

**INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)**

No. IBBI/DC/128/2022

7th September, 2022

ORDER

This Order disposes the Show Cause Notice (SCN) No. IBBI/IP/R(INSP)/2020/18/3628/563 dated 28th June 2022 issued to Mr. Sanjit Kumar Nayak, Insolvency Professional under section 220 of the Insolvency and Bankruptcy Code, 2016 (Code) read with regulation 13 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017 (Inspection Regulations) and regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations 2016 (IP Regulations). Mr. Sanjit Kumar Nayak is a Professional Member of Insolvency Professional Agency of Institute of Cost Accountants of India (IPA-ICAI) and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board/IBBI) with registration No. IBBI/IPA-003/IP-N00079/2017-18/10702.

1. Developments in relation to resolution/liquidation of the CDs

Marsons Limited (CD)

1.1. The Hon'ble NCLT, Kolkata Bench (AA) vide order dated 20.06.2018 admitted the application under section 9 of the Code for initiating Corporate Insolvency Resolution Process (CIRP) of Marsons Limited. The AA appointed Mr. Sanjit Kumar Nayak as an Interim Resolution Professional (IRP) who was confirmed as the Resolution professional (RP). The resolution plan submitted by Yashoda Inn Private Limited and M/s Uneecops Solar Private Limited was approved by AA on 09.05.2019. The said order of AA was set aside by the Hon'ble NCLAT on 14.02.2020 and the matter was remitted back to the AA with a direction that the Resolution Plan to be reconsidered by the Committee of Creditors (CoC) and resubmit the Plan after satisfying the parameters as laid down by the Hon'ble Supreme Court in the Judgement in the matter of "Essar Steel" and the Code. The CoC in its meeting dated 19.12.2021 considered the order given by the Hon'ble NCLAT and revised the plan which was approved by AA on 25.01.2022.

Skyrise Overseas Private Limited

1.2. The CIRP against Skyrise Overseas Private Limited was admitted by AA under section 7 of the Code and in absence of any eligible resolution applicant it was ordered into liquidation on 11.02.2020 and Mr. Nayak was appointed as liquidator on 20.02.2020. The liquidation is currently going on.

2. Issuance of Show Cause Notice (SCN) and hearing before DC

2.1. On having reasonable grounds to believe that Mr. Sanjit Kumar Nayak had contravened certain provisions of the Code, Regulations and Circulars issued thereunder, the Board, in exercise of the powers conferred to it under section 218 of the Code read with the Inspection Regulations, appointed an Inspecting Authority (IA) to conduct the inspection of Mr. Sanjit Kumar Nayak *vide* order dated 12.10.2020. A draft inspection report (DIR),

prepared by the IA, was shared with Mr. Sanjit Kumar Nayak on 12.04.2021, to which Mr. Sanjit Kumar Nayak submitted reply vide email dated 02.05.2021.

- 2.2. Based on the material available on record including the Inspection Report, the Board issued the SCN to Mr. Sanjit Kumar Nayak on 28.06.2022. The SCN alleged contravention of Section 25(2)(d), Section 25(2)(j), Section 208(2)(a), 208(2)(e), Regulation 35A of IBBI (Insolvency Resolution Process for Corporate Persons), 2017 (CIRP Regulations), Regulation 7(2)(a), Regulation 7(2)(h) of IP Regulations read with Clause 1, 2, 3, 5, 10, 13 and 14 of the Code of Conduct as specified in the First Schedule of the IP Regulations. Mr. Sanjit Kumar Nayak replied to the SCN on 13.07.2022.
- 2.3. The Board referred the SCN, written and oral submissions of Mr. Sanjit Kumar Nayak, 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. Sanjit Kumar Nayak availed an opportunity of personal hearing before DC on 05.09.2022 through virtual mode where he along with his counsel Mr. Shaunak Mitra were present.

3. Alleged contraventions and submissions of the IP

Contraventions alleged in the SCN and Mr. Sanjit Kumar Nayak's submissions thereof are summarized below:

Contravention – I

In the matter of Marsons Limited (CD)

3.1. Abdication of duties and failure to file avoidance application

- 3.1.1. The minutes of 5th Committee of Creditors (CoC) meeting held on 05.11. 2018 record that Mr. Nayak requested CoC to approve forensic audit of the aforementioned CD for three years. The minutes further state that he requested for forensic audit in CoC meetings held on 07.08.2018, 03.09.2018 and 24.09.2018. This clearly shows that he felt the need for forensic audit of the CD for ascertaining avoidance transactions. It is also observed from minutes of 6th CoC meeting held on 21.11.2018, that Allahabad Bank having 98.96% voting share informed the meeting that to initiate the forensic audit, it has invited quotations from audit firms. Further, Mr. Nayak informed AA through 7th progress report dated 09.03.2019 that forensic audit of the CD for last 3 years is to be conducted to assess avoidance transactions and that Allahabad Bank vide email dated 20.02.2019 has informed him that they have appointed M/s PVRL & Co for conducting forensic audit.
- 3.1.2. Regulation 35A (1) of CIRP Regulations provides timelines for forming opinion whether the CD has been subjected to any transaction covered under section 43, 45, 50 or 66 of the Code. Regulation 35A (2) provides timelines for determination of any avoidance transactions in the CD subsequent to forming opinion and Regulation 35A (3) provides timelines for filing of necessary applications before AA for orders after determination of such transactions. Further, Section 25(2)(d) of the Code provides that is duty of the IP to appoint accountants, legal or other professionals in the manner as specified by Board.
- 3.1.3. The Board observed that even though he felt the need to appoint forensic auditor for conducting forensic audit of the CD, he did not appoint a forensic auditor and requested CoC for the same. It is his own admission in his reply to the DIR that since CoC had not

shared the forensic audit report with him, he could not form opinion with respect to preferential, avoidance, fraudulent and extortionate transaction. As per Regulation 34 of CIRP Regulations, the CoC shall fix the expenses incurred by the RP and expenses so incurred shall be treated as CIRP cost. Hence, the role of the CoC is limited to approval/ratification of the fee of auditors. The duty of appointment of professionals vests with RP only. Thus, it is noted that he has abdicated his duty for appointing forensic auditor in favour of the CoC members thereby violated Section 25(2)(d) of the code.

3.1.4. The RP is mandated under section 25(2)(j) of the Code to file application for avoidance transactions, if the same is necessary. However, as he himself has allowed CoC to appoint forensic auditor, therefore, delay in submission of report by such auditor cannot be taken as a justification for not forming opinion on avoidance transactions. In view of the above, the Board is of the *prima facie* view that Mr. Nayak has *inter alia* violated section 25(2)(d), section 25(2)(j) of the Code, regulation 35A of CIRP Regulations read with clauses 1, 2, 3, 5, 10 and 14 of the Code of Conduct as specified in the First Schedule of IP Regulations (Code of Conduct).

3.2. Submissions made by the IP

3.2.1. Section 25(2)(d) enjoins the RP to appoint accountants, legal and other professionals in the manner specified by the Board. There is no mandatory requirement to appoint a forensic or transaction auditor. Notably, as per regulations 33(4) and 34 of the CIRP Regulations and the explanations thereto, the CIRP expenses are to be fixed / ratified by the CoC and this includes the fees to be paid to any professionals (including obviously Forensic Auditor) appointed by the RP. In other words, the fees to be paid to a forensic auditor would come under the category of CIRP costs and the same cannot be paid without approval/sanction/ratification by the COC. RP can appoint a forensic auditor but is not vested with the authority to sanction payment for such purpose. Thus, the RP has to obtain sanction of the COC for the expenses to be incurred on account of professional fees towards forensic auditor and practically speaking, then only can the RP move forward to appoint a forensic auditor.

3.2.2. In the CIRP of aforesaid CD, despite repeated requests and proposals put up by the RP to obtain the approval of the CoC for the costs to be incurred for appointing a forensic auditor, the CoC members have refused, failed and neglected to approve the same. This is recorded in several minutes of CoC meetings. Despite his best and repeated efforts, the COC members, for reasons best known to them, have inexplicably displayed total disinterest in the matter of appointing a forensic auditor, which would have definitely helped in identifying transactions that may be hit by sections 43, 45, 49, 50 and/or 66 of the Code. It is in such circumstances, that the forensic auditor could not be appointed, since the circumstances stated above and especially the recalcitrance and total disinterest of the CoC members in this regard, rendered it practically impossible to appoint an forensic auditor.

3.2.3. Mr Nayak submitted that he did not seek appointment of FA by the CoC instead asked it to approve the expenses to be incurred for forensic auditor, which were refused. For illustration, the recording in the minutes of the COC meeting held on 05.11.2018 reflects as follows:

“Sanction of resolution process cost for conducting corporate Insolvency Resolution Process of Marsons Limited (CD) was also discussed. Due to delay in sanctioning of

CIRP cost, activities like receipt of Registered Valuers report, FA, appointment of legal professional, appointment of professional during bidding process etc. are pending. the difficulties faced by RP was again explained to members of the Committee.

However, sanction for hiring of security personnel was communicated to RP on 22/10/18. On receipt of sanction, order was placed on M/s. NIS Management Limited, Kolkata-700017 on 25/10/18. Copy of the order was sent to the members of the COC.”

Thus, it is evident from above that during the CoC meeting held on 05.11.2018, the issue of appointment of forensic auditor was put up for approval of costs and not for appointment. In the CoC meetings held on 07.08.2018, 03.09.2018 and on 24.09.2018, he continuously pursued the members of CoC to sanction the cost as it requires fixation/ratification by COC as per regulation 34 of CIRP Regulations.

- 3.2.4. Mr. Nayak further submitted that due to the practical impossibility in appointing a forensic auditor, it was not possible for the him to arrive at a conclusive determination on avoidable transactions and it would neither be appropriate nor proper for him to file any avoidance application before AA on the basis of speculation and conjecture.
- 3.2.5. Mr. Nayak submitted that regulation 35A and 40A of CIRP Regulations in its present form was introduced by Notification No. IBBI/2018-19/GN/REG031, dated 03.07.2018. The notification provided that they shall come into force on the date of their publication, which was 04.07.2018, in the Official Gazette and shall apply to corporate insolvency resolution processes commencing on or after the said date. Since the CIRP of CD was admitted on 20.06.2018, hence regulations 35A and 40A are not applicable in the present case.

3.3. Summary Findings

- 3.3.1. The DC notes that regulation 35A of CIRP regulations were notified on 04.07.2018 and applicable to CIRP commenced thereafter. The CIRP of CD commenced on 20.06.2018, hence the said regulations were applicable on CIRP of CD. However, it does not absolve Mr. Nayak of his duties under section 25(2)(j) of the Code to file avoidance transactions in accordance with Chapter III of the Code. The DC notes the submission of Mr. Nayak that there is no mandatory requirement to appoint a forensic or transaction auditor under the Code or its underlying regulations. The sections 43 to 51 of the Code casts duty upon RP for forming opinion, examination, determination of avoidance transactions. Mr. Nayak should have formed opinion, examined, determined and filed avoidance applications before AA. If he felt any need, he could have appointed forensic auditor. Hence, Mr. Nayak has contravened section 25(2)(d) and (j) of the Code read with clauses 1, 2, 3, 5, 10 and 14 of the Code of Conduct as specified in the First Schedule of IP Regulations

Contravention-II

In the matter of Skyrise Overseas Private Limited

3.4. Incorrect Constitution of Stakeholders' Consultation Committee

- 3.4.1. Regulation 31A(2) of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Liquidation Regulations) provides the composition of the consultation committee, wherein number of representatives of unsecured financial

creditors can be maximum of two. The Board observed from the documents available on record that Mr. Nayak constituted Stakeholders' Consultation Committee (SCC), comprising one representative of secured financial creditor (FC), three representatives of unsecured FC and one representative of Government, of the CD. Thus, three unsecured FCs have been admitted as part of the SCC against the stipulated maximum of two such members. It is his submission in reply to draft inspection report that the table under Regulation 31A Liquidation Regulations is for minimum number of representatives, and that you are free to include more members to advise you on the sale process. It is noted that you misinterpreted sub-regulation 2 of regulation 31A of Liquidation Regulations which clearly stipulates that maximum 2 representative of unsecured FCs can be part of SCC. In view of the above, the Board is of the prima facie view that you have inter-alia violated Regulation 31(A)(2) of Liquidation Regulations read with Clause 1, 10, 14 of the Code of Conduct.

3.5. Submissions made by the IP

- 3.5.1. Mr. Nayak submitted that the inclusion of three representatives (maximum permissible limit being two (2) as prescribed in the said Regulations) was due to an inadvertent, bona fide and unintentional oversight. He submitted that he has rectified such anomaly and brought the constitution of the SCC in line with the Regulations. It is relevant to note and mention that no prejudice has been caused to anybody and nor has any wrongful gain accrued to anybody as a result of the aforesaid inadvertent oversight, which is also curable in nature. He expressed his sincerest regrets in the matter and tenders apology and assures that henceforth, will be extremely careful to ensure that no similar mistake is committed.

3.6. Summary Findings

- 3.6.1. In respect to the issue of incorrect constitution of SCC, the DC observes Mr. Nayak has admitted his mistake and corrected the constitution of SCC. Viewing the circumstances of the delay and acceptance of the mistake by Mr. Nayak, DC does not intend to labour on this point further.

4. Order

- 4.1. In view of the submission made by Mr. Sanjit Kumar Nayak, and materials available on record, DC notes that Sanjit Kumar Nayak should have been more careful and vigilant in conducting the CIRP and Liquidation process. The deficiencies as noticed and conceded by Mr. Sanjit Kumar Nayak, with little care and knowledge of the statute, could have been avoided.
- 4.2. Making efforts towards examination and determination of avoidance transaction is duty of the resolution professional. Non pursuance of the same stands contrary to the maxim of 'value maximization as enshrined in the Code. Section 25(2)(d) and (j) of the Code clearly lay down the responsibility of the resolution professional in this regard amply clear. Therefore, an argument about lack of clarity in the statute or relevant regulations coming at a later date does not help.
- 4.3. Similarly merely conceding that mistake in deciding the composition of the SCC has been inadvertently committed, also stands against professional acumen which insolvency professional has to adhere and follow unscrupulously.

- 4.4. Now, given the fact that contraventions on both the counts have been established beyond doubt, only question which needed to be addressed relates to quantum of penalty which can be imposed on Mr. Nayak. For this it is imperative to look at the severity of offence and the related balance with the penalty. Keeping this aspect in mind, the DC is of considered view that contraventions committed by Mr. Nayak do not involve any mala-fide intensions.
- 4.5. The DC notes that contraventions on the part of Mr. Nayak are procedural in nature and largely resulted due to ignorance of provisions of the Code and regulations made thereunder. Hence, DC warns Mr. Nayak to be more careful in handling pending assignments and Mr. Nayak is further directed to undergo pre-registration educational course specified under regulation 5(b) of the IP Regulations from the IPA where he is registered. Mr. Nayak shall accept or undertake an assignment under the Code only after successful completion of the preregistration education course.
- 4.6. This Order shall come into force immediately in view of para 4.5.
- 4.7. A copy of this order shall be forwarded to the Insolvency Professional Agency of Institute of Cost Accountants of India where Mr. Sanjit Kumar Nayak is enrolled as a member.
- 4.8. 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.
- 4.9. Accordingly, the show cause notice is disposed of.

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(Sudhaker Shukla)
Whole Time Member, IBBI

Date: 7th September 2022
Place: New Delhi