



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION (L) NO. 23016 OF 2023

Poonam Basak

...Petitioner

Versus

Union of India & Ors.

...Respondents

Senior Counsel Sharan Jagtiani, a/w Adv. Nirman Sharma a/w Adv. Ansh Karnawat a/w Adv G. Aniruth Purusothaman a/w. Adv. Parth Shah i/by Adv Parth Shah, Advocates for Petitioner.

Mr. Pankaj Vijayan, Advocates for Respondent No. 2.

**CORAM : B. P. COLABAWALLA &
M.M. SATHAYE, JJ.**

DATE : AUGUST 31, 2023

P. C.

1. The above Writ Petition is filed challenging the Order dated 11th August, 2023 passed by the Disciplinary Committee of the Insolvency and Bankruptcy Board of India (for short “**IBBI**”). There is also a constitutional challenge to Sections 7(5), 9(5) and other provisions of the Insolvency and Bankruptcy Code, 2016 (for short “**IBC, 2016**”), as more particularly mentioned in ground ‘uuuu’ of the petition as being arbitrary, illegal and ultra vires the Constitution of India.

2. For the purposes of interim relief, Mr. Jagtiani, the learned Senior Counsel appearing on behalf of the Petitioner, apart from attacking the impugned order on merits, took a strong objection to the jurisdiction of the Authority passing the impugned order. He submitted that under the Provisions of Section 220 of the IBC, 2016 it is the IBBI which constitutes a Disciplinary Committee to consider the reports of the investigating Authority submitted under sub-Section (6) of Section 218. He submitted that the proviso to Section 220 (1) of the IBC, 2016 makes it clear that the members of the Disciplinary Committee shall consist of Whole Time Members of the IBBI only. He even brought to our attention the definition of the words “Disciplinary Committee” in the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017 which stipulates that a Disciplinary Committee means a Committee of Whole Time Member(s) constituted by the Board under Section 220 (1) of the IBC, 2016.

3. Mr. Jagtiani submitted that in the facts of the present case, the impugned order is not passed by any Whole Time Member but in fact by the Chairperson of IBBI. In support of this argument he also drew our attention to the website of IBBI in which it is clearly stated that Mr. Ravi Mital is the Chairperson of the IBBI and Shri. Sudhakar Shukla and Shri Jayanti Prasad are its Whole Time Members. He submitted that in the

present case, the impugned order is passed by Mr. Ravi Mital who is the Chairperson and not a Whole Time Member. He therefore submitted that the Order impugned in the present Petition, is thus without jurisdiction.

4. On the other hand, Mr. Pankaj Vijayan, the learned Counsel appearing on behalf of the Respondent No. 2/IBBI, submitted that in fact the Chairperson is a de-facto Whole Time Member of the IBBI. To buttress this argument he relied upon Section 189 of the IBC, 2016. He submitted that Section 189 has two categories of Members, namely, Whole Time Members and Part Time Members. He submitted that when one reads Section 189 as a whole, it is clear that other than Whole Time Members and Part Time Members there can be no other Members. He submitted that the Chairperson therefore would be a de-facto Whole Time Member of the IBBI, because he is admittedly not a Part Time Member. If this be the case, then the Order passed by the Chairperson, and which is impugned in this Writ Petition, cannot be assailed on the ground that the Chairperson did not have jurisdiction to pass the impugned order. Consequently, he submitted that no prima facie case is made out for grant of any interim or ad-interim relief.

5. We have heard learned Counsel for the parties at length. We have also perused the papers and proceedings as well as the relevant

provisions of the Code. Prima facie, we are unable to agree with the argument canvassed by the Mr. Vijayan. Section 220(1) of the IBC 2016 stipulates that the Board (IBBI) shall constitute a Disciplinary Committee to consider the reports of the investigating Authority submitted under sub-Section (6) of Section 218. What is important is the proviso to Section 220(1). The said proviso clearly stipulates that members of the Disciplinary Committee 'shall' consist of Whole Time Members of the Board 'only'. From this provision it is absolutely clear that the Disciplinary Committee can only consist of Whole Time Members. For the time being, we are not going into the issue whether the Disciplinary Committee it can be constituted by a single Whole Time Member or it requires more than one Member. We leave that question open to be decided at a future date. However, from this proviso it is very clear that the Disciplinary Committee has to consist of Whole Time Member(s).

6. The only question therefore is whether the Chairperson is a de-facto Whole Time Member of the Board. If that is the case then the argument of the Mr. Vijayan, would be correct. On the other hand, if we find this argument to be without substance, then clearly the Chairperson would have no jurisdiction to pass the impugned order. Since everything

turns upon the interpretation of Section 189 of the IBC, 2016 the same is reproduced hereunder:-

189. Constitution of Board. - (1) The Board shall consist of the following members who shall be appointed by the Central Government, namely:- (a) a Chairperson;

(b) three members from amongst the officers of the Central Government not below the rank of Joint Secretary or equivalent, one each to represent the Ministry of Finance, the Ministry of Corporate Affairs and Ministry of Law, ex officio;

(c) one member to be nominated by the Reserve Bank of India, ex officio;

(d) five other members to be nominated by the Central Government, of whom at least three shall be the Whole Time Members.

(2) The Chairperson and the other members shall be persons of ability, integrity and standing, who have shown capacity in dealing with problems relating to insolvency or bankruptcy and have special knowledge and experience in the field of law, finance, economics, accountancy or administration.

(3) The appointment of the Chairperson and the members of the Board other than the appointment of an ex officio member under this Section shall be made after obtaining the recommendation of a selection committee consisting of -

(a) Cabinet Secretary - Chairperson;

(b) Secretary to the Government of India to be nominated by the Central Government -Member;

(c) Chairperson of the Insolvency and Bankruptcy Board of India (in case of selection of members of the Board) -Member;

(d) three experts of repute from the field of finance, law, management, insolvency and related subjects, to be nominated by the Central Government -Members.

(4) The term of office of the Chairperson and members (other than ex officio members) shall be five years or till they

attain the age of sixty five years, whichever is earlier, and they shall be eligible for re-appointment.

(5) The salaries and allowances payable to, and other terms and conditions of service of, the Chairperson and members (other than the ex officio members) shall be such as may be prescribed.

7. As can be seen from the above reproduction, Section 189 (1) stipulates that the IBBI shall consist of the following members who shall be appointed by the Central Government, viz.,

(a) a Chairperson;

(b) 3 members from amongst the officers of the Central Government not below the rank of Joint Secretary or equivalent, one each to represent the Ministry of Finance, the Ministry of Corporate Affairs and Ministry of Law, ex officio;

(c) one member to be nominated by the Reserve Bank of India, ex officio;

(d) five other members to be nominated by the Central Government, of whom at least three shall be Whole Time Members.

8. In other words the IBBI consists of totally 10 members i.e. 1 Chairperson, 4 *ex officio* members and 5 other members to be

nominated by the Central Government, of whom at least 3 shall be Whole Time Members.

9. When we go through Section 189 we find that 4 distinct categories of persons are appointed to constitute the IBBI. Prima facie, on reading these provisions we are unable to agree with the Mr. Vijayan, that the Chairperson is a de-facto Whole Time Member. We say this because the nomination of the Whole Time Members is to be done by the Central Government under Section 189 (1) (d) whereas the appointment of the Chairperson is under Section 189 (1)(a). If we were to accept the submission of Mr. Vijayan, it would effectively mean that instead of 5 Whole Time Members, the Board would consist of 6 Whole Time Members, which would be contrary to the provisions of Section 189.

This is made further clear from the General Order 01/2023 which is called The Insolvency and Bankruptcy Board of India (Delegation of Powers and Functions) Order, 2017 and which has been amended from time to time. What is interesting to note is that in this General Order also, the word ‘Chairperson’ is defined under clause 2(1)(e), to mean the Chairperson of the Board and under clause 2(1)(n), the word “Whole Time Member/WTM” is defined to mean the Member of the Board appointed and designated as such by the Central Government. We find

that these definitions in the said General Order are in consonance with the provisions of Section 189.

10. Once this is the case, we are of the view, at least prima facie, that the ‘Chairperson’ is a separate and distinct category from a ‘Whole-Time Member’. Admittedly the present impugned order has not been passed by a Whole-Time Member but by the Chairperson.

11. In these circumstances, prima facie, we are of the view that the Order impugned in the present Petition, was passed by an Authority which lacked jurisdiction. In these circumstances, until the admission of the above Writ Petition, there will be ad interim relief in terms of prayer clause (c) which reads thus :

“c. Pending the hearing and final disposal of this Writ Petition, this Hon’ble Court be pleased to issue an order of injunction thereby restraining and injuncting the Respondents from in any manner acting upon or giving effect to or implementing the impugned Order dated 11.08.2023 and Show Cause Notice dated 08.05.2023 and stay the operation, effect and implementation thereof.”

12. Since the constitutional validity of Sections 7(5) and 9(5) of the IBC, 2016 are also challenged in the present Petition, notice is issued to the Attorney General of India returnable on 27th September, 2023.

13. Place the above Writ Petition on Board for Admission on 27th September, 2023.

14. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[M.M. SATHAYE, J.]

[B. P. COLABAWALLA, J.]