. He further mentioned that most of the pre

CIRP dues have been paid out of ongoing projects receipts. The CoC members took note of the same.”

Further during 15th CoC meeting dated 31.10.2019, it was noted by CoC as follows:

Update on release of pre-CIRP dues to maintain going concern

The RP team updated the CoC members about the pre-CIRP dues which were paid during the CIRP period (as was discussed in previous CoC meeting) to ensure that the going concern status of the Company is not adversely affected. The RP team further apprised the CoC that such pre-CIRP dues have been bifurcated into two parts:

- Cost funded by projects receipts (i.e. the cost was paid out of the project receipts); and*
- Actual cash outflow (the cost was borne directly by the Company)*

The CoC members took note of the same

3.3.6. The DC observes that the payment of pre-CIRP dues of one set of creditors tantamount to preferential treatment to certain creditors. There is no evidence on record to suggest that Mr. Anil Mehta has approached to AA on this issue to seek directions.

3.3.7. The point (n) of Facilitation/005/2020 dated 13.11.202 issued by the Board provides as follows:

(n) Payment to creditors during CIRP: The Code requires every creditor to submit claims as on insolvency commencement date (ICD) to the IRP. Section 14 of the Code prohibits settlement of any such claim during CIRP and requires the resolution plan to deal with them together in the manner decided by the CoC subject to section 30(2) of the Code. Section 53 of the Code provides a waterfall for distribution of liquidation proceeds if the CIRP yields liquidation. Therefore, the IRP / RP cannot clear the dues of any creditor during the CIRP, as this amounts to giving preferential treatment to one creditor over others and thereby alters the priority mandated under the Code. He cannot also allow any creditor, who is having custody of funds of the CD, to appropriate it towards its own dues. There are instances where the RP allowed payment of dues outstanding as on the ICD to some creditors during CIRP. This not only impacts the interests of remaining creditors but also may be seen as compromising independence and integrity of the IP.

3.3.8. The Hon'ble National Company Law Appellate Tribunal in the matter of Indian Overseas Bank Vs Mr. Dinkar T. Venkatsubramaniam, Resolution Professional for Amtek Auto Ltd. (Company Appeal (AT) (Insolvency) No. 267 of 2017) observed as follows:

“Having heard learned counsel for the Appellant, we do not accept the submissions made on behalf of the Appellant in view of the fact that after admission of an application under Section 7 of the ‘I&B Code’, once moratorium has been declared it is not open to any person including ‘Financial Creditors’ and the appellant bank to recover any amount from the account of the ‘Corporate Debtor’, nor it can appropriate any amount towards its own dues”.

Thus, once the moratorium is in force, the financial creditor/operational creditor has to prefer its claim before IP, which is considered along with other claims as per law.

3.3.9. As an RP, Mr. Anil Mehta should ensure that CIRP is conducted as per the provisions of the Code and Regulations made thereunder. It has to be understood that conduct and performance of a RP have a substantial bearing on the survival of an ailing entity. He, therefore, is expected to function with a strong sense of urgency and with utmost care and diligence. Moreover, if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the Rule is that if this was not so, the statutory provision might as well not have been enacted. Section 14 of the Code, therefore, by necessary implication, prohibits this power from being exercised in any manner other than the manner set out in the said provision of the Code.

3.3.10. The DC notes that there cannot be an exceptional or special treatment to any corporate entity in any CIRP. While reinforcing the rule of law, every stakeholder is to be given the same level playing field, irrespective of its size or the influence of people behind them. Under the existing laws, once CIRP is initiated against a CD and a moratorium is imposed, the provisions of the Code take precedence over all other laws of the country. In the instant case, payment of pre-CIRP dues to the employers and vendors of the CD and that too in preference of other creditors had the effect of causing disturbance in the moratorium as envisaged in the provisions of section 14 of the Code. The resolution process will be rendered meaningless, if the assets of the CD are allowed to be disintegrated during the process. Thus, in view of the observations made hereinabove, the DC is of the view that Mr. Anil Mehta has violated section 14(1)(b) and 208(2)(a) of the Code, regulation 7(2)(a) and 7(2)(h) of IP Regulations read with Clause 1, 2, 3 and 14 of the Code of Conduct as specified in the First Schedule of IP Regulations (Code of Conduct).

Contravention-II

3.4. Failure to obtain the audit report of M/s Currie & Brown

3.4.1. Mr. Mehta has appointed an external agency namely M/s Currie & Brown at a professional fee of Rs.15.93 lakh (including taxes) for audit of sub-contracted works

given to M/s R Krishnamurthy & Co. (RKC) for the period 01.01.2018 to 12.12.2020 as well as for reconciliation of the accounts with RKC for the final settlement. The estimated work completion date mentioned in the work order dated 15.02.2020 was 27.02.2021. As per the terms of the work order, 30% payment was to be made in advance. Accordingly, Mr. Mehta made the payment of Rs. 4.78 lakhs to the agency and included it in the CIRP cost.

3.4.2. It has been noted by the Board that no report has been received from M/s Currie & Brown even till submission of reply Mr. Mehta to DIR though the report as per the work order was required to be submitted by 27.02.2021. Since Mr. Mehta had made the advance payment of Rs. 4.78 lakhs to the agency for reconciliation of the accounts and included it in the CIRP cost, it was his duty to take all necessary actions and ensure timely submission of the report by such agency. There was considerable delay in finalization of the report by the agency and no concrete action seems to have been taken by Mr. Mehta to enforce the terms of work order. In view of the above, the Board is of the *prima facie* view that you have *inter alia* violated regulation 7(2)(a) and 7(2)(h) IP Regulations read with clause 14 of the Code of Conduct.

3.5. Submissions made by the IP

3.5.1. Mr. Mehta submitted that he has taken all diligent steps within his power to expedite the process for completion of the work assigned to Currie and Brown and there has not been any negligence on his part and the audit report has since been received. The delay if any in getting the final report was beyond his power and control and had occasioned due to lack of co-operation from Engineers India Limited (EIL)/Delhi Jal Board (DJB) and specifically RKC and therefore he most humbly requested for leniency and deserves no action in respect of the above observation.

3.6. Summary Findings

3.6.1. With regards to failure of Mr. Mehta to obtain the audit report of M/s Currie & Brown, the DC takes notes his submission that the draft report has been received from Currie & Brown in February 2022 and the final report in September 2022. The DC also notes the submission by Mr. Mehta that delay in getting the final report was due to lack of cooperation from other entities like RKC, EIL and DJB. The DC accepts the submissions of Mr. Mehta on this count.

Contravention-III

3.7. Payment to salary of employees deployed at RKC

3.7.1. Mr. Mehta *vide* letter dated 11.11.2020, asked RKC to pay the salaries/expenses of the staff on the payroll of CD deployed exclusively for the P2 project. The said letter further requires RKC to clear the salary dues of all the employees deployed at the site within 3 days, on failure of which action shall be taken against RKC as per the terms of the agreement and

the applicable laws, including approaching the court/tribunal for necessary reliefs. However, without waiting for 3 days given by Mr. Mehta to RKC or even without any reply from RKC, he himself paid the salary to the staff the very next day on 12.11.2020. Mr. Mehta has admitted in his reply to DIR that without waiting for 3 days' notice, salary was paid to the employees.

3.7.2. The negligence and lack of clear communication on his part by way of paying the salaries to the staff on behalf of RKC, has, thus, resulted in excess outflow of resources from the assets of CD. In view of the above, the Board is of the *prima facie* view that Mr. Mehta has *inter alia* violated regulation 7(2)(a) and 7(2)(h) of IP Regulations read with clauses 14 and 15 of the Code of Conduct.

3.8. Submissions made by the IP

3.8.1. Mr. Mehta submitted that as explained above, RKC was engaged as sub-contractor by the PM Consortium for execution of balance work pertaining to capex portion for package 2 and package 3 on the agreed terms and conditions. In one of the disputes, Mr. Mehta had approached Hon'ble Delhi High Court who was pleased to stay the wrongful termination of a contract, that RKC started writing misleading letters to various authorities, creditors and other stakeholders and started initiating litigations on various fronts. It was always communicated to EIL that, since RKC has been overpaid no amounts should be paid to them and payments should be directly made to vendors/employees. However, even at that point in time i.e. in November 2020, RKC had not made payments to employees engaged since May 2020.

3.8.2. Mr. Mehta submitted that they were aware of the conduct of RKC as similar contracts sub-contracted by CD to RKC were terminated on account of non-performance leading to huge losses including encashment of bank guarantee, forfeiture of retention money and deposits held by client. In these contracts as well, RKC had not paid salaries to the employees.

3.8.3. Mr. Mehta submitted that he did not want the DJB project to suffer nor the employees, he requested EIL to make the payment to employees so that project work would not be affected and employees are also paid. In November 2020, the employees were unpaid for around 6 months and this being the first project of this kind in Asia, it would have been difficult to readily get these employees with their skill sets. Further, there was a bank guarantee of Rs. 82.06 crores given by Axis Bank and EIL/DJB threatened encashment of the BG to pay the subcontractor.

3.8.4. Mr. Mehta submitted that he has made payments to the employees of the CD who were deployed at RKC aggregating to Rs.23.41 lakhs approximately. The said employees were highly skilled employees and were necessary for the project being executed by RKC (which is the first project of its kind in Asia). It would have been impossible to get the said project completed without their presence. RKC was refusing to pay the salaries on account of alleged non-payment of its dues by the CD. The employees were unpaid for about 6 months from May 2020 to November 2020. They had been denied their salaries by RKC for the

time they had been working on the project and they did not have money for even conveyance to report to work.

3.8.5. He further submitted that he was being pressurised to ensure payment of the salaries to the said employees and the same is evident from the following facts:

- (i) Axis Bank had furnished a Bank Guarantee of Rs. 82.06 crores.
- (ii) Employees had stopped all work at the sites for about 15 days.
- (iii) EIL/DJB was threatening to encash the Bank Guarantee furnished by Axis Bank to pay RKC.
- (iv) Axis Bank sent repeated emails to resolve its issues with RKC and ensure that the Bank Guarantee is safeguarded, including an email on 10.11.2020.
- (v) EIL sent emails and letters, including email on 30.10.2020 and letter on 11.11.2020 to resolve its issues with RKC as it had been receiving representations from sub-contractors and vendors regarding the non-payment of their dues. Further stating that failure to resolve issues will result in EIL and DJB in encashing the Bank Guarantees to pay RKC.
- (vi) On receiving the letter dated 11.11.2020 from EIL, Axis Bank sent an email on the same date to Mr. Abizer Diwanji, National Head of Ernst and Young who were providing support services to Mr. Mehta, stating that the Bank Guarantees will be invoked and encashed if issues are not resolved.
- (vii) Ernst and Young threatened to resign in the event no action is taken by the CD on the letter dated 11.11.2020 sent by EIL.
- (viii) Mr. Mehta received an email on 11.11.2020 from the Under Secretary, President's Secretariat, Rashtrapati Bhawan, requesting release of salaries of employees.
- (ix) Mr. Suyog Karmarkar, Director from Ernst and Young in another email stated that the salaries of Employees should be released by tomorrow i.e. 12.11.2020.

3.8.6. Mr. Mehta submitted that it was on account of the above-stated pressure that, despite giving a 3-day notice to RKC, he was compelled to release the salary dues of employees deployed at RKC. However, the said payments were debited to the account of RKC. Since the employees were on the rolls of the CD, he was entitled to pay the employees without any notice to RKC. However, since the employees were deployed at RKC and RKC was obligated to pay their salaries, he first requested RKC to pay the said dues.

3.8.7. The intentions were never to favour one person over the other and since employees were on the payroll of the CD, and the primary payment responsibility was of the CD. The payment of salaries was made in good faith to hardworking employees who were suffering on account of the *mala fides* of RKC especially during the festive season and was debited to the account of RKC. As such there was no loss to the CD. The intention was not to favour anyone but to ensure that the employees who were working on the project should not suffer on account of RKC's deliberate defaults for *mala fide* intent to derive unjust enrichment. Further, it is pertinent to note that, RKC has not made these payments to date despite it being their obligation under the contract to do so. RKC has raised the same issues

before AA. RKC is maligning him with the sole intent to gain undue advantages. RKC/ Ravi Baid has been raising these issues before several forums including the lenders, NCLT, and the Board to have me removed so that they can sign the lucrative O&M Contract of P2 & P3 at terms onerous to the CD by at least Rs. 282 Crores

- 3.8.8. Mr. Mehta further submitted that if RKC had any issue on making payment to employees within 1 day of issue of notice, they should have raised the objection with us within a reasonable time which they did not, and which would have given us the opportunity to consider the matter and resolve the matter.

3.9. Summary Findings

- 3.9.1. Mr. Mehta should have acted cautiously in his communications with RKC to avoid any such confusion as the same may have caused double payment of salary leading extra burden on CD.
- 3.9.2. Further, the Axis Bank has been raising the issues since August 2020. In view of which, Mr. Mehta could have followed up with RKC earlier and avoided such hasty actions.
- 3.9.3. Considering the submissions of Mr. Mehta that employees, to whom the salaries were paid, were on the rolls of the CD and deployed at RKC, hence authority for payment of salary to the employees is available with Mr. Mehta as an RP of the CD. . Further the event enumerated above, the exigency for the payment of salary is also made out. Hence the DC takes a lenient view on said contravention.

Order

- 5.1. In view of the submission made by Mr. Anil Mehta, and materials available on record, DC notes that Anil Mehta has violated section 14(1)(b) and 208(2)(a) of the Code, regulation 7(2)(a) and 7(2)(h) of IP Regulations read with Clause 1, 2, 3 and 14 of the Code of Conduct as specified in the First Schedule of IP Regulations (Code of Conduct) for payment of pre-CIRP expenses during Moratorium. The contraventions in terms of payment of pre-CIRP dues to the vendors in violation to the statute is established beyond doubt which is not consistent with section 14 of the Code. The point to be considered is whether such contravention can be ignored as it stems from the actions which are firstly not taken with any *mala fide* intension and secondly are taken as a requirement arising from commercial judgement to run the CD as a going concern. There are no evidences which can raise doubts about intentions of Mr. Mehta for not being *bona fide*. The case for running the CD as a going concern is strong, and evidence suggests that payment of pre-CIRP dues became of crucial importance to keep the CD as going concern. However, procedural lapses about not explicitly mentioning to CoC about the fact that consideration of agenda of clearing Pre-CIRP dues are beyond its competence and not approaching to AA to seek appropriate direction on such payments, points towards dereliction of duty by Mr. Anil Mehta.
- 5.2. Hence, DC hereby strictly warns Mr. Anil Mehta for avoiding such contraventions in future. To keep reminding the IBC ecosystem and its players that areas of explicit prohibition are no go areas and if one ventures into such territory, he needs to approach

AA for further direction before *suo moto* taking call on the basis of wrong interpretation of the provisions, DC hereby imposes monetary penalty as detailed in para 5.3 below.

- 5.3. In view of the above, the Disciplinary Committee, in exercise of the powers conferred under section 220 (2) of the Code read with Regulation 13 of the Inspection Regulations hereby imposes a penalty on Mr. Anil Mehta of Rs. five lakhs and directs him to deposit the penalty amount directly to the Consolidated Fund of India (CFI) under the head of “penalty imposed by IBBI” on **<https://bharatkosh.gov.in>** within 45 days from the date of issue of this order and submit a copy of the transaction receipt to the Insolvency and Bankruptcy Board of India.
- 5.4. This Order shall come into force immediately in view of para 5.3.
- 5.5. A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Anil Mehta is enrolled as a member.
- 5.6. 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.
- 5.7. Accordingly, the show cause notice is disposed of.

Sd/-
(Sudhaker Shukla)
Whole Time Member, IBBI

Date: 28th October 2022
Place: New Delhi