

No. IBBI/DC/51/2020

4th December 2020

ORDER

In the matter of Mr. Balaknath Bhattacharyya, Insolvency Professional (IP) under Section 220 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 and Regulation 13 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017.

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/INSP/2019/29 dated 3rd July, 2020, issued to Mr. Balaknath Bhattacharyya, Sahabagan, Salua, PO-R Gopalpur, Dist-North 24 Paraganas, Kolkata, West Bengal- 700136 who is a Professional Member of the Insolvency Professional Agency of Institute of Cost Accountants of India and an Insolvency Professional registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-003/IP-N00096/2017-18/10971.

Background

1. Mr. Balaknath Bhattacharyya, IP was appointed as an interim resolution professional (IRP) for the corporate insolvency resolution process (CIRP) in the matter of Advance Power Infra Tech Ltd., Corporate Debtor (CD) vide Order of the Hon'ble National Company Law Tribunal, Bench at Kolkata (AA) dated 27.09.2018 which admitted an application for CIRP under Section 9 of the Code. He was confirmed by Committee of Creditors (CoC) as resolution professional (RP) on 23.10.2018 to conduct the CIRP. As there being no resolution plans received within the stipulated time, the liquidation order in respect of the CD was passed by the AA on 06.05.2019 and IP, Mr. Sanjay Kumar Sarkar was appointed as the Liquidator.
 - 1.1 In exercise of its powers under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017, the IBBI vide Order dated 6th December 2019 appointed an Inspecting Authority (IA) to conduct an inspection of Mr. Balaknath Bhattacharyya, on having reasonable grounds to believe that the IP had contravened provisions of the Code, Regulations, and directions issued thereunder. IA submitted the Inspection Report to IBBI on 29.01.2020.
 - 1.2 The IBBI on 3rd July 2020 had issued the SCN to Mr. Balaknath Bhattacharyya, based on findings in the inspection report in respect of his role as IRP/ RP in the CIRP of Advance Power Infra Tech Ltd., CD. The SCN alleged contraventions of several provisions of the Insolvency and Bankruptcy Code, 2016 (Code), IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (CIRP Regulations), the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and the Code of Conduct under regulation 7(2) thereof. Mr. Balaknath Bhattacharyya replied to the SCN vide email dated 20th July 2020.

1.3 The IBBI referred the SCN, response of Mr. Balaknath Bhattacharyya 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. Balaknath Bhattacharyya availed an opportunity of personal hearing before the DC on 23rd September, 2020 wherein he reiterated the submissions made in his written reply and also made a few additional submissions. Thereafter, the IP submitted additional reply vide email dated 26th September 2020 in support of his submissions made during the course of personal hearing.

Show Cause Notice

2. The contraventions alleged in the SCN are summarised as follows.

2.1 It has been observed from the third progress report filed by the RP before the AA that some transactions appearing to be preferential entered by the CD were noticed by RP. It is also mentioned in the fourth progress report filed by RP that transactions disposing the immovable properties as well as the movable property of the CD took place immediately before the date of filing the application. It is also noted that RP had submitted some findings regarding preferential transactions to Adjudicating Authority (AA) vide letter dated 5th February 2019. However, despite being aware that certain preferential transactions were carried out by the CD, RP failed to file application before the AA for avoidance of such transaction in accordance with Chapter III of the Code. It is also observed that the AA vide Order dated 6th May 2019 passed in CA(IB) No. 528/KB/2019 in CP(IB) No. 990/KB/2018 had observed that,

“12. In the above said circumstances an attempt to defraud any creditors of the Corporate Debtor by the applicant joins hand with the applicant is also cannot be ruled out. It is also understood that the corporate debtor disposed of the immovable and movable properties and withdraw the money available with the bank prior to the filing of this CP. Whether the Corporate Debtor has undertaken fraudulent trading within the meaning of Section 66 of the Code also seen not explored by the Resolution professional in the case in hand. Though he has observed that there are certain preferential transactions carried on by the Corporate Debtor no application also seems to have filed u/s 44, 45 & 46 of the Code by him.”

2.2 Section 25(2)(j) of the Code explicitly imposes a duty on the RP to file application for the avoidance transactions in accordance to the chapter III of the Code to preserve and protect the assets of the CD. Further section 43(1) of the Code requires the RP to apply to the AA for avoidance of preferential transactions where he is of the opinion that CD has given a preference in such transactions in manner as laid down in sub-section (2), Regulation 35A of CIRP Regulations requires an IP to form an opinion whether the CD has been subjected to any transaction covered under section 43, 45, 50 or 66, make a determination under intimation to the IBBI and apply to the AA for appropriate relief within stipulated timelines. Mr. Bhattacharyya failed to file an application under Section 43(1) of the Code before the AA. This is in violation of section 25(2)(j), 43(1), 208(2)(a) and (e) of the Code, Regulation 35A of CIRP Regulations 2016 and Regulation 7(2)(a)

and 7(2)(h) of the IP Regulations, read with clause(s) 10 and 14 of the Code of Conduct as given in the First Schedule of the IP Regulations.

Submission by Mr. Balaknath Bhattacharyya

3. It has been submitted by the RP, Mr. Bhattacharyya that he had informed the Hon'ble AA time to time through 4th Progress and 5th Progress as well as through a normal application dated 05.02.2019 citing all the preferential transactions but the RP had received no Order in this respect.
- 3.1 Mr. Bhattacharyya further submitted that his only lacunae was that he did not make application as per court procedure. This was due to ignorance about the technicalities of making application using demi papers, submitting fees of Rs.1000, affixing court fee, giving file name of the application as interlocutory application, enclosing an affidavit etc. which he came to know subsequently. Since, he had a background in Public Sector Undertaking and never had any court transaction during his service.
- 3.2 Mr. Bhattacharyya also submitted that he attended various meetings organized by the Insolvency Professional Agency (IPA) but court procedures were not discussed therein. Apart from knowing rules and regulations of the Code, it is important to know the court procedures. There was a general understanding that everything had to be intimated to AA and the AA will provide further directions. He further submitted that he had no *mala fide* intention.
- 3.3 Regarding the loss occurred due to preferential transaction, Mr. Bhattacharyya's submission is that since AA had pointed out issues in their observations, the liquidator is bound to initiate forensic audit and reverse the transactions. Hence, no loss occurred during his tenure. Also had the AA given their observations in the 4th Progress Report instead of the 5th Progress Report which is also the application for liquidation then the RP could have initiated the process of forensic audit by making application following technicalities of court procedure and could have caused reversal of preferential transactions.
- 3.4 It has also been contended by the RP that nowhere has the Hon'ble AA indicated that there should be penal action for deficiency of action from RP. The Hon'ble AA only observed that *'though he (resolution professional) has observed that there are certain preferential transactions carried on by the corporate debtor no applications seems to have (been) filed u/s 44,45 and 46 of the code by him'*. It transpires from above that the RP had intimated about all the preferential transactions to AA several times but did not make any proper application to court as per provisions of the Code by making formal application by maintaining all the formalities of court procedure. Also the Hon'ble AA had admitted that the RP has intimated AA about the preferential transactions and had formed opinion about the preferential transactions from the progress reports and application submitted by the RP.
- 3.5 During the personal hearing dated 23rd September, 2020, Mr. Bhattacharyya had reiterated the submissions made by him in his reply dated 3rd July 2020.
- 3.6 Further, in his additional submission made on 26th September 2020, Mr. Bhattacharyya reiterated his earlier submissions and also averred that this was his first assignment and

he was appointed as IRP of CD vide Order dated 27.09.2018 of the AA. On assuming charge as a RP, he found out that the CD had stopped functioning and the employees except bare minimum were transferred to the group companies.

- 3.7 Mr. Bhattacharyya observed by comparing the balance sheet of 31.03.2018 and the audited balance sheet of 27.09.2018 that some assets of CD were missing ie. land and building of the value of Rs. 38 lakh and machineries of the value of Rs. 64 lakh. The RP sought explanation from the ex-Directors of CD, who informed that the land and part of machineries was sold off to meet up the liability of the CD and part of machineries was written off as scrap. The RP raised this issue in subsequent 4th and 5th CoC meetings and asked for initiating forensic audit or special audit for the transactions but CoC was satisfied with the reply of the ex-Director and decided not to conduct any forensic audit.
- 3.8 Mr. Bhattacharyya further in his additional submission stated that in the 4th and 5th progress reports, he had intimated to AA detailing all the preferential transactions and a separate application before the Hon'ble AA detailing every preferential transaction was also made but due to RP's ignorance the application was not made in accordance with specific court procedure and no response from AA was received due to the fact that the application was not made as per court procedure.
- 3.9 Mr. Bhattacharyya also submitted that the application was addressed to Deputy Registrar, NCLT Kolkata, as is the practice before NCLT, Kolkata. Therefore, he had submitted all the progress reports to Deputy Registrar, NCLT and the reports had duly reached the Hon'ble AA. Also, he had submitted application for liquidation to Deputy Registrar, NCLT and was also instructed to make good certain defects in the application vide letter dated 29.03.2019. Hence, applications were made to Deputy Registrar, NCLT Kolkata as per practice and if it was wrongly addressed, they would have mentioned it in their earlier communications.

Analysis and findings

4. The DC after taking into consideration the SCN, the reply to SCN, the oral and additional written submissions of Mr. Balaknath Bhattacharyya and also the provisions of the Code, rules and the regulations made thereunder finds as follows.
- 4.1 Under the Code, the RP plays a crucial role in resolution process of the CD. He is appointed by the AA as an officer of the court to conduct the resolution process and it is the duty of the RP under Section 25(2)(j) of the Code to file an application for avoidance transaction in accordance with the provisions of the Code. Section 25 of the Code reads as under:

“25. Duties of resolution professional. -

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -

(j) file application for avoidance of transactions in accordance with Chapter III, if any; and”

One of the sources for maximisation of value of the assets under the Code is reversal of avoidance transactions to restore the position existing prior to such transactions. This

responsibility is given under the Code to the RP to get the value back to the CD. The conduct of an IP of not filing avoidance application before the AA is a gross violation of his duty under section 25(2)(j) of the Code

- 4.2 A duty is imposed on the RP under Section 43(1) to examine whether there is any avoidance transaction or not and form an opinion as to the avoidance transaction, if any, and file an application immediately with AA for the purpose of maximization of value of assets. Section 43(1) of the Code reads as under:

“43. Preferential transactions and relevant time. -

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.”

- 4.3 The provision of Section 43 are worded in a very clear and unambiguous language which cast a duty to file a separate application under Section 43 (1) before the AA (addressed to the AA) if any avoidance transaction is identified by the RP. Therefore, it is the duty of an IP to perform his assignments under the Code with utmost care and diligence, so that the interests of all the stakeholders are protected. Section 208(2) of the Code provides that every IP shall abide by the Code of conduct. It reads 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;

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

- 4.4 Further, the CIRP Regulations states that the determination of the avoidance transactions as well as the filing of an application on the avoidance transaction before the AA has to be done by the RP within time as stipulated under Regulation 35A, so that the CD can be resolved in a time bound manner.

Regulation 35A of CIRP Regulations reads as under:

“35A. Preferential and other transactions.

(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66.

(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board.

(3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date.”

4.5 Further, to ensure the compliance of provisions of the Code and Regulations thereof, the Code of Conduct has been provided under Regulation 7 (2) of the IP Regulations, which lays down the duties and responsibilities of the IP while conducting a CIRP/Liquidation under the Code. 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; and”

4.6 In the present matter, the DC finds that in the 3rd Progress report dated 06.12.2018 submitted by Mr. Bhattacharyya, observations were made on transactions of CD from 01.04.2018 some deficiencies were made out, a sum of Rs 2,90,000 was encashed on 27.09.2018 from the account of CD. Further, the due of the applicant creditor is Rs. 5,40,000 as against the claim of Rs. 6,00,000 as admitted by AA. Observations were also made by him in the 4th Progress Report dated 01.02.2019, wherein encashment of Rs 2,90,000 from the account of CD, transfer of freehold land of Rs. 38,51,482/- and machinery of value Rs. 66,86,878/- prior to the insolvency commencement date were reported to the Hon’ble AA. Mr. Bhattacharyya filed an application addressed to Deputy Registrar, NCLT Kolkata was made on 05.02.2019, where the aforementioned findings on transactions were again informed and submitted that the land was transferred to MD of CD against settlement of his outstanding dues and part of machineries was sold off to meet up the liability of the CD and part of machineries was declared as scrap. The CoC was satisfied that reasonable action was taken and decided not to conduct any forensic audit. The DC finds that such an application should have been made to AA instead of Deputy Registrar. Section 43 (1) clearly spells out that application under Section 43(1) should be filed with AA. Though he made an application to Deputy Registrar but the same was not in accordance with the provisions of the Code. Further, Deputy Registrar is not empowered to pass order on such application. Hence, Mr. Bhattacharyya’s action was futile and could not achieve the objective. Further, in the application for liquidation dated 09.04.2019 it was observed that the RP had again informed the Hon’ble AA of the withdrawal of sum from the account of CD and transfer of freehold land and machinery prior to the initiation of insolvency of CD.

4.7 It is also noted that the AA in its Order dated 06.05.2019 has observed as follows:

“As per the report of Resolution Professional a freehold land of book value of Rs.

378,51,482/- and machinery worth Rs. 66,86,878/p as shown in the Balance Sheet of 31.03.2018 was disposed off by the corporate debtor at the book value. No data available in the record as to when exactly the disposal took place. As per the 1st Progress Report dated 20th March, 2019 itself he has taken note of some transactions appear to be preferential by the Corporate Debtor. Though he observed that the transactions reflected in the Balance Sheet requires close scrutiny and follow up what action has been initiated by him is not mentioned in the report. He also has not explained the reason for not taking any action at the time of hearing the application.

In the meanwhile 180 days of CIRP period was expired on 25th March, 2019 and this application seen filed on 15th March 2019 i.e. before the expiry of the CIRP period and this application came up for consideration on 29th March, 2019. As per the Balance Sheet, according to the resolution professional the assets seems to have been disposed off by the Corporate Debtor prior to initiation of the CIRP. The applicant/operational creditor being the professional of corporate debtor, filed this application knowingly well that there is nothing to be resolved with the Corporate Debtor also cannot be ruled out from the peculiar circumstances brought out in the case in hand.

In the above said circumstances an attempt to defraud any creditors of the Corporate Debtor by the applicant joins hand with the applicant is also cannot be ruled out. It is also understood that the corporate debtor disposed of the immovable and movable properties and withdrawn the money available with the Bank prior to the filing of this CP. Whether the Corporate Debtor has undertaken fraudulent trading within the meaning of section 66 of the code also seen not explored by the Resolution Professional in the case in hand. Though he has observed that there are certain preferential transactions carried on by the corporate debtor no application also seems to have been filed u/s 44, 45 & 46 of the Code by him.”

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- 4.8 The DC observes that, the RP had submitted 3rd and 4th Progress Report informing of the preferential transactions and even an application was made to Deputy Registrar NCLT Kolkata for the avoidance transactions. However, as per the Hon'ble AA it is also observed that though the RP had noted preferential transactions were carried out but no applications were filed. The occurrence of fraudulent trading under Section 66 of the Code was also not explored by RP and no action was taken to reverse the preferential transactions.
- 4.9 The DC is aware that this is the first assignment undertaken by Mr. Bhattacharyya and that there was no *mala fide* intent as he had informed the AA several times of the preferential transactions and it was due to the lack of RP's knowledge of the provisions of the Code that the filing of the application under section 43(1) of the Code could not be made to the AA having jurisdiction to deal with such applications. It is the RP, who steps into the shoes of the Board of Directors of the distressed CD and plays a crucial role in bringing resolution to the failing CD. It is the responsibility of the RP to take major decision on the day-to-day functioning of the CD and to safeguard the interests of the stakeholders. The submission of Mr. Bhattacharyya that he was not aware of court

procedure is not a valid excuse as it is the duty of IP to update his knowledge and skills to render competent professional service. Further, he could have appointed a legal professional or sought advice from a legal professional on the process of filing. Hence, this is a major lapse on the part of Mr. Bhattacharyya.

- 4.10 The DC also observes that a bare perusal of section 43 of the Code and regulation 35A of the CIRP Regulations reveals that the RP is to make an independent determination on the avoidance transaction and then he shall apply to the AA for appropriate relief on or before the 135th day of the insolvency commencement date. But in the present case Mr. Bhattacharyya after finding the avoidance transaction merely intimated the AA about such transaction through progress reports but did not file application before the AA under section 43(1) of the Code. Though the RP has observed that preferential transaction has taken place, no further scrutiny or any action to recover the amount has been undertaken. The vague reply of the ex-Directors and complacency of the CoC was sufficient for RP to not investigate any further into the attempts to defrauding the creditors of CD. Even though he was not aware of Court procedures, the RP should have been more diligent to recover the amount instead of whiling away 180 days of the CIRP period.
- 4.11 Further, the submission of Mr. Bhattacharyya that since the AA had pointed out issues in their observations, the liquidator is bound to initiate forensic audit and reverse the transactions is untenable. The Code envisages a time bound process to ensure maximisation of the value of assets for the interests of all the stakeholder and it was the duty of the RP to initiate forensic audit, make a determination on the avoidance transaction and file an application before the AA to reverse the transaction instead of awaiting the orders of AA based on the submission of Progress Reports and without taking any follow up actions. Hence, his conduct is in explicit contravention of sections 25(2)(j), 43(1), 208(2) (a) and (e) of the Code, regulation 35A of CIRP Regulations 2016 and regulation 7(2)(a) and 7(2)(h) of the IP Regulations, read with clause(s) 10 and 14 of the Code of Conduct in the First Schedule of the IP Regulations.

ORDER

5. In view of the above, the DC, in exercise of the powers conferred under Section 220 (2) of the Code read with Regulation 13 (3) of the IBBI (Inspection and Investigation) Regulations, 2017 and sub-regulations (7), (8) and (9) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, issues the following directions:
- (i) Balaknath Bhattacharyya shall not seek or accept any process or assignment or render any services under the Code for a period of six months from the date of coming into force of this Order. He shall, however, continue to conduct and complete the assignments / processes he has in hand as on date of this order.
 - (ii) This Order shall come into force on expiry of 30 days from the date of its issue.
 - (iii) In view of the above Order, a copy of this order shall be forwarded to the Insolvency

Professional Agency of Institute of Cost Accountants of India where Mr. Balaknath Bhattacharyya is enrolled as a member for their further necessary action.

(iv) 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: 4th December 2020
Place: New Delhi



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