

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/92/2022

12th April, 2022

Order

In the matter of Mr. Pankaj Dhanuka, Insolvency Professional (IP) under section 220 of the Insolvency and Bankruptcy Code, 2016 read with regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

This Order disposes of the Show Cause Notice (SCN) No. COMP-11011/33/2020-IBBI/2712/461 dated 25.11.2021 issued to Mr. Pankaj Dhanuka, R/o – FE-328, Sector-3, Salt Lake City, Kolkata, West Bengal – 700106 who is a Professional Member of Indian Institute of Insolvency Professionals of ICAI (IIP-ICAI) and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P01205/2018-2019/11911.

Background

- 1.1 Mr. Pankaj Dhanuka was appointed as an interim resolution professional (IRP) of Corporate Power Limited, the corporate Debtor (CD) by the National Company Law Tribunal, Kolkata (AA) in the matter titled as “*Asset Reconstruction Company (India) Limited vs. Corporate Power Limited*” vide its order dated 19.02.2020 admitting an application for Corporate Insolvency Resolution Process (CIRP) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (Code). Subsequently, Mr. Dhanuka was also appointed as Resolution Professional (RP) in the said CD.
- 1.2 The IBBI issued the SCN to Mr. Dhanuka on 25.11.2021 based on the material available on record in respect of his role as an IRP and RP in the CIRP of the CD. The SCN alleged contravention of section 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and 7(2)(h) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and Clause 14 and 23B of the Code of Conduct under First Schedule of regulation 7(2) thereof. Mr. Dhanuka replied to the SCN vide letter dated 15.12.2021.
- 1.3 The IBBI referred to the SCN, response of Mr. Dhanuka 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. Dhanuka availed an opportunity of personal e-hearing before the DC on 15.03.2022 wherein he was represented by his counsel, Saraf and Partners Law Offices. Subsequently, Mr. Dhanuka filed additional written submissions via email dated 21.03.2022.

2. Alleged Contraventions and Submissions

Contraventions alleged in the SCN and Mr. Dhanuka’s submissions thereof are

summarized as follows.

Contravention-I

- 2.1 The IBBI received a complaint against Mr. Dhanuka in respect of the said CIRP. The said complaint was examined by the Board. It was observed from the minutes of 1st meeting of Committee of Creditors (CoC) that Deloitte Touche Tohmatsu India LLP (DTTILLP) was appointed to provide support services in the CD. The minutes further note that Mr. Dhanuka is an advisor of DTTILLP.
- 2.1.1 As per sub-clause (g) of section 5(24A) of the Insolvency and Bankruptcy Code, 2016 (Code), a limited liability partnership or partnership firm which acts on advice of an individual is a related party in respect to that individual. Further, as per Clause 23B of the Code of Conduct in First Schedule to IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations), a related party cannot be appointed or engaged by an insolvency professional for any work related to an assignment under Code.
- 2.1.2 Despite being an advisor of DTTILLP, Mr. Dhanuka appointed DTTILLP to provide support services in the CIRP of the said CD which is in contravention of regulation 7(2)(h) read with clause 23B of the Code of Conduct in First Schedule of the IP Regulations. The aforesaid acts and omissions on the part of Mr. Dhanuka during the CIRP of the CD when seen in context of role, functions, responsibilities and powers conferred upon an Interim Resolution Professional/ Resolution Professional, suggest that his conduct was allegedly in violation of the aforementioned provisions.

Submission

- 2.2 With regard to the aforesaid contravention, Mr. Dhanuka made the following submissions:
 - 2.2.1 Mr. Dhanuka submitted that he had undertaken his duties and obligations during the CIRP of the CD in complete compliance with the provisions of the Code, IP Regulations wherever applicable, as well as the Code of Conduct. He stated that the said appointment was for the purpose of DTTILLP providing professional advisory services to him during the CIRP. Mr. Dhanuka submitted that the allegations of breach of the provisions of the Code, Regulations made thereunder and the Code of Conduct applicable to IPs arise solely from the fact that Mr. Dhanuka disclosed his role as an advisor to DTTILLP during the 1st meeting of the CoC dated 20.03.2020, as recorded in the minutes of such meeting. The said professional relationship has been relied upon in the SCN to wrongly identify Mr. Dhanuka and DTTILLP as '*related parties*' under Section 5(24A) (g) of the Code, and on such basis hold Mr. Dhanuka's appointment of DTTILLP to be in contravention of Clause 23B of the Code of Conduct.
 - 2.2.2 Mr. Dhanuka stated that as per clause 23B of the Code of Conduct, an insolvency professional shall not engage/appoint any related parties in connection with any work relating to his/her assignment under the Code. As per Section 5 (24A)(g) of the Code, in respect of an individual, a related party would consist of an LLP *whose*

partners/employees, in the ordinary course of business, act on the advice, directions or instructions of the individual.

- 2.2.3 Mr. Dhanuka, further, relied on the case of *Poppatlal Shah v. State of Madras* (1953) 4 SCR 677 wherein it has been held that “*it is (a) settled rule of construction that to ascertain the legislative intent all the constituent parts of a statute are to be taken together*”. As such, the term ‘advice’ must be read and interpreted in the context of the entire provision, and not in isolation. Further, the Hon’ble Supreme Court in ‘*Rainbow Steels & Anr. V. Commissioner of Sales Tax, U.P. & Anr.*’ (1981 AIR 2101) held that “*where two or more words which are susceptible of analogous meaning are coupled together, noscitur a sociis, they are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general.*” Mr. Dhanuka submitted that as such, it is abundantly clear that the word ‘advice’ as used in the abovesaid provision, must be restricted in its interpretation to the extent that it is analogous to the words ‘directions’ and ‘instructions’. Therefore, the said cardinal principle of statutory interpretation also makes it evident that “advice” as used in Section 5(24A)(g) has to be interpreted as advice which is binding upon the partners/ employees of the LLP. Such binding nature of “advice” follows from similar connotation and import of the terms “directions” or “instructions” which immediately follow the word “advice”.
- 2.2.4 Mr. Dhanuka, thus, submitted that the wording and framing of the section 5(24A)(g) make it abundantly clear that it is aimed at persons on whose advice/ directions/ instructions, the partnership/LLP is accustomed or required to act. The provision makes it clear that the partners/employees act on such advice, instructions, or directions in the ordinary course of business. As such, the provision cannot be said to be applicable to an individual who provides professional advisory services similar in his capacity of being a consultant, and only provides the same as and when his/her advice is solicited. Therefore, as used in Section 5(24A)(g) the word “advice” cannot, by any stretch of imagination, be said to include the advice provided by a consultant engaged by the partnership firm or LLP, as the case may be.
- 2.2.5 Mr. Dhanuka stated that an analogous provision exists in the Companies Act, 2013 which is aimed at holding ‘*shadow directors*’ liable. Section 2(59) of the Companies Act, 2013 states that an “officer” includes any director, manager or key managerial personnel or any person in accordance with “*any person in accordance with those directions or instructions the Board of Directors or any one or more of the Directors is or are accustomed to act.*” It is clear that a shadow director must be a person involved very closely with the day-to-day affairs and functioning of the company and that a person who is merely a professional advisor or consultant, who provides his advice on it being solicited for a professional fee, would not be a shadow director. Similarly, section 5(24A)(g) of the Code is not attracted merely on account of an individual providing purely advisory services to an LLP, with no ability to influence the decision making or governance of the LLP. In other words, where a professional’s consultant’s advice is not binding on the LLP – where it may at its discretion and option may be followed or may not be followed by LLP at its discretion. The interpretation of section 5(24A)(g) would lead to absurd results – for instance, a lawyer appointed by the LLP, which provides legal advice to the LLP would also by virtue of being an advisor to the LLP, become a related party of the LLP – this could have never been the intention of the legislature.

- 2.2.6 Mr. Dhanuka submitted that in the present case, he as a consultant engaged by DTTILLP at its will is, as a matter of fact, not providing any advice in relation to the governance or management of DTTILLP or any other advice to DTTILLP which any of its partners or employees are required to act upon in the ordinary course. It is pertinent to note that DTTILLP is exclusively managed and governed by its own group of its equity partners, who are all professionals from various fields including but not limited to experts in the field of finance, financial advisory (including those on mergers and acquisitions), etc. and of significant standing in their own right. As such, Mr. Dhanuka's role with DTTILLP is solely as a consultant providing certain advisory services to DTTILLP as and when sought and is limited to one of the business lines of DTTILLP, and he cannot be said to be an individual on whose advice DTTILLP and its partners and/or employees are accustomed to act.
- 2.2.7 Mr. Dhanuka submitted that DTTILLP is a significant organization with large number of employees and partners and delivers a wide array of professional services. As such, DTTILLP has professional relationships with number of independent consultants, and it would be wholly incorrect to classify them as 'related parties' of DTTILLP. The term 'advisor' itself is utilized commonly and frequently within the finance and consulting industry to denote professionals and consultants who provide a wide range of advisory and professional services.
- 2.2.8 Mr. Dhanuka further stated that he has been transparent about the nature and extent of his professional relationship with DTTILLP. He disclosed his role as an advisor to DTTILLP, as was prescribed in Circular No. IP/005/2018 dated 16.01.2018, issued by the IBBI. The same was also disclosed to the CoC during its Ist meeting held on 20.03.2020 by Mr. Dhanuka himself, who additionally requested the CoC members to raise any concerns they may have had, however no such concerns were raised.
- 2.2.9 Thus, Mr. Dhanuka submitted that he is not a related party of DTTILLP as envisaged in section 5(24A)(g). Consequently, the appointment of DTTILLP by Mr. Dhanuka to provide professional advisory services in the CIRP of CPL does not fall foul of any provisions of the Code, of the Code of Conduct or of IP Regulations.
- 2.2.10 In view of the above, the allegations levelled in the SCN dated 25.11.2021 regarding violation of certain provisions of the Code, the regulations framed thereunder and the Code of Conduct were denied by Mr. Dhanuka. Mr. Dhanuka reiterated that he has complied with the applicable provisions of the Code, Code of Conduct as well as the Regulations while discharging his duties as the interim resolution professional/resolution professional of the CD.

Analysis and Findings

3. After considering the allegations in the SCN and submissions made by Mr. Dhanuka in light of the provisions of the Code, regulations and the relevant circulars, the DC finds as follows.
- 3.1 Under the Code, RP plays a central role in resolution process of the CD, he is appointed by the Adjudicating Authority as an officer of the Court to conduct the resolution process and it is the duty of RP to conduct CIRP with integrity and

accountability in the process and to take reasonable care and diligence while performing his duties. Therefore, it becomes imperative for an IP to perform his duties with utmost care and diligence. Section 208(2) of the Code provides that every insolvency professional shall abide by the Code of conduct.

- 3.2 The IP is to maintain integrity, by being honest, straight forward and forthright in all his professional relationships while conducting business during CIRP. His conduct has a substantial bearing on performance and outcome of the processes under the Code. He, therefore, is expected to function with reasonable care and diligence to ensure credibility of the process.
- 3.3 The DC notes from the minutes of 1st CoC meeting that DTTILLP was appointed by Mr. Dhanuka to provide support services in the CD. The DC also notes that Mr. Dhanuka and DTTILLP are related parties in as much as Mr. Dhanuka worked as an advisor of DTTILLP and despite of being an advisor of DTTILLP, he appointed DTTILLP to provide support services in the CIRP of the said CD.
- 3.4 The DC notes the submission of Mr. Dhanuka that the said appointment was for the purpose of DTTILLP providing professional advisory services to him during the CIRP.
- 3.5 The DC notes that as per the provision of section 5(24A)(g) of the Code, “related party”, in relation to an individual, *means a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual*. In the instant matter, the submission of Mr. Dhanuka that restricted interpretation is to be given in respect the advice given by him during his engagement as a consultant to DTTILLP, is not tenable. When a firm engages a professional, usually the advice given by the individual is acted upon as it is from a professional person and it gives authenticity to the advice and for that purpose, a consultant fee is also paid. Thus, the DC finds that Mr. Dhanuka has contravened the provisions of the Code by engaging DTTILLP as its support service provider.
- 3.6 In view of the submissions made by Mr. Dhanuka, the DC notes that Mr. Dhanuka is a related party of DTTILLP as envisaged in section 5(24A)(g) of the Code. Such an act of Mr. Dhanuka is in violation of section 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and 7(2)(h) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and Clause 14 and 23B of the Code of Conduct under First Schedule of regulation 7(2) thereof.

Order

4. In view of the above, the DC, in exercise of the powers conferred under section 220 (2) of the Code read with sub-regulations (7) and (8) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, hereby issues the following directions:
 - (i) Mr. Dhanuka shall not undertake any assignments under the Code for a period of one year from the date of coming into force of this order.

- (ii) The Order shall come into force within 30 days from the date of its issue.
- (iii) A copy of this order shall be forwarded to the Indian Institute of Insolvency Professional of ICAI where Mr. Pankaj Dhanuka is enrolled as a member.
- (iv) 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. Accordingly, the show cause notice is disposed of.

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(Dr. Mukulita Vijayawargiya)

Whole Time Member, IBBI

Dated: 12th April, 2022

Place: New Delhi