

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/199/2023

29th December 2023

ORDER

This Order disposes of the Show Cause Notice (SCN) No. COMP-11012/241/2022-IBBI/244/707 dated 14.02.2023, issued to Mr. Sanjeev Jhunjunwala, an Insolvency Professional, registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P00325/2017-2018/10595, who is a Professional Member of the Indian Institute of Insolvency Professionals of ICAI and having recorded residential address with IBBI as 9, Western Street Siddha Weston Suite No. 134, 1st Floor, Kolkata, West Bengal, 700013.

1. Background

- 1.1 The National Company Law Tribunal, Kolkata Bench, (AA) had admitted the application under Section 7 of the Code filed by the financial creditor, M/s. P.M. Cold Storage Pvt. Ltd, for corporate insolvency resolution process of 'M/s. Goouksheer Farm Fresh Pvt. Ltd. (CD) *vide* order dated 13.12.2019 and Mr. Sanjeev Jhunjunwala was appointed as Interim Resolution Professional (IRP) *vide* the same order. Later on Mr. Jhunjunwala was appointed as Resolution Professional (RP).
- 1.2 The IBBI, in exercise of its powers under section 218 of the Code read with regulations 7(1) and 7(2) of IBBI (Inspection and Investigation) Regulations, 2017, appointed an Investigating Authority (IA) to conduct investigation, the role of the IP in the Corporate Insolvency Resolution Process (CIRP) of the CD. The notice of investigation was shared with the IP on 07.11.2022, and the IP replied to the same *vide* e-mail dated 18.11.2022. The IA submitted the Investigation Report to IBBI on 18.11.2022.
- 1.3 The IBBI issued the SCN on 14.02.2023 based on findings in the Investigation Report in respect of his role as IRP/RP in CIRP of the CD. The IP submitted his reply to the SCN on 05.03.2023. The IP further provided submissions *vide* e-mail dated 10.08.2023 and 12.08.2023.
- 1.4 The IBBI referred the SCN, response of the IP 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. The IP availed the opportunity of personal hearing through virtual mode before the DC on 10.08.2023 where he and his Advocate Mr. Nipun Singhvi attended.

2. Alleged Contraventions, Submissions of IP and Findings

2.1 Lack of due diligence in verification of claim

2.1.1 It was noted that CIRP of the CD was initiated by the AA *vide* its order dated 13.12.2019 and Mr. Jhunjhunwala was appointed as IRP to conduct the CIRP. He constituted CoC with PM Cold Stores Private Limited (PMCS) as the sole financial creditor (FC) with 100% voting right. However, in the 4th CoC meeting held on 11.03.2020, CoC was reconstituted with the admission of claim of New Hind Silk House Private Limited (NHSH) and its inclusion in the CoC reduced the voting share of PMCS to 25.07%.

2.1.2 It was noted that the IP relied on documents for verification of claim of NHSH which were questionable in its authenticity as the balance sheets of the years for FY 2016-17, 2017-2018 and 2018-19 got prepared in 2020 by the IP during the continuation of the CIRP, after the receipt of the said claim. It is further noted that the balance sheet of F.Y. 2015-16 based on which the aforesaid claim was admitted, and subsequent balance sheets prepared thereafter, did not contain the seal of the Chartered Accountant.

2.1.3 It was noted that the said claim of NSHS was admitted after PMCS had filed IA on 13.2.2020 for replacement of RP, which drastically changed the composition and voting share of the CoC. It was further noted that PMCS had filed an application before the AA regarding the admission of the said claim of NSHS, which was dismissed. However, on appeal Hon'ble NCLAT *vide* its order dated 14.09.2022 observed the following regarding the admission of the said claim:

“18. We also note that the balance sheets for FY 2016-17, FY 2017-18 and FY 2018-19 were prepared by the RP through Auditors on 12.3.2020. We note that at the point of initiation of CIRP, only balance sheet for the FY 2015-16 was available. Thus, the inclusion of the debt of NHSH in the balance sheet for FY 2015-16 in the ‘Notes to Financial Statement’ (attached at pp.125- 130 of the appeal paperbook) also does not appear to be reliable as the relevant page 127 of the appeal paperbook does not contain the seal of the Chartered Accountant M.D. Deboo and the company. Thus, we are unable to place reliance of balance sheets for the relevant FY 2016-17, FY 2017-18 and FY 2018-19 regarding acknowledgment of debt since they were prepared on 12.3.2020, and contain the admitted claim of NHSH which is in question. Thus, in view of the fact that the last payment by the corporate debtor was made to the financial creditor NHSH on 5.8.2016 and the claim was filed on 26.2.2019. We find that the claim is barred by limitation. ...It was the duty of the RP to exercise necessary care and diligence in verifying the claims and scrutinise the documents submitted with Form C for genuineness and authenticity. Such exercise does not appear to have been done by the RP in the present case.”

2.1.4 It was noted that the facts and circumstances showed lack of objectivity on his part in admitting the claim of NHSH, which helped him in avoiding his replacement. Accordingly, the Board was of the *prima facie* view that, that he had, *inter alia*, violated Sections 18(b), 23(2), 25(2)(e), 208(2)(a) and (e) of the Code, Regulation 13 and 14 of the CIRP Regulations and Regulation 7(2)(h) of IP Regulations read with Clause 1, 2, 3 and 14 of the Code of

Conduct.

Submissions by Mr. Jhunjunwala

- 2.1.5 Mr. Jhunjunwala submitted that the instant SCN is solely based on the order of Hon'ble NCLAT whereas previously the same facts were considered in light of observation of NCLT, Kolkata Bench. He submitted that since, judicial findings are based on mixed question of fact and law and therefore the same cannot be faulted at his end. He submitted that the AA had clearly held in favour of the resolution professional with regard to admission of claim but since the facts have been misrepresented before NCLAT and a different conclusion has been arrived it doesn't give basis to IBBI for reagitation of the same matter.
- 2.1.6 Mr. Jhunjunwala submitted that *vide* an email dated 27.02.2020 (i.e., within 90 days from the CIRP commencement), he had received the claim of NHSH in Form-C along with following supporting documents: (i) Copy of Ledger account of the CD, (ii) Copy of Bank Statement, (iii) Copy of loan Confirmations as on 01.04.2016 & 01.04.2017, and (iv) Copy of Authorization Letter. Mr. Jhunjunwala submitted that *vide* email dated 27.02.2020, requested NHSH to provide other supporting documents i.e. (i) Poof of Incorporation of the company (ii) copy of board resolution (iii) Id & address proof of person filing the claim (iv) 26AS in support of TDS (v) Agreement with reference to rate of interest & loan (vi) Any correspondence for repayment of loan (vii) Pan Card of the company. He submitted that in response NHSH, *vide* email dated 28.02.2020, provided (i) Incorporation certificate, (ii) Board Resolution (iii) PAN (iv) Identity Card issued by the Election Commission of India of person filing the claim (v) 26AS F.Y. 2015-16 & 2016-17. It was also mentioned that there was no separate agreement but 26AS was proof for the rate of interest at 9 % per annum.
- 2.1.7 Mr. Jhunjunwala submitted that having observed some deficiencies, the claimant was again advised through email dated 28.02.2020 to provide a correct claim which was furnished vide mail dated 28.02.2020. Mr. Jhunjunwala submitted that he had examined NHSH's claim with reference to the documents along with the claim form in accordance with Regulation 13 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- 2.1.8 Mr. Jhunjunwala submitted that the directors of the CD remained present in the CoC meetings and never disputed the debts of NHSH, rather confirmed, *vide* email dated 10.07.2020, that the said balance confirmations issued by the Company in reply to the email of the RP. He submitted that he had verified and accepted the claim of NHSH on the basis of documents/ information provided. Mr. Jhunjunwala submitted that the last audited financial statement of the CD as on 31.03.2016 conducted by the earlier statutory auditor of the CD i.e. M.B. Deboo & Co and that the balance sheet abstract matches with that of the tally data received. He submitted that the claim of NHSH was additionally substantiated by him by referring to the Trial Balance and ledger received from CD on 24.12.2019 which matches with tally data as on 31.03.2019 obtained from CD *vide* email on 02.01.2020 showing thereon amount payable to NHSH as opening balance as on 01.04.2016 and closing balance as on 31.03.2017. Mr. Jhunjunwala submitted that the claim of NHSH had been

verified and accepted within the timeline of seven days as provided under the law.

- 2.1.9 Mr. Jhunjhunwala submitted that after admission of the claim of NHSH on 02.03.2020, the list of creditors was re-updated and intimated to financial creditor PMCS on same day vide email on 02.03.2020 and that the reconstitution report was filed with NCLT on 03.03.2020 and list also presented in the immediately next 4th CoC meeting held on 11.03.2020. Mr. Jhunjhunwala submitted that the list of creditors was duly made available for inspection by the person who submitted proofs of claim and that while approved, P.M. Cold Storage Pvt Ltd. one of the financial creditors, inspected the list of creditors, claim Form C with annexed documents of NHSH on 11.03.2020. He submitted that P.M. Cold Storage Pvt Ltd. did not find any anomaly as evidenced from the minutes of the 4th CoC meeting. He submitted that the list of creditors was available for inspection by the directors of the corporate debtor and no comment was so far received, thus he complied with Regulation 13(2)(b). He submitted that regulation 13(2) (ca) was inserted after the Commencement of the CIRP of CD and accordingly the list of creditors uploaded on the electronic platform of the Board also, thus, he complied with Regulation 13(2) (ca). He submitted that in terms of the order dated 14.09.2022 pronounced by the Hon'ble NCLAT, the CoC was re-constituted on 23.09.2022 and the same was filed with the Hon'ble NCLT.
- 2.1.10 Mr. Jhunjhunwala submitted that because of some unfortunate events he was not able to properly represent his case before Hon'ble NCLAT and because of that the order of NCLAT in Company Appeal (AT) (Ins.) No. 615 of 2020 dated 14.09.2020 suffers from certain factual errors which are prima facie evident and can be found on the plain reading of the order. He submitted that the order is passed on the basis of certain written notes not supported with an affidavit submitted by the applicant on 26.08.2022 just four days before the hearing and as the regular council Advocate Shaunak Mitra was not able to be present on the date of hearing in which the matter was reserved for order and certain oral submissions made by appellant were also factually incorrect and advocate of RP could not respond to it.
- 2.1.11 Mr. Jhunjhunwala submitted that immediately after the NCLAT hearing on 01.09.2020, he had asked his advocate to put on record before the Hon'ble NCLAT the facts that claim form of NHSH was received in E mail and balance confirmation was also part of it. He submitted that he had also asked his advocate to put on record email correspondence that directors had confirmed that balance confirmation was issued by the CD. He submitted that he wanted to place on record the facts before NCLAT with affidavit but NCLAT did not allow the same as the matter was already reserved for order.
- 2.1.12 Mr. Jhunjhunwala submitted that although he was suggested to go for appeal in Supreme court for such defects to get appropriate relief; but the huge cost involved, to be borne by him from his own pocket was not possible since during the CIRP itself RP had already incurred huge expenses as the matter had been pending for more than two years in NCLAT as also keeping in view that outstanding CIRP expenses are more than the only asset of the CD in the form of fixed deposit, as the company did not have any line of activity.
- 2.1.13 Mr. Jhunjhunwala submitted that the balance confirmation that was received by NHSH was

submitted to him as an attachment to the Form C as sent through email dated 27.02.2020 and in no case he had claimed that the balance confirmation was given in person and was signed by the directors of the company. He submitted that the PMCS had himself mentioned in his complaint to IBBI that balance confirmation in the normal course are not signed by the directors. Mr. Jhunjhunwala submitted that once the questions were raised by the PMCS regarding authenticity, he had sought clarification from the CD and it had confirmed it. He submitted that if authenticity is to be challenged, NHSH who had submitted the said balance confirmation should be put on trial and that he was intentionally not made party in the appeal.

- 2.1.14 He submitted that he could not give preferential treatment to any one creditor when both the creditors have relied upon 26AS showing interest deducted and deposited under section 194A of the income tax act, which specifically relates to the interest and matter was discussed at length in 5th CoC meeting, in which he also placed his desire to obtain legal opinion, but none of the creditors agreed for same.
- 2.1.15 Mr. Jhunjhunwala submitted that he never wanted to continue in the assignment but had mentioned that subject to payment of fees and expenses he is ready to quit from the same and is evident from the Order of Hon'ble NCLT Kolkata dated 25.06.2020 in IA(IB) No. 392/KB/2020 in CP(IB) No. 1582/KB/2019. He submitted that since the decision to change RP was made prior to admission of claim of NHSH therefore, inclusion of NHSH would not impact the decision taken earlier by PMCS had they followed law. He submitted that even in the liquidation application filed before Hon'ble NCLT in July 2020, he had not proposed himself as the liquidator as he wanted to get out of the process and did not want to continue in it. Mr. Jhunjhunwala submitted that after the NCLAT order dated 14.09.2022 also, he had requested PMCS to replace him in 8th CoC meeting held on 26.09.2022 but PMCS refused to consider it.
- 2.1.16 Mr. Jhunjhunwala further submitted that when there is mixed question of facts and the law and when the view taken by NCLT and NCLAT are diametrically opposite it shall be unfair to hold him guilty. Mr. Jhunjhunwala submitted that in the matter of the CD, PMCS filed complaint against him before IBBI bearing Complaint no. COMP11011/105/2020-IBBI/270/1333, which was closed by IBBI *vide* order dated 05.01.2021. Mr. Jhunjhunwala submitted that against the said order of IBBI, PMCS filed Writ Petition bearing no. W.P 3293 of 2021 before Hon'ble Delhi High Court titled as PM Cold Storage Pvt Ltd vs Insolvency and Bankruptcy Board of India & Anr. on the same facts and subject matter and the same is pending before Hon'ble High Court of Delhi. He submitted that as per the principle of Res sub judice IBBI cannot decide the matter when already on same facts and subject matter writ petition is pending before Hon'ble High Court of Delhi.
- 2.1.17 Mr. Jhunjhunwala submitted that he conducted 5th CoC meeting on 03.06.2020 and discussed that he (RP) had received complaint from PMCS with respect to admissibility of claim of NHSH and it was mentioned by RP that RP had used his best judgment in admission of claim of NHSH and proposed to obtain a legal opinion with regard to admissibility of claims of NHSH. He submitted that the proposal for obtaining legal opinion was rejected by PMCS. Mr. Jhunjhunwala submitted that as per the direction of Hon'ble NCLAT in an order dated

14.09.2022, he reconstituted CoC of CD and conducted 8th CoC meeting on 26.09.2022 and enquired CoC regarding any proposal for replacement of the RP which PM Cold Storage Pvt Ltd had been desiring since long. He submitted that before issuance of the SCN, he had filed application with the AA with regard to replacement of RP on 10.01.2023 and that the said IA for replacement of RP was heard and reserved for orders on 22.06.2023.

Mr. Jhunjhunwala further submitted that PMCS filed unnotarized written submissions before Hon'ble NCLAT and in its written notes PMCS alleged that signature in the acknowledgment of the debt is not matched with any of the directors of the CD. He submitted that acknowledgment of the debt is signed by the authorised person of the CD it was confirmed by him and even CD never objected that it was not signed by the CD company.

- 2.1.18 Mr. Jhunjhunwala submitted that he had verified the claim in accordance with regulation 13 & 14 and had no reason to doubt the authenticity of the document which tallies with the books of accounts and statutory records. He submitted that in “Swiss Ribbons v. UOI reported in (2019) 4 SCC, it was categorically held that the RP has no adjudicatory powers and is only vested with limited powers to verify claims and upon undertaking such exercise, the RP had admitted NHSH's claim. He submitted that upon NCLAT deciding that claim was barred by limitation, he had abided by the order and removed NHSH from the COC.

Analysis and Finding

- 2.1.19 The DC takes note of the order passed by Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 615 of 2020, dated 14.09.2022, wherein Hon'ble NCLAT observed that “documents on which the RP relied on in accepting and admitting the claim of NHSH and inducting it as a member of CoC does not inspire confidence and should not have been relied upon by the RP in admitting the claim of the NHSH being within limitation..... ”.
- 2.1.20 The DC notes the submissions made by Mr. Jhunjhunwala and the compliance done by reconstituting CoC of the CD as per the order of the NCLAT. The DC is of the view that Mr. Jhunjhunwala should have been more careful while dealing with claims, *ab-initio*.

3. Order

- 3.1 In view of the forgoing, the DC, in exercise of the powers conferred under section 220 of the Code read with regulation 13 of the Investigation Regulations disposes of the SCN with caution to Mr. Sajneev Jhunjhunwala to be more careful and vigilant while handling assignments under the Code and Regulations made thereunder.
- 3.2 This Order shall come into force immediately in view of Para 3.1 of the Order.
- 3.3 A copy of this order shall be sent to the CoC/Stakeholders' Consultation Committee (SCC) of all the Corporate Debtors in which Mr. Jhunjhunwala is providing his services, and the respective CoC/SCC, as the case may be, will decide about continuation of existing assignment of Mr. Jhunjhunwala.

- 3.4 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Jhunjhunwala is enrolled as a member.
- 3.5 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal.
- 3.6 Accordingly, the show cause notice is disposed of.

Sd/-
(Jayanti Prasad)
Whole Time Member, IBBI

Dated: 29th December 2023
Place: New Delhi