

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/148/2023

31st January 2023

ORDER

In the matter of Mr. Ashutosh Gokhale, Insolvency Professional (IP) under Section 219 of the Insolvency and Bankruptcy Code, 2016 read with Regulation 11 and Regulation 12 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017.

This Order disposes the Show Cause Notice (SCN) No. IBBI/IP/INSP/2022/147/4168/641 dated 12th October, 2022 issued to Mr. Ashutosh Gokhale, 206, Manas Bhawan Ext., 11 RNT Marg, Indore, Madhya Pradesh, 452013, who is a Professional Member of Indian Institute of Insolvency Professionals of ICAI and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P00613/2017-2018/11072.

Background

- 1.1 The Hon'ble NCLT, Ahmedabad Bench, *vide* its order dated 26.06.2019, admitted an application filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 (Code), by Mr. Mukesh Agrawal, initiating Corporate Insolvency Resolution Process (CIRP), in the matter of Premshree Devcon Private Limited (CD). Mr. Ashutosh Gokhale, IP, was appointed as the Authorised Representative (AR) of the creditors in class by the same bench of NCLT, *vide* its order dated 11.10.2019.
- 1.2 The Insolvency and Bankruptcy Board of India (IBBI) in exercise of its powers under Section 218(1) of the Insolvency and Bankruptcy Code, 2016 (Code), read with Regulation 3(2) and (3) of the IBBI (Inspection and Investigation) Regulations, 2017 (Inspection Regulations), appointed the Inspecting Authority (IA) to conduct inspection of the records pertaining to CIRP of aforesaid CD.
- 1.3 The IBBI on 12th October, 2022 had issued the SCN to Mr. Gokhale, based on findings in the inspection report in respect of his role as AR in the CIRP of CD. The SCN observed certain contraventions of provisions of the Insolvency and Bankruptcy Code, 2016 (Code), the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, (CIRP Regulations), (Insolvency Professionals) Regulations, 2016 (IP Regulations), Inspection Regulations and the Code of Conduct. Mr. Gokhale replied to the SCN dated 12.11.2022.
- 1.4 The IBBI referred the SCN, the response of Mr. Gokhale 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. Gokhale availed an opportunity of personal hearing before the DC on 16th January 2023, wherein he and his advocate were present.

2. Contraventions and Submissions

Contraventions observed in the SCN and Mr. Ashutosh Gokhale's submissions are summarized below:

2.1 Contravention – I

Failure to give Specific Reply to IA

2.1.1. It is noted that The Draft Inspection Report (DIR) was prepared by the IA and shared *vide* e-mail dated 30th June, 2022, requiring reply within 15 days from the date of receipt of Draft Inspection Report. However, Mr. Ashutosh chose not to reply specifically to such observations and deflected the issue by making generic statements and stated that the matter is sub-judice before the Hon'ble National Company Law Appellate Tribunal (NCLAT) without providing evidence indicating what are the issues which are under adjudication before the NCLAT.

2.1.2 It is noted that Mr. Gokhale failed to provide full information while replying to the DIR, as required under the provisions of the Code and the rules and Regulations thereunder.

2.1.3 In view of the above, the Board held the *prima facie* view that Mr. Gokhale has, *inter alia*, violated Regulation 4(4) and 4(7) of Inspection Regulations read with Clause 18 and 19 of the Code of Conduct as specified in the First Schedule of IP Regulations (Code of Conduct).

Submissions

2.1.4 With regard to the aforesaid contraventions, Mr. Gokhale submitted that the said contravention is not maintainable as he had filed reply to DIR through email dated 14.07.2022 which duly referenced previous communications as well.

2.1.5 The response to DIR was provided in a manner in which he thought was appropriate and he had no intention of non-cooperation with the IA.

Findings

2.1.6 Regulation 4(4) of the Inspection Regulation specifies the duty of the service provider as follows:

“It shall be the duty of the service provider and an associated person to produce before the Inspecting Authority such records in his custody or control and furnish to the Inspecting Authority such statements and information relating to its activities within such time as the Inspecting Authority may require”

2.1.7 Regulation 4(7) of the Inspection Regulations specifies the duty of providing assistance by the service provider as under:

“It shall be the duty of the service provider and an associated person to give to the Inspecting Authority all assistance which the Inspecting Authority may reasonably require in connection with the inspection”.

2.1.8. Clause 18 of the Code of Conduct mandates the following duties on an IP during inspections and investigations carried out:

“An insolvency professional must appear, co-operate and be available for inspections and investigations carried out by the Board, any person authorised by the Board or the insolvency professional agency with which he is enrolled”.

2.1.9. Clause 19 of the Code of Conduct provides that *“An insolvency professional must provide all information and records as may be required by the Board or the insolvency professional agency with which he is enrolled”.*

2.1.10. Submitting evasive replies or incomplete information defeats the very purpose for which investigation has been launched. Perusal of response to DIR as submitted by Mr. Gokhale, demonstrate the fact that due care has not been taken in preparing the same. Keeping in view the assurance on behalf of the erring AR to not to repeat such a non-cooperation in future, the DC is inclined to take a lenient view on this count.

2.2 Contravention – II

Failure to circulate agenda/minutes of 5th, 6th, and 7th CoC meeting and delayed circulation of the minutes of the 8th CoC meeting.

2.2.1 It is noted that Section 25A (2) of the Code provides that it shall be the duty of the Authorised Representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor he represents.

2.2.2 It is noted that neither the agenda nor the minutes of the 5th, 6th, and 7th meeting of the Committee of creditors (CoC) were circulated to the homebuyers. In the submission of Mr. Gokhale to the Board, it is stated that the agenda and minutes were not circulated by him to avoid duplication since the Resolution Professional had already sent the minutes to the homebuyers directly.

2.2.3 It is noted that as an Authorised Representative, it was the primary duty to circulate the agenda and minutes to the financial creditors. The RP *vide* e-mails dated 25th November, 2019, December 5, 2019, December 28, 2019 had e-mailed agenda of the 5th, 6th and 7th CoC meeting, that he failed to circulate to the homebuyers.

2.2.4 It is noted that one of the homebuyers, Mr. Rohan Mehra, *vide* e-mail dated September 20, 2020, had requested Mr. Gokhale to circulate the minutes of the 8th CoC meeting held on 3rd September, 2020. The minutes of the 8th CoC meeting had not been circulated to the homebuyers even after 17 days of the meeting of CoC, and no reply to this was given despite this ground being included in the DIR, seeking his reply.

2.2.5 It is noted that as per Regulation 25(6) of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016 (CIRP Regulations), the Authorised Representative is required to circulate the minutes of the meeting to creditors in a class and announce the voting window open for at least twenty-four hours before the window opens for voting instructions

and to keep the window open for voting instructions for at least twelve hours. However, it is noted that Mr. Gokhale failed to circulate the minutes of the 8th CoC meeting till 20th September, 2020 and did not specifically reply as to how he voted on behalf of the homebuyers in the 8th CoC meeting.

2.2.6 In view of the above, the Board held the *prima facie* view that Mr. Gokhale, had violated *inter alia* Section 25A (2) and (3) of the Code and Regulation 25(6) of the CIRP Regulations read with Clause 1, 2, 13, and 14 of the Code of Conduct.

Submissions

2.2.7. Mr. Gokhale submitted that the provision Section 25A (2) under which he is being held liable, was a new provision and associated modalities were still being understood by the market and professionals alike.

2.2.8. Mr. Gokhale submitted that the said omission on his part, did not cause any prejudice to anyone as the RP had already sent the minutes/agenda of the 5th, 6th and 7th CoC meetings to the homebuyers and recirculation may have caused the confusion.

2.2.9. In the 9th CoC meeting, voting was directly opened to the homebuyers by the RP.

Findings

2.2.10 To facilitate informed decision making among the creditors in class especially the homebuyers, role of AR was conceived to participate and vote in meetings of the CoCs on behalf of the FCs he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.

2.2.11 Section 25A(2) envisages that “*It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor he represents.*”

2.2.12 Furthermore, Section 25A (4) states that “*The authorised representative shall file with the committee of creditors any instructions received by way of physical or electronic means, from the financial creditor he represents, for voting in accordance therewith, to ensure that the appropriate voting instructions of the financial creditor he represents is correctly recorded by the interim resolution professional or resolution professional, as the case may be.*”

2.2.13 Failing to implement provisions of the Code due to lack of clear understanding of the provisions of the statute is not only irrational but also bereft of professionalism which IPs are otherwise supposed to profess. The duties of AR is well laid out and any argument to digress from them is not tenable. Hence contravention on this count is established beyond iota of doubt. The plea that there was no mala-fide intention behind this action has been noted.

2.3 Contravention- III

Failure to seek instructions on the manner of voting for 5th, 6th, 7th, 8th, and 9th CoC Meeting

2.3.1 It is noted that there was failure on the part of Mr. Gokhale to provide any proof of having received any prior voting instructions from homebuyers indicating that he voted on behalf of homebuyers without taking instructions from homebuyers.

2.3.2. It is noted that in his reply to the Board, Mr. Gokhale stated

“That as an Insolvency Professional, I had to act in a prudent manner, and for faster resolution and safeguarding interest of the Homebuyers, I acted on the decisions which were necessary for speedy completion of CIRP of Corporate debtor. That, IBC indicates, that AR apart from being a technically qualified is expected to be a good manager with ability to take commercially prudent decisions in the interest of Homebuyers, and in the 9th CoC meeting, it is the Homebuyers who have passed resolutions by way of e-voting”.

2.3.3 It is noted that Regulation 16A(9) of CIRP Regulations, that came into existence w.e.f 7th August, 2020, specifically required AR to seek preliminary views on any item in the agenda for effective participation in the CoC meeting. It is noted that the 8th CoC meeting was held on 3rd September, 2020, by which time, the said Regulation had already come into force. However, Mr. Gokhale failed to take requisite voting instructions from the homebuyers for the 5th, 6th, 7th and 8th CoC meeting, nor were preliminary views of homebuyers in accordance with Regulation 16A (9) above, were taken before the 8th CoC meeting.

2.3.4 In view of the above, the Board held that it *prima facie* constituted a violation of Section 25A (3) of the Code read with Regulation 16A (9) of CIRP Regulations and Clause 1, 2 and 14 of the Code of Conduct.

Submissions

2.3.5 Mr. Gokhale submitted the same grounds as submitted in relation to Contravention II above. He stated that there was confusion among the members with respect to the meetings. Mr. Gokhale submitted, that in the 5th and 7th CoC meeting, there were no voting agendas, so contravention with respect to seeking instructions on the manner of voting for these meetings should stand modified.

2.3.6 On the ground of violation of Regulation 16 A(9), the said Regulation was recently incorporated by way of an amendment, and thus, Mr. Gokhale was new to the law and was taking time to be acquainted with the new law. Mr. Gokhale submitted, that on a conjoint reading of Regulation 25 (6) read with Section 25A (3), the intent of the law was ultimately adhered to. There has been no violation of the Regulation and no prejudice has been caused. A very small percentage of voters, that is 20 per cent were absent in the final voting.

Analysis and Findings

2.3.7 The DC notes that the AR cannot shirk away from his responsibility under the Code by saying that he was not aware of the law or of any provision. The argument of the AR cannot be accepted, that the said circulation was not done to avoid repetition, since it was already done by the RP. The DC notes that the conduct expected from an AR is to exercise his function in a better manner in accordance with law, however his negligent conduct in the present case was not very supportive of his case.

2.3.8 To the contention of Mr. Gokhale that no prejudice was caused to anyone, thus it could be considered a mitigating factor, has been noted.

2.4 Contravention- IV

Failure to provide documents which were sought by certain homebuyers.

2.4.1 Certain Homebuyers had requested Mr. Gokhale as well as RP to provide certain documents/information viz. copy of IM, up to date financials of CD, proceedings before NCLTs, etc. The documents requested by the homebuyers were important documents for taking informed decisions for voting on various resolutions in the CIRP of the CD. By not taking up requests of the homebuyers for providing relevant documents, there was failure to fulfil duty under section 25A (3) of the Code.

2.4.2 It is observed that Section 25A (3) of the Code states *inter alia* that the AR shall not act against the interests of the financial creditor he represents. The documents requested by the homebuyers *vide* e-mail dated 2nd March, 2020 were important documents for taking informed decision for voting on various resolutions in the CIRP of the CD. It is noted that, by not taking up such requests to provide the relevant documents, Mr. Gokhale had failed to fulfil his duty under Section 25A (3) of the Code.

2.4.3 In view of the above, the Board held the *prima facie* view that he has *inter alia* violated Section 25A (3) of the Code read with Clause 1, 2 and 12, 14 of the Code of Conduct.

Submissions

2.4.4 Mr. Gokhale submitted that all those documents were not sought from him but from the RP. All the required documents were with the RP and not with him, thus contravention, of any, should be made out against the RP, and not against him. He further submitted that all the e-mails requesting certain documents were addressed to the RP and not to him. As to the clarification to Regulation 6, the AR is to have no role in the claims of creditor, and if any list or copies of list are to be provided, then, Mr. Gokhale does not have any copy.

2.4.5 Mr. Gokhale submitted that he carried out actions as an AR in good faith and in accordance with the provisions of the Code and the Rules and Regulations thereunder, and tendered unconditional apology for any neglect on his part. He further requested the DC to take note of certain mitigating factors and pleaded three such mitigating factors.

2.4.6 He submitted that everyone was in a learning stage of the law and was trying to get acquainted with new laws and amendments. Mr. Gokhale submitted that this was his first assignment as an AR, and that no one was aware as to what an AR was supposed to do.

2.4.7 Mr. Gokhale submitted that the test to be undertaken in deciding his liability should be that whether his conduct embarks to the level of gross negligence. It should not be an ordinary conduct or minor inadvertent error that should decide his liability, but whether the conduct was such as to be of the level of gross negligence. Mr. Gokhale pleaded mistake on his part, and that no prejudice has been caused to anyone. He submitted that voting did take place in accordance with law and that no serious prejudice was caused to anyone as a result of his conduct. He submitted that there was no malice on his part in carrying out his functions as an AR or in the omissions on his part. He tendered an apology, respectfully requesting the Regulator (IBBI) to consider as just a mistake and not gross negligence.

2.4.8 Mr. Gokhale further requested the DC to take a very sympathetic and lenient approach in the said matter considering all the mitigating factors.

Findings

2.4.9 The DC noted the contention of Mr. Gokhale that documents sought were in possession of RP as custodian of that sensitive information. While contravention is not established on this count, yet, Mr. Gokhale failed to provide any evidence about his efforts to mitigate prevailing information asymmetry between RP and FCs.

3.1 Order

3.1.1 The DC notes that it was the duty of Mr. Gokhale as an AR, to carry out his functions in interest of the class he represents.

3.1.2 The AR is remunerated for his services, and is bound by his duties in accordance with the provisions of the Code and the Rules and Regulations thereunder. In view of the forgoing discussion, 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 12 of IBBI (Inspection and Investigation) Regulations, 2017, disposes of the SCN cautioning the IP, Mr. Ashutosh Gokhale to be more careful in future and directs him to strictly comply with the applicable provisions of the Code and its underlying Regulations while performing his duties and imposes penalty of rupees one lac and directs Mr. Gokhale 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.

3.1.3 This shall come into effect immediately in view of para 3.1.2 of the order.

3.1.4 A copy of this order shall be sent to the CoC of all the Corporate Debtors in which Mr. Ashutosh Gokhale is providing his services, if any.

3.1.5 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Ashutosh Gokhale is enrolled as a member.

3.1.6 A copy of this order shall also be forwarded to the Registrar of the Principal Bench of National Company Law Tribunal, New Delhi, for information.

3.2 Accordingly, the show cause notice is disposed of.

-sd-

(Sudhaker Shukla)

Whole Time Member, IBBI

Date: 31st January 2023

Place: New Delhi