

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/127/2022

25th August 2022

ORDER

In the matter of Mr. Dinkar Tiruvannadapuram Venkatasubramnian, 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/2021/69/3241/505 dated 30th March, 2022, issued to Mr. Dinkar Tiruvannadapuram Venkatasubramnian, Ernst & Young LLP, Golf View Corporate Tower B, Sector 42, Gurugram, Haryana -122002 who is a Professional Member of Indian Institute of Insolvency Professionals of ICAI and an Insolvency Professional registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P00003/2016-17/10011.

1. Background

- 1.1 Mr. Dinkar Tiruvannadapuram Venkatasubramnian, IP was appointed as Interim Resolution Professional (IRP) and Resolution Professional (RP) in the corporate insolvency resolution process (CIRP) in the matter of Amtek Auto Limited (CD). The NCLT, Chandigarh Bench (AA) had admitted the application for CIRP under Section 7 of the Code for CIRP of CD vide Order dated 24.07.2017 and appointed Mr. Dinkar Tiruvannadapuram Venkatasubramnian as interim resolution professional (IRP). Subsequently he was also confirmed as the RP on 22.08.2017.
- 1.2 In exercise of its power under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017, the IBBI vide Order dated 26.03.2021 appointed an Inspecting Authority (IA) to conduct an inspection of Mr. Dinkar, IA submitted the Inspection Report to IBBI on 14.12.2021. The IBBI on 30th March 2022 had issued the SCN to Mr. Dinkar, based on findings in the inspection report in respect of his role as IRP/RP in the processes of CD. Mr. Dinkar replied to the SCN vide email dated 20.04.2022.
- 1.3 The IBBI referred the SCN, response of Mr. Dinkar 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. Dinkar availed an opportunity of personal hearing before the DC on 27th July, 2022 with his advocate Mr. Sumant Batra 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 29th July 2022 in support of his submissions made during the course of personal hearing.

2. Show Cause Notice, Submissions and Findings

The contraventions alleged in the SCN and Submissions by Mr. Dinkar are summarized as follows:

3. Contravention- I

- 3.1 It has been observed from the minutes of the 4th CoC meeting dated 22.11.2017 that Mr. Dinkar received approval from the Committee of Creditors (CoC) to have himself and Ernst & Young LLP (EYLLP) adequately insured. However, the insurance policy obtained by Mr. Dinkar from ICICI Lombard General Insurance states that insurance was obtained for EYLLP, Ernst & Young Restructuring LLP (EYRLLP) and Mr. Dinkar and the costs of insurance was added in the insolvency resolution process costs (IRPC).
- 3.2 It is noted that the cost incurred for the insurance of EYLLP and EYRLLP being included in IRPC, resulted in increased insurance premium at the cost of the CD. It is the most crucial duty of the IP to keep the CIRP expenses minimal. It is IP's duty to ensure reasonable care and diligence while performing duties including incurring expenses. The Board Circular No IBBI/IP/013/2018 dated 12th June 2018 has specifically clarified:
- “7. The Code read with regulations made thereunder specify what is included in the insolvency resolution process cost (IRPC). The IP is directed to ensure that:-*
- (a) no fee or expense other than what is permitted under the Code read with regulations made thereunder is included in the IRPC;*
- (b) no fee or expense other than the IRPC incurred by the IP is borne by the corporate debtor;”*
- 3.3 Also, it is noted from the 4th CoC meeting that *“the RP has opted for a insurance coverage... He informed the participants that the insurance covers Insolvency Professional and Ernst & Young LLP (supporting the RP in discharging his duties as an RP”* Thus, it is noted that the inclusion of Ernst & Young Restructuring LLP was not even discussed in CoC, however insurance for the same was taken. Therefore, by obtaining insurance for EYLLP and EYRLLP in addition to himself when he had presented to CoC that the beneficiaries of the insurance will be EYLLP and himself only, Mr. Dinkar misrepresented/ concealed the facts to unduly benefit the said entities. Further, insurance premium being dependent on underlying risk being covered, inclusion of EYLLP and EYRLLP as beneficiaries of the insurance policy, added additional expenses on CD.
- 3.4 In view of the above, the Board is of the *prima facie* view that Mr. Dinkar has *inter alia* violated Section 5(13), Section 208(2)(a) and (e) of the Code, regulation 31 of the CIRP Regulations, regulation 7(2)(a) and 7(2)(h) of IP Regulations read with Clause 2, 3 and 12 of the Code of Conduct and Board Circular No IBBI/IP/013/2018 dated 12th June 2018.

Submission

- 3.5 Mr. Dinkar submitted that during the nascent stage of the Code, insurers were typically wary of providing insurance cover only to an individual IP as opposed to an IP which has a backing of a credible advisory firm. Such a backing is looked upon more favourably by insurers from a risk and pricing stand-point, accordingly insurers considered it prudent to have both firm/ team members as an insured under the policy. Considering the fact that no insurance product was exclusively available to cover IPs, the members of the CoC of the CD in its 4th Meeting, proceeded to ratify the insurance cover for the RP and EYLLP. The approval of the costs by the CoC was in accordance with the CIRP Regulations. The decision was taken by Mr. Dinkar in a transparent manner, prudently, in good faith, and with full disclosures. Therefore, it is clear from the above that he did not have the option to select an insurance policy which covered RP's risk only, and he

had to take a product that was available in the market in the year 2017. This was done by Mr. Dinkar in good faith, to prevent potential costs from risk of litigation in managing such vast enterprise in early days of the Code, rather than to add to CIRP costs.

- 3.6 That it is the contention of the Board that the inclusion of EYLLP and EYRLLP has resulted in additional expenses on the CD, to which Mr. Dinkar humbly submitted that the cost of premium having been approved by the CoC in accordance with the Code and CIRP Regulations. In this regard, reliance is also placed on the Endorsement Schedule of Professional Indemnity, the schedule clearly provides that the inclusion of EYRLLP resulted in nil premium from the insured and that all other terms, conditions and warranties of the policy remain unaltered. This clearly indicates that the inclusion of an additional beneficiary did not result in any increase in premium and consequent additional burden on the CD. Mr. Dinkar also cites the order dated 7.04.2022 of the DC in the matter of Mr. Sripatham Venkatasubramanian Ramkumar, IP wherein the RP had also included the IPE as one of the beneficiaries to the Insurance Policy and the DC had exonerated the concerned IP taking into consideration the factors which are not different in principle to the present case.

Findings

- 3.7 In the present matter it is observed that Mr. Dinkar had obtained insurance from ICICI Lombard General Insurance for EYLLP, EYRLLP and for himself. However, he had been given approval from the CoC for insurance for himself and EYLLP only in the 4th CoC meeting. Mr. Dinkar submitted that he did not have the option to select an insurance policy which covered RP’s risk only, and he had to take a product that was available in the market in the year 2017 when policy was available only for the combination of the RP and the firm supporting the RP. In view of the complex operations of CD and prevailing condition in 2017, the insurance for the RP and EYLLP is justified. However, there is an inclusion of EYRLLP as an additional beneficiary beyond the bounds of approval of the CoC. Since, no additional expense is indulged by including the additional beneficiary and the same has not affected the CIRP of the CD adversely, the DC cautions Mr. Dinkar to be more careful in future while handling process under the Code.

4. Contravention-II

- 4.1 It is observed that Mr. Dinkar had appointed three process advisors for the CIRP i.e. IDBI capital, SBI Capital Markets Ltd and Grant Thornton Advisory Private Limited. It has been noted from the engagement letters that similar work was assigned to more than one process advisor.

S. No	Scope of Work	Process Advisors
1	Setting up Virtual Data Room (VDR)	Both IDBI Capital and SBI caps were assigned setting up VDR at separate fee of Rs.15 lacs and Rs.20 lacs respectively for the same task.
2	Comparison of Bid	IDBI Capital and SBI Caps were assigned with the task of comparison of the bids.

- 4.2 Mr. Dinkar appointed more than one professional for similar task which resulted in the increase in the IRPC. The fees paid to the professionals appointed by the IP constitutes IRPC. This IRPC has the priority in the payment over all other dues and payments. Hence, it is significant to mention

that he should have kept the IRPC reasonable. It is also observed from the engagement letters of SBI Capital Markets Ltd and Grant Thornton Advisory Private Limited, that success fee and milestone fee were being paid to these process advisors respectively. The fees payable to these entities at a success fee or milestone fee is untenable. Since advisors were paid suitable fee/fixed retainers for their professional services, there is no reasonability for payment of success/milestone fee. Professionals or advisors engaged by the IP should be paid on a reasonable basis and as per the nature and scope of the work and not on the outcome of the final result of CIRP or any other task performed during the CIRP. Mr. Dinkar was obliged to take reasonable care and diligence while performing his duties, including incurring expenses.

- 4.3 In view of the above, the Board is of the *prima facie* view that Mr. Dinkar has *inter alia* violated Sections 5(13), 208(2)(a) and 208(2)(e) of the Code, regulation 31 of CIRP Regulations, regulation 7(2)(a) and 7(2)(h) of IP Regulations read with Clause 3 and 25 of the Code of Conduct and Board's Circular No IBBI/IP/013/2018 dated 12th June 2018.

Submission

- 4.4 Mr. Dinkar submitted that section 25(2)(d) of the Code authorises the RP to seek the services of accountants, legal or other professionals and the decision to appoint professionals has to be need based, in good faith and on costs, that are reasonable. The safeguard provided in the Code is that costs of such professionals have to be approved by the CoC. Approval of the costs by the CoC by default requires the approval of the need for such appointments by the IP. The decision of CoC is based on assessment of what is in the interest of the best outcome of the CIRP. In a particular case whether the quantum of cost approved by the CoC is justified or not can be questioned before the AA when a resolution plan is brought before it for approval. It has been held by the Hon'ble National Company Law Appellate Tribunal (NCLAT) in *Mr. Jayesh N. Sanghrajka versus The Monitoring Agency nominated by the Committee of Creditors of Ariisto Developers Pvt. Ltd.* that the issue of reasonability of fees is a justiciable matter. In the present case, the CoC found the fees payable to the process advisors to be reasonable. Mr. Dinkar invited competitive proposals and followed the transparent process. All these factors have contributed in their own way in maximising the value of the assets of the CD. In the present case, IRPC including fees of professionals were approved by the CoC and AA by order dated 09.07.2020 approving the resolution plan of Successful Resolution Applicant. Appeals against there were dismissed and the issue of quantum of fees is no longer *res integra*.
- 4.5 Mr. Dinkar submitted that the CIRP of CD was part of the initial few cases which entailed a large exposure and numerous complexities, one of the biggest complexities of the resolution process is its group structure, which is spread across Japan, Spain, Germany, Thailand amongst others, which added to the challenges with respect to establishing communication channels across geographies. The scale of operations was massive, with 15+ operational domestic plants in 7 locations across the country – the company had strategically built plants around the major automotive belts across India to be able to cater to all major OEMs. Preservation of value of these assets and their management required combination of skills and many able hands.
- 4.6 The Minutes of the 2nd Meeting of the CoC clearly show that the appointment of the Process Advisors was a transparent process wherein the detailed scope of work for the advisors was tabled

for deliberation and suggestions and the Members of the CoC deliberated on the need for Process Advisors and their role. The CoC members deliberated the need for appointment of three Process Advisors and its roles. In the minutes of the 3rd meeting of the CoC the rationale for the appointment of the Process Advisors was discussed again. Accordingly, the CoC in exercise of their commercial wisdom and being alive to the scope of work have duly approved the appointment of the said process advisors by a majority of 85.47% for IDBI caps and SBI caps and 89.31% for Grant Thornton Advisory Private Limited.

- 4.7 Keeping in view the complexities involved in the process, largely untested distressed market under IBC framework, the spread of the operations of the CD across Indian and foreign jurisdictions, the RP had decided to engage multiple process advisors. As a consequence of the individual and collective efforts of the Resolution Professional and the Process Advisors, more than 71 prospective resolution applicants were reached (many foreign participants), 3 EOIs were received, 22 parties were granted access to the VDR and 9 Non-Binding Offers were received. Regarding the success fee, the DC of the Board in the matter of Ms. Charu Sandeep Desai has itself concluded that that *the charging of success fee linked to the milestones has not been barred in the Code, Regulations or the Circular issued thereunder*. Reference is also placed on Regulation 4 of the Liquidation Regulations which rewards the liquidator based on the amount realised/ distributed and the time taken which is similar to the success fee model and also Annexure B of the IBBI Circular no. IBBI/IP/013/2018 dated 12.06.2018 which contains an illustrative list of factors to be considered by IPs in determination of what is reasonable cost and reasonable fee also mentions success or contingency fee.

Findings

- 4.8 In the present matter it is observed that three process advisors have been engaged namely IDBI capital, SBI Capital Markets Ltd and Grant Thornton Advisory Private Limited by Mr. Dinkar. It is also noted that the appointment and the fees of the Process Advisor was approved by the CoC with majority voting share and the AA while approving the resolution plan had also taken note of the CIRP cost incurred and no adverse remarks regarding the expenses was made. Since, the scale of CD's business was spread over at 15 domestic plant location and with operations across several jurisdictions, the submission of Mr. Dinkar for having a larger team of supporting staff is accepted.

5. Contravention-III

- 5.1 It is observed that EYRLLP was appointed for assisting and advising in the monitoring Committee. As per the agreement dated 11.09.2020 between Mr. Dinkar and EYRLLP, the fee was fixed at Rs. 47.50 lakh per month. It is observed that Mr. Dinkar is partner in EYRLLP and therefore the latter falls within the definitions of related party to him which is in contravention of clause 23B of Code of Conduct. Section 208(2)(a) of the Code specifies that every IP to take reasonable care and diligence while performing his duties. The Code of Conduct specified in First Schedule of IP Regulations *inter alia* provide that an IP should maintain confidentiality and avoid conflict of interest. The intent of the same was to enhance the credibility of the ecosystem under Code. Further to ensure that direct or indirect interest of an IP must not compromise the interest of the stakeholders. In view of the above, the Board is of the *prima facie* view that Mr. Dinkar has *inter alia* violated section 208(2)(a) and (e) of the Code, regulation 7(2)(a) and (h) of the IP

Regulations read with Clause 3 and 23B of the Code of Conduct.

Submission

- 5.2 Mr. Dinkar submitted that at the outset, it is clarified that he did not appoint EYRLLP. It is the Implementation and Monitoring Committee (IMC) which appointed EYRLLP. In issuing the appointment letter to EYRLLP, Mr. Dinkar only conveyed the decision taken by IMC and acted on behalf of IMC. Reference is made to the Engagement Letter dated 11.09.2020 issued by Mr. Dinkar on behalf of the IMC in accordance with its approval in IMC meetings dated 14.07.2020 and 11.09.2020.
- 5.3 Furthermore, EYRLLP was appointed to provide support services to the IMC in terms of the approved Resolution Plan and not as a professional advisor under the Code. The fees payable to EYRLLP was not treated as CIRP Costs. It was borne by the Successful Resolution Applicant. The appointment of EYRLLP was in accordance with the Resolution Plan as approved by the AA which is binding on all stakeholder under Section 31 of the Code. The Plan further stipulates that all decisions taken by the IMC shall be by way of a majority vote of the members of the IMC.

Findings

- 5.4 It is observed in the present issue that the EYRLLP was appointed on behalf of the IMC. Therefore, submission of Mr. Dinkar is accepted.

6. Contravention-IV

- 6.1 Regulation 35 of CIRP provides that IP shall provide the liquidation value to every member of the Committee in an electronic form, on receiving an undertaking from the members of the CoC. At the time of inspection, IA sought the confidentiality undertaking received from the member of CoC before sharing the fair and liquidation value obtained from second valuation conducted by Mr. Dinkar during 2019.
- 6.2 However, Mr. Dinkar replied that confidentiality undertaking was obtained from each member of CoC in the year 2017 i.e. when the first valuation was conducted. It is Mr. Dinkar's plea that such undertakings are to survive and remain valid even after the completion of the CIRP. He further clarified that no fresh liquidation value was obtained and only an updation of the earlier valuation was obtained and hence "*no fresh confidentiality undertaking was required or obtained from the members of CoC.*" However, it was observed that actual fee paid to the valuers was Rs. 1.38 crores as against the approved amount of Rs. 70 lakhs to RBSA and Rs.1.10 crores as against the approved amount of Rs. 40 lakhs to BDO. Accordingly, the said valuation was fresh valuation conducted by him and not just the updation of the earlier valuation reports. In view of the above, the Board is of the *prima facie* view that Mr. Dinkar has *inter alia* violated Section 208(2)(a) and (e) of the Code, regulation 35 of CIRP Regulation, regulation 7(2)(a) and (h) of the IP Regulations read with clause 14 of the Code of Conduct.

Submission

- 6.3 Mr. Dinkar submitted that in compliance with the then regulation 36, he had disclosed the Liquidation Value to the members of the CoC who had executed an Undertaking under Regulation 36(4) of CIRP Regulations to maintain confidentiality. It may be noted that the said

Confidentiality Undertaking specifically provided that, “All information including of whatever kind (including proprietary and trade secret information disclosed by or on behalf of the Corporate Debtor, by any means whatsoever, whether such information is disclosed before, or on after the date of this acceptance, is confidential information (“Confidential Information”). The said undertaking obligated the Members of the CoC to undertake to maintain confidentiality of the Confidential Information and not to use such information to cause an undue gain or undue loss to yourself or any other person.

6.4 Further, Clause (6) of the Confidentiality Undertaking casts a specific obligation on the Members of the CoC to the effect that the *confidentiality condition shall survive and remain valid even after completion of the Corporate Insolvency Resolution Process*. The mere fact that the valuers had charged additional professional fee to provide an update on the earlier valuation does not lead to the conclusion that a fresh valuation exercise was undertaken. The relevant extract of Form H as described above also evidences that the valuation was updated due to an unprecedented prolonged CIRP. As an unusual time of CIRP of 798 days had lapsed (extension of which was approved right upto the Hon’ble Supreme Court, to find a resolution and prevent liquidation), the Members of the CoC decided to have the liquidation value updated to ensure that the Members of the CoC are able to take an informed decision while evaluating any new Resolution Plans in the 22nd CoC meeting. In any event, the aforesaid undertaking of confidentiality squarely covers all confidential information disclosed before or even after the date of the acceptance and the same undertaking survives even after completion of CIRPs. Therefore, irrespective of the fact that whether Mr. Dinkar had conducted a fresh valuation or an updated valuation, the confidentiality undertaking shall cover both as it was drafted to cover all aspects during and even after the period of the CIRP.

Findings

6.5 In the present matter it is observed that erstwhile Regulation 36 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution process for Corporate Persons) Regulations, 2016 provides the liquidation value in the IM. Further, the Confidentiality Undertaking is in regard to the contents of the IM and it binds the CoC members from disclosing all or any information contained in IM of the CD before, or on after the date of this acceptance, as the same is confidential information. Further, to that effect the Clause (6) of the Confidentiality Undertaking also pertains to the information provided in the IM. Since, the details of the second valuation reflect the both the updated liquidation and fair value of the CD and conducted as per the direction of the CoC to enable the CoC to evaluate the bids being received more accurately, the DC accepts the submission of Mr. Dinkar.

7. Contravention-V

It is noted that in the instant CD, exercise of valuation was done at two different times viz., first in 2017 and second in 2019. The act of conducting valuation twice during the CIRP period has nowhere been provided in the provisions of Code or Regulations made thereunder nor any court/tribunal has passed any such direction in the instant matter. Further, it is noted that conducting valuation for the second time has resulted in additional financial burden on CD. It is noted from the 1st CoC meeting dated 22.08.2017, the fee of RBSA and BDO was Rs.70 lakhs and Rs.48 lakhs respectively. However, as per the CIRP cost sheet shared by Mr. Dinkar, it is noted that the

amount paid to RBSA and BDO was Rs 1.38 core and Rs 1.10 crore respectively.

- 7.1 The regulation 2(k) of CIRP regulations, provide that the liquidation value is determined as on insolvency commencement date. Such reduction in value has reduced the amount payable to the stakeholders other than the assenting financial creditors in the resolution plan. Thus, the Board is of the *prima facie* view that Mr. Dinkar has *inter alia* violated section 208(2)(a) and (e) of the Code, regulation 7(2)(a) and (h) of IP Regulations read with Clause 1, 2, 3, 5, 14 and 27 of the Code of Conduct.

Submission

- 7.2 Mr. Dinkar submitted that as an unusual time of CIRP of 798 days had lapsed (extension of which was approved right upto the Hon'ble Supreme Court, to find a resolution and prevent liquidation), the Members of the CoC decided to have the liquidation value updated to ensure that the Members of the CoC are able to take an informed decision while evaluating any new Resolution Plans in the 22nd CoC meeting. The jurisdiction to interpret a regulation lies with the AA as held by the Hon'ble NCLAT in Mr. Sundresh Bhat, C.A. (AT) (Insolvency) No. 398 of 2021 decided on 20.9.2021. This issue is no longer *Res Integra*. It is also a standard practice in the banking industry regular valuations are obtained for current and immovable assets to manage risks associated with the exposure made to the borrower and maintain prospects of recovery in the event of default. There was neither anything illegal nor unusual in the CoC members desiring an updated valuation. No such objection was raised by the relevant stakeholders.
- 7.3 Regarding reduction of liquidation value, Mr. Dinkar submitted that liquidation value under the provisions of the Code which is determined by registered valuers appointed by the RP is required to the effect that under Section 30(2) of the Code, a resolution plan provides for payment of debts of OC which shall not be less than the amount to be paid to such creditors in the event of a liquidation of the CD. The amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in section 53(1), whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan which shall not be less than the amount to be paid to such creditors in accordance with section 53(1) in the event of a liquidation of the CD.

Findings

- 7.4 It is observed in the 22nd CoC meeting that, the CoC members requested Mr. Dinkar to conduct a fresh valuation to be able to evaluate the bids being received more accurately given that the existing valuation exercise reflects value of the Corporate Debtor as on CIRP initiation date i.e 24-Jul-17. The DC notes that the prime objective of the Code is of maximising the value of the assets of CD during the CIRP and that valuation exercises allows the CoC to make an informed decision regarding the option/bids being placed before them. Therefore, a pedantic view regarding limiting number of valuations undertaken during the CIRP cannot be taken especially when the CIRP has been continuing for 798 days and lack of updated value of CD could affect the assessment of the CoC while considering resolution plans. Hence, the DC is inclined to accept the submission of Mr. Dinkar.

8. ORDER

- 8.1 In view of the above, the DC, in exercise of the powers conferred under Section 220 of the Code read with regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017, disposes of the SCN with a warning to Mr. Dinkar Tiruvannadapuram Venkatasubramnian to be extremely careful and ensure full compliance with the provisions of the Code and Regulations made thereunder in future assignment
- 8.2 This Order shall come into force with immediate effect in view of para 8.1.
- 8.3 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Dinkar is enrolled as a member for their further necessary action.
- 8.4 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.

Accordingly, the show cause notice is disposed of.

-sd-
(Ravi Mital)
Chairperson, IBBI

Dated: 25th August 2022
Place: New Delhi