

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/190/2023

29th September 2023

ORDER

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/INSP/2022/118/684/36 dated 10.01.2023, issued to Mr. Dhaval Jitendrakumar Mistry, an Insolvency Professional, registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P-01853/2019-2020/12849 and enrolled as professional member with the Indian Institute of Insolvency Professionals of ICAI and resident of 9-B, Vardan Complex, Near Vimal House, Lakhudi Circle, Navrangpura, Ahmedabad, Gujarat, 380014.

1. Background

- 1.1 The National Company Law Tribunal, Ahmedabad (AA) had admitted the application under section 7 of the Code for corporate insolvency resolution process (CIRP) of Polygold Pre-Cured Systems Limited (CD) vide Order dated 16.03.2020 whereby Mr. Parag Sheth was appointed as Interim Resolution Professional (IRP). The CoC, in first meeting on 11.08.2020, resolved to replace the IRP, and thereafter the AA vide order dated 31.08.2020 allowed the application for replacement and Mr. Dhaval Jitendrakumar Mistry was appointed as RP.
- 1.2 In exercise of its powers under section 218 of the Code read with regulation 3(2) and 3(3) of the IBBI (Inspection and Investigation) Regulations, 2017, the IBBI appointed an Inspecting Authority to conduct an inspection of Mr. Mistry in the matter of his appointment as RP in the CIRP of CD. The Draft Inspection Report (DIR) dated 24.06.2022, was shared with Mr. Mistry and he submitted response to the same vide e-mail on 7.07.2022. Thereafter, the IA submitted the Inspection Report to IBBI on 01.08.2022.
- 1.3 The IBBI on 10.01.2023, issued the SCN to Mr. Mistry, based on findings in the Inspection Report. The SCN alleged contraventions of several provisions of the Insolvency and Bankruptcy Code, 2016 (Code), IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations), and the Code of Conduct for Insolvency Professionals as specified in the First Schedule of IBBI (Insolvency Professionals) Regulations, 2016.
- 1.4 The SCN, response of Mr. Mistry to the SCN dated 23.01.2023 and other material available on record were referred to the Disciplinary Committee (DC) for disposal of the SCN. Mr. Mistry availed an opportunity of personal hearing virtually before the DC on 31.05.2023 where he was represented by Senior Advocate Mr. Rashesh Sanjanwala. Mr. Mistry made additional submissions vide e-mail dated 06.06.2023.

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

The contraventions alleged in the SCN and submissions of Mr. Mistry are summarized as follows:

2.1 Non-acceptance of claims

- 2.1.1 It is noted that Mr. Hardik Pradyumankumar Patel, Ms. Jyotsnaben Pradyumankumar Patel and Mr. Pradyumankumar Dwarkadas Patel, who had filed section 7 application for initiation of CIRP, filed the claim as unsecured Financial Creditor for Rs.3,06,56,735 (Rupees three crore six lakh fifty six thousand seven hundred thirty five only) which had been admitted by the IRP Mr. Parag Seth, however Mr. Mistry, after being appointed as RP, revised and reduced the claim amount to Rs.2,83,12,283 (Rupees two crore eighty three lakh twelve thousand two hundred eighty three only).
- 2.1.2 Mr. Mistry, in his reply to DIR mentioned, that the evidence and clarification on the interest part of the claim was called upon but no such evidence or clarification was given by the parties which could suffice the interest amount claimed by them. He further stated that as per regulation 14(2) of the CIRP Regulations, the claims of the parties were reduced thereby revising the amount of claim admitted, as the interest was claimed without any significant evidence. It is noted that due to this, it was evident that while he admitted interest on the claim amount for the period from 01.04.2017 to 31.01.2019 but for the remaining period, he disallowed the same, thereby taking inconsistent stand with regard to claim of above-stated three unsecured financial creditors. It is noted that admission of the application by the AA, does mean that an amount above a specified threshold is due and default has been made in payment of the said amount but it does not mean that the whole claim amount has been verified by the AA. Thus, it is noted that the act of admitting the claim with interest up to application date was not in accordance with law.
- 2.1.3 Accordingly, the Board was of the prima facie opinion that IP had, inter alia, contravened section 18 and 208 of the Code, regulation 13 and 14 of CIRP Regulations and Clause 14 of the Code of Conduct specified in the First Schedule of the IBBI (Insolvency Professionals) Regulations, 2016 (Code of Conduct).

Submissions by Mr. Mistry

- 2.1.4 Mr. Mistry submitted that the IA had shared DIR dated 24.06.2022 which was duly replied by him vide e-mail dated 07.07.2022. He submitted that three unsecured financial creditors i.e., Mr. Pradyumankumar Dwarkadas Patel jointly with Smt. Jyotsnaben Pradyumankumar Patel and Mr. Hardik Pradyumankumar Patel (related parties to the CD) made an application under Section 7 of the Code seeking for initiation of insolvency resolution process of the CD and that by way of the said application, the said creditors jointly claimed an amount of Rs. 2,83,12,283 (Rupees two crore eighty three lakh twelve thousand two hundred eighty three only) which was including the interest component. He submitted that in order to substantiate the interest amount claimed in the petition, the said creditors relied upon Form No. 26AS showing the interest amount and TDS and also further filed a computation of the amount of interest due and particulars of the principal amount due as on 31.01.2019.
- 2.1.5 He further submitted that the amount claimed in the petition filed under Section 7 of the Code was not at all disputed by the CD before the AA and that the AA while admitting the petition under section 7 of the Code had also made the following observation: *“17.2 Respondent Corporate Debtor admitted the debt and deducted TDS on the interest payable on the Debt advanced to the Respondent Corporate Debtor Company by the Applicants.”* He submitted that when the CD had itself admitted the interest component as claimed in the petition which

was claimed till 31.01.2019, he as an RP had no authority to deny the said admitted amount which was already not disputed by the CD before the AA. He submitted that the ‘Doctrine of Estoppel’ applies in the present case since the CD itself had admitted the debt claimed in the petition by not disputing the interest component claimed till 31.01.2019 and thus, he could not deny or adjudicate or reject the said amount which was already an admitted and undisputed amount.

- 2.1.6 He submitted that the three unsecured Financial Creditors had filed an Interlocutory Application in relation to the issue involved herein, being IA/199 (AHM) 2021 in CP (IB) 161 of 2019 wherein, in the said application the issue involved herein was also one of the ground for challenge to the Resolution Plan. He submitted that Ground V(A) stated that: *“A. The Applicants submit that Respondent No. 1 reduced the Applicant’s claim by calculating interest only till 31.01.2019 as shown in CP (IB) No. 161 of 2019 with Hon’ble National Company Law Tribunal, Ahmedabad Bench, which came to be filed on 19.02.2019 and without considering interest from 01.02.2019 till the date of pronouncement of order dated 16.03.2020”*. He submitted that the AA, had recorded the said submissions of the complainants in order dated 20.09.2021 in Paragraph No. 3 which was stated as: *“3. Learned Counsel for the Applicant appeared and submitted that in application filed under Section 7 of IBC, 2016 against the Corporate Debtor, amount. of default was claimed at Rs. 2,83,12,283.50/-, however, interests on the principal amount due was also calculated and attached to the application in Annexure-C... It was also claimed that conduct of the Resolution Professional was biased and same was also brought to the notice of this Adjudicating Authority by filing IA No. 921 of 2020, which was however, disposed of by directing the Applicants to approach IBBI...”*
- 2.1.7 He submitted that the AA while dismissing the said application vide order dated 20.09.2021 made the following observations: *“6, We have considered the submissions made by both sides and material on records. From the averments made in the application, it is noted that Applicant is related party and they were directors of the Corporate Debtor. During the course of hearing, we also noted that the unsecured loan amount represents unpaid remuneration covered into unsecured loan. It is also noted that after 01.04.2017, there is no provision of interest in the books of account nor any TDS has been deposited with the Government. Further, Applicants have also not brought any material on record to show that inspite of this position they have claimed interest income in their hands in F.Y. 2017-2018 and 2018-2019... Further, amount mentioned in Section 7 application by itself is not the amount to be admitted as claim needs to be filed by the claimant before IRP/ Resolution Professional as per relevant provisions of law and Regulations. We are further of the view if some amount is wrongly admitted that fact by itself would not legitimate further revision of their claim as perpetuation of a mistake is not desired at all.”*
- 2.1.8 He submitted that the issue raised in the SCN had already been adjudicated by the AA vide order dated 20.09.2021 passed in IA/199 (AHM) 2021 in CP (IB) 161 of 2019 and thus, adjudicating the said issue again was barred by the law as per the principle of Res Judicata. He submitted that this issue involved in the SCN had been heard and had attained finality vide order dated 20.09.2021 by the AA as the same was not challenged before the Hon’ble National Company Law Appellate Tribunal or before the Hon’ble High Court or Supreme Court of India and thus, he has not contravened any provisions of the Code and Regulations framed thereunder. He submitted that the interest till 31.01.2019 was admitted by the CD itself in

Section 7 of the Code petition and therefore, neither the AA nor could he object or revisit the said amount.

- 2.1.9 He further submitted that the Hon'ble National Company Law Appellate Tribunal in Company Appeal (AT) Insolvency No. 210 of 2021 in Mr. Hardik Fakirchand Shah, Proprietor of Cotton Hub vs. Male Square Retails Private Limited held that: *“6. The present is a case where Corporate Debtor in spite of several notices issued by the Adjudicating Authority did not appear to contest the Application... When the Corporate Debtor has chosen not to oppose the Application, we fail to see that on what basis the Adjudicating Authority has returned the finding that Cash Payment made to the Appellant is not acceptable and further the invoice dated 08.07.2017 being in different format cannot be accepted...”*. He further submitted that when the CD itself had not disputed the interest claimed between 01.04.2017 to 31.01.2019 in the application filed under Section 7 of the Code by the said three unsecured financial creditor and had admitted the same, then in that case he could not overturn the said admission which was not objected by the CD itself before the AA. He submitted that in relation to interest claimed after 31.01.2019 as there was no supporting documentary evidence submitted by the said creditors, the interest from 31.01.2019 till the admission of the application on 16.03.2020 was not admitted by him and the same had already been considered by the AA in its order dated 20.09.2021 passed in IA/199 (AHM) 2021 in CP(IB) 161 of 2019. He submitted that the interest from 31.01.2019 till 16.03.2020 was also not expressly admitted by the CD and thus, accordingly, by virtue of Regulation 14 of CIRP Regulations, 2016, he revised the claim of the said Creditors from Rs. 3,06,56,735 (Rupees three crore six lakh fifty-six thousand seven hundred thirty five only) to Rs. 2,83,12,283 (Rupees two crore eighty-three lakh twelve thousand two hundred eighty-three only).
- 2.1.10 He submitted that as per the terms of the approved Resolution Plan, the successful resolution applicants had duly made the payment of 100% of the total amount claimed jointly by the said three unsecured financial creditors and admitted by him during CIRP to the tune of Rs. 2,83,12,284 (Rupees two crore eighty-three lakh twelve thousand two hundred eighty three only) which was also accepted by the said creditors without any objections. He submitted that he had not violated any provisions of the Code and Regulations framed thereunder particularly as prescribed under Section 18 and 208 of Code, regulation 13 and 14 of CIRP Regulations and Clause 14 of the Code of Conduct as specified in the First Schedule of the IBBI (Insolvency Professionals) Regulations, 2016 (Code of Conduct).

Analysis and Findings

- 2.1.11 The DC notes that Mr. Mistry took inconsistent view while admitting the claim of the unsecured Financial Creditors. In the section 7 application filed, the FCs had claimed debt of Rs. 2,83,12,283 (Rupees two crore eighty three lakh twelve thousand two hundred eighty-three only) which included interest on the principal amount from 01.04.2017 to 31.01.2019 at the rate of 10%. Accordingly, the said unsecured FCs, while submitting claim, during CIRP, added interest also from the date of filing of section 7 application on 01.02.2019 till 16.03.2020. The AA, in its order dated 20.09.2021, while disposing IA 199 of 2021 in Para 6 held that: *“..The only material plea which is being taken by the Applicants is that for part of period after 31.03.2017 interest claimed have been accepted, hence interest upto date of order or thereafter should also be paid. In our view, when an application is filed under Section 7 of IBC, 2016, facts stated in application and relevant Form are recorded in the order. Further, recording of*

contention of any parties, as such, does not amount to finding of the Adjudicating Authority. Hence, such plea of the Applicants is not having any force. Apart from this, plea that IRP had admitted the claim made by the Applicants, in our view, it does not bind the Resolution Professional conclusively and the same can be revised if considered appropriate. Even scheme of IBC, 2016 permits so.”

2.1.12 Hence, if Mr. Mistry was of the view that there was no provision for payment of interest on the principal amount, he should have very well revised the amount as claimed and mentioned in section 7 application. Having admitted the amount of interest for the period 01.04.2017 to 31.01.2019 and not admitting the amount of interest for the period 01.02.2019 till 16.03.2020, cannot be said to be justified.

2.2 Breach of Moratorium

2.2.1 The order of commencement of CIRP was passed by the Hon'ble NCLT, Ahmedabad Bench on 16.03.2020 and Mr. Parag Sheth was appointed as IRP. The said order is stated to have been received by IRP on 22.05.2020. The IRP was in custody, control and management of the CD from 22.05.2020 to 31.08.2021 when Mr. Mistry was appointed as RP by the Hon'ble NCLT, Ahmedabad Bench vide order dated 31.08.2021. It is noted that some payments were made after commencement of CIRP till the IRP took the control over the CD (i.e. from 16.03.2020 till 22.05.2020), as also noted by 01.02.2019 till 16.03.2020 from the bank statement of the CD for the said period. It is noted that that the said payments were made in breach of moratorium and no action had been taken by Mr. Mistry to recover the said amount. Accordingly, the Board was of the prima facie opinion that Mr. Mistry had, inter alia, violated section 14 and 208 of the Code and Clause 14 of the Code of Conduct.

Submissions by IP

2.2.2 Mr. Mistry submitted that when the CIRP of the CD was initiated, the CD was a going concern having an active business operation with about 80 workers and employees employed for carrying the business of the Company. He submitted that during the CIRP process of the CD, it generated a revenue of more than Rs. 15 Cr. and thus, it could be easily averred that the CD was a running unit at the time of initiation of the CIRP and even at the end of the CIRP. He submitted that as per section 14 of the Code, the RP has to maintain the status of the CD as a going concern by managing the operations of such CD and thus, for the same the supply of goods or services are required to be continued to maintain the status of the CD as a going concern.

2.2.3 He submitted that the authenticated copy/certified copy of the order was received from the registry of the Hon'ble National Company Law Tribunal, Ahmedabad Bench (AA) by the IRP only on 21.05.2020 and accordingly Public Announcement in Form-A making public announcement of moratorium was made by the IRP only on 22.05.2020 and thus, the payment made before 22.05.2020 cannot be even considered as a breach of moratorium. He further submitted that even otherwise, the said transaction was a normal course of business transaction. He submitted that with respect to the payments made from HDFC OD account, the said were in regular course of payments which were required for running the CD as a going concern, and that the said payments were also made before 22.05.2020 i.e., prior to receipt of order of AA. He submitted that he had not violated any provisions of the Code particularly section 14 and 208 of the Code and clause 14 of the Code of Conduct. He submitted that the payment made in

between 16.03.2020 till 20.05.2020 were regular payments which are made to run the CD as a going concern as per section 14 of the Code like payment to Electricity Department, payment of Insurance, payment of Salary and Wages to workers, GST etc. He submitted that even if he was working as RP at that time, he would have made such payments to keep the CD as a going concern, hence the question of recovery of such expenses did not arise. He further submitted that the said payments had not at all hampered the claim of any stakeholders as all the claimants in the CIRP of the CD have been paid in full 100% of their admitted amount by way of the approved resolution plan and thus, there is no contravention of breach of moratorium.

Findings of DC

2.2.4 Based on facts and circumstances of the matter, the DC accepts the submission of Mr. Mistry.

3. ORDER

- 3.1 In view of the forgoing discussion, SCN, reply to the SCN, oral and written submission made by Mr. Dhaval Jitendrakumar Mistry, the DC is of the view that Mr. Dhaval Jitendrakumar Mistry has not acted diligently with respect to verification and admission of the claim of the Financial Creditors. The DC, in exercise of the powers conferred under section 220(2) of the Code read with IBBI (Insolvency Professionals) Regulations, 2016 and the IBBI (Inspection and Investigation) Regulations, 2017, hereby, imposes a penalty of Rs. 1,00,000 (Rupees one lakh only) on Mr. Dhaval Jitendrakumar Mistry 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.
- 3.2 This Order shall come into force with immediate effect in view of para 3.1 of the order.
- 3.3 A copy of this order shall be sent to the CoC of all the Corporate Debtors in which Mr. Dhaval Jitendrakumar Mistry is providing his services, if any.
- 3.4 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Dhaval Jitendrakumar Mistry is enrolled as a member, for their further necessary action.
- 3.5 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.
- 3.6 Accordingly, the show cause notice is disposed of.

Sd/-

(Jayanti Prasad)

Whole Time Member, IBBI

Dated: 29th September 2023

Place: New Delhi