

No. IBBI/DC/45/2020

24th November, 2020

Order

In the matter of Mr. Nitesh Kumar Sinha, 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/2020/20 dated 28th August, 2020 issued to Mr. Nitesh Kumar Sinha, 8A UG CS, Ansal Corporate Suites, Ansal Plaza, Sector-1, Vaishali, Ghaziabad, UP - 201010, who is a Professional Member of the ICSI Institute of Insolvency Professionals (IPA) and an IP registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-002/IP-N00280/2017-2018/10838.

- 1.1 The IBBI had issued the SCN to Mr. Nitesh Kumar Sinha on 28th August, 2020 for accepting the assignment as Interim Resolution Professional in the Corporate Insolvency Resolution Process of Terrence Alloys Private Limited after 31st December, 2019 without holding a valid Authorisation for Assignment (AFA) issued to him by his IPA.
- 1.2 Mr. Sinha submitted his reply to the SCN vide email dated 6th September, 2020 to the SCN. The IBBI referred the SCN, response of Mr. Sinha 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. Sinha availed an opportunity of personal hearing before the DC on 9th September 2020.

Show Cause Notice

2. The SCN issued by IBBI alleged contraventions of sections 208(2)(a) and 208(2)(e) of the Insolvency and Bankruptcy Code, 2016 (Code), regulations 7(2)(a), 7(2)(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 of the Interim Resolution Professional in the Corporate Insolvency Resolution Process (CIRP) of Terrence Alloys Private Limited after 31st December, 2019 for which public announcement was made on 11th February 2020 without holding a valid AFA from the IPA;

Written and oral submissions by Mr. Nitesh Kumar Sinha

3. Mr. Sinha's submissions made in his written reply and in the course of personal hearing are summarized as follows:

3.1 Mr. Sinha in his reply submitted as follows:

- (i) Mr. Sinha, during personal hearing, submitted that he was under *bonafide* belief that AFA was not required as he had given his consent on 7th August, 2019 for appointment as Interim Resolution professional in this matter and therefore, his case is covered under proviso to Regulation 7A of the IP Regulations.
- (ii) IPA had also issued the show cause notice dated 24th July, 2020 to Mr. Sinha and had passed an order on 7th September, 2020 wherein warning had been issued to Mr. Sinha to be extremely careful and diligent and that he should act strictly as per law and similar action should not be repeated. Further, the IPA had directed that Mr. Sinha shall not accept any new assignment without obtaining Authorisation for Assignment.

Analysis and Findings

4. The DC after taking into consideration the SCN, the reply to SCN, the oral and written submission of Mr. Nitesh Kumar Sinha and also the provisions of the Code, rules and the regulations made thereunder finds as follows.

4.1 The DC notes that the provisions of the Code and regulations are spelt out in a plain and unambiguous language. Regulation 7A of IP regulations requires for any 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 conditions 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 assignments or conduct various processes thereof. Regulation 7A was inserted in the IP Regulations vide notification dated 23rd July, 2019, much before 31st December, 2019. Adequate time was given to the professionals to obtain AFA from respective IPAs.

4.3 Regulation 12A of the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 read as under:

“12A. Authorization for Assignment.

The Agency, on an application of its professional member, may issue or renew an

authorization for assignment.”

4.4 The Bye-Laws of ICSI Institute of Insolvency Professionals 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 to the IPA under para 12A of 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 bye-laws 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 The credibility of the processes under the Code hinges upon the conduct and competence of the IRP/RP during the process. 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.

4.8 In the present matter it is observed that, Mr. Sinha had provided his acceptance to NCLT, Delhi under rule 9 of the Insolvency and Bankruptcy (Application to Adjudication

Authority) Rules, 2016 to accept the assignment as Interim Resolution Professional in the Corporate Insolvency Resolution Process of Terrence Alloys Private Limited on 7th August, 2019 which was prior to the cut-off date, i.e., 31st December, 2019. It is noted that the amendment to the IP Regulations incorporating the provision relating to requirement of AFA to conduct the CIRP was notified on 23rd July, 2019. Mr. Sinha gave his consent/acceptance to the NCLT, Delhi on 7th August 2019 which was after the said amendment, however, the said amendment came into force on 1st January, 2020, accordingly to which an insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid AFA. Mr. Sinha after giving consent knew that in all probabilities he would be appointed as an IRP in the matter, therefore, Mr. Sinha should have applied for and obtained AFA even if the consent was given on 7th August, 2019. As per section 208(2)(e) of the Code, every IP is under an obligation to comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member.

- 4.9 The DC finds that an order has been passed against Mr. Sinha on 7th September, 2020 by the Disciplinary Committee of IPA for accepting assignment as IRP after 31st December, 2019 without holding a valid AFA in the matter of Terrence Alloys Private Limited, and wherein warning has been issued to Mr. Sinha to be extremely careful and diligent and that he should act strictly as per law and similar action should not be repeated.

Order

5. In view of the fact that ICSI Institute of Insolvency Professionals has already given warning to Mr. Nitesh Kumar Sinha for undertaking assignment as Interim Resolution Professional after 31.12.2019 without holding a valid AFA in the matter of Terrence Alloys Private Limited, 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. Nitesh Kumar Sinha.
- 5.1 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Nitesh Kumar Sinha is enrolled as a member.
- 5.2 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.
6. Accordingly, the show cause notice is disposed of.

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(Dr. Mukulita Vijayawargiya)
Whole Time Member, IBBI

Dated: 24th November, 2020

Place: New Delhi