

Insolvency and Bankruptcy Board of India

Subject: Complaints received under Section 236 of the Code.

The IBBI has regulatory oversight over the service providers, namely, IPs, IPAs and IUs to facilitate insolvency resolution process and other processes under the Insolvency and Bankruptcy Code, 2016. Sections 196 and 217 to 220 of the Code empower the IBBI to conduct inspection or investigation of service providers. Without co-operation of the key stakeholders, namely, debtors, creditors and resolution applicants, it is difficult to meet the timelines provided under the Code and to complete a process successfully, particularly if any of them is mischievous. With the approval of the Governing Board, IBBI has requested MCA to cast in the Code an obligation on stakeholders to co-operate in completing the processes and non-compliance of the same may explicitly attract a penalty from the IBBI.

2. The Code currently casts certain duties and obligations on some of the stakeholders. For example, section 19 of the Code reads as under:

“19. Personnel to extend cooperation to interim resolution professional. - (1) The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the corporate debtor.

(2) Where any personnel of the corporate debtor, its promoter or any other person required to assist or cooperate with the interim resolution professional does not assist or cooperate, the interim resolution professional may make an application to the Adjudicating Authority for necessary directions.

(3) The Adjudicating Authority, on receiving an application under sub-section (2), shall by an order, direct such personnel or other person to comply with the instructions of the resolution professional and to cooperate with him in collection of information and management of the corporate debtor.”.

3. There have been a few instances where the corporate debtor does not cooperate or even does not allow the IP to enter into its premises. The IRP had to file application seeking intervention

of the Adjudicating Authority (AA), which passed appropriate orders. Two such orders are reproduced here:

(i) In the matter of Punjab National Bank Vs. Divyajyoti Sponge Iron Pvt. Ltd., the RP sought necessary assistance and security to him to visit factory premises of the corporate debtor to carry out statutory duties and obligations peacefully. The AA ordered: *“Keeping in view of the direct threatening by the corporate debtor it is hereby ordered that copy of this order may be served on the Director General of Police, West Bengal, Superintendent of Police, Bankura and in-charge of Mejia P.S. for making proper and effective assistance to the Resolution Professional in valuation of the company. In discharge of his duty any interference in the work of the Resolution Professional, action shall be initiated against the corporate debtor and it will be presumed that that corporate debtor is not obeying the order of the Court. It is expected that corporate debtor should fully cooperate with the Resolution Professional.”*

(ii) In the matter of M/s Alchemist Asset Reconstruction Co. Ltd Vs. M/s Hotel Gaudavan Pvt. Ltd., an IP sought protection for all acts done by him in good faith and to save him from the frivolous allegations made in a FIR. The AA observed: *“If, there is any complaint against the Insolvency Professional then the IBBI is competent to constitute a disciplinary committee and have the same investigated from an Investigating Authority as per the provision of section 220 of the Code. If, after investigation ‘IBBI’ finds that a criminal case has been made out against the Insolvency Resolution Professional then the ‘IBBI’ has to file a complaint in respect of the offences committed by him. It is with the aforesaid object that protection to action taken by the IRP in good faith has been accorded by section 233 of the Code. There is also complete bar of trial of offences in the absence of filing of a complaint by the ‘IBBI’ as is evident from a perusal of section 236(1) (2) of the code. Therefore, a complaint by Harendra Singh Rathore, a former director with the SHO, Police Station would not be maintainable and competent as the complaint is not lodged by the IBBI. ..the jurisdiction would vest with Investigation Officer only when a complaint is filed by IBBI”.*

4. Besides the directions of the AA, the Code provides for several offences and penalties. For example, Chapter VII of Part II provides for punishment in matters relating to corporate insolvency resolution process. These need to be dealt in the manner provided in section 236 of the Code which reads as under:

“236. Trial of Offences by Special Court. - (1) Notwithstanding anything in the Code of Criminal Procedure, 1973, offences under this Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013.

(2) No Court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Board or the Central Government or any person authorised by the Central Government in this behalf.

(3) The provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, in case of a complaint under sub-section (2), the presence of the person authorised by the Central Government or the Board before the Court trying the offences shall not be necessary unless the Court requires his personal attendance at the trial.”.

5. The IBBI has received a few complaints alleging commission of offences under the Code. It is required to file a complaint before the Special Court in accordance with section 236 of the Code. It may also file a complaint *suo motu* based on material available on record. However, it may not be prudent for the IBBI to forward every complaint it receives to the Special Court without due application of mind. Initiating criminal prosecution by way of a complaint entails mobilisation of public resources such as money, time, human resource, including valuable judicial time. In view of the above, it is felt that the IBBI may devise a policy relating to handling of complaints under section 236 of the Code to ensure that false, frivolous and malicious complaints are not filed in the Special Court, while no genuine complaint goes unprosecuted, keeping in view the fact that the IBBI is the complainant in cases before the Special Court.

6. In view of the foregoing, it is proposed to have the following guidelines to deal with complaints under section 236 of the Code, whether on receipt of a complaint from a stakeholder or noticed by the IBBI on its own as under:

- a. Every onymous complaint / allegation received by the IBBI complaining / alleging misconduct of a debtor, a creditor, a resolution applicant or any other person other than a service provider shall be forwarded / referred to Prosecution Division in the Administrative Law Wing.
- b. Every misconduct of a debtor, a creditor, a resolution applicant or any other person, as may be noticed by any Division of the IBBI in discharge of its functions, shall be referred to the Prosecution Division.
- c. On receipt of the reference under (a) or (b) above, the Prosecution Division shall assign a number to each such reference.
- d. The Prosecution Division shall gather information from the complainant, operational Division, and the debtor, the creditor the resolution applicants, or the other person, as the case may be, and evidence, if any, regarding the alleged misconduct, within 30 days of then receipt of the complaint.
- e. A DGM level officer of the Prosecution Division shall form an opinion within 45 days of receipt of complaint if there exists a *prima facie* case for filing a complaint before the Special Court. If he is of the opinion that there exists a prima facie case, he shall put up the matter to the ED in charge of Prosecution Division who shall decide whether complaint is to be filed before the Special Court or not. In cases where the DGM is of the opinion that there exists no *prima facie* case, he shall close the complaint after recording reasons for the same.
- f. In case where the ED in charge of Prosecution Division is satisfied that a complaint should be filed, he shall cause filing of the complaint under section 236 of the Code to the Special Court having jurisdiction over the matter according to the procedure of Criminal Procedure Code, 1973.
- g. Thereafter, due process of law shall be followed.

7. It is submitted for consideration and approval of the Governing Board.