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

+ W.P.(C) 3692/2020

MOHAN LAL JAIN

..... Petitioner

Through

Mr. Sumesh Dhawan, Advocate with  
Mr. Vatsala Kak and Ms. Ankita  
Bajpai, Advocates.

versus

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA  
AND ANR

..... Respondents

Through

Mr. Vikas Mehta and Mr. Kushal  
Sarkar, Advocates for R-1 with  
Mr. Saji Kumar, Executive Director,  
Mr. Umesh Kr. Singh, Chief General  
Manager, Insolvency and Bankruptcy  
Board of India.  
Mr. Rahul Malhotra and Mr. Varun  
Garg, Advocates for R-2.

**CORAM:**

**HON'BLE MR. JUSTICE A. K. CHAWLA**

**ORDER**

% **29.06.2020**

**(Video Conference Hearing)**

**CM APPL. 13211/2020 (Exemption)**

It is an application seeking exemption from filing typed copies of dim annexures, affixing the court fee and also from filing duly attested affidavit. Taking note of the prevailing conditions on account of Covid-19 pandemic, application is allowed with the stipulation that the requisite court fee and attested affidavit shall be filed within 7 days of the resumption of the regular functioning of the Court. Application stands disposed of accordingly.



**CM APPL. 13212/2020 (Exemption)**

It is an application seeking exemption from filing certified/typed copies of the documents. Allowed, subject to just exceptions.

**W.P.(C) 3692/2020 & CM APPL. 13210/2020 (for stay)**

The petitioner was appointed Insolvency Professional (IP) of Mack Soft Tech Private Limited - against which the Corporate Insolvency Resolution Process (CIRP) was initiated on 11.08.2017 and an Insolvency Resolution Professional (IRP) appointed. As for the petitioner, he is said to have taken over as the IP only on 31.01.2018. The petitioner is alleged to have violated the terms of moratorium inasmuch as he is stated to have allowed some amounts to flow out to a debtor i.e. the respondent no.2 in violation of the provisions of IBC.

According to the petitioner, there was no violation of any term of Moratorium inasmuch as the monies were remitted from the escrow account maintained by HDFC Bank and that, the monies lying in the escrow account could not be under the control of the IP. In addition thereto, it is the plea of the petitioner that he did not take any decision of his own but only followed the past decisions taken by the previous IP and CoC.

During the course of hearing, Mr. Dhawan, ld. counsel for the petitioner has also adverted to three of the orders passed by the same Authority- which passed the impugned order and which form part of the compilation filed, to show that in quite similar circumstances of misunderstanding of the provisions of the IBC Code, the Insolvency Professionals (IPs) were let off with warnings but the petitioner has come to



be imposed disproportionate penalty in the face of the given facts and circumstances.

Issue notice. Mr. Mehta, ld. counsel appearing on behalf of respondent no.1 and Mr. Malhotra, ld. counsel appearing on behalf of respondent no.2 accept notice. Respective counter-affidavits/replies be filed within four weeks. Rejoinders thereto, if any, may be filed a week before the adjourned date.

List on 04.09.2020. Till then, taking into account the totality of the facts and the circumstances, the operation of the impugned order is stayed subject to the petitioner depositing within 10 days from today a sum of Rs.25 lacs with the respondent no.1 – Insolvency and Bankruptcy Board of India. The amount so deposited by the petitioner shall be kept in fixed deposit with a nationalized bank earning maximum interest for an initial period of one year. Such deposit would be disbursable subject to any further orders that may be passed by the Court.

**A. K. CHAWLA, J**

**JUNE 29, 2020**

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INSOLVENCY AND BANKRUPTCY BOARD OF INDIA  
(Disciplinary Committee)

No. IBBI/DC/24/2020  
30<sup>th</sup> May 2020

**Order**

In the matter of Mr. Mohan Lal Jain, Insolvency Professional (IP) under Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 read with Section 220 of the Insolvency and Bankruptcy Code, 2016 (Code).

<b>Appearances before Disciplinary Committee on 16<sup>th</sup> March 2020</b>	
For Noticee	Mr. Mohan Lal Jain, In Person. Mr. G.P. Madaan, Advocate for RP Ashutosh K. Sharma, Advocate.
For Board	Mr. Debajyoti Ray Chaudhuri, Chief General Manager. Ms. Pooja Singla, Assistant Manager and Ms. Maryam Sharma, Research Associate.

**1. Background**

- 1.1 This Order disposes of the Show Cause Notice (SCN) dated 14<sup>th</sup> January 2020 issued to Mr. Mohan Lal Jain, F – 2/28, Sector – 15, Rohini, New Delhi, 110089, who is a Professional Member of ICSI Institute of Insolvency Professionals and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board) with Registration No. IBBI/IPA-002/IP-P00006/2016-17/10006.
- 1.2 In exercise of its power under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017, the Board vide Order dated 6<sup>th</sup> August 2019 appointed an Inspecting Authority (IA) to conduct an inspection of Mr. Mohan Lal Jain, on having reasonable grounds to believe that the IP had contravened provisions of the Code, Regulations, and directions issued thereunder.
- 1.3 The Board on 14<sup>th</sup> January 2020 had issued the SCN to Mr. Mohan Lal Jain, based on findings of an inspection in respect of his role as a Resolution Professional (RP) in Corporate Insolvency Resolution Process (CIRP) of Mack Soft Tech Private Limited (CD). The SCN alleged contraventions of several provisions of the Insolvency and Bankruptcy Code, 2016 (Code), the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and the Code of Conduct under regulation 7(2) thereof. Mr. Mohan Lal Jain replied to the SCN vide letter dated 31<sup>st</sup> January 2020.
- 1.4 The Board referred the SCN, response of Mr. Mohan Lal Jain to the SCN 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. Mr. Mohan Lal Jain availed an opportunity of personal hearing before the DC on 16<sup>th</sup> March 2020 where he reiterated the submissions made in his written reply. Thereafter, the IP made some additional submissions vide email dated 23<sup>rd</sup> March 2020 in support of submissions made during the course of personal hearing.

## **2. Consideration of SCN**

The DC has considered the SCN, the reply to SCN, oral submissions of Mr. Mohan Lal Jain during the course of personal hearing, additional submissions made by him, other material available on record and proceeds to dispose of the SCN.

## **3. Alleged Contraventions, Submissions, Analysis and Findings**

A summary of contraventions alleged in the SCN, Mr. Mohan Lal Jain's written and oral submissions thereon and their analysis with findings of the DC are as under:

### **3.1 Contravention:**

- a) In the matter of Mack Soft Tech Private Limited, it has been observed from the minutes of the 3<sup>rd</sup> CoC meeting dated 16<sup>th</sup> March 2018 that the RP had sought approval from the CoC members to continue making payments through EMIs to HDFC Pvt. Ltd. ('HDFC'), one of the Financial Creditors of the CD. That after obtaining approval from CoC members, the RP continued to make payments to HDFC during CIRP which is in violation of Section 14(1)(e) of the Code which states that transfer and disposal of any of the assets of the CD is prohibited during the CIRP.
- b) As per the minutes of 10th CoC meeting dated 1<sup>st</sup> September 2018, the claim of HDFC Ltd. as per the revised list as on 27th August 2018 stood at Rs 1,08,34,362/- and this decrease in value of the admitted claim of HDFC from Rs. 22,45,49,456/- to Rs. 1,08,34,362/- was because of the regular payment of EMIs from the assets of CD during CIRP which is in contravention of Section 14 (1)(e) of the Code.
- c) Moreover, it was decided in the 10th CoC meeting that HDFC may recover remaining EMIs from the Security deposit of Rs. 5,48,63,987/- available with HDFC. Therefore, the Board is of the *prima facie* view that the RP had violated section 14 (1) (e) , section 208 (2) (a) & (e) of the Code, Regulations 7(2)(a) and 7(2)(h) of the IP Regulations read with clause 10 and 14 of the Code of Conduct of the said IP Regulations.

### **Submission:**

- a) RP has submitted that HDFC had advanced a Rental Discounting Loan Facility of Rs 75,00,00,000/- in the year 2012 which was being repaid by the CD from the rental income generated. It was submitted that the rental income of the CD was pledged to HDFC for this purpose and an Escrow Account

was opened in HDFC Bank in which the receivables had to be deposited and continuously maintained so long as the Financial Facility was fully paid. This arrangement was as per the Facility Agreement dated 10.1.2012 entered between the CD and HDFC bank.

- b) He submitted that the EMIs were being recovered during the CIRP period from the rental receipts deposited in the said Escrow Account and not out of the assets of the CD available as on CIRP commencement date.
- c) It was submitted that HDFC Limited was the sole secured lender and the payment of EMIs was approved by 100% voting share of CoC which also consisted of unsecured financial creditors. And that voting share of unsecured lenders was 96% and they decided to continue to make payment of EMIs to HDFC Ltd. being the only secured creditor.
- d) During the personal hearing on 16<sup>th</sup> March 2020, it was submitted by the counsel for the RP that the decision to continue to pay regular EMIs out of rental receipts of CD in the ordinary course of business was taken by CoC with 100% voting share even prior to his taking over of charge as RP. It was further submitted that it was a commercial decision taken by CoC in the interest of CD and that RP had no reason to challenge the decision of the CoC taken in its commercial wisdom.

It was further submitted that the payment of EMIs was a routine business transaction undertaken by the RP in order to keep the CD as a going concern and not a transfer of asset. Furthermore, the payments were made in the interest of the CD so as to reduce the burden of higher interest and penalty.

### **Analysis:**

The provision on 'Moratorium' envisages prohibition on institution of suits by or against the CD, transfer, alienation or disposal of any of the assets or legal right or beneficial interest of the CD, action to foreclose, recover or enforce any security interest created by CD in respect of his property. The moratorium period is analogous to the insolvency resolution process period.

To summarize, 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 main point to be examined in the present case is whether payment of EMI's to a Financial Creditor made during the period of moratorium in CIRP is in violation of Section 14(1) (b) of the Code.

It has also been observed that the SCN has alleged contravention of section 14(1)(e) of the Code against the RP, however, it has been submitted by the RP that clause (1) (e) in Section 14 of the Code does not exist which is correct. Thus, it appears that the inclusion of contravention of clause(1)(e) in the SCN is a typographical mistake. In this matter the correct clause shall be clause (1) (b) of section 14 and the same shall be referred accordingly.

In the present case, it has been observed that the RP continued to make payments to HDFC after obtaining approval of CoC members during CIRP which is in violation of the provisions on moratorium contained in the Code and imposed by the AA vide order dated 11<sup>th</sup> August 2017.

It has been submitted by the RP that the decision to continue to make payment of regular EMIs out of rental receipts of CD in the ordinary course of business was taken by CoC with 100% voting share before he took charge as RP and was a part of CoC's commercial decision taken in the interests of CD.

It is pertinent to mention that Mr. Sundaresh Bhat was appointed by the Adjudicating Authority as an IRP. He was confirmed as RP by the CoC in the meeting held on 19<sup>th</sup> September 2017. However, the CoC in its second meeting held on 08<sup>th</sup> January 2018 decided to replace Mr. Sundaresh Bhat and appointed Mr. Mohan Lal Jain as RP who took over the charge on 7<sup>th</sup> February 2018.

It was further submitted by the RP that payment of EMIs was a routine business transaction undertaken by him in order to keep the CD as a going concern and thus, cannot be regarded as a transfer of asset.

Before proceeding to decide whether payment of EMI's to a Financial Creditor made during the period of moratorium in CIRP is in violation of Section 14(1) (b) of the Code, it is important to understand the relevant terms and conditions of the Facility Agreement/Escrow Account Agreement entered by the CD with HDFC (Financial Creditor/ FC), the meaning of Asset and Financial Asset, and whether Security Deposit falls under the definition of the term 'Financial Asset'.

It has been observed that the CD has entered into a facility agreement dated 10<sup>th</sup> January 2012 with the FC. In the main body of the agreement, it has been mentioned as under:

*“Open a Separate Escrow Account:*

*The Borrower open and maintain a separate current account bearing No. with the HDFC Limited at Lakdikapool (hereinafter referred to the “BANK”).”*

Schedule – II appended to the agreement provides:

*“Schedule – II: Interest Rate and Repayment Specific:*

***The repayment of the Financial Facility will be done in the following manner:***

*The term of the Loan is 84 months.*

*The Loan will be repaid by way of equated monthly instalments (EMI's) equivalent to Rs. 1,37,46,120/- through the tenure of the Loan.*

*MTSPL will open an escrow account and designated account for this facility with a Bank acceptable to HDFC. Disbursements will be deposited in the designated account and MSTPL will inform its tenants to draw all cheques in favour of*

*MSTPL escrow account no. 00210350003946 and ensure that all receivables by way of rental accruals are deposited in escrow account only. The residual amount in the escrow account would be transferred into the designated account of MSTPL for its use.”*

Schedule – I of the agreement contains special conditions for rental discounting. It provides that *“In addition to the general conditions as stipulated in Facility Agreement, following special conditions shall be applicable to the Financial Facility. ...”*

***“Clause - 4. SECURITY AND REPAYMENT SPECIFIC COVENANTS”***

- a) The Borrower agrees that the Financial Facility shall be secured by exclusive security interest on the receivables in such mode and manner as deemed fit and desired by the Lender.*
- b) .....*
- c) The Borrower agrees that the Receivables shall be exclusive property of the Lender for the purpose of secured repayment of the Financial Facility and as such the Borrower will not make any further borrowing on the Strength of the Receivables as being Borrower's Property.*
- d) .....*
- e) The Borrower agrees that the receivables will directly be received in an escrow account and as such undertakes to open an Escrow account with such Bank as approved by the Lender with 7 days of execution of this agreement.*
- f) The parties agree that HDFC Bank will be appointed and be acting as Escrow agent in terms of the Escrow Agreement to be executed in line as part of the Special Condition.*
- g) The Parties further agree that the receipt and distribution of the Receivables under the Escrow arrangement shall be in accordance to the payment waterfall as detailed hereunder and furthermore particularly detailed in the Escrow Agreement.*
- h)....*
- i).... the Escrow Account”*

As per the Escrow Account Agreement dated 11<sup>th</sup> January 2012 executed between the CD and HDFC Bank, it has been agreed, inter-alia, that the CD shall open and maintain an escrow Account with HDFC. The relevant clause of the Escrow Agreement states:

*“...(B) One of the terms of the agreement of the Loan is that, for the benefit of the Lender, the Borrower shall establish/open an Escrow Account with the Escrow Bank. Immediately before or after first disbursement.....*

*(C) The Borrower has agreed that, the payments to be collected/received by the Borrower from the lessee/allottee of various units/properties built and sold or leased on the property, shall be credited to the said Escrow account and the Lender shall adjust all the amounts to be paid by the borrower to the Lender under the Loan agreement from time to time, out of the amounts credited in the*

*said Escrow account, and permit the transfer in the designated account of the borrower opened with the Escrow Bank, the amount over and above the EMI amount of the facility, out of the remaining balance in the said Escrow Account after such adjustment as agreed hereunder...”*

To understand the terms ‘Financial Asset’ and ‘Asset’, the Indian Accounting Standard (Ind AS) 32 and 38 issued by the Central Government are relevant which provides as under:

**Ind AS-32** has defined the term ‘Financial Asset’ as below:

*A financial asset is any asset that is:*

*(a) cash;*

*(b) an equity instrument of another entity;*

*(c) a contractual right: (i) to receive cash or another financial asset from another entity; or (ii) to exchange financial assets or financial liabilities with another entity under conditions that are potentially favourable to the entity; or*

*(d) a contract that will or may be settled in the entity’s own equity instruments and is: (i) a non-derivative for which the entity is or may be obliged to receive a variable number of the entity’s own equity instruments; or (ii) a derivative that will or may be settled other than by the exchange of a fixed amount of cash or another financial asset for a fixed number of the entity’s own equity instruments. For this purpose the entity’s own equity instruments do not include puttable financial instruments classified as equity instruments in accordance with paragraphs 16A and 16B, instruments that impose on the entity an obligation to deliver to another party a pro rata share of the net assets of the entity only on liquidation and are classified as equity instruments in accordance with paragraphs 16C and 16D, or instruments that are contracts for the future receipt or delivery of the entity’s own equity instruments.*

Ind AS 38 has defined the term ‘Asset’ as below:

*An asset is a resource:*

*(a) controlled by an entity as a result of past events; and*

*(b) from which future economic benefits are expected to flow to the entity;*

Thus, applying the above definitions to the facts of the present case, it can be observed that the amount credited to the said Escrow account will fall within the definition of the term ‘Asset’ and in view of the fact that moratorium was already imposed by the Hon’ble Adjudicating Authority, the said asset or for that matter any asset of CD couldn’t have been used or adjusted for the payment of EMIs in any manner whatsoever.

**Security Deposit:**

A security deposit is money that is given to a landlord, lender, or seller of a home or apartment as proof of intent to move-in and care for the domicile. Security

deposits can be either be refundable or non-refundable, depending on the terms of the transaction. A security deposit is intended as a measure of security for the recipient and can also be used to pay for damages or lost property.

A refundable Security Deposit given by an entity represents its contractual right to receive cash from the holder of the deposit, hence it falls under the definition of the term 'Financial Asset' in accordance with Ind AS 32. In the present matter, it has been categorically observed from the minutes of the 3<sup>rd</sup> CoC meeting held on 16<sup>th</sup> March 2018 that RP placed a note for ratification and approval of payments of EMIs towards term loan to HDFC which is also one of the members of CoC. It was decided in the said meeting to approve and ratify the payment of EMIs towards Term Loan to HDFC amounting to Rs. 2,74,92,240.00 for the months of January 2018 and February 2018. The minutes of 3<sup>rd</sup> CoC meeting further manifests that RP sought approval of the CoC for authorizing HDFC to continue to recover the future EMI payments from the surplus funds available in the bank account of the CD.

In the minutes of 5<sup>th</sup> CoC meeting held on 4<sup>th</sup> May 2018, [Item A (5)] it has been mentioned that -

*"The claim of HDFC Ltd is revised to Rs. 6,12,18,158.00 after adjusting the two EMIs paid after the last update".*

From the Agenda of the 10<sup>th</sup> CoC meeting held on 1<sup>st</sup> September 2018, it has been observed that Item No. A (5) provides as under:

*"...In response, every member of the CoC agreed with the suggestion made by Mr. Rajan Tandon that HDFC Ltd. may recover EMIs from the Security Deposit available with them and in case of any difference of the amount arises, then the same shall be paid from the account of the Corporate Debtor...."*

Moreover, as evident from the *List of Claims* updated in the month of March, April, June and August 2018, Fixed deposit of Rs. 5,48,63,987.00 available with the HDFC was used to recover the EMIs payable to the financial creditor.

Thus, it can unequivocally be observed from the revised list of constitution of creditors as on 27<sup>th</sup> August 2018, that CoC has approved the regular payment of EMIs to the Financial Creditor- HDFC during CIRP, which has reduced the amount claimed by HDFC from Rs. 22,45,49,456.00 to Rs. 1,08,34,362.00.

As per the obligations imposed by section 208(2)(a) of the Code, it is the duty of the RP to take reasonable care and diligence while performing his duties. However, the RP not only failed to bring to the notice of the CoC the embargo imposed on the transfer of the assets of the CD during CIRP under section 14 of the Code but also allowed the moratorium to be violated continuously by letting the EMIs to be deducted out of the cash flows/rental income of the CD. This indicates RP's casualness and negligence in performing his duty as RP and his

misunderstanding of law.

The argument advanced by the counsel of the RP that no funds were ever used from the Cash & Bank balance of the CD for repayment of EMIs to HDFC is not tenable and is incorrect. It is evident from a bare perusal of the minutes of 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 10<sup>th</sup> CoC meeting and from the list of creditors updated in the month of March 2018 till August 2018, that, payment of EMIs has regularly been made from the assets of the CD to HDFC. The rental income which was first deposited by the tenants in current account of the CD and then deposited (by the CD) in Escrow Account was evidently the Asset (cash) of the CD as per Ind AS 32. (Cash is a financial asset).

So much so, that in the 10<sup>th</sup> CoC meeting dated 1<sup>st</sup> September 2018, it has been observed that RP along with the members of the CoC agreed that HDFC Ltd may recover EMIs from the Security Deposit available with them and in case any difference of the amount arises, then the same shall be paid from the account of the CD. In addition to this, it was contended by the counsel for the RP that the EMIs to the FC were paid by virtue of the operation of the Facility Agreement and Escrow Account Agreement and that the amount in the Escrow Account even though in the name of CD, were being held in trust for HDFC and the CD was acting as a 'Custodian' only.

As per Facility Agreement, Lender has the right to recover EMI's from the Credit Balance lying in Escrow Account without any reference to or recourse to the borrower. However, as per the minutes of the 4<sup>th</sup> COC meeting, rental income of CD was credited in Current Account and then transferred to Escrow Account. Thus, in such a situation, borrower was not in a position to recover directly from the Current Account during CIRP (as the agreement was to recover from Escrow Account). This also indicates that the submission made by RP that the rental income was getting credited in FC's Escrow Account is not correct.

Further, during the personal hearing, it was submitted by the counsel for the RP that as per the Facility Agreement, it was covenanted that the amount lying to the credit of the escrow account shall not be treated as the asset of the CD in the event of Bankruptcy/Liquidation and that such amount shall inure to the benefit of the lender.

In this regard, it can be observed that Chapter IV of Part III of the Code contains provisions relating to Bankruptcy in relation to individuals and not corporates. A CD has to go through CIRP before it can go into liquidation. There is a difference between 'commencement of CIRP' and 'Bankruptcy/ Liquidation' and these terms are not similar or interchangeable. During CIRP, CD functions as a going concern and is not considered as 'bankrupt or undergoing liquidation' because it is only in case of no revival during CIRP that insolvency process culminates into liquidation. Therefore, the provision contained in the Facility Agreement shall not

be applicable to the present case since it envisages the stage of liquidation or bankruptcy. Therefore, the said arguments are untenable and are implausible.

Furthermore, the contention of the counsel of the RP, that the payment of EMIs was made as per the Facility agreement and thus, the same is not violative of section 14 of IBC, is not tenable in view of the objectives of the Code. IBC is an exhaustive code dealing with the Insolvency Law and therefore, in the event of an inconsistency between a covenant and IBC, it is evident that the latter would prevail.

It can thus be concluded that the argument of the RP cannot be accepted as it would vitiate the very purpose for which the Code was formulated. Furthermore, a contrary approach as suggested by the RP, if taken, would result in making the whole exercise of CIRP biased and troublesome for certain creditors.

The RP in his written submissions, has submitted that the payment of EMI was a routine business transaction in order to keep the CD as a going concern and also that the said payments were made in normal course of business. However, it has been observed that repayment of loan by way of EMIs to the FCs is clearly a financing activity which cannot be regarded as “ordinary course of business of the CD” or even necessary to keep the CD as a going concern.

In this regard, Accounting Standard-3 is relevant, wherein a provision for Cash Flow Statement classifies cash flows during the period as operating, investing and financing activities. In this, *Operating activities are the principal revenue-producing activities of the enterprise and other activities that are not investing or financing activities whereas, Financing activities are activities that result in changes in the size and composition of the owners’ capital (including preference share capital in the case of a company) and borrowings of the enterprise.*

Examples of cash flows arising from *financing activities* are:

- (a) cash proceeds from issuing shares or other similar instruments;
- (b) cash proceeds from issuing debentures, loans, notes, bonds, and other short or long-term borrowings; and
- (c) cash repayments of amounts borrowed.**

In the present case, from a bare perusal of the Cash Flow Statement shown in the minutes of 1<sup>st</sup> CoC meeting and from the nature of business carried on by the CD, the ‘Repayment of loan by making EMI payments to HDFC’ is clearly a financing activity and cannot be said to be in the ordinary course of business of the CD to maintain it as a going concern.

Section 238 of the Code states that “*The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.*”

Thus, the provisions of the Code shall prevail over any other provision or law, contrary or inconsistent with any of its provisions. The Hon'ble Supreme Court also had occasion to consider the importance of section 238 of the Code in the case of *Innoventive Industries Ltd. Vs. ICICI Bank and Anr.* and in *Pr. Commissioner of Income Tax Vs. Monnet Ispat and Energy Ltd.*, whereby it was held that in view of section 238 of the Code, the provisions in the Code will override anything inconsistent contained in any other enactment. Hence, it can be concluded that the Code is a complete code in itself and the provisions of this code override all other laws.

In view of this section, it is amply clear that the Code overrides the inter-se commercial and contractual covenants which are in conflict with the Code and therefore, the FC and the CD cannot, by virtue of a clause in the Facility Agreement, take the assets of the CD out of the purview of CIRP and violate the provisions of moratorium contained in section 14 of the Code on account of approval granted by the members of CoC. Thus, provisions of the Code shall supersede and prevail over the said clause in the Facility agreement, to the extent of any inconsistency between the two.

Further, certain duties are also cast upon the RP under the provisions of the Code. Section 25 of the Code provides that the RP shall preserve and protect the assets of the CD and must take immediate custody and control of all the assets of the CD. 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. In the present case, it appears that the IP (after he took over as RP on 08<sup>th</sup> January 2018) never informed the CoC that repayment of loan (EMIs) cannot be made during moratorium even though the matter regarding payment of EMI's was discussed in one or other way in 3<sup>rd</sup>, 5<sup>th</sup> and 10<sup>th</sup> CoC meetings. However, in the 4<sup>th</sup> CoC meeting Mr. Udayraj Patwardhan from the team of RP informed the committee that the Bank accounts should be operated as per the instructions of RP in accordance with the provisions of the Code and that any prior escrow arrangement may not be obligatory during the CIRP process.

The contention of the RP that the payment of EMIs was approved by 100% voting share of CoC which also consisted of unsecured FCs (whereas HDFCs voting share was 9.8% at the time of CIRP commencement) is not sustainable because CoC cannot take a decision beyond the express provisions of the Code since it is a principle of law that what cannot be done directly, cannot be done indirectly. Thus, any action approved by the CoC must strictly adhere to the provisions of the Code and the rules and regulations made thereunder. Even though, in the present case, the decision to continue to make payment of EMIs was taken by CoC, however, the RP should have considered if it is within the prerogative of the CoC to take such a decision in contravention of the provisions of the Code. It has also been observed that CoC has also not recorded any reason

for taking such a decision (beyond the provisions of law) which is not permitted by law.

The power bestowed on CoC is coupled with a duty to exercise that power with utmost care, caution and reason, keeping in mind the legislative intent and spirit of the Code. The CoC while exercising their commercial wisdom to arrive at a business decision must necessarily take into account the key features of the Code.

The Supreme Court in *Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta (2019)* reinstated the existence of certain intrinsic assumptions relating to the CoC on which the principle of ‘commercial wisdom’ has been recognised. The assumptions are: that the CoC has taken into account the fact that the corporate debtor needs to maintain itself as a going concern during the insolvency resolution process; that it needs to maximize the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. Therefore, the Supreme Court has been categorical that the discretion given to the CoC in taking commercial decisions about a corporate debtor comes with its boundaries. Exceeding the limits would defy the very objective of the Code.

These assumptions cannot be misinterpreted to be taken as absolute, and over and above the basic objectives and inherent checks and balances within the Code, which govern this principle in the first place.

Thus, the Hon’ble Court held that when the CoC exercises its commercial wisdom to arrive at a business decision to revive the CD, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors.

In the present case, the decision of the CoC goes against the grain of the intrinsic limitations enshrined within the Code, which the Hon’ble Supreme Court has reiterated in cases such as Swiss Ribbons and Essar Steel.

It is for this reason, the decision of the CoC to ratify and approve the payment of EMI to FC in preference to other Creditors, and also to authorise HDFC Limited to continue to recover the future EMI payments from the surplus funds available in the Bank Account of the CD, can by no stretch of imagination comes within the purview of commercial wisdom of CoC and goes against the basic objectives of the IBC.

It is a matter of common knowledge, that the CD is prohibited from alienating in any manner any of the assets upon declaration of memorandum and therefore, once the claim of FC has been admitted, the RP cannot make the repayment of Loan to FC out of the earnings/assets of the CD during CIRP. The resolution process will be rendered meaningless if the assets of the CD are allowed to be disintegrated during the process. The resolution process aims at bringing back the

CD on the rails of recovery and rehabilitation. The purpose of the moratorium include keeping the assets of CD together during CIRP, facilitating orderly completion of the processes envisaged during CIRP and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default. Moratorium also prohibits initiation and continuation of legal proceedings, including debt enforcement action and ensures a stand-still period during which creditors cannot resort to individual enforcement action which may frustrate the very object of the CIRP.

While considering the present case, the DC has placed reliance on para 5 of the judgment dated 15.11.2017 of Hon'ble National Company Law Appellate Tribunal rendered in the case of *Indian Overseas Bank Vs Mr. Dinkar T. Venkatsubramaniam, Resolution Professional for Amtek Auto Ltd.*, which is reproduced below:

*“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 including the bank has to prefer its claim before the RP, which is considered along with other claims as per law.

### **Findings:**

Upon commencement of CIRP, IP is duty bound to take over all the assets of the CD which includes financials of the CD. During CIRP, receipt of rent is an income and the CD has a legal right to receive the same.

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.

There cannot be an exceptional or special treatment to any corporate entity in any CIRP. While reinforcing the rule of law, every company 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 IBC take precedence over all other laws of the country.

Once CIRP commences, all the FCs whose claims have been admitted have to wait for the completion of the process. There is a distinction between pre-CIRP and post-CIRP circumstances. The CoC and the RP in the said matter failed to appreciate the essence and purpose of declaration of moratorium under section 14 of the Code.

Ratification of action regarding payment of 7 EMI's to HDFC by CoC which is *prima facie* illegal, cannot make the said action legal since the CoC has no jurisdiction to take such a decision.

Whatever may be the resource, (here rental income) the amount due to one creditor cannot be made to him at the expense of other creditors as the same is in violation of the moratorium declared u/s 14 of the Code.

In this matter, the RP has made payment of EMIs to the FC during CIRP from the assets of the CD and that too in preference to other creditors, although Section 14 of the Code prohibits transfer and disposal of any of the assets of the CD during the CIRP period. Accordingly, in the present case, the IP has acted in contravention of Section 14, Section 208(2)(a) and (e) of the Code and Regulation 7(2)(a) and 7(2)(h) of the IP Regulations, read with clause 10 and 14 of the Code of Conduct as given in the First Schedule of the IP Regulations.

The DC has taken note of the order dated 05 March, 2019 of the Hon'ble Supreme Court in the matter of *Mecon FZE Vs Quinn Logistics India Pvt Ltd.* (Civil Appeal No. 9547 of 2018) vide which the insolvency proceedings has been terminated. Hence it does not make any sense to ask for recovery of the amount paid to the FC by way of EMIs. However, since this is gross violation of the moratorium which aims to keep the CD alive, leakage of resources through clandestine to select creditors not only risks the life of the company but disturbs the balance amongst stakeholders, In addition to being contravention of Section 14 of the Code, it also impinges the solemn objective of the Code namely resolution of corporate person, maximization of value of assets and balancing the interest of all the stakeholders.

#### 4. **Conclusion:**

- 4.1 The role of RP is vital to the efficient operation of the insolvency and bankruptcy resolution process. An IP exercises the powers of the Board of Directors of the firm under resolution, manages its operations as a going concern, and complies with applicable laws on behalf of the firm. He conducts the entire insolvency resolution process: he is the fulcrum of the process and the link between the Adjudicating Authority and stakeholders - debtor, creditors - financial as well as operational, and resolution applicants. The process culminates in a resolution plan that maximises the value of assets of the firm. The IP must apprise the members of the COC about the correct position of Law.

- 4.2 The Code casts strenuous responsibilities on an IRP/ IP to run the affairs of the firm in distress as a going concern and to maximize the value of the assets. As the key objective of the Code is maximization of the value of the assets, one needs to keep the assets of CD together during the CIRP and facilitate orderly completion of the processes envisaged during the insolvency resolution process and therefore, ensuring that the company may continue as a going concern while the creditors take a view on resolution of default.
- 4.3 IP organises all information relating to the assets, finances and operations of the firm, receives and collates the claims, prepares information memorandum, and provides access to relevant information, so that there is complete symmetry of information among the entitled stakeholders, while maintaining confidentiality. He thus addresses the market failure arising from information asymmetry. The resolution balances the interests of the stakeholders. This requires the services of a third person who does not side with any stakeholder and has no conflict of interests. The law casts this duty on the IP and makes several provisions to ensure his integrity, objectivity, independence and impartiality. It also requires him to be a fit and proper person. Given the responsibilities, an IP requires the highest level of professional excellence.
- 4.4 In this matter, the DC observes that Mr. Mohan Lal Jain, displayed a casual and negligent approach during the conduct of CIRP. When a CD is admitted into CIRP, the Code shifts the control of a CD to creditors represented by a CoC for resolving its insolvency. The CoC holds the key to the fate of the CD and its stakeholders. Thus, several actions under the Code require approval of the CoC. On the other hand, the IP must maintain absolute independence in discharge of his statutory duties under the Code. In the present matter, the RP compromised his independence and continued making payment of EMIs to the FC during CIRP from the assets of the CD.
- 4.5 Thus, Mr. Mohan Lal Jain, has displayed utter misunderstanding of the provisions of the Code and Regulations made thereunder. He has, therefore, contravened provisions of:
- (a) Sections 14(1)(b) and Section 208 (2) (a) & (e) of the Code,
  - (b) Regulation 7(2)(a) and 7(2)(h) of the IBBI (Insolvency Professionals) Regulations, 2016 read with clause 10 and 14 of the Code of Conduct under the said Regulations.

## **5. Order**

- 5.1 Adherence to provisions of the code is the first and foremost duty of an IP. It is incumbent upon IPs to build and safeguard the reputation of the profession which should enjoy the trust of the society and inspire confidence of all the stakeholders.

5.2 In view of the above, the DC, in exercise of the powers conferred under Section 220 of the Code read with sub-regulations (7) and (8) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and Regulation 13 of IBBI (Inspection and Investigation) Regulations, 2017, disposes of the SCN with the following directions:

5.2.1 The DC hereby imposes on Mr. Mohan Lal Jain a penalty equal to twenty five percent of the fee he has received in this process. This twenty-five percent works out as Rs. 34,22,500/- (Thirty-Four Lakh Twenty-Two Thousand and Five Hundred only) (i.e. Rs. 1,36,90,000/- X 25% = Rs. 34,22,500/-) and directs him to deposit the penalty amount by a crossed demand draft payable in favour of the 'Insolvency and Bankruptcy Board of India' within 45 days from the date of issue of this order. The Board in turn shall deposit the penalty amount in the Consolidated Fund of India.

5.2.2 Mr. Mohan Lal Jain shall not accept any new assignment as an IP till he deposits the penalty amount of Rs. 34,22,500/- (Thirty-Four Lakh Twenty-Two Thousand and Five Hundred only) with the Board and produces evidence to the Board of such deposit.

5.3 This Order shall come into force on expiry of 30 days from the date of its issue.

5.4 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professional where Mr. Mohan Lal Jain, is enrolled as a member.

5.5 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.

5.6 Accordingly, the show cause notice is disposed of.

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(Dr. Navrang Saini)

Whole Time Member, IBBI

Dated: 30-5-2020

Place: New Delhi