

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/ 13/2018
7th January, 2019

In the matter of Mr. Vasudeo Agarwal, Insolvency Professional under sub-regulations (7) and (8) of regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 read with section 220 of the Insolvency and Bankruptcy Code, 2016.

Order

This order disposes of the show cause notice dated 28th July, 2018 (SCN) issued to Mr. Vasudeo Agarwal, 5 Fancy Lane, 3rd Floor, Kolkata-700001. Mr. Agarwal is a professional member of the Indian Institute of Insolvency Professionals of ICAI and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board) with Registration No. IBBI/IPA-001/IP-P00186/2017-18/10365. Mr. Agarwal replied to the SCN vide his letter dated 16th August, 2018. The Board referred the SCN, response of Mr. Agarwal to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal. Mr. Agarwal, appeared for a personal hearing on 5th October, 2018 and requested to be represented by an Advocate and sought adjournment, which was allowed. He along with the learned Advocate, Mr. Alok Dhir, accordingly appeared before the DC on the 23rd October 2018 and made oral submission.

2. The DC has carefully considered the oral and written submissions of Mr. Agarwal and material available on record.

3. The undisputed facts leading to issue of SCN is as under:

3.1 Based on an application filed by an operational creditor, Mr. Arun Kumar Jain, Upadan Commodities Private Ltd., corporate debtor (CD) was admitted into corporate insolvency resolution process (CIRP) and Mr. Sandeep Kumar Kejriwal was appointed as Interim Resolution Professional (IRP) by the Hon'ble Adjudicating Authority (AA) vide order dated 29th August, 2017. Mr. Kejriwal, however, resigned abruptly. The Board invited an expression of interest from IPs interested to act as IRP of the CIRP and after following the due process, recommended appointment of Mr. Agarwal as IRP. Accordingly, the AA appointed Mr. Agarwal as IRP vide order dated 16th January, 2018. He filed his consent on 18th January, 2018 to accept the appointment as IRP of the CIRP.

3.2 The committee of creditors (CoC) comprised the sole operational creditor, namely, Mr. Arun Kumar Jain.

3.3 Mr. Agarwal sent a letter dated 31st January, 2018 to the CD informing that he had been appointed as the IRP and seeking certain records. He issued a notice dated 31st January, 2018 convening the third meeting of the CoC on 12th February, 2018. He filed the first progress report on 1st February, 2018 with the AA informing the aforesaid letter and notice.

3.3 The meeting of the CoC did not take place as the sole creditor was absent. The sole creditor, vide his letter dated 15th February, 2018, consented to hold the meeting of the CoC on 19th February, 2018.

3.4 Mr. Agarwal sent a letter dated 15th February, 2018 to the sole creditor seeking his help to locate the CD.

3.5 The CoC met on 19th February, 2018, where the sole creditor was present and decided not to seek any extension of time for the CIRP beyond 27th February, 2018.

3.6 A director of the CD, who was present at the meeting of the CoC on 19th February, 2018, informed that the registered office of the CD had been shifted to another location and assured to provide certain documents relating to the CD to Mr. Agarwal. Accordingly, the CD, vide letter dated 19th February, 2018, provided the documents to Mr. Agarwal.

3.7 Mr. Agarwal filed the second progress report dated 22nd February, 2018 expressing his inability to continue resolution process for want of co-operation from the CD and decision of the CoC not to seek extension of the CIRP period which was expiring on 27th February, 2018.

3.8 The AA, vide order dated 1st March, 2018, initiated the liquidation process of the CD. It appointed Mr. Agarwal as the Liquidator.

3.9 Mr. Agarwal filed an application dated 5th March, 2018 requesting the NCLT not to appoint him as liquidator for personal reasons.

3.10 The AA, vide order dated 3rd April, 2018, forwarded the resignation of Mr. Agarwal to the Board so as to get a new IP to continue the liquidation process and directed Mr. Agarwal to continue the liquidation in the meantime.

3.11 The AA, vide order dated 26th April, 2018, appointed Mr. Subodh Kumar Agarwal as the Liquidator. As Mr. Subodh Kumar Agarwal expressed difficulty to take up the responsibility in view of his existing workload, the AA, vide order dated 14th May, 2018, appointed Mrs. Savita Agarwal as the Liquidator. Ms. Savita Agarwal also expressed inability to take up the assignment. However, the AA, vide order dated 17th July, 2018, discharged Mr. Vasudeo Agarwal, after taking note of the progress report dated 17th July, 2018.

3.12 The Board took note of the observations of the AA in its order dated 1st March, 2018 and sought comments thereon of Mr. Agarwal. After following the due process, it issued the SCN.

4. A summary of contraventions alleged in the SCN, Mr. Agarwal's written and oral submissions thereon and the findings of the DC are as under:

4.1 **Contravention:** Mr. Agarwal did not proceed expeditiously even though he knew that the CIRP period was ending on 27th February, 2018. He issued a notice only 31st January, 2018 convening the third meeting of the CoC to be held on 12th February, 2018. He ought to have convened the meeting earlier and he should have done so with seven days' notice, which is the requirement under the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations). Further, he should have adjourned the meeting to the next day (13th February, 2018), as required under the CIRP Regulations, if no one turns up for the meeting, instead of adjourning the meeting to 19th February, 2018.

Submission: The sole member in the CoC requested the RP to hold the meeting after 10th February, 2018 due to his unavailability. He also wanted the meeting to be held on 19th February, 2018. Therefore, it would not have served any purpose had the meeting been scheduled earlier or adjourned to the next day.

Finding: An IP has the highest professional responsibility. His conduct and performance have substantial bearing on survival of an ailing entity. He, therefore, ought to work with a sense of urgency and with utmost care and diligence and he should endeavour to fast track the process, wherever the situation demands. Though the DC would have appreciated had Mr. Agarwal fast tracked the process, it can't hold him liable for the same in contravention of any specific regulation. The DC notes that even if Mr. Agarwal had complied with the regulations by adjourning the meeting to the next day, it would have been an exercise in futility and would not have made any difference to the process.

4.2 Contravention: Mr. Agarwal did not take over the management of operations of the CD in contravention of the provisions of section 23 of the Code. The excuse that he faced non-cooperation from the CD is not tenable as he did not even seek help of the AA under section 19(2) of the Code.

Submission: Mr. Agarwal has, vide its progress report dated 22nd February, 2018, informed the AA about the non-cooperation of the CD.

Finding: Mr. Agarwal, as the resolution professional (RP), has the statutory duty to manage the operations of the CD as a going concern. He has duty to protect and preserve the value of the property of CD. The statute anticipates that a RP may not always get co-operation and, therefore, entitles him in such situations to make an application under section 19(2) of the Code seeking a direction from the AA. Mr. Agarwal neither took over the management of the CD nor did he apply for direction of the AA. He merely informed the AA, through the progress report, at the fag-end of the CIRP period that he was not getting co-operation of the CD. It is a lame excuse that Mr. Agarwal could not trace the CD when there was an IRP for about 140 days, two meetings of the CoC were held, a director of the CD attended the meeting of the CoC convened by Mr. Agarwal, and the said director informed Mr. Agarwal about change of address of the CD. It is preposterous that Mr. Agarwal, as RP, never visited the premises of the CD and yet he claims that there was no co-operation from the CD. Mr. Agarwal has thus clearly failed in his statutory duty in contravention of the provisions of sections 20 and 23 of the Code.

4.3 Contravention: Mr. Agarwal did not appoint valuers, prepare information memorandum, issue invitation for expression of interest, invite resolution plans, etc., and, therefore, did not conduct the CIRP, in contravention of various provisions of the Code and the CIRP Regulations.

Submission: Mr. Agarwal has generally denied these allegations and stated his difficulties to explain his failure to conduct the CIRP.

Finding: An RP exercises the powers of the Board of Directors of a CD in distress and conducts the CIRP. Obviously, the job is tough and challenging. Every other IP encounters difficulties similar to those faced by Mr. Agarwal. An IP is known for his ability to deal with challenges, not for his ability to explain the failure. Mr. Agarwal did not make serious effort to get any of the tasks done.

4.4 Contravention: Mr. Agarwal recused himself from being appointed as the Liquidator without any cogent reasons for the same.

Submission: He continued to perform duties of the Liquidator till the AA discharged him on 17th July, 2018.

Finding: Although Mr. Agarwal wanted to be recused, he continued to discharge the responsibilities as the Liquidator till the AA discharged him. Further, though the statute does not envisage an IP to avoid or to run away from the responsibility, there is no prohibition on

seeking recuse with the approval of the AA. It may be difficult to find fault with Mr. Agarwal in this regard.

5.1 An IP is not just another professional. He is dealing with a CD in distress. In this matter, the DC observes that Mr. Agarwal displayed a laid-back attitude, gave up even before trying and practically abandoned the CIRP. During his term as RP, he did not do anything, which an RP is required to do, except having one meeting of the CoC and submitting two progress reports and, therefore, contravened provisions of sections 20 and 23 of the Code.

5.2. Mr. Agarwal was appointed as IRP after about 140 days of the commencement of the CIRP, when everything was not in order. There is a limit up to which one can fast track the process to complete it within balance 40 days and arrive at a satisfactory outcome.

5.3 Keeping in view the stage of the CIRP when Mr. Agarwal was appointed and the difficulties he has explained, the DC is inclined to take a lenient view of the serious contraventions by Mr. Agarwal.

6.1 In view of the above, the Disciplinary Committee, in exercise of the powers conferred under section 220 (2) of the Code read with sub-regulations (7) and (8) of regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, hereby imposes on Mr. Agarwal a monetary penalty equal to one hundred percent of the total fee payable to him as IRP and as RP in the CIRP of Upadan Commodities Private Ltd. and directs him to deposit the penalty amount by a crossed demand draft payable in favour of the Insolvency and Bankruptcy Board of India within 30 days of the issue of this order. The Board in turn shall deposit the penalty amount in the Consolidated Fund of India. Accordingly, the show cause notice is disposed of.

6.2 This Order shall come into force on expiry of 30 days from the date of its issue.

6.3 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI, where Mr. Agarwal is enrolled as a professional member.

6.4 A copy of this order shall be forwarded to the Secretary, National Company Law Tribunal, New Delhi for information.

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(Dr. M. S. Sahoo)
Chairperson, IBBI

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(Dr. Mukulita Vijayawargiya)
Whole Time Member, IBBI

Date: 7th January, 2019

Place: New Delhi.