

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/111/2022

5th July, 2022

ORDER

This Order disposes the Show Cause Notice (SCN) No. IBBI/IP/INSP/2020/46/3524/525 dated 10th May, 2022 issued to Mr. Sunil Kumar Agarwal, Insolvency Professional under section 220 of the Insolvency and Bankruptcy Code, 2016 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. Sunil Kumar Agarwal is a Professional Member of Indian Institute of Insolvency Professionals of ICAI (IIP-ICAI) and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board/IBBI) with Registration No. IBBI/IPA-001/IP-P01390/2018-2019/12178.

1. Developments in relation to resolution of the CD

- 1.1. The Hon'ble NCLT, Ahmedabad Bench (AA) *vide* its order dated 24.07.2019 admitted the application filed by M/s Nuvoco Vistas Corporation Limited under section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) for initiating Corporate Insolvency Resolution Process (CIRP) against Shilpraj Developers Private Limited (CD) and appointed Mr. Sunil Kumar Agarwal an Interim Resolution Professional on 24.7.2019 who was later confirmed as the Resolution Professional.
- 1.2. After the admission and verification of claims, the Committee of Creditor (CoC) was constituted having only one Financial Creditor (FC) – Mr. Mukeshbhai Nanubhai Desai. The AA *vide* its order dated 10.07.2020 stated that Mr. Mukeshbhai Nanubhai Desai cannot be treated as FC for the purpose of constituting CoC being partner in the project of the CD. Further, AA opined that amount paid by Mr. Mukeshbhai Nanubhai Desai has no reference to time value of money by way of interest, therefore on this count too he can't be classified as FC to the CD.
- 1.3. In view of facts presented in para 1.2 above, AA directed Mr. Sunil Kumar Agarwal to proceed for withdrawal of CIRP, as already requested by the Operational Creditor (OC) earlier. On an application filed by Mr. Sunil Kumar Agarwal u/s 12A of the Code read with regulation 30(1)(a) of the CIRP regulations, the AA *vide* its order dated 10.08.2020 approved the withdrawal of the CIRP against the CD.

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

- 2.1. Based on the material available on record including the Inspection Report, the Board issued a show cause notice to Mr. Sunil Kumar Agarwal on 10.05.2022. The SCN alleged contravention of sections 45, 50, 66, 25(2)(d) and 208(2)(a) and (e) of the Code, read with regulation 6(2)(b)(i), 27, 35A (2) and (3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), regulation 7(2)(a) and (h) of the IP Regulations and clause 1, 2, 3, 5, 12, 13 and 14 of the Code of Conduct as specified in the First Schedule of the IP Regulations. Mr. Sunil Kumar Agarwal submitted his reply to the SCN vide email dated 30th May, 2022.
- 2.2. The IBBI referred the SCN, response of Mr. Sunil Kumar Agarwal to the DC and other material available on record, to the DC for disposal of the SCN in accordance with the Code and Regulations made thereunder. The DC provided an opportunity of virtual hearing to Mr. Sunil Kumar Agarwal on 17.06.2022, which he availed and was accompanied by advocate, Mr. Nipun Singhvi. Mr. Sunil Kumar Agarwal submitted his written submissions alongwith additional documents via email dated 17-06-2022.

3. Alleged contraventions and submissions of the IP

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

3.1. Contravention No. I with regard to failure to file avoidance application

- 3.1.1. It is observed that Mr. Sunil Kumar Agarwal appointed transactional auditors vide engagement letter dated 18.03.2020, to conduct the transaction audit of the CD. The auditors pointed out undervalued transactions, transactions defrauding creditors, extortionate credit transactions and fraudulent transactions in their report. Further in the seventh CoC meeting dated 01.05.2020, conducted by Mr. Sunil Kumar Agarwal, transaction report was discussed and CoC in the said meeting resolved to file avoidance application before AA for necessary orders. Further, Board was also in receipt of an email dated 20.05.2020 from Mr. Sunil Kumar Agarwal intimating the Board that the application under section 66 of the Code in terms of Regulation 35A(2) of the CIRP Regulations was under filing process.
- 3.1.2. It is noted from Mr. Sunil Kumar Agarwal's reply to the IA, that he did not file the

avoidance application before AA since the CIRP was getting withdrawn. It is pertinent to mention that even though when such transactions were pointed out by the transaction auditors appointed by Mr. Sunil Kumar Agarwal, CoC also approved for filing of avoidance application before AA, yet the said application was not filed before AA for necessary orders.

- 3.1.3. In view of the above, the Board is of the prima facie view that Mr. Sunil Kumar Agarwal has inter alia violated Section 45, 50, 66, 208(2)(a) and (e), Regulation 35(A)(2) and (3) of CIRP Regulations, Regulation 7(2)(a) and 7(2)(h) of the IP Regulations read with Clause 1, 2, 3 and 14 of the Code of Conduct.

3.2. Submissions of Mr. Sunil Kumar Agarwal

- 3.2.1. Mr. Sunil Kumar Agarwal submitted that as decided in 7th COC meetings dated 01.05.2020, he instructed Advocate Pratik Thakkar to suitably draft and file the subject application before the AA immediately. He had prepared the application, and the same was affirmed on 06.06.2020. The court fee was also paid through Bharat Kosh on 08.06.2020.
- 3.2.2. Further, Mr. Sunil Kumar Agarwal duly reported to IBBI on 20.05.2020 about the avoidance transactions through mail and also stated that application under Section 66 of the Code is in process to be filed before Hon'ble AA, Ahmedabad bench. However, during this period, the Hon'ble AA reserved the application IA no. 752 of 2019 in CP (IB) No. 178 of 2018 filed by suspended director, challenging the constitution of COC itself and the order was pronounced on 10.07.2020 deciding that the constitution of COC was *void ab initio* and also ordering for closing the CIRP immediately.

EVENTS OF IA No. 752 OF 2019 :

Sr. no.	Event	Date
1.	CoC decided to file IA for PUFEE transaction	01.05.2020
2.	Avoidance transaction application was ready and affirmed	06.06.2020
3.	Bharatkosh payment was made	08.06.2020
4.	IA No. 752 of 2019 challenging constitution of CoC was heard	05.06.2020, 10.06.2020

5.	IA no.752 of 2019 challenging constitution of CoC was reserved for orders	10.06.2020
6.	IA no. 752 of 2019 challenging constitution of CoC order was pronounced	10.07.2020

3.2.3. Mr. Sunil Kumar Agarwal submitted that since the very constitution of the COC was under challenge and the hearing/order of such application was already reserved, the proprietary demanded to keep such application on hold till the order in the reserved matter was pronounced.

3.2.4. Mr. Sunil Kumar Agarwal relied on the decision of the Hon'ble Supreme Court of India in *K N Rajakumar vs. V Nagarajan & Ors.* wherein it was held that:

“We find that NCLT vide order dated 06.07.2021, passed in the application (I.A.No.540/CHE/2021) filed by D. Ramjee, has rightly held that from the date of the order dated 04.06.2021, after the withdrawal of CIRP proceedings, the powers and management of the Corporate Debtor were handed over to the Directors of the Corporate Debtor and from that date RP and CoC in relation to the Corporate Debtor had become functus officio.”

3.2.5. Mr. Sunil Kumar Agarwal, thus, submitted that the allegation of non-filing of PUFEE transaction applications were frivolous as he had put forward the agenda before the CoC for filing an IA for avoidance transactions and was about to file the application however, as CIRP was closed by Hon'ble AA, the IP become functus officio. Mr. Sunil Kumar Agarwal duly reported to IBBI about the avoidance transactions on 20.05.2020 record for the same.

3.2.6. He further submitted that the allegations of avoidance transactions in forensic audit would not have survived due to order of Hon'ble AA in IA no. 752/2019 as the same creditor was alleged in the report which was rejected to be considered as financial creditor by the Hon'ble AA.

3.3. Summary Findings

3.3.1. The DC notes the submission of Mr. Sunil Kumar Agarwal that the agenda for filing an IA for avoidance transactions was put before the CoC by him and in view thereof, a resolution for filing avoidance transaction was passed in 7th CoC meeting.

3.3.2. The Code and regulation 35A of the CIRP regulations clearly specify that onus of filing avoidance transaction rests with the RP. For filing the same, CoC's permission is neither necessary nor a pre-condition. Therefore, Mr. Sunil Kumar Agarwal erred in his judgment at the first place to move to the CoC before filing the avoidance

application. This wasted some time in between. Further, even if it is not required, the CoC's decision to file avoidance transactions application was available with him on 01.05.2020. Thereafter, there has been delay in preparing the application and depositing the money with the Bharatkosh for filing the avoidance transactions application. Therefore, with little efforts, Mr. Sunil Kumar Agarwal was in a position to file the avoidance transactions application even before IA no. 752 of 2019 was heard.

3.4. Contravention No. II with regard to non-appointment of registered valuers

- 3.4.1. Regulation 27 of the CIRP Regulations provides that the resolution professional shall, within seven days of his appointment but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the CD in accordance with Regulation 35 of CIRP Regulations. It is observed that in the 1st CoC meeting, CoC approved the appointment of registered valuers to carry out the valuation of assets of the CD. It was also recorded in the minutes *"...it is mandatory to carry out valuation of three categories each viz. Land and Building, Plant and Machinery, and Security and Financial Assets by appointing two valuers in each category. Based on individual case to case and because the current case is a little different, plant and machinery will include the inventory.."* It is the submission of Mr. Sunil Kumar Agarwal to the IA, that valuers were not appointed by him since the assets were not identified nor did the suspended management/ auditors provided any data. Even when the appointment of the registered valuers was approved by the CoC, the same was not appointed by Mr. Sunil Kumar Agarwal which is in violation of Regulation 27 of CIRP Regulations.
- 3.4.2. Thus, in view of the above, the Board is of the prima facie view that Mr. Sunil Kumar Agarwal have inter alia violated Section 25(2)(d), 208(2)(a) and 208(2)(e) of the Code, Regulation 27 of CIRP Regulations, Regulation 7(2)(a) and 7(2)(h) of IP Regulations and Clause 3, 5 and 13 of Code of Conduct.

3.5. Submissions of Mr. Sunil Kumar Agarwal

- 3.5.1. Mr. Sunil Kumar Agarwal submitted that he conducted 2nd CoC meeting on 16.09.2019 and after discussion, CoC resolved and directed him to appoint valuers for the valuation of assets of the CD. Pursuant to the resolution passed by the CoC, Mr. Sunil

Kumar Agarwal appointed Ms. Darshna Gajjar through engagement letter dated 27.01.2020 for the valuation of Land & Building of the CD. Mr. Sunil Kumar Agarwal submitted that he also disclosed the appointment of valuer Ms. Darshna Gajjar to IIPA as per IBBI circular no. IP/005/2018. However, later, Mr. Sunil Kumar Agarwal stated that he found from search of revenue records of Gujarat that only asset, *i.e.*, piece of land which was a small part, was sold without registration of documents to Ryan International School. The whole transaction sounded suspicious as no proper justification or any detail relating to payment was received either from CD or from the management of Ryan International School. In IA no. 751 of 2019 (non-cooperation application filed by Mr. Sunil Kumar Agarwal) Ryan International School was made party as Respondent no. 5 and in its reply, Ryan International School admitted that the registration of the sale deed was pending since 1999 as CD was not co-operating.

3.5.2. Mr. Sunil Kumar Agarwal submitted that he, in accordance with law, discussed the appointment of valuers with the CoC members and appointed valuer for the valuation of the assets of the CD however, as there were no assets of the CD to be valued therefore, there remained no point in appointing further valuers. Mr. Sunil Kumar Agarwal further submitted that Disciplinary Committee (DC) under Insolvency and Bankruptcy Board of India *vide* its order dated 08.04.2022 in the matter of Mr. Manish Gupta, Insolvency Professional (IP) under Section 220 of the Insolvency and Bankruptcy Code, 2016 read with regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 observed that the alleged non-appointment of registered valuers and non-preparation of IM was due to circumstances beyond the control of Mr. Gupta. Hence, no contravention can be attributed on the part of Mr. Gupta.

3.6. Summary Findings

3.6.1. The DC notes that provision of the statute is clear as regulation 27 of CIRP regulations expressly mention that RP shall, within 7 days of his appointment but not later than 47th day from the ICD, appoint two registered valuers to determine the fair value and the liquidation value of the CD. It is not clear from his submissions why Mr. Sunil Kumar Agarwal as RP took the issue of appointment of valuers to CoC, when he himself was competent to take decision in this regard. Further, after taking the approval of CoC, the decision to appoint single valuer is also not as per the stipulations of the statute.

3.7. Contravention No. III with regard to failure to make public announcement as per Regulation 6 of the CIRP Regulations

- 3.7.1. Regulation 6(1) CIRP Regulations specifies that an insolvency professional shall make a public announcement immediately on his appointment as an interim resolution professional. Further, Regulation 6(2) of CIRP Regulations specifies that the public announcement shall be published in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the CD.
- 3.7.2. It is pertinent to mention that the registered office of the CD was in Surat, Gujarat. However, it was noted from the report certifying constitution of CoC dated 06.12.2019, wherein Mr. Sunil Kumar Agarwal had stated that the public announcement was made on 29.07.2019 in Times of India, English Newspaper-Ahmedabad Edition. However, Mr. Sunil Kumar Agarwal in his reply to the IA submitted that public announcement was made in Surat edition only and also submitted an invoice dated 30.07.2019 of a media agency - Jessica Associates wherein the invoice for Times of India, English-Surat Edition was raised. Thus, it was noted that Mr. Sunil Kumar Agarwal's submission to IA was contradictory to the submissions made before Hon'ble AA.
- 3.7.3. Thus, in view of the above, the Board is of the prima facie view that Mr. Sunil Kumar Agarwal has *inter-alia* violated Section 208(2)(a) and 208(2)(e) of the Code, Regulation 6(2)(b)(i) CIRP Regulations, Regulation 7(2)(a) and 7(2)(h) of IP Regulations and Clause 1, 2, 12 and 14 of the Code of Conduct.

3.8. Submissions of Mr. Sunil Kumar Agarwal

- 3.8.1. Mr. Sunil Kumar Agarwal submitted that as per regulation 6(1) and 6(2) of CIRP Regulations, Public Announcements were done in one English and one Gujarati newspaper covering Surat where the Registered office of CD is based.
- 3.8.2. Mr. Sunil Kumar Agarwal stated that while preparing the Report of Constitution of COC, he inadvertently mentioned that public announcement was made in Times of India, English Newspaper - Ahmedabad edition instead of Times of India, English Newspaper - Surat edition. He stated that it was purely a clerical error.

3.9. Summary and Findings

3.9.1. The DC notes from the records that Mr. Sunil Kumar Agarwal has provided invoice dated 30 July, 2019 of a media agency — Jessica Associates wherein the invoice for Times of India, English — **Surat Edition** is raised. However, Mr. Sunil Kumar Agarwal has mentioned in the report (certifying constitution of CoC) submitted to the Hon'ble AA on 19th August 2019, that the public announcement was made on 29th July 2019 in Times of India, English Newspaper — **Ahmedabad Edition**. The DC is of the view that the copy of the invoice dated 30th July 2019 provided by Mr. Sunil Kumar Agarwal with his reply to the Draft Inspection Report and the SCN, cannot be relied upon as he failed to adduce direct evidence of publication made in Times of India, English — Surat Edition. Therefore, the DC finds Mr. Sunil Kumar Agarwal to be in violation of the regulation 6(2) of CIRP Regulations as the public announcement was not made in one English and one regional language newspaper at the location of the registered office, i.e., at Surat.

3.10. Contravention No. IV with regard to making misleading representation in CoC meetings

3.10.1. Section 208(2)(a) of the Code specifies that every insolvency professional to take reasonable care and diligence while performing his duties. It is observed that misleading statements were made to CoC in the 4th and 6th CoC meeting. An extract from the 4th CoC meeting dated 02nd January 2020 states "*Further RP stated that the court observed that the document upon which the applicant Mr. Piyushbhai Patel is relying is not sufficient to prove his argument that denied Mr. Mukeshbhai as the financial creditor. The document is firstly not partnership deed as it is not registered, and therefore it simply is an MoU*".

3.10.2. Further in the 6th Meeting held on 18.03.2020, Mr. Sunil Kumar Agarwal again mentioned to CoC "*Mukhesbhai was considered as Financial Creditor finally by the court. His claim needs to be updated a little with correction in interest calculation*".

3.10.3. It was observed that AA in its order dated 10.07.2020 noted the reference made in the 6th CoC meeting as mentioned above. AA noted the following observation "*It is matter of record that as on 18.03.2020, no such order has been passed whereby Mr. Mukeshbhai Desai is declared/considered as Financial Creditor*".

3.10.4. In his reply to IA, Mr. Sunil Kumar Agarwal submitted that he had already apologized

for the inadvertent mistakes in recording minutes of meetings in an affidavit before AA and had also prayed for omitting the remarks which was passed by AA in the order dated 10.07.2020. However, the same was rejected by AA vide order dated 31.08.2020. Mr. Sunil Kumar Agarwal further submitted to IA that NCLAT vide order dated 13.10.2020 removed all the observations against him. However, the NCLAT order dated 13.10.2020 reflects that the NCLAT has not expunged the remarks made by NCLT. However, NCLAT directed Mr. Sunil Kumar Agarwal to withdraw the appeal filed by him. Thereby, not only has Mr. Sunil Kumar Agarwal misrepresented to CoC, he also made contradictory statements to the IA.

3.10.5. In view of the above, the Board is of the prima facie view that Mr. Sunil Kumar Agarwal has, inter-alia, violated Section 208(2)(a) and 208(2)(e) of the Code, Regulation 7(2)(a) and 7(2)(h) of the IP Regulations read with Clause 1, 2, 12 and 14 of the Code of Conduct.

3.11. Submissions of Mr. Sunil Kumar Agarwal

3.11.1. Mr. Sunil Kumar Agarwal submitted that he had physically attended the AA's court proceedings during the hearing of IA no. 752 of 2019 filed under Section 60(5) of 2019 on 02-01-2020 and on the same day immediately after court proceedings, 4th CoC meeting of CD was conducted by him on 02.01.2020. He stated that upon inquiry by CoC members about the court proceeding in IA no. 752 of 2019 of that day, he shared the actual observations of the court with the CoC which were verbal and true.

3.11.2. Mr. Sunil Kumar Agarwal further submitted that he is a professionally qualified CMA and has worked overseas for most of his professional life and not an advocate, hence he had no prior occasions/experience of attending courts ever in life and was not aware that the discussion of the court room doesn't come in order as it was discussed, observed and commented by Hon'ble Members of the AA during hearings.

3.11.3. Mr. Sunil Kumar Agarwal submitted that the issue involved in IA 752 of 2019 that Mukesh Desai should be considered as financial creditor or not, was the moot point because in balance-sheet of the CD, amount of Rs. 4,41,82,071/- given by Mukesh Desai was shown under long term borrowings. He stated that Hon'ble AA in its order dated 10.07.2020 held that Mukesh Desai cannot be treated as financial creditor because amount so paid by Mukesh Desai has no time value of money. Mr. Sunil

Kumar Agarwal further stated that this order of AA dated 10.07.2020 was challenged before Hon'ble NCLAT in Company Appeal (AT) (Ins.) No. 780 of 2020 and Hon'ble NCLAT took almost 1.5 years to come to a conclusion and on 24.02.2022, Hon'ble NCLAT dismissed the appeal. Mr. Sunil Kumar Agarwal stated that, therefore, the allegations were denied because the minutes recorded were not with an intention to gain benefit in any way and not to harm anyone but was purely due to him being new and having a poor experience in the legal domain particularly. Mr. Sunil Kumar Agarwal submitted that upon realizing how court proceedings were conducted and recorded in order, he apologized to poor/ avoidable portion of COC minutes to Hon'ble AA through affidavit 15.06.2020 as his intention was never *malafide* and he believed that learning was an ongoing process. He further submitted that the Hon'ble NCLAT in an appeal by him categorically recorded vide order dated 13.10.2020 that there were no adverse observations which may require expunction.

3.12. Summary Findings

- 3.12.1. The DC notes that Mr. Sunil Kumar Agarwal has wrongly stated that he shared the *actual observations* in the minutes, as reflected from the perusal of the minutes of the 4th CoC meeting dated 02nd January 2020 and 6th CoC meeting dated 18th March 2020. Further, the DC notes that perusal of the NCLAT order dated 13.10.2020 reflects that the court has not expunged the remarks made by NCLT in its judgment. Rather, the court directed the counsel of Mr. Sunil Kumar Agarwal to withdraw the appeal which was accepted by his counsel. Mr. Sunil Kumar Agarwal should have applied his professional judgement and refrained from referring perceived discussions as decision points which were very much contrary to the order pronounced by the AA.

4. Order

- 4.1. In view of the submission made by Mr. Sunil Kumar Agarwal, and materials available on record, DC notes that Mr. Sunil Kumar Agarwal has erred on all counts as detailed above. Be it related to filling of avoidance application; appointment of valuers or related to publication announcements, the responses are not as per the spirit of the Code. Above all, misreporting to CoC on its status is grave error which needed to be avoided at any cost. He should have been more careful, diligent, and vigilant in conducting the CIRP of the CD and should have been cautious and prompt in discharging his duties as the RP of the CD.

- 4.2. The CIRP already stands withdrawn under Section 12A of the Code, with or without contraventions established against the RP, the outcome may not have been different. Nevertheless, getting away with such set of blatant contraventions will send wrong signal and serve as bad precedent to other professionals.
- 4.3. Mr. Sunil Kumar Agarwal shall undergo pre-registration educational course from the IPA of which he is a member.
- 4.4. The DC hereby imposes a penalty on Mr. Sunil Kumar Agarwal equal to 50 percent of the fee he has received during entire period of the CIRP of the CD and directs him to deposit the penalty amount directly to the Consolidated Fund of India (CFI) under the head of “penalty imposed by IBBI” on <https://bharatkosh.gov.in> within 45 days from the date of issue of this order and submit a copy of the transaction receipt to the Insolvency and Bankruptcy Board of India.
- 4.5. The Adjudication Division of the IBBI is directed to keep this Order in active record as negative points against him warranting continuous vigil, and follow other cases being handled by him to deter him from making such mistakes.
- 4.6. The order shall come into effect immediately in view of aforesaid directions.

Accordingly, the show cause notice is disposed of.

-sd-

(Sudhaker Shukla)

Whole Time Member, IBBI

Dated: 5th July, 2022

Place: New Delhi