IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 07.12.2023

ORDERS PRONOUNCED ON : 22.01.2024

CORAM :

THE HON'BLE MR.SANJAY V.GANGAPURWALA, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Writ Petition Nos.16650 of 2020
and 14448 of 2021 & W.M.P.No.24548 of 2020

CA V.Venkata Sivakumar .. Petitioner in both the W.P's.,

Versus

1.Insolvency and Bankruptcy Board of India(IBBI)
Represented by Deputy General Manager
7th Floor, Mayur Bhawan, Shankar Market
Connaught Circus, New Delhi – 110 001.

2.Indian Institute of Insolvency Professionals of ICAI
Represented by Mr.Rahul Madan, MD
ICAI Bhawan
8th Floor, Hostel Block
A-29, Sector – 62
Noida, UP – 201 309.

3.ICSI Institute of Insolvency Professionals
Represented by Dr.Binoy J.Kattadiyil (MD)
3rd Floor, ICSI House,
22, Institutional Area
Lodi Colony, New Delhi – 110 003.

4.Insolvency Professional Agency of Institute of Cost Accountants of India
Represented by Dr.S.K.Gupta (CEO)
4th Floor, CMA Bhawan
3 Institutional Area, Lodhi Road
New Delhi – 110 003.

5.Dr.MS.Sahoo
Insolvency and Bankruptcy Code of India
7th Floor, Mayur Bhawan, Shankar Market
Connaught Circus, New Delhi – 110 001.

6.The Union of India
Secretary to Government of India
Ministry of Corporate Affairs (MCA)
Garage No.14, "A" Wing
Shastri Bhawan, Rajendra Prasad Road
New Delhi – 110 001. .. Respondents in W.P.No.16650 of 2020

1.Indian Institute of Insolvency Professional of ICAI
Insolvency Professional Agency
Represented by Mr.Rahul Madan
Managing Director
1st Floor, ICAI Building
Indraprastha Marg
New Delhi – 110 002.

2.Insolvency and Bankruptcy Board of India(IBBI)
Represented by its General Manager
7th Floor, Mayur Bhawan, Shankar Market
Connaught Circus, New Delhi – 110 001.

3.The Union of India
Secretary to the Government of India
Ministry of Corporate Affairs (MCA)
Garage No.14, "A" Wing,
Shastri Bhawan, Rajendra Prasad Road
New Delhi – 110 001. .. Respondents in
W.P.No.14448 of 2021

Prayer in W.P.No.16650 of 2020 : Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Declaration that the provisions of Chapter III of the Insolvency and Bankruptcy Code, 2016, more particularly, Section 204 (a) (b) (c) (d) and (e) of the Act, as *ultra vires,* the provisions of Article 14, 19 (1) (g) and 21 of the Constitution, manifestly arbitrary, substantively unreasonable, excessive legislation and repugnant to the objectives of Insolvency and Bankruptcy Code, 2016.

Prayer in W.P.No.14448 of 2021 : Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Declaration that the impugned Regulation 23A of the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, which was subsequently amended by the 2nd respondent vide Notification No.IBBI/2016-17/GN/REG0001 dated 23.07.2019 as *ultra vires* the Constitution and consequentially direct the 1st and 2nd respondents to pay the compensation for the financial loss and mental agony suffered by the petitioner which may be paid to Tamil Nadu "Chief Minister's Public Relief Fund" (CMPRF).

In W.P.No.16650 of 2020 :

For the Petitioner : Mr.CA.V.Venkata Sivakumar, P-in-P

For the Respondents : Mr.Sankaranarayanan, ASGI
Assisted by
Mr.C.V.Ramachandramurthy for R2
Mr.Rajesh Vivekanandan, Dy.SG
for R1
Mr.K.Subburanga Bharathi for R6
For RR3, 4 and 5 – No appearance

In W.P.No.14448 of 2021 :

For the Petitioner : Mr.CA.V.Venkata Sivakumar, P-in-P

For the Respondents : Mr.Sankaranarayanan, ASGI
Assisted by
Mr.C.V.Ramachandramurthy for R1
Mr.Rajesh Vivekanandan, Dy.SG
for R2
Mr.M.Sathyan, ACGSC for R3

COMMON ORDER

(Order made by the Hon'ble Mr.Justice D.Bharatha Chakravarthy)

A. The Writ Petitions:

1. The W.P.No.16650 of 2020 is filed by the petitioner for declaring the provisions of Chapter III of the Insolvency and Bankruptcy Code, 2016, more particularly, Section 204 (a) (b) (c) (d) and (e) of the Act as *ultra vires*

the provisions of Article 14, 19 (1) (g) and 21 of the Constitution, manifestly arbitrary, substantively unreasonable, excessive legislation and repugnant to the objectives of Insolvency and Bankruptcy Code 2016.

1.1 The W.P.No.14480 of 2021 is filed for declaring the Regulation 23 A of the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, which was subsequently amended by the 2nd respondent vide Notification No.IBBI/2016-17/GN/REG0001 dated 23.07.2019 as *ultra vires* the Constitution and consequentially direct the 1st and 2nd respondents to pay compensation for the financial loss and mental agony suffered by the petitioner which may be paid to Tamil Nadu “Chief Minister's Public Relief Fund” (CMPRF).

1.2 Since both the Writ Petitions are filed by the same writ petitioner and interlinked the same are taken up and disposed by this common order.

1.3 In these Writ Petitions since the ranking of the respondents differ, the Insolvency and Bankruptcy Board of India is referred as 'IBBI', the Indian Institute of Insolvency Professional of ICAI is referred as 'IIIPI' and the Union of India, Ministry of Corporate Affairs is referred as 'UoI'.

B. The Case of the Petitioner:

2. The case of the petitioner is that he is a practicing Chartered Accountant for the past 30 years and is a member of the Institute of Chartered Accountants of India (ICAI). He became a member of the IBBI, which is a statutory body established under the Insolvency and Bankruptcy Code (IBC) vide membership No.IBBI/IPA-001/IP-P00184/2017-18/10852 and carrying on the profession as Insolvency Professional from the year 2018. Since the Regulation 7 (A) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, requires the Insolvency Professional to obtain Authorisation for Assignment (hereinafter referred to as 'AFA') from the Insolvency Professional Agencies, the petitioner made an application to the IIIPI on 31.12.2019. By an order dated 14.01.2020, the said application was rejected by the IIIPI. The petitioner also challenged the constitutional validity

of the Regulations 7A and 13 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulation 2016, by W.P.No.9132 of 2020. By an order dated 28.07.2020, the said Writ Petition was dismissed upholding the validity of the Regulations. Thereafter, the petitioner filed an appeal on 20.07.2020 as against the rejection of his application for AFA. The petitioner also filed a second application before the IIIPI on 01.08.2020 praying for AFA. Once again this application AFA was rejected by IIIPI by an order dated 25.08.2020. Aggrieved by the same, another appeal was preferred before the Membership Committee on 25.08.2020.

2.1 Whileso, on 28.08.2020, a show cause notice was issued by the IBBI, calling upon the petitioner to show cause as to why suitable disciplinary action cannot be taken against him for contravention of Section 208 (2) (a) and 208 (2) (e) of the IBC and other regulations mentioned therein. The petitioner submitted his explanation on the same day. Subsequently on 31.08.2020, the petitioner also received another show cause from the IIIPI, again proposing to take disciplinary action for the violations mentioned therein. It is under these circumstances, the petitioner has filed the above Writ

Petitions.

2.2 Regulation 23A of the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 reads as under:-

> "The authorization for assignment shall stand suspended upon initiation of disciplinary proceedings by the Agency or by the Board, as the case may be."

2.3 It is the case of the petitioner that the said regulation grants uncontrolled powers to the Board and the Agency thereby depriving the member from carrying out his profession, damaging the professional standing resulting to huge financial loss. The member is also not given any opportunity, notice or opportunity of being heard and thus the impugned regulation has a far reaching consequence which cannot be repaired or rectified later, if the member is found to be innocent. According to the petitioner, regulation violates the fundamental rights, is manifestly arbitrary, and substantively unreasonable. It is also excessive and repugnant to the objectives of IBC and Regulations. There is a huge scope for abuse and colourable exercise of power. Therefore, he prays that the Regulation 23 A be declared unconstitutional.

2.4 Section 204 of the IBC reads thus,

> "**Sec 204.** An insolvency professional agency shall perform the following functions, namely:-
>
> a. Grant membership to persons who fulfill all requirements set out in its byelaws on payment of membership fee;
>
> b. lay down standards of professional conduct for its members;
>
> c. Monitor the performance of its members;
>
> d. Safeguard the rights, privileges and interests of insolvency professionals who are its members;
>
> e. Suspend or cancel the membership of insolvency professionals who are its members on the grounds set out in its bye-laws;
>
> f. Redress the grievances of consumers against insolvency professionals who are its members; and
>
> g. Public information about its functions, list of its members, performance of its members and such other information as may be specified by regulations."

2.5 It is the contention of the petitioner that Section 204 (a) enables collection of fees for the services rendered by the Insolvency Professional Agencies such as the third respondent. It is waste of resource, because the same is already done by IBBI. Secondly, Section 204 (c)which empowers the Insolvency Professional Agencies to monitor the Insolvency professional is again repetitive and irrational. Repeated information is sought from the Insolvency Professionals without any basis or knowledge about their functioning, which results in harassment to the professionals. The Insolvency

Professional, who steps into the shoes of the promoters is the key person who should not just be the person complying the procedure, but should be clubbed with entrepreneurial skills and the information which are sought by these agencies should take into account the ground realities.

2.6 Even though Section 204 (d) states to safeguard the rights, privileges and interests of the Insolvency Professionals, it only results in harassment. Over all, the entire Section which places the Insolvency Professional under the control of dual agencies viz., the IBBI and IPA's is illegal and would result in double jeopardy as the persons such as the petitioners are punished twice for the same acts. It would only result in parallel proceedings and different conclusions drawn by different agencies in respect of the same delinquency. The entire Section violates the fundamental rights, is manifestly arbitrary and substantively unreasonable. The legislation is excessive and contrary to the objectives. There is huge scope for misuse and colourable exercise of the power. Therefore, the petitioner prays that the same be declared as unconstitutional.

C. The Respondents' Case:

3. The Writ Petitions are resisted by filing a separate counter affidavits by the UoI and IBBI. The summary of their case of is that the IBC itself was enacted based on the Bankruptcy Law Reform Committee Report (BLRC) dated 04.11.2015 and is modeled on similar laws in various other countries and the UNCITRAL legislative guide on insolvency law. In the BLRC report, the importance of the Insolvency Professionals, the regulatory superstructure, the role of the IPA's and their functions are all indicated in various parts of the report. The report clearly envisages twin tire regulatory frame work of the Insolvency Professionals. The Insolvency Professionals are required to hold an AFA as per the Regulation 7A. Correspondingly, the manner of issuance / renewal of AFA by the Insolvency Professional Agencies is laid down in Article 12A of the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016. Similarly, the impugned Regulation 23 A, provides for suspension of AFA upon initiation of disciplinary proceedings by the Board or by the Agencies. The effect is that if the Board or the Agency has initiated

disciplinary proceedings against an Insolvency Professional, he is not eligible to undertake the resolution process.

3.1 It is intended to strengthen the regulatory control over the insolvency professionals. It is not violative of any fundamental right and there is no illegality in the said provision. Already the petitioner challenged the *vires* of the Regulation vide W.P.No.13229 of 2020 and the same is dismissed by a Division Bench of this Court on 03.11.2020. Once again, one more Regulation cannot be challenged by way of a separate Writ Petition.

3.2 Separate counter affidavit is also filed in respect of the challenge to the Section 204 of the IBC. It is submitted that the IBC has an exponential impact on the ease of doing business. The contention of the petitioner that IPA's had to be dispensed with to achieve the goals set in the IBC is erroneous. The IPA's are expected to grant membership to qualified persons and to lay down the standards of conduct for them. They are also responsible for monitoring the performance of the members while safeguarding their interests. They are also empowered to suspend or cancel the membership of

Insolvency Professionals in accordance with their bye-laws. They are also expected to address the grievances against the Insolvency Professionals. The Scheme of IBC suggests that the IBBI need not engage itself directly with these functions and expects the IPAs to carry out these functions. Merely because dual control is provided, the same by itself would not render Section 204 as unconstitutional.

D. The Submissions:

4. We heard *Mr.CA.V.Venkata Siva Kumar,* Petitioner-in-Person and *Mr.Sankaranarayanan*, learned Additional Solicitor General of India – learned Senior Counsel appearing on behalf of IIIPI. *Mr.Rajesh Vivekandandan*, learned Dy.SG appearing on behalf of IBBI, *Mr.K.Subburanga Bharathi*, learned counsel and *Mr.M.Sathyan,* ACGSC appearing for Union of India.

4.1 Mr.CA.V.Venkata Siva Kumar, the Petitioner, would contend that the impugned Regulation 23A does not contemplate any hearing before the AFA is suspended. Hearing in the disciplinary proceedings would only amount to post decisional, which is of no consequence. He would rely upon the

Judgment of the ***Maneka Gandhi Vs. Union of India and Anr*** [1] for the proposition that the principles of natural justice should be applied in all proceedings administrative or quasi judicial in nature. He would further rely upon the Judgment of the Hon'ble Supreme Court in ***K.I.Shephard and Ors. Vs. Union of India and Ors.,*** [2] to contend that there is no justification to throw the Insolvency Professional out of employment and then give them an opportunity of representation. He would rely upon the case of ***H.L.Trehan and Ors. Vs. Union of Inda and Ors.,*** [3] (Caltex Oil Refinery (India) Ltd.,) to submit that when the impugned rule results in altering the condition of the professionals to their prejudice, not granting an opportunity of hearing would be illegal. Alternatively imposition of exemplary costs would be a check on arbitrary power and therefore, the power of suspension of AFA cannot be automatic.

4.2 There are no checks and balances in the exercise of power and the Insolvency Professional such as the petitioner suffer irreparable damage

1 (1978) 1 SCC 248
2 (1987) 4 SCC 431
3 (1989) 1 SCC 764

and the opportunities once lost cannot be made good. The disciplinary authorities are always biased and once the Insolvency Professional is suspended then they will be more interested in covering up, even if they had erroneously initiated disciplinary proceedings. Thus the provision results in grave mental agony, financial and reputational loss and as such has to be struck down.

4.3 *Mr.CA.V.Venkata Siva Kumar,* making his submissions in respect of challenge to the *vires* of Section 204 of IBC would submit that the Section enables multiple disciplinary agencies and as such it has not only proved to be ineffective but also results in parallel proceedings and repetitive punishments on the same alleged violations and as such would be violative of Article 20 (2) of the Constitution of India. These proceedings are quasi criminal in nature and accordingly, the standards of criminal jurisprudence will be applicable. As a matter of fact, the Parliament cannot be presumed to create multiple agencies with same power.

4.4 *Mr.CA.V.Venkata Siva Kumar,* would rely upon the Judgment of the Hon'ble Supreme Court in ***Mahipal Singh Rana Vs. State of Uttar Pradesh*** [4]. He would also rely upon the Judgment in ***N.Sampath Ganesh Vs. Union of India*** [5].

4.5 The second contention of the petitioner is that providing multiple agencies would lead to multiple legal proceedings and therefore would increase the cost of accessing justice. Relying upon the Judgment of the Hon'ble Supreme Court in ***Anita Kushwaha Vs. Pushap Sudan*** [6]**,** he would submit that access to justice is an invaluable human right and a very much part of Article 21 of the Constitution of India and therefore, the impugned Section 204 of IBC is violative of the fundamental right to life.

4.6 The next contention of the petitioner is that the impugned provision is manifestly arbitrary and substantively unreasonable and therefore has to be struck down as violative of Article 14 of the Constitution of India. In

4 (2016) 8 SCC 335
5 (2020) SCC Online Bom 782
6 (2016) 8 SCC 509

this context, the petitioner would rely upon the ***Swiss Ribbons Pvt. Ltd., and Anr Vs. Union of India and Ors.,***[7]**.** There is irrationality in choosing the twin tire structure. It has also proved to be ineffective and is in fact drag on the scarce resources and is one of the main reason for the failure of the economical legislation. The respondents never considered any proper empirical data on the need for resorting to this twin tire system. They are refusing to consider the disadvantages. Thus the impugned Section is liable to be struck down as violative of Article 14 of the Constitution of India.

4.7 The petitioner would contend that the previous petition was filed in different context and therefore, by relying upon the Judgment in ***Lal Chand (Dead) by LRs and Ors., Vs.Radha Krishan*** [8] he would contend that the present petition would not be barred by *resjudicata.* When the legislation is illegal, by merely pleading the judicial hands off policy qua economic legislation, the same cannot be sustained. The fact that the legislation is just enacted by the Parliament and is in experimental stage by itself is a ground for a more strict scrutiny of law.

7 (2019) 4 SCC 17
8 (1977) 2 SCC 88

4.8 He would further rely upon the Judgment of the Hon'ble Supreme Court in ***State of West Bengal Vs. Anwar Ali Sarkar,*** [9] to contend that if the legislation provision gives a wide power to the executive without indicating the policy, it has to be set aside as violative of equality. Placing reliance in ***Maganlal Chhaganlal (P) Ltd., Vs. Municipal Corporation of Greater Bombay and Ors.,***[10] he would contend that any law which gives differential treatment to Government or other public bodies is necessarily prone to challenge on the ground of discrimination. He would submit that any law which is so arbitrary and unreasonable can be challenged and for the said proposition relies upon the Judgment in ***Shri Sitaram Sugar Company Ltd., and Anr Vs. Union of India and Ors., [11].***

4.9 Placing reliance in the Judgment of the Hon'ble Supreme Court in ***Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Anr.,***[12] to contend that the statute which is otherwise invalid as being unreasonable cannot be saved by contending that it is being administered in a reasonable

9 (1952) 1 SCC 1
10 (1974) 2 SCC 402
11 (1990) 3 SCC 223
12 (1962) SCC OnLine SC 30

manner. He would submit that the true nature and character of the legislation has to be tested to adjudge the constitutional validity and for that purpose would rely upon the Judgment of ***Dwarkadas Shrinivas of Bombay Vs. V.Sholapur Spinning & Weaving Co. Ltd., and Ors.,***[13]. By placing reliance on the Judgment of the Hon'ble Supreme Court in ***Subramanian Swamy Vs. Director, Central Bureau of Investigation and Anr.***[14] he would submit that a legislation would also be liable to be struck down, if it is discriminatory or manifestly arbitrary. The principles of reasonableness has been spelt out by the Supreme Court in ***Municipal Committee Kareli Vs. State of M.P.*** and if the test of reasonableness laid down therein if applied, the impugned enactment again will not stand scrutiny of the law.

4.10 The impugned Section 204 of the IBC also liable to be declared as unconstitutional on the principle of *delegata potestas non potest delegari,* repugnance and colourable exercise of power by a sub-delegate such as the IPA and prone to abuse of the power granted under the Section. Therefore, the

13 1954 AIR 119
14 (2014) 8 SCC 682

petitioner would contend that the impugned provision is liable to be struck down as unconstitutional.

4.11 Per contra, *Mr.Sankara Narayanan*, the learned Additional Solicitor General of India, would submit that the petitioner has failed to make out any constitutional infirmity with reference to Regulation 23A, which is under challenge. The only ground raised is that it exposes Resolution Professionals to irreversible consequence. Hardship cannot be a ground to strike down any provision as unconstitutional. The provision is in the nature of ad-interim suspension. As far as the Writ Petition challenging the Section 204 of IBC is concerned, the twin tire structure is perfectly in order. Already the self same ground was raised in W.P.No.13229 of 2020 by the petitioner and the same was negatived. The challenge on the ground of excessive delegation is not maintainable in as much as it is not a delegated legislation, but the plenary legislation. The procedural safeguard contained in Article 20 (2) of the Constitution of India on the ground of subsequent or second prosecution cannot be a ground to challenge the present Section. The provisions are not manifestly arbitrary. On the other hand it was an outcome of

an active and purposeful deliberation on the BLRC Report dated 04.11.2015. Fair procedure is mandated by the Model Bye Laws and the disciplinary authorities have to follow the same. In respect of the IPA's there is also an appellate mechanism. Therefore, there are adequate options to prevent any arbitrary issuance of show cause notices.

4.12 The learned ASGI would submit that already the petitioner's challenge to Regulation 7 A of the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 was repelled by a Judgment dated 03.11.2020 in W.P.No.13229 of 2020. In paragraph No.12 of the said Judgment, the said question has been specifically considered and rejected. Pointing out paragraph No.204 (XIII) of the Judgment in ***N.Sampath Ganesh's case*** (cited supra), the learned ASGI would submit that the finding was given that when already two bodies exercised regulatory control, it would be presumed that the legislation has not vested the same with National Company Law Tribunal under Section 140 (5), especially in the light of the specific contention made by UoI that the proceedings are not in the nature of disciplinary proceedings. The said

judgement does not lay down that there cannot be more than one body, exercising disciplinary power. As a matter of fact, this has been now affirmed by the Hon'ble Supreme Court in ***Union of India and Anr. Vs.Deloittee Haskinds and Sells LLP and Anr,***[15].

4.13 Further, in the case of the petitioner, the first show cause notice was issued by IBBI on 28.08.2020 and thereafter on 31.08.2020. The IIIPI issued another show cause notice on 31.08.2020. The IIIPI conducted the disciplinary proceedings and decided the issue on 01.12.2020 and the petitioner was subject to punishment by way of imposition of fine. Thereafter, taking note of the same, the IBBI disposed of the show cause notice without further action.

4.14 The learned ASGI placing reliance on the case of ***Pioneer Urban Land and Infrastructure Limited and Anr Vs. Union of India and Ors.,***[16] would submit that in respect of economic legislation like, the IBC, the legislature must be given a free play in the joints and the provisions cannot be

15 (2023) 8 SCC 56
16 (2019) 8 SCC 416

challenged on the ground of arbitrariness. Adequate safeguards have been provided in the bye-laws in respect of the disciplinary actions. The grievance redressal committee has a detailed procedure to follow under bye-laws 21 and 22, while dealing with the complaint. Bye-law 24 also mandates that the IPAs should have a disciplinary policy which should prescribe the manner in which the show cause notices are disposed off by a reasoned order, following the principles of natural justice. Bye-law 25 also mandates that the governing Board shall constitute an appellate panel consisting of one independent director of the Agency, one member from amongst the persons of eminence having experience in the field of law, and one member nominated by the Board. Therefore, the argument of hardship or harassment to the Insolvency Professionals are unfounded. The petitioner is repeatedly approaching the Courts of law, with ulterior motives and the petitions are without any merits.

E. The Questions:

5. We have considered the rival submissions made on either side and perused the material records of the case.

5.1 The following questions arise for consideration,

(i) Whether Regulation 23 A is liable to be struck down as (a)manifestly arbitrary; (b) conferring unbridled, excessive power on IPAs and (c) for violation of principles of natural justice ?

(ii) Whether Section 204 of IBC is: (a) violative of Article 20(2) of the Constitution of India, in as much as it provides for disciplinary proceedings by two agencies; (b) is manifestly arbitrary and prevents access to justice and (c) is illegal for confirming unbridled and excessive powers to the agencies ?

(iii) Whether the present Writ Petitions are maintainable in law ?

F. Question No.(i):

6. Regulation 23 A has already been extracted supra. It can be seen that it only lays down that the AFA shall remain suspended once the disciplinary proceedings are initiated. As a matter of fact, Regulation 12 A of the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, categorically provides that the Resolution Professionals should not have any

disciplinary proceedings pending against them. If that be the case, it is only logical that there is an ad-interim suspension of AFA if any disciplinary proceedings are initiated subsequently also. The power of ad-interim suspension has always been held to be a valid and natural exercise of power and the only requirement there must be an express rule enabling the same.

6.1 There is no discretion vested with the IPAs and the suspension is automatic, once the disciplinary proceedings are initiated. Therefore, it can neither be termed as manifestly arbitrary nor be challenged on the ground of any confirmation of unguided/unbridled power.

6.2 The power of suspension is not a punishment and is an ad-interim measure and if one has to be issued with show cause notice, then the very purpose of ad-interim suspension is lost. In as much as ultimate punishment is imposed only on the conclusion of the disciplinary proceedings it cannot be said that any substantial or vested right of the Resolution Professional is violated. On the contrary, the purpose of suspension is to immediately keep the erring person away from the office, so that the relevant

materials and evidences which are on record be properly collected and that there is an impartial and fair enquiry in the issue. Therefore, the requirement of issuance of show cause notice cannot be read into a provision of ad-interim suspension.

6.3 Of course, any suspension, if prolonged, without any inquiry being proceeded with, would cause stigma. But the larger public interest and the laudable purpose behind the rule of suspension and the relative hardship had to be balanced. Only to avoid hardships, normally swift and prompt completion of the process of disciplinary proceedings is insisted upon. Therefore, the petitioner or any other aggrieved professional can only insist upon prompt completion of the proceedings and the hardship cannot be a ground for challenging the very regulation itself.

6.4 Accordingly, finding no infirmity, we uphold the constitutional validity of the Regulation 23A of the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016.

G. Question No.(ii):

7. For ready reference Article 20(2) of the Constitution of India is extracted hereunder:-

> "*20. Protection in respect of conviction for offences.—(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.*
> *(2) No person shall be prosecuted and punished for the same offence more than once.*
> *(3) No person accused of any offence shall be compelled to be a witness against himself*"

7.1 The grievance of the petitioner is that the IBBI as well as the IPAs initiate parallel proceedings in respect of the same action and if punishment imposed twice, the same would be double jeopardy. Applying the principles in disciplinary proceedings, on the basis of the rule of issue estoppel and lack of authority under the relevant Service Rules, a second punishment for the self same charge would be bad in law. But the very provision of the twin tire control will not give rise to illegality or the presumption of double jeopardy. Even in the case of the petitioner, finding that the petitioner has been punished for the same delinquency by the IIIPI, IBBI dropped the

proceedings. Further, in a given case, for the very same action, it may be possible that both IBBI and IPAs can initiate action. Even under Criminal Law, there can be prosecution and punishment by different agencies or more than one penal provision of law, if the gravamen of the charge differs. If only gravamen of the charge is self same, double jeopardy arises. Useful reference can me made to the Judgment of the Supreme Court of India in ***Sangeethaben Mahendrabai Patel -Vs- State of Gujarat and Another*** [17] more particularly paragraphs 14 -33 of the Judgment. Thus, if for a particular act of delinquency, for the very same charge, if any individual is punished twice or the second proceedings are initiated, then such second punishment or proceedings alone can be challenged and on that ground, the provision of law itself cannot be challenged.

7.2 As stated by the respondents, there is a purpose for which two agencies, viz., IBBI and IPAs are pressed into service for monitoring and regulating the Insolvency Professionals. The relevant portion of the BLRC

17 (2012) 7 SCC 621

Report dated 04.11.2015 as reproduced in the counter affidavit is extracted hereunder:-

> "4.4 The Insolvency Professionals:
> .....
> 4.4.3 **IP Regulatory Structure:**
> .....
> The Committee deliberated on the question of regulation versus development. The Indian experience on self-regulating professional bodies (such as Institute of Chartered Accountants of India (ICAI), Bar Council of India and Institute of Company Secretaries (ICSI)) has been reasonably positive in the development of their respective professions and professional standards. However, the experience on their role in regulating and disciplining their members has been mixed. In comparison, financial regulators (such as SEBI and RBI) have had greater success in preventing systemic market abuse and in promoting consumer protection.
>
> Thus, **the Committee believes that a new model of "regulated self- regulation" is optimal for the IP profession. This means creating a two tier structure of regulation.** The Regulator will enable the creation of a competitive market for IP agencies under it. This is unlike the current structure of professional agencies which have a legal monopoly over their respective domains. The IP agencies under the Board will, within the regulatory framework defined, act as self-regulating professional bodies that will focus on developing the IP profession for their role under the Code. They will induct IPs as their members, develop professional standards and code of ethics under the Code, audit the functioning of their members, discipline them and take actions against them if necessary. These actions will be within the standards that the Board will define. The Board will have oversight on the functioning of these agencies and will monitor their performance as regulatory authorities for their members under the Code. If these agencies are found lacking in this role, the Board will take away their registration to act as IP agencies.

4.4.4 The role of the IP agencies:

The IP agencies will be formed according to the guidelines laid out by the Board. The agencies must be given legal powers to ensure they are financially autonomous. This must be done by ensuring that the agencies have the power to collect fees from their members for supporting their operations. The Committee is also of the opinion that the regulatory structure be so designed such that competition is promoted amongst the multiple IP agencies to help achieve efficiency gains. Greater competition among the IP agencies will in turn lead to better standards and rules and better enforcement.

Within this framework, regulation must ensure that IPs are competent to perform the variety of tasks they may be hired for and also that IPs are fair and impartial, and conflicts of interest are minimised. **To this end, the Committee recommends that the professional IP agencies establish rules and standards for their members through bye-laws, create and update relevant entry barriers, and have mechanisms in place to enforce their rules and standards effectively.**

The Code specifies the necessary regulatory governance processes to be followed by the professional IP agencies in carrying out the following functions:

1. Regulatory functions - drafting detailed standards and codes of conduct through bye-laws, that are made public and are binding on all members;
2. Executive functions – monitoring, inspecting and investigating members on a regular basis, and gathering information on their performance, with the over-arching objective of preventing frivolous behavior and malfeasance in the conduct of IP duties;

3. Quasi-judicial functions-addressing grievances of aggrieved parties, hearing complaints against members and taking suitable actions.

There is a need for clear separation of these functions, and in performing these functions, the IP agencies must at all times

follow the regulations and guidelines laid out by the Board....."

"....**Regulatory functions of IP agencies**

The primary function of the professional IP agencies is to set minimum standards of behavior expected from all Ips....."

Multiple regulatory instruments with similar outcomes might have different regulation- making processes thereby resulting in undesired confusion among the parties affected. Hence the Committee recommends that the IP agencies should be empowered to issue only bye-laws. **The Committee believes that the process of framing bye-laws should be directly overseen by the board of the IP agency, to ensure that issues that require regulatory intervention are discussed and approved at the highest level within the agency's organization. Further, once a bye-law is formulated by an IP agency, it should be sent to the Board for approval.**

In a system governed by the rule of law, no action should be judged against unknown standards. Hence, before the IP agencies can carry out any supervision or adjudication function, they have the responsibility to lay down, in clear and unambiguous terms, the behaviour they expect from member IPs. In doing so, the agencies need to follow a standardised, and structured framework such that all stake-holders are fully informed of the process which in turn would help establish credibility and confidence in the overall IP system.

Thus, IP agencies specify bye-laws governing specific areas of IP conduct....."

"Quasi-judicial functions of IP agencies

In exercise of their supervisory powers, IP agencies need to assess whether or not an IP has adequately complied with the provisions of the bye-laws. In case of any detected breach, the agency has the power to impose appropriate penalties.

The Committee therefore recommends that each professional IP agency will have an independent quasi-judicial wing that will be

> responsible for hearing complaints against IPs of that specific agency. In their quasi- judicial jurisdiction, IP agencies will have the power to impose penalties for non-compliance on IPs and will perform this function impartially....".

7.3 Thus, it can be seen that it is a result of due consideration of an expert report and cannot be termed arbitrary, much less manifestly arbitrary. When a new legislation such as the IBC carrying out major reforms in the field is brought up, as held by the Hon'ble Supreme Court in ***Pioneer Urban Land and Infrastructure Limited's case*** cited supra, the legislature must be given a free play in the joints and there must be room for experimentation and correction also. Therefore, when with the proper application of mind, provision has been incorporated in the IBC for subjecting the Resolution Professionals to be under monitoring and control of two tier system, the same by itself cannot be termed as arbitrary. Even if there is a likelihood of hardship to an individual Resolution Professional, the provision itself cannot be held to be blocking free access to justice.

7.4 The very question of the existence of more than one authority with regulatory or disciplinary control over Resolution Professionals is

considered in the earlier Writ Petition filed by the petitioner himself in W.P.No.13229 of 2020 and it is essential to extract paragraph No.12, which reads as follows:-

> "12. This leads to the next question as to whether the impugned regulations violate Article 14, 19 and 21 of the Constitution of India. The primary ground on which the regulations are assailed is that it subjects registered IPs to the added requirement of obtaining an AFA from the IPA. Therefore, the question arises as to whether the imposition of the AFA requirement violates the aforesaid provisions of the Constitution. Chartered Accountants are subject to the regulatory and disciplinary control of the Institute of Chartered Accountants of India. In the exercise of audit functions, they are also subject to the supervisory control of the National Financial Reporting Authority under Section 132 of the Companies Act, 2013 (CA 2013) and, in the event of the commission of or abetment of fraud, they may be removed by the NCLT even suo motu under Section 140(5) of CA 2013. Upon challenge, including on the ground of being subject to the regulatory control of multiple authorities, a Division Bench of the Bombay High Court in N. Sampath Ganesh v. Union of India 2020 SCC Online Bom 782, upheld the validity of Section 140(5) of CA 2013. Similarly, in contempt jurisdiction, the exercise of control by the court over the right of advocates to appear in court was upheld in cases such as Mahipal Singh Rana v. State of Uttar Pradesh (2016) 8 SCC 335. Therefore, the existence of more than one authority with regulatory or disciplinary control over a professional is per se not a ground to hold that the impugned regulations are unconstitutional. In the specific context of IPs, the registration of an enrolled professional member as an IP and the cancellation of such registration are within the domain of the IBBI, whereas the grant of or cancellation of membership and the issuance, renewal and cancellation of an AFA are within the domain of the IPA, which functions

> under the supervisory control of the IBBI. Indeed, we note that paragraph 4.4.3 of the BLRC Report recommended such a two-tiered regulatory structure. Hence, we conclude that the challenge on this basis is untenable."

7.5 Moreover mere conferment of authority on IBBI and IPAs for supervision control and disciplinary proceedings by itself cannot be held to be conferring of unbridled power. The Regulations and Bye-laws which are framed under Section 204 of the IBC clearly provide checks and balances. The procedure for taking disciplinary action and the appellate remedies are provided. Therefore, it cannot be said to be confirmation of excessive or unbridled power. Section 204 of IBC is only an enabling provision and therefore, we see no constitutional infirmity in any of the provisions under Section 204 (a) (b) (c) (d) and (e) of IBC.

H.Question No.(iii):

8. As regards the challenge to Regulation 23 A, earlier, the petitioner challenged Section 7 A of the Regulation, including on the self same ground of twin tier control. When it comes to the constitutional validity of the self same

regulations, the petitioner cannot pick and choose the particular regulation, one after the other on the same grounds or different grounds and repeatedly file Writ Petitions. If aggrieved, the petitioner ought to have challenged the *vires* of the Regulation 23 A also when he filed the earlier W.P.No.13229 of 2020, challenging the other provisions of the self same regulations and filing of the repeated Writ Petitions would be barred by the principles of constructive *res judicata*. More specifically, the issue of twin control has been specifically decided by this Court *qua* the same parties. The entire provisions of IBC were upheld by the Hon'ble Supreme Court of India in ***Swiss Ribbons (P) Ltd. v. Union of India***[18]. It is essential to reproduce paragraph 120, which reads thus:

> "*120. The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, "trial" having led to repeated "errors", ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which*

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> *the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners.*"
>
> (emphasis supplied)

8.1 Recently the Supreme Court of India decided the constitutional validity of Sections 96 to 100 of IBC in ***Dilip B. Jiwrajka -Vs- Union of India & Others*** [19]. We have accordingly answer that the Writ Petition No. 14448 of 2021 as barred by the principles of *res judicata* and the same is also without any merits as we have declared the Regulation 23 A to be *intra vires* and W.P.No. 16650 of 2020 as without any merit and another unsuccessful successive challenge to the Constitutional *vires* of IBC.

I. The Result:

9. In the result, the Writ Petitions are dismissed. No costs. Consequently connected miscellaneous petition is closed.

(S.V.G., C.J.,) (D.B.C., J.,)
22.01.2024

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Index : Yes

19 (2023) SCC Online SC 1530

Speaking order
Neutral Citation : Yes

To

1.The General Manager
Insolvency and Bankruptcy Board of India(IBBI)
7th Floor, Mayur Bhawan, Shankar Market
Connaught Circus, New Delhi – 110 001.

2.The Secretary to the Government of India
Union of India
Ministry of Corporate Affairs (MCA)
Garage No.14, “A” Wing,
Shastri Bhawan, Rajendra Prasad Road
New Delhi – 110 001.

THE HON'BLE CHIEF JUSTICE
AND
D.BHARATHA CHAKRAVARTHY, J.

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Pre-Delivery Order made in
Writ Petition Nos.16650 of 2020
and 14448 of 2021

22.01.2024