

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH
I. A. 1175/2023
IN**

C. P. (IB) NO. 935/ (MB)/C-III/2020

Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016

Mr. Shripal Morakhia

Having his address at Prithvi Apartments,
Altamount Road, Peddar Road, Gam Devi,
Mumbai 400 026

...Applicant

Versus

1. Bhrugesh Amin

Resolution Professional for Smaaash
Entertainment Private Ltd.

...Respondent no. 1/
Resolution Professional

**2. Insolvency and Bankruptcy Board of
India**

7th floor, Mayur Bhavan, Shankar
Market, Connaught Circus, New Delhi
110001.

...Respondent no. 2/
IBBI

IN THE MATTER OF

**M/S Edelweiss Asset Reconstruction
Company Limited**

...Financial Creditor

Versus

**M/S Smaaash Entertainment Private
Limited**

...Corporate Debtor

Order Pronounced on 25.01.2024

Coram:

MS. LAKSHMI GURUNG, MEMBER (J)

SH. CHARANJEET SINGH GULATI, MEMBER (T)

Appearances:

For Applicant: Adv. Manish Jha

For Respondent: Adv. Sachin Pawar for Respondent No.1

Per: SH. CHARANJEET SINGH GULATI, MEMBER (T)

ORDER

1. The above I.A. is filed by Mr. Shripal Morakhia (**Applicant**), erstwhile promoter and suspended director of the Corporate Debtor under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (**Code**), seeking following reliefs:
 - a. *this Tribunal be pleased to exercise its powers under Insolvency and Bankruptcy Code, 2016 and rules laid thereunder and initiate disciplinary proceedings against Respondent No. 1 as this Tribunal and/or Respondent No. 2 deem fit and appropriate;*
 - b. *pending the hearing and final disposal of the present Application, this Hon'ble Tribunal be pleased to:*
 - i. *Stay the Respondent's appointment as Resolution Professional of the Corporate Debtor;*
 - ii. *Stay the further hearing and adjudication of Interlocutory Application No. 2115 of 2022 filed by Respondent No. 1.*
 - c. *ad-interim reliefs in terms of prayer clause (b) above;*
 - d. *for costs;*
 - e. *pass such order or orders as Tribunal may deem fit and proper in the facts and circumstances of the present matter.*

Submissions of the Applicant:

2. The CIRP was initiated in the case of Smaaash Entertainment Pvt. Ltd. (**Corporate Debtor**) vide order dated 06.05.2022 and Shri. Bhrugesh Amin was appointed as its Resolution Professional (**RP**).
3. After initiation of CIRP, the Applicant came to be suspended as a director but continued to assist Respondent No.1 in ensuring the Corporate Debtor's business is operated and managed as a going concern. The Corporate Debtor's business is unique, being the only interactive arcade gaming center having presence pan India. Even though the Corporate Debtor's affairs were severely affected by the Covid-19 pandemic, the Applicant continues to hold unique and valuable experience in operating and managing the affairs of Corporate Debtor.
4. The Respondent No.1 proposed to conduct a transaction audit of the Corporate Debtor's accounts in accordance with the provisions of the Code and Respondent No.1 proposed to appoint Pipara & Co. LLP. To the Applicant's shock, around the contemporaneous period when Respondent No.1 was considering to do so, Respondent No.1 approached the Applicant and demanded illegal gratification (essentially a bribe) in order to restrict the purport of the audit report.
5. Whilst making the aforesaid demand, Respondent No.1 threatened the Applicant by insinuating that he would operate and manage the Corporate Debtor's CIRP to its complete detriment, such that the Corporate Debtor is practically unable to resolve its financial dues. The Applicant, on enquiring further with Respondent No.1, was informed that Respondent No.1 will proceed to launch challenges to transactions carried out by the erstwhile management of the Corporate Debtor should the Applicant refuse to handover the money demanded. In due

course sometime around June 2022, Respondent No.1 demanded Rs. 60,00,000/- (Rupees Sixty Lakhs) from the Applicant in order to obtain a favourable transaction audit report. Respondent No.1 clarified this to mean that the transaction audit report would not contain adverse remarks against the erstwhile management of the Corporate Debtor.

6. Respondent No.1 was well aware from the day of taking charge of the Corporate Debtor's affairs of the Deed of Assignment and Brand Context executed between the Corporate Debtor and Fun Gateway Arena Pvt. Ltd. On 31.08.2019 (**Assignment Agreement**). The Respondent No.1 was also well aware that pursuant to executing the Assignment Agreement, the parties had submitted a copy of the same with the Trademarks Registrar in June 2022.
7. The Assignment Agreement was executed between the parties almost 3 (three) years prior to CIRP being initiated qua the Corporate Debtor and about a year before the onset of the Covid-19 pandemic. Whilst demanding illegal gratification, Respondent No.1 informed the Applicant that the Respondent No.1 would challenge Assignment Agreement as an invalid transaction to deprive Corporate Debtor of its assets, if demanded amount is not paid.
8. Respondent No.1 went a step ahead to inform the Applicant that Respondent No.1 would challenge the Assignment Agreement as an invalid transaction with the insinuation that the same was executed in order to deprive the Corporate Debtor of its assets. Even while threatening the Applicant, Respondent No.1 was well aware that the Assignment Agreement is a genuine transaction between the parties, and accordingly, cannot be arbitrarily called into question/issue by Respondent No.1.

9. The applicant paid a sum of Rs. 5,00,000/- (Rupees Five Lakh only) on 16.07.2022 to Mr. Kiran Chonkar (partner of BDO India) in the office of Pipara & Co. LLP. Even thereafter, Respondent No.1 continued to make repeated demands from the Applicant.
10. Since the follow up demands were not being met, Respondent 1 filed Interlocutory Application No. 2115 of 2022 (**Brand Assignment IA**), inter alia, to challenge the Assignment Agreement.
11. Despite payment of the aforesaid amount, the demands from Respondent No.1 only grew. Eventually unable to meet the force of Respondent No.1's demands, in the first week of September 2022, the Applicant made it clear to Respondent No.1 that he would not make further payments for illegal gratification.
12. Thereafter, Respondent No.1 was creating several hurdles in an effective functioning of the Corporate Debtor's CIRP, including :
 - [a] intimidating employees;
 - [b] completely excluding the Applicant from assisting in management;
 - [c] involving individuals suspended by Respondent 2 to participate in the Corporate Debtor's CIRP etc.The Applicant filed a complaint with the Insolvency and Bankruptcy Board of India against Respondent No.1.
13. Also, in order to create further hurdles, Respondent 1 did not include details of the Assignment Agreement while publishing Form G and the information memorandum. Form G was subsequently amended by Respondent 1.
14. Respondent No.1 has conducted the CIRP of Corporate Debtor in a manner that is grossly prejudicial to its stakeholders. In fact, due to Respondent No.1's conduct, the employees of the Corporate Debtor

have been constrained to resign *en masse* as also reported in leading newspapers.

15. The Applicant filed this application to seek disciplinary proceedings against Respondent No.1 to stop his undue influence over the Corporate Debtor's CIRP and stay the Respondent's appointment as the Corporate Debtor's Resolution Professional.

Submissions of the Resolution Professional:

16. Resolution Professional (Respondent No. 1) has submitted that, the Applicant has sought an interim relief of stay of his Appointment. The scheme of the Code does not confer power on this Tribunal to remove RP. The said power has been specifically conferred on the wisdom of the CoC. The jurisdiction of this Tribunal qua removal / replacement of the RP is limited to Section 27 (3) and (4) of the Code. The power is conferred on CoC to remove and replace the RP. Section 27 provides the mechanism for removal of RP. The power of removal and replacement of RP is vested with the CoC.
17. Insofar as the relief for initiation of any disciplinary proceedings against the RP is concerned, the powers are conferred on IBBI by the provisions of the Code. In this regard, it is relevant to note that Section 196 of the Code stipulates the Powers and Functions of the IBBI, which includes sub-section (1) (g) to specify a mechanism for redressal of grievances against insolvency professionals and pass orders relating to complaints filed for compliances for the provisions of the Code.
18. Further, Chapter VI of the Code comprising of Sections 217 to 220 and *inter alia* provides for Inspection and Investigation. The aforesaid provisions contain modalities for filing of complaints against an insolvency professional, investigation of the insolvency professional

agency, issuance of show cause notices and appointment of disciplinary committees.

19. The IBBI has *inter alia* framed the following regulations in furtherance of Section 217, 218 (2), 219 and 220 of the Code.
- a. IBBI (Insolvency Professionals) Regulations, 2016
 - b. IBBI (Grievance and Complaint Handling Procedure) Regulations, 2017
 - c. IBBI (Inspection and Investigation) Regulations, 2017

The IBBI in terms of the Code is vested with jurisdiction to institute disciplinary proceedings and take disciplinary actions against an RP.

20. The Applicant's reliance on Section 60(5) of the Code is wholly misconceived. Section 60(5) of the Code deals with the residuary powers of this Tribunal. The non-obstante clause Section 60(5) is only deals with respect to '*any other law*' and the same is not in respect of '*the other provisions of the code*'. It is submitted that when there are specific provisions contained in the Code dealing with disciplinary proceedings, section 60(5) containing the residuary powers cannot be invoked, rendering the present Application as not maintainable.

21. RP has also relied on judgement of Hon'ble NCLAT in the matter of ***Veeral Controls Pvt. Ltd. v/s M/s Regen Powertech Pvt. Ltd. and Amit Sangal v/s Prince MFG Industries Pvt. Ltd.***

22. Insofar as the Respondent No.1's functioning qua the business of the Corporate Debtor is concerned, it is apposite to note the following"

- I. The business of the Corporate Debtor is being continued in the similar manner as was being done before the commencement of CIRP process. No adverse comment/ remark has been made by CoC qua the functioning of the Resolution Professiona.

- II. Despite being impacted by Covid and initiation of CIRP, the Corporate Debtor operates 12 centers in India, including one which has been made operational post initiation of CIRP. In fact, the total revenue earned by the Corporate Debtor has improved vis-à-vis the revenue earned prior to Covid, which is evident from the tables below;

Year-on-year comparison of revenue of corporate debtor

Financial Year	Gaming Revenue	F&B Revenue	Event Revenue	Sponsorship & Other Revenue	Total Revenue	YoY Growth
2018-19	5,145	2,235	1,825	559	9,762	100%
2019-20	4,825	2,549	1,760	565	9,699	99%
2020-21	430	25	-	177	632	6%
2021-22	3,094	1,012	417	76	4,599	47%
2022-23	6,993	2,598	2,105	451	12,148	124%

23. The Respondent No.1/RP has submitted that the applicant filed a complaint against RP before Insolvency and Bankruptcy Board of India (IBBI) on 02.01.2023 raising allegation for taking illegal gratification. The CoC has not made any adverse comment against conduct and performance of duties as Resolution Professional of the Corporate Debtor.

24. On 09.01.2023, IBBI issued a 'Notice of Investigation' to RP under IBBI (Inspections and Investigation) Regulations, 2017 to provide response to the allegations made by the Applicant. In compliance, RP filed response denying the allegations made against him. On 15.03.2023, an email was received from IBBI seeking further information which has

been provided by the RP. No response has been received from IBBI thereafter.

25. The Application has been filed by the Applicant making allegations against RP without placing any evidence on record.
26. With regard to the allegation of illegal gratification, the Respondent 1 has submitted that, the applicant has alleged that he had paid certain sum of money in June 2022 and July 2022 and the Applicant resisted payment of money in September 2022. It is evident that IA No. 2115 of 2022 was filed by the Respondent 1 on 25.07.2022. Subsequently, the interim order was passed on 08.08.2022 and a final Order allowing the Application was passed on 22.11.2023.
27. No complaint was filed against the Respondent 1 from September 2022 to January 2023. A belated complaint was filed with IBBI (Respondent 2) in January 2023. In the IBBI Complaint, the Applicant has not stated that any amount was paid to the RP. Also, in the application it is said that the Rs. 5,00,000 was paid to the Forensic Auditor Pipara & Co LLP. However, the said entity is unknown to the RP and the forensic auditor of the Corporate Debtor is M/s. G. D. Apte & Co.
28. Further, the Applicant through its erstwhile employees of the Applicant did not provide access and/or requisite passwords of the Corporate Debtor to the RP.
29. On instructions of the Applicant, the erstwhile employees obstruct RP from carrying out functioning, management and operations of the Corporate Debtor as a going concern during the CIRP. Hence RP filed I.A. 2430/2023 under Section 19 of the Code to seek orders and directions from this bench against erstwhile promoters and its employees.

30. The Applicant intends to seek liquidation of the Corporate Debtor to defraud its creditor. The erstwhile promoters filed Company Appeal (AT) (Ins) No. 870 of 2023 before Hon'ble NCLAT. On 18.08.2023 the Appeal was preferred against NCLT's order dated 13.06.2023 passed in I.A. No. 1679 of 2023, where an exclusion of 262 days from the CIRP of the Corporate Debtor due to pending adjudication [including Brand Application (I.A. no. 2115/2022)] was permitted by the Bench.
31. The Applicant with its erstwhile employees was seeking to obstruct, impede and hinder the successful CIRP of the Corporate Debtor. These actions are affecting the business of the Corporate Debtor.
32. In the view of the above, the present application deserves to be dismissed with cost.

FINDINGS/OBSERVATIONS

33. Heard Ld. Counsels for the parties and perused the record.
34. The arguments in this I.A. were heard and concluded on 05.01.2024 and both the parties were directed to file their written submissions within one week which has also been clearly mentioned in the daily order dated 05.01.2024. Despite such directions, written submissions has only been received from Respondent No.1 in this I.A. The Applicant has not filed any written submission. Be that as it may, the Application is being decided based on the material available on record, the arguments made by both the parties and written submission filed by the Respondent No.1.
35. In this I.A. IBBI has been made the Respondent No.2, however, during the submission being made by the Ld. counsel for the Applicant it was

stated that they are not seeking any relief against the IBBI and further stated that they are not pressing prayer clause (b).

36. The applicant in prayer (a) is seeking disciplinary proceedings against the RP/Respondent No.1 for demanding and taking illegal gratification. In this regard, it is mentioned that IBC, 2016 is the complete Code relating to Insolvency. It also deals with the circumstances when RP fails to perform his duties in accordance with the Code. The removal/ replacement of RP is dealt in section 27 of the Code where such powers have been conferred on the wisdom of the CoC. Section 196 & Section 217 to 220 of the Code relates to initiation of disciplinary proceedings against the RP and such powers/functions have been conferred on the IBBI under the provisions of the Code. In this regard, the IBBI *inter alia* has framed following regulations in furtherance of sections 217, 218(2), 219 and 220 of the Code:-

- (a) IBBI (Insolvency Professional) regulations 2016,
- (b) IBBI (Grievance complaint handling procedure) regulations 2017,
- (c) IBBI (Inspection and investigation) regulations 2017.

37. IBBI in terms of the Code is vested with jurisdiction to institute disciplinary proceedings and take disciplinary action against the RP. During the arguments, Ld. counsel for the Applicant contended that powers of this Tribunal under section 60(5) of the Code should be invoked to grant relief under prayer clause (a). In this regard, it is stated that section 60(5) of the Code deals with the residuary powers of this Tribunal and non-obstinate clause in this section is only with respect to the “any other law” and the same is not in respect of “any other provision” of the Code and in any case when there are specific provisions to deal with a particular circumstances arising in the insolvency proceedings the same has to be dealt by the concerned

specific section of the code and not under the section which provides for residuary powers.

38. In this regard, it is appropriate to refer to and rely on the judgement of Hon'ble NCLAT in the matter of ***Veeral Controls Pvt. Ltd. v/s M/s Regen Powertech Pvt. Ltd.*** wherein Hon'ble NCLAT inter alia while dismissing the Appeal challenging the Order of the Adjudicating Authority had reiterated the findings of the Appellate Tribunal that the Adjudicating Authority cannot enforce disciplinary proceedings against the IRP/RP and only IBBI would be the competent authority to initiate disciplinary proceedings. In addition, the Hon'ble Appellate Authority made various observations in respect of the jurisdiction under Section 60 (5) of the Code.
39. It is also appropriate to refer to the judgement of Hon'ble NCLAT in the matter of ***Amit Sangal v/s Prince MFG Industries Pvt. Ltd.*** wherein NCLAT while dealing with an application seeking directions to IBBI to initiate disciplinary action against the RP amongst other reliefs inter alia held that in relation to misconduct of IRP/RP, the appropriate authority to deal with such matter is IBBI. The applicant in the instant case has already filed the Complaint before IBBI.
40. It is further observed that the Applicant has alleged that on demand a money of Rs. 5 lacs was paid. However, such an allegation is not found to be mentioned in the complaint filed by the Applicant before the IBBI. Further, it is averment of the Applicant that such an amount was paid on 16.07.2022 to Mr. Kiran Chonkar (partner of BDO India) in the office of Pipara & Co. LLP who supposedly worked as transactional auditor. It is submitted by the RP that the Pipara & Co. LLP is un known entity to the him and forensic auditor of the Corporate Debtor is M/s. G. D. Apte & Co. Accordingly there are factual inconsistencies.

41. Though the decision in the case of **M/s. Satori Global Limited & Ors. vs. Ms. Shailja Krishna & Ors.** in Company Appeal (AT) No. 379 of 2018 dated 02.06.2023 of the Hon'ble NCLAT is in respect of the Companies Act, but it is relevant for the circumstances and facts on hand as well. In this case Hon'ble NCLAT have observed as under:

“12.We are of the earnest view that issues of fraud, manipulation and coercion cannot be decided in a summary jurisdiction as it requires examination of elaborate evidence.....

*15.At the cost of repetition, any dispute with respect to issues relating to 'fraud', manipulation', and 'coercion', and false statements **cannot be decided in a summary jurisdiction.** The contentions of the Learned Counsel for the Respondent that there is 'over writing on the certificates', signatures were taken on blank forms, there is malafide suppression of some documents all require examination of evidence and hence cannot be decided by the **NCLT in a summary fashion.**”*

(Bold for emphasis)

In the proceedings under IBC also, this adjudicating authority only has summary jurisdiction over the cases and cases are decided as such.

42. In view of the aforesaid discussions and harmonious construction of the relevant provisions of the Code coupled with the decision cited above, it is clear that IBBI is the appropriate authority to initiate the disciplinary proceedings against the RP. The Applicant has already filed the complaint and IBBI is seized of the matter. Moreover, this Tribunal does not have any jurisdiction to deal with misconduct, if any, of the RP and initiate disciplinary proceedings against him. Further thereto, this tribunal does not have any supervisory role on IBBI and therefore no directions can be issued to the IBBI. Accordingly, the prayer sought at clause (a) is **rejected.**

43. Ld. counsel of the Applicant during the course of the hearing stated that he is not pressing the prayer at clause (b) and accordingly the same is **rejected**. Consequently, prayers at clause (c) (d) and (e) become **infructuous** and are accordingly **disposed of**.

44. Accordingly, the above I.A. is **rejected** and stands **disposed of**.

45. The copy of this Order may be sent to the IBBI.

Sd/-

CHARANJEET SINGH GULATI
MEMBER (TECHNICAL)
(Saayli/Rajeev)

Sd/-

LAKSHMI GURUNG
MEMBER (JUDICIAL)