

INSOLVENCY AND BANKRUPTCY BOARD OF
INDIA
(Disciplinary Committee)

No. IBBI/DC/34/2020

15th October 2020

Order

In the matter of Mr. Kishan Gopal Somani, Insolvency Professional (IP) under Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/MON/2020/4 dated 27th August, 2020 issued to Mr. Kishan Gopal Somani, 4th Floor, 3/15 Asaf Ali Road, New Delhi, National Capital Territory of Delhi, 110002 who is a Professional Member of the Indian Institute of Insolvency Professionals of ICAI (IPA) and an IP registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P00300/2017-2018/10544.

Background

- 1.1 The IBBI had issued on 27th August, 2020, the SCN to Mr. Kishan Gopal Somani for accepting the assignment as the Liquidator in Liquidation process of Advance Surfactants India Limited (CD) after 31st December 2019 without holding a valid Authorisation for Assignment (AFA) from his IPA. The Order of Liquidation was passed by the National Company Law Tribunal (NCLT), Principal Bench on 14th January 2020 due to the failure of the Corporate Insolvency Resolution Process (CIRP) of CD.
- 1.2 Mr. Somani submitted reply to the SCN, dated 4th September, 2020. The IBBI referred the SCN, response of Mr. Somani 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 an opportunity of personal hearing before the DC on 24th September 2020.

Show Cause Notice

2. The SCN issued by IBBI alleged contraventions of sections 208(2)(a) & (e) of the Insolvency and Bankruptcy Code, 2016 (Code), regulations 7(2)(a) & (h) and 7A of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clauses 1, 2, 11, 12 and 14 of the Code of Conduct contained in the First Schedule of the IP Regulations for accepting the assignment as the Liquidator in Liquidation process of Advance Surfactants India Limited after 31st December 2019 for which public announcement was made on 21st January 2020 without holding a valid AFA from the IPA.

Written and oral submissions by Mr. Kishan Gopal Somani

3. Mr. Somani's submissions made in his written reply and in the course of personal hearing are summarized as follows.
- 3.1 Mr. Somani has submitted that-
 - (i) as per the decision of CoC, he had given his „Written Consent“ to CoC in its meeting held on 22nd November 2019 to act as Liquidator in terms of section 34(4) and accordingly the same was filed with NCLT on 28th November 2019 itself, much before the cut-off date of 31st December 2019. As per Regulation 7A of IP Regulations it is clearly mentioned that provisions of the regulation shall not apply to an assignment which an insolvency professional is undertaking as on 31st December 2019.
 - (ii) in terms of express provisions contained in Section 34 of the Code, the Resolution Professional of the CD shall be appointed as Liquidator, unless replaced and as such in the present case, the application seeking liquidation of CD along with IP's written consent was filed before Hon'ble NCLT before the cut-off date. Hence, it is not a new assignment and the bar under Regulation 7A of IP Regulations would not be applicable in this case.
 - (iii) He was appointed as an IP by Hon'ble NCLT Kolkata Bench in the matter of Phoenix ARC Private Pvt. Ltd. Vs M/s. Limtex Agri Udyog Ltd. CP (IB) No.1496/KB/2018 vide order dated 26.2.2020 but he did not accept for want of AFA from the IPA, as that would have been a new assignment .
 - (iv) The SCN has also been issued to him in this regard and matter is pending with the Disciplinary Committee of the IPA. IPA is the authority for granting the AFA, the present proceedings cannot and should not continue.
 - (v) He had also filed a writ before Hon'ble Supreme Court of India in Writ Petition (Civil) No. 230/2020 in the matter of K.G.Somani & Ors. Vs Union of India & Anr challenging the said Regulations 7A of IP Regulations read with Regulation 12A of IBBI (Model Bye-laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 for fixing the upper age limit as 70 years for obtaining AFA. Hence, the matter is sub-judice and the present proceedings should not continue.
 - (vi) During personal hearing, he had submitted that he is a practicing IP and had passed the Limited Insolvency Examination at the age of 78 and till date he has conducted 10 assignments diligently and has unequivocally followed the Code and any rules and regulations made thereunder. At present his age is more than 80 years. He had spent significant amount of time, money and training to become an IP, the subsequent ineligibility of IP above 70 years from obtaining AFA is arbitrary.
 - (vii) He also submitted that he has not taken / accepted any assignment after 31st December 2019 and will not be able to take due to this restriction of age bar.

Analysis and Findings

4. The DC after taking into consideration the SCN, the reply to SCN, the oral and written submission of Mr. Somani and also the provisions of the Code, rules and the regulations

made thereunder finds as follows.

- 4.1 The DC notes that the Regulation 7A of IP regulations requires every IP to have AFA before undertaking any assignment after 31st December 2019. Regulation 7A reads as follows:

“7A. An insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid authorisation for assignment on the date of such acceptance or commencement of such assignment, as the case may be:

Provided that provisions of this regulation shall not apply to an assignment which an insolvency professional is undertaking as on-

(a) 31st December, 2019; or

(b) the date of expiry of his authorisation for assignment.”

- 4.2 Thus, it is clear from the said Regulation that one of the essential condition for undertaking any assignment by an IP is that he should have a valid AFA which is issued by the IPA with which he is enrolled. In other words, without AFA, an IP is not eligible to undertake any assignments or conduct various processes thereof. Regulation 7A was inserted in the IP Regulations vide notification dated 23rd July 2019.

- 4.3 The IBBI (Model Bye-laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 provides under clause 12 A (2) (e) of its Schedule that the age-limit for obtaining AFA is 70 years. Clause 12A (2) reads as follows:

“12A. Authorisation for Assignment.

(1) ...

(2) A professional member shall be eligible to obtain an authorisation for assignment, if he-

(a) is registered with the Board as an insolvency professional;

(b) is a fit and proper person in terms of the Explanation to clause (g) of regulation 4 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016;

(c) is not in employment;

(d) is not debarred by any direction or order of the Agency or the Board;

(e) has not attained the age of seventy years;

(f) has no disciplinary proceeding pending against him before the Agency or the Board;

(g) complies with requirements, as on the date of application, with respect to-

(i) payment of fee to the Agency and the Board;

(ii) filings and disclosures to the Agency and the Board;

(iii) continuous professional education; and

(iv) other requirements, as stipulated under the Code, regulations, circulars, directions or guidelines issued by the Agency and the Board, from time to time.”

- 4.4 The bye-laws of Indian Institute of Insolvency Professionals of ICAI defines in para 4(1)(aa) the expression “authorisation for assignment” as an authorisation to undertake an assignment, issued by an insolvency professional agency to an insolvency professional, who is its professional member, in accordance with its bye-laws

regulation. An application for grant of AFA can be made by the IPs to the IPA under para 12A of said bye-laws. An IP who is more than 70 years of age is ineligible to make an application for AFA under para 12A (2)(e) of the said bye-laws.

- 4.5 Further, Section 208 of the Code also casts an obligation to abide by the code of conduct and comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member. Section 208(2) provides as follows:

“208. Functions and obligations of insolvency professionals.-

(2) Every insolvency professional shall abide by the following code of conduct: –

(a) to take reasonable care and diligence while performing his duties;

(b) to comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member; and

(e) to perform his functions in such manner and subject to such conditions as may be specified.”

- 4.6 The DC further notes that the certificate of registration granted to an IP is subject to the condition that he should follow at all times the provisions of the Code and Regulations and the bye-laws of Insolvency Professional Agency of which the IP is a member and also follow the Code of Conduct specified in the First Schedule to the IP Regulations. In this regard, clauses(a) and (h) of regulation 7 (2) of the IP Regulations provide as follows:

“7. Certificate of registration.

(2) The registration shall be subject to the conditions that the insolvency professional shall –

(a) at all times abide by the Code, rules, regulations, and guidelines thereunder and the bye-laws of the insolvency professional agency with which he is enrolled;

(h) abide by the Code of Conduct specified in the First Schedule to these Regulations;”

- 4.7 Section 208(2) of the Code provides that every IP shall take reasonable care and diligence while performing his duties and to perform his functions in such manner and subject to such conditions as may be specified. Further, the Code of Conduct specified in the First Schedule of the IP regulations enumerates a list of code of conduct for insolvency professionals including maintaining of integrity and professional competence for rendering professional service, representation of correct facts and correcting misapprehension, not to conceal material information and not to act with malafide or with negligence.

5. In the present matter, the DC notes that, Mr. Somani had given his written consent to CoC in its meeting held on 22nd November 2019 to act as Liquidator in terms of Section 34(4) and accordingly the same was filed with NCLT on 28th November 2019 prior to the requirement of AFA for accepting or undertaking assignment under Regulation 7A of the IP Regulations which came into effect from 1st January 2020, i.e., after 31st December 2019. The Hon“ble NCLT, Principal Bench, had passed the Liquidation

Order dated 14.01.2020 due to failure of CIRP in this matter. Mr. Somani's appointment was confirmed as Liquidator based on his "Written Consent to act as Liquidator" and also on the recommendation of CoC.

- 5.1 The DC further notes that an IP who is more than 70 years of age cannot make an application for the grant of AFA. Therefore, he could not apply for obtaining grant of AFA and hence, could not hold AFA.
- 5.2 In the aforesaid backdrop, especially in the context of age bar under clause 12A (2) (e) of the Schedule to the IBBI (Model Bye-laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 and also the written consent being filed by Mr. Somani with the NCLT on 28th November 2019 prior to the coming into effect of the requirements of AFA, the DC does not find any lapse on the part of Mr. K.G. Somani.

Order

6. In view of the above, the DC in exercise of the powers conferred under Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, disposes of the SCN without any direction against Mr. Kishan Gopal Somani.
- 6.1 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Kishan Gopal Somani is enrolled as a member.
- 6.2 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.
7. Accordingly, the show cause notice is disposed of.

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(Dr. Mukulita Vijayawargiya)
Whole Time Member, IBBI

Date: 15th October 2020
Place: New Delhi