

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION (L) NO. 16317 OF 2023

Kairav Anil Trivedi

.. Petitioner

Versus

Union of India and Ors.

.. Respondents

**Mr.Nirman Sharma , Parag Sawant, Akshay Doctor,
Ansh Karnawat and Manali Sawant i/b P.S.
Chambers, Advocates for the Petitioner.**

**Ms. Savita Ganoo a/w Mr. Abhishek Bhadang for
Respondent No. 1.**

**Mr. Pankaj Vijayan a/w P.N. Lakshmi Sagar i/b Intra
legal , Advocates for IBBI.**

**CORAM : B. P. COLABAWALLA &
M.M. SATHAYE, JJ.**

DATE : JUNE 20, 2023

P. C.

1. The above Writ Petition is filed challenging the order dated 23/05/2023 passed by the Disciplinary Committee, constituted by the Insolvency and Bankruptcy Board of India (for short “**IBBI**”) under Section 220 of the Insolvency and Bankruptcy Code, 2016 (for short “**IBC,2016**”).

2. The learned Counsel appearing on behalf of the Petitioner, apart from attacking the impugned order on merits, took strong

objection to the jurisdiction of the authority passing the impugned order. He submitted that under the provisions of Section 220 of the IBC, 2016, it is the IBBI which constitutes a Disciplinary Committee to consider the reports of the investigating authority submitted under sub-section (6) of Section 218. It is submitted that the proviso to 220(1) of the IBC, 2016 makes it clear that the members of the disciplinary committee shall consist of Whole Time Members of the IBBI only. He even brought to our attention the definition of words “Disciplinary Committee” defined in the *Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017*, which stipulates that a *Disciplinary Committee* means a Committee of Whole Time Members constituted by the Board under Section 220(1) of the IBC, 2016. The learned Counsel submitted that the order passed on 23.05.2023, and which is impugned in the present Petition, is not passed by the Whole Time Members but in fact by the Chairperson of IBBI. In support of this argument, the learned Counsel brought to our attention the Website of IBBI in which it is clearly stated that Shri. Ravi Mital is the Chairperson of IBBI and Shri. Sudhaker Shukla and Shri Jayanti Prasad are its Whole Time Members. The learned Counsel submitted that the impugned order in the present case is passed by Mr. Ravi Mital who is the Chairperson

and not a Whole Time Member. He therefore submitted that the order impugned in the present Petition is thus without jurisdiction.

3. The learned counsel appearing on behalf of the IBBI sought two weeks time to take instructions and file an Affidavit-in-Reply to the above Petition.

4. On the limited issue of Interim relief we have heard the learned counsel for Petitioner. From perusal of Section 220 of the IBC, 2016 read with definition of the words “Disciplinary Committee” in the *Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017*, prima facie we are of the opinion that the Disciplinary Committee can consist only of Whole Time Member(s), who can then pass orders. In the present case, the impugned order dated 23.05.2023 is passed by Mr. Ravi Mital, who, at least on the Website of the IBBI, is shown as the Chairperson of the IBBI and not its Whole Time Member.

5. In these circumstances, we find that until IBBI files a reply in answer to the above Petition, there will be ad-interim relief in terms of prayer clause (c) which reads thus:-

“c. Pending the hearing and final disposal of this Writ Petition, this Hon’ble Court be pleased to issue an order of injunction thereby restraining and injuncting the Respondents from in any manner acting upon or giving effect to or implementing the impugned order dated 23.05.2023 and the Show Cause Notice dated 21.03.2023 and stay the operation, effect and implementation thereof.”

6. Place the above Writ Petition on board for admission on 4th July 2023.

7. All concerned to act on an authenticated copy of this order duly authenticated by the Associate.

[M.M. SATHAYE, J.]

[B. P. COLABAWALLA, J.]

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/173/2023

23rd May 2023

ORDER

In the matter of Mr. Kairav Anil Trivedi, Insolvency Professional (IP) under Section 220 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 and Regulation 13 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017.

This Order disposes of the Show Cause Notice (SCN) No. COMP-11011/47/2022-IBBI/726/363 dated 21st March 2023, issued to Mr. Kairav Anil Trivedi, resident of 23A, 5th Floor, Jyoti Building, Barquatali Dargah Marg, Wadala East, Mumbai City, Maharashtra-400037 who is a Professional Member of the ICSI Institute of Insolvency Professionals and an Insolvency Professional registered with the Insolvency and Bankruptcy Board of India (IBBI/Board) with Registration No. IBBI/IPA-002/IP-N00728/2018-2019/12332.

1. Background

- 1.1 The Hon'ble National Company Law Tribunal, Mumbai Bench (AA) vide its Order dated 05th October 2021, admitted the application under Section 9 of the Code for corporate insolvency resolution process (CIRP) of the M/s. Prince MFG Industries Private Limited (Corporate Debtor/CD). Mr. Kairav Anil Trivedi was appointed as Interim Resolution Professional vide the above-said Order and was later also confirmed as Resolution Professional for the CD.
- 1.2 The IBBI 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 conduct investigation in the CIRP of the CD.
- 1.3 Based on the findings of the investigation as mentioned in the Investigation Report submitted by the IA, the IBBI issued the SCN to Mr. Trivedi on 21st March 2023. The reply of Mr. Trivedi on the SCN was received by the Board on 04th April 2023. The SCN, response of Mr. Trivedi to the SCN and other material available on record were referred to the Disciplinary Committee (DC) for disposal of the SCN. Mr. Trivedi availed an opportunity of personal hearing through virtual mode before the DC on 28th April 2023.

2. Alleged Contraventions, Submissions and Findings

The contraventions alleged in the SCN and submissions by Mr. Trivedi are summarized as follows:

2.1 Misrepresentation in recording of minutes of CoC:

- 2.1.1 It was observed that Mr. Trivedi had conducted the 1st meeting of Committee of Creditors (CoC) on 10.11.2021 wherein the agenda regarding confirmation of IRP as RP was discussed. As per

the minutes of the 1st CoC meeting recorded and circulated by Mr. Trivedi, the CoC had confirmed the appointment of IRP as RP. The SCN mentions the relevant extract of the minutes states as under:

“The IRP expressed his willingness to continue as an RP, if approved by the COC, and also disclosed the fact that he is not disqualified from being appointed as an RP, under IBBI guidelines. The COC accordingly passed the following resolutions.

RESOLVED THAT the COC appoints Mr. Kairav Anil Trivedi, (Registration No. IBBI/IPA-002/IP-N00728/2018-2019/12332) as the Resolution Professional ("RP") of the Corporate Debtor and thus his services would continue as an RP.

RESOLVED FURTHER THAT the COC approved the RP fees of Rs 1,50,000/- per month and this be treated as CIRP expenses.”

- 2.1.2 It was further noted from the perusal of 2nd CoC meeting held on 30.12.2021, that a resolution for appointment of Mr. Pradeep Kabra as resolution professional in place of Mr. Trivedi was approved by 100% voting of CoC after which an application for the replacement of RP under section 27 of the Code was filed before the AA. It was observed from the perusal of affidavit (para 22) dated 28th March 2022 filed by the CoC in the IA for change of RP, that the CoC had in its first meeting voted against the appointment of Mr. Trivedi as RP. The email from online voting platform Right2Vote Infotech Private Limited also shows the voting result of item regarding appointment of IRP as RP appears as “dissent”. But the Mr. Trivedi recorded minutes of 1st CoC meeting by misrepresenting the fact.
- 2.1.3 The SCN finds it evident from the said affidavit of the CoC and email dated 19.11.2021 of the Right2Vote Infotech Private Limited (online voting platform provider) that the CoC in the 1st CoC meeting had voted against the agenda for appointment of IRP as RP. However, Mr. Trivedi had incorrectly recorded in the minutes that his appointment as RP was confirmed by CoC in the 1st meeting. Further, in the Form 2 filed by Mr. Trivedi with IBBI, he mentioned that he was appointed as RP on 10.11.2021 and even in a Memorandum of Understanding (MoU) executed between CD and Sarvashree Industries Private Limited on 10.11.2021 regarding Contract Manufacturing Activity, Mr. Trivedi had represented himself as RP duly appointed by CoC. Hence, it is observed that despite the CoC having voted against the agenda for appointment of IRP as RP as per the e-voting result of 1st CoC meeting, Mr. Trivedi failed to record the same in the minutes and instead misrepresented himself as RP on various occasions.
- 2.1.4 In view of the above, the Board was of the *prima facie* view that Mr. Trivedi has *inter alia* violated Sections 22(2) and 208(2)(a) & (e) of the Code and regulation 7(2)(a) and (h) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clause 1, 2, 3, 5 and 14 of the Code of Conduct as specified in the First Schedule of IP Regulations (Code of Conduct).

Submissions by Mr. Trivedi

- 2.1.5 Mr. Trivedi submitted that during the meeting of the COC, one of the banks namely Canara Bank having 67% voting share informed the IRP that as per their internal policy guidelines framed by the bank for CIRP process, they need to nominate an Insolvency Professional who is empanelled only with them in their list. Mr. Trivedi clarified to the Canara bank that in case the COC wants to replace the IRP then the provision of section 22 applies wherein in order to

replace the IRP in the 1st CoC meeting, the CoC needs to ensure compliance of mandatory requirements mentioned therein. In reply to this, the Canara bank informed that they need to follow a set process before nominating the name of the RP for replacement and this process includes internal approvals of the sub committees who will suggest a name of the RP from their panel and then the consent of the said RP would be obtained and after this the name of the RP would be proposed by the CoC for replacement in the next CoC meeting and then this will be put to vote on resolution for replacement of the RP in the next CoC meeting. Thus, in the 1st CoC meeting, neither the CoC obtained the consent from any Resolution Professional along with his Form 2 for replacement of the IRP u/s 22 nor could even propose the name of any resolution professional to be replaced, nor did the CoC proposed any resolution for replacement of the IRP u/s 22 in the 1st CoC meeting.

- 2.1.6 Accordingly, the CoC agreed during the meeting that this process of replacement of RP would be done in the second CoC meeting, till then the IRP will continue as RP since after 45 days the IRP will be a deemed RP and in order to perform his functions it is necessary that he has complete clarity and properly authorized so as he is allowed to perform his duties with full support of the CoC. Some of the CoC members suggested that all this be put for e-voting but on deliberations it was found that the process of e-voting could take another 10 to 15 days due to the leaves during Diwali and this would delay the approval process.
- 2.1.7 Further the matters discussed during the CoC which were put for approval was of the routine CIRP expenses already incurred by the IRP like advertisement in newspapers, visit of the IRP to Plant, IRP fees etc and for this the CoC members present in the CoC meeting need to have the authority to approve the same as without this basic authority a member should not be even attend the CoC meeting as per the discussion papers issued by IBBI for the Conduct of the CoC members. Accordingly, Canara Bank along with the other CoC members agreed in the meeting that since these are routine CIRP expenses, reimbursements of the same can be approved by the CoC members in the meeting itself and based on this IRP passed all the resolutions as being approved in the CoC meeting and the minutes of the meeting were circulated accordingly within the specified time lines of 48 hours. i.e. on the 12th November 2021. Further on 17th November 2021 after a gap of about 5 days from the closure of the meeting i.e. after circulation of the minutes of the 1st CoC meetings on 12th November 2021, the IRP informed the Hon'ble NCLT vide its e mail of his continuation as an RP and also filled up the necessary forms with IBBI and ICSI IIP for his continuation of RP.
- 2.1.8 The Minutes of the First CoC meeting was submitted by the CoC in its application u/s 27 in IA 247 of 2022 on 28th Jan 2022. The said minutes confirm the approval of appointment of the IRP as RP in the First CoC meeting u/s 22 by the CoC. Further these minutes does not contain any reference to any e voting nor is there any reference to e voting results since the meeting was concluded based on the discussions there in and the minutes of this first CoC meeting were circulated on 12th November 2021 within 48 hours. Thereby the first meeting of CoC was concluded on 12th November 2021.
- 2.1.9 Mr. Trivedi further submitted that the notice of the 2nd meeting of the CoC was issued on 24th December 2021 to be convened on 30th December 2021. A request was received from Canara

Bank on 29th December 2021 late evening just a day before the actual meeting date that they are proposing to appoint Mr. Pradeep Kumar Kabra having IBBI Registration no IBBI/IPA-001/IP-P01104/2017-18/11790. Accordingly, this was taken up by the RP for the CoC meeting on the next day i.e. 30th December 2021. After receipt of this notice the CoC informed that they have been able to get their internal approval and thus would like to propose to nominate an Insolvency Professional to replace the existing RP u/s 27 of IBC. The resolution for replacement of the existing RP was proposed by the COC in the 2nd meeting which was approved by 100% voting. Thereafter, application was filed by the CoC with AA for replacement of Mr. Trivedi, where the CoC at various places has mentioned that the IRP was appointed as RP in the 1st CoC meeting. Furthermore, the application was filed under section 27 of the Code which talks of replacement of resolution professional.

Findings of the DC

2.1.10 Regulation 17 of the CIRP Regulations provides as follows –

“17. Constitution of committee

...

(3) Where the appointment of resolution professional is delayed, the interim resolution professional shall perform the functions of the resolution professional from the fortieth day of the insolvency commencement date till a resolution professional is appointed under section 22”

Therefore, the regulations make it clear that in case the appointment of resolution professional is being delayed, the duties of resolution professional are performed by the interim resolution professional.

2.1.11 In terms of regulation 17(3) of the CIRP Regulations, the IP appointed as IRP for the CD has to perform the functions of RP, till another RP is appointed by the CoC. This is a temporary arrangement which is a deeming fiction for the IRP and in no way means that IRP is confirmed or appointed as RP by the CD. In the instant case, para 15 of the minutes of the 1st CoC meeting specifically mentions that the IRP has expressed his willingness to continue as an RP and subsequently resolution was proposed to confirm the services of IRP as RP. The e-voting result reflects that this proposal was in ‘dissent’. Although, Mr. Trivedi avers that there was no e-voting for the said meeting, the material available on record with respect to the email from voting facility suggests otherwise. It is also noted that, copy of the said minutes was annexed in the application filed before CoC, for replacement of RP, and in the said application no averment was made minutes was recorded incorrectly. However, it is the duty of the IP to be upright in his conduct which is independent of any act of the CoC member and accurately record the discussion of the CoC meetings, motions proposed or voted on, and activities to be undertaken without any scope of further disputes or misrepresentation of situation.

2.2 Entering MoU without CoC approval:

2.2.1 It was observed that a Memorandum of Understanding (MoU) was entered by Mr. Trivedi with Sarvashree Industries Private Limited for Contract Manufacturing Activity on 10.11.2021 which came into force w.e.f. 05.10.2021 i.e. the date of initiation of CIRP. In this regard it was discussed in 1st CoC meeting as follows:

“8. To review the possibility of continuation of the Plant operations at Haridwar, by a third party, on contractual basis, during the CIRP period and pass appropriate resolutions, if approved, by CoC.”

2.2.2 The said issue was further discussed in the 2nd meeting of CoC as under:

“7. To Review the efforts being made by RP for entering into Third party MOU and the possibility of continuation of the Plant operations at Haridwar during CIRP Period by a Third Party, on contractual basis.

The RP shared the Draft Copy of the MOU for contract Manufacturing dt 10.11.21 with the COC members.

Further to the discussions shared in the last meeting, the RP has completed his due diligence on the party interested in Contract Manufacturing and confirms that the same is not covered under 29A of IBC.

...There were a few further clarifications which have been sorted and the draft MOU has been shared with the said party. They are presently getting a second opinion before signing. It is suggested that a further period of max two weeks be provided to them for their second opinion. It was proposed by the COC members during this meeting that this Draft MOU be vetted by the Council of COC though Canara Bank.”

2.2.3 The SCN notes that the draft MoU was shared with CoC on 30.12.2021 (dated of 2nd CoC meeting) for vetting by advocate of CoC and the 2nd CoC minutes records that a second opinion was being considered before approving. However, it is noted from the MoU that it was already executed on 10.11.2021 without the approval/intimation of CoC. It was further noted that the Mr. Trivedi was appointed as IRP in the said matter vide AA Order dated 05.10.2021 and the MoU was executed on 10.11.2021 with the suspended director Mr. Piyush Chheda as a witness, which was to come into force from 05.10.2021. It was also noted that Sarvashree Industries Private Limited had given 6 post-dated cheques to CD and one cheque was dated 05.10.2021.

2.2.4 The SCN therefore concluded that it was clear that while the possibility of continuing plant operation by a third party was still being discussed in the 1st CoC meeting, the said MoU had already been signed on 10.11.2021 and the same had been made effective w.e.f. 05.10.2021 which is the date of initiation of CIRP. Making the MoU operational retrospectively from the date of initiation of CIRP clearly indicates that even before signing the MoU, the plant was handed over to party for contract manufacturing. This fact negates the submission of Mr. Trivedi that the MoU was executed after doing necessary due diligence and reviewing the 29A clearance with the consent of CoC.

2.2.5 The SCN states that section 28 of the Code enumerates the list of actions which mandatorily requires the prior approval of the CoC. Clause (h) of the sub-section (1) of Section 28 of the Code provides that the RP shall not delegate its authority to any other person without first acquiring the prior approval of the CoC.

2.2.6 In view of the above, the Board was of the *prima facie* view that Mr. Trivedi has *inter alia* violated Sections 25(2)(b), 28(1)(h), 208(2)(a) &(e) of the Code and regulation 7(2)(a) and 7(2)(h) read with clauses 1, 2, 3, 5 and 14 of the Code of Conduct of the IP Regulations.

Submissions by Mr. Trivedi

- 2.2.7 Mr. Trivedi submitted that he has received a letter dated 03rd March 2023 from the CoC which states that CoC has no issues with the IRP/RP. The CoC is fully satisfied on the clarification received with respect to the contract manufacturing activity initiated by the IRP/RP. Further, the CoC has withdrawn the application filed for replacement of RP and the existing RP has been continued along with the Contract Manufacturing activity.
- 2.2.8 Mr. Trivedi further submitted that the contract manufacturing activity has ensured that the CD remains a going concern during the CIRP. This has ensured maximization of value of the assets besides providing employment opportunity to the locals, also the entire CIRP expenses are being met from the Contract Manufacturing Income which otherwise would have to be contributed by the CoC since the CD was non-operational.
- 2.2.9 Mr. Trivedi further submitted that the plant has never been handed over to any other person as has been wrongly concluded by the investigating officer as the RP continues to have complete possession of the Plant along with the machinery. The Contract manufacturer is only allowed to enter premises on temporary monthly basis to undertake contract manufacturing activity by using the Fixed assets are under the control of the RP and these facts have been clearly specified in the MOU. The Contract manufacturer does not have any rights on the assets as these are under CIRP. This fact is re confirmed by the frequent visits made by the RP to the Plant location. Further the list of Plant and machinery under the control of the RP has been verified by the valuers. Further all the 6 prospective Resolution applicants have also done physical visit to the plant and their visit report submitted to CoC appreciates the fact that the machines are in running condition and the plant is operational, and thereby under the control of the RP. The non-operational CD would have otherwise fetched only scrap value.

Findings of the DC

- 2.2.10 The DC notes that Mr. Trivedi has not refuted the allegations made in the SCN with respect to the signing of MoU by him even when it was under consideration of the CoC. If in the interest of the going concern business of the CD, Mr. Trivedi has entered into any commercial arrangements with any third party, and the same is also the matter of discussion in the CoC meetings, it becomes the bounden duty of Mr. Trivedi to intimate the CoC about the correct factual situations.
- 2.2.11 In the instant case, it is observed that when the CoC was considering on getting the MoU vetted, Mr. Trivedi had already entered into the MoU with the third party and that too from a retrospective date. The DC is of the view that in signing MoU for the contract manufacturing activity, the required transparency was not maintained by Mr. Trivedi. Though the draft CoC was shared with CoC on 10.12.2021 for vetting by Canara Bank, it had already been signed by Mr. Trivedi on 10.11.2021. This conduct of Mr. Trivedi is unacceptable. Therefore, DC finds that Mr. Trivedi has suppressed the fact of already entered MoU with the CoC and therefore holds the violation of section 28(1)(h), 208(2)(a) &(e) of the Code and regulation 7(2)(a) and 7(2)(h) read with clauses 1, 2, 3, 5 and 14 of the Code of Conduct of the IP Regulations.

3. ORDER

- 3.1. In view of the foregoing discussion, and material available on record, it is clear that Mr. Trivedi has not recorded the minutes of the 1st CoC meeting accurately. Moreover, it is evident that Mr. Trivedi has not disclosed to CoC about the factual status of MoU for Contract Manufacturing Activity. The draft MoU was shared with CoC on 30.12.2021 for vetting and a second opinion was being considered. However, the MoU was already executed on 10.11.2021 without the approval/intimation of CoC. Hence, the DC finds that Mr. Trivedi has suppressed the fact of already entered MoU with the CoC. Therefore, the DC, in exercise of the powers conferred under section 220 of the Code read with regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017 and Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 hereby suspends the registration of Mr. Kairav Anil Trivedi bearing registration number IBBI/IPA-002/IP-N00728/2018-2019/12332 for a period of six months.
- 3.2. This Order shall come into force on expiry of 30 days from the date of its issue.
- 3.3. A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Kairav Anil Trivedi is enrolled as a member.
- 3.4. A copy of this order shall be sent to the CoC of all the Corporate Debtors in which Mr. Kairav Anil Trivedi is providing his services, if any.
- 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/-

(Ravi Mital)
Chairperson, IBBI

Dated: 23rd May 2023

Place: New Delhi