

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA  
(Disciplinary Committee)

No. IBBI/DC/41/2020

11<sup>th</sup> November, 2020

**Order**

**In the matter of Mr. Vinod Kumar Kothari, Insolvency Professional (IP) under Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016**

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/MON/2020/15 dated 28th August, 2020 issued to Mr. Vinod Kumar Kothari, 1006-1009, Krishna Building, 224 A.J.C. Bose Road, Kolkata, West Bengal- 700017 who is a Professional Member of the ICSI Institute of Insolvency Professionals (IPA) and an IP registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-002/IP-N00019/2016-2017/10033.

**Background**

- 11 The IBBI had issued on 28<sup>th</sup> August, 2020, the SCN to Mr. Vinod Kumar Kothari for accepting the assignment as the Liquidator in the Voluntary Liquidation of IL&FS Portfolio Management Services Limited after 31st December 2019 without holding a valid Authorisation for Assignment (AFA) issued to him by his IPA.
- 12 Mr. Kothari submitted reply to the SCN dated 4<sup>th</sup> September, 2020. The IBBI referred the SCN, response of Mr. Kothari 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. The IP availed an opportunity of personal hearing before the DC on 10<sup>th</sup> September 2020.

**Show Cause Notice**

- 2 The SCN issued by IBBI alleged contraventions of sections 208(2)(a) and 208(2)(e) of the Insolvency and Bankruptcy Code, 2016 (Code), regulations 7(2)(a), 7(2)(h) and 7A of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clauses 1, 2, 11, 12 and 14 of the Code of Conduct contained in the First Schedule of the IP Regulations for accepting the assignment as the Liquidator in Voluntary Liquidation of IL&FS Portfolio Management Services Limited after 31<sup>st</sup> December 2019 for which public announcement was made on 18<sup>th</sup> March 2020 without holding a valid AFA from the IPA.

### Written and oral submissions by Mr. Kothari

3. Mr. Kothari's submissions made in his written reply and in the course of personal hearing are summarized as follows:

3.1 Mr. Kothari in his written reply and Mr. Joy Shah, Sr. Advocate on behalf of Mr. Kothari during the personal hearing had submitted that-

- (i) he had accepted the assignment and provided his consent on 01.03.2019. As such, the Assignment was mutually consented to by signing of the mandate and hence, was accepted on 01.03.2019. Therefore, if an IP has already undertaken an assignment before 31<sup>st</sup> December, 2019, which is continuing after such date, no AFA would be required. The IP further submits that he was already professionally engaged by the corporate debtor in tasks relating to Declaration of Solvency, special resolution etc. required for initiation of voluntary liquidation and had undertaken the assignment prior to 31<sup>st</sup> December, 2019. He states that the legal process of accepting a professional assignment is no different from that of a contract with offer and acceptance, with definitive terms, resulting into commencement of an engagement.
- (ii) There was a lack of clarity in the Regulations and ICSI IIP bye-laws, therefore, there cannot be a case of 'misconduct' unless there is a clear and unambiguous errant intent of a professional, requiring disciplining, which is completely absent in this case. Further, regulation 7A cannot be given a retrospective operation and should be in place at the time or commencement of assignment.
- (iii) He was under *bonafide* belief that AFA is required in cases of appointment of IRP/RP which are made by order of the AA in CIRP or liquidation under Section 33 of the Code and not in voluntary liquidation process.
- (iv) IPA has also issued the show cause notice dated 16.06.2020 and order dated 7.09.2020 has also been passed warning him to be extremely careful, diligent, strictly act as per law and similar action should not be repeated. Subsequently, Mr. Kothari had filed an appeal before the Appellate Panel of IPA, wherein the Order dated 03.11.2020 of the Appellate Panel held that he had not acted either in violation or in breach of regulation 7A and the order of the DC of IPA was set aside.

### Analysis and Findings

4. The DC after taking into consideration the SCN, the reply to SCN, the oral and written submission of Mr. Kothari and also the provisions of the Code, rules and the regulations made thereunder finds as follows.

4.1 The DC notes that the provisions of the Code and regulations are spelt out in a plain and unambiguous language. Regulation 7A of IP regulations requires for any IP to have AFA before undertaking any assignment after 31<sup>st</sup> December 2019. Regulation 7A reads as follows:

*"7A. An insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid authorisation for assignment on the date of such acceptance or commencement of such assignment, as the case may be:  
Provided that provisions of this regulation shall not apply to an assignment*

*which an insolvency professional is undertaking as on-*  
*(a) 31st December, 2019; or*  
*(b) the date of expiry of his authorisation for assignment.”*

- 4.2 Thus, it is clear from the said Regulation that one of the essential conditions for undertaking any assignment by an IP is that he should have a valid AFA which is issued by the IPA with which he is enrolled. In other words, without AFA, an IP is not eligible to undertake assignments or conduct various processes thereof. Regulation 7A was inserted in the IP Regulations vide notification dated 23<sup>rd</sup> July 2019, much before 31<sup>st</sup> December, 2019. Adequate time was given to the professionals to obtain AFA from respective IPAs.
- 4.3 The bye-laws of ICSI Institute of Insolvency Professionals defines in para 4(1)(aa) the expression “authorisation for assignment” as an authorisation to undertake an assignment, issued by an insolvency professional agency to an insolvency professional, who is its professional member, in accordance with its bye-laws regulation. An application for grant of AFA can be made to the IPA under para 12A of said bye-laws.
- 4.4 Further, Section 208 of the Code also casts an obligation to abide by the code of conduct and comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member. Section 208(2) provides as follows:  
*“208. Functions and obligations of insolvency professionals.-*  
*(2) Every insolvency professional shall abide by the following code of conduct: –*  
*(a) to take reasonable care and diligence while performing his duties;*  
*(b) to comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member; and*  
*(e) to perform his functions in such manner and subject to such conditions as may be specified.”*
- 4.5 In the present matter it is observed that, Mr. Kothari had provided his consent to the Board of Directors of IL&FS Portfolio Management Services Limited vide letter dated 01.03.2019 to undertake the assignment for acceptance of assignment in the voluntary liquidation of IL&FS Portfolio Management Services Limited prior to 31.12.2019. The said letter enumerated the scope of work relating to voluntary liquidation of corporate debtor.
- 4.6 The DC further notes that the certificate of registration granted to an IP is subject to the condition that he should follow at all times the provisions of the Code and Regulations and the bye-laws of Insolvency Professional Agency of which the IP is a member and also follow the Code of Conduct specified in the First Schedule to the IP Regulations. In this regard, clauses (a) and (h) of regulation 7 (2) of the IP Regulations provide as follows:  
*“7. Certificate of registration.*  
*(2) The registration shall be subject to the conditions that the insolvency professional shall –*

(a) at all times abide by the Code, rules, regulations, and guidelines thereunder and the bye-laws of the insolvency professional agency with which he is enrolled;  
(h) abide by the Code of Conduct specified in the First Schedule to these Regulations;”

- 4.7 The credibility of the processes under the Code depends upon the conduct and competence of the IRP/RP/Liquidator during the process. Section 208(2) of the Code provides that every IP shall take reasonable care and diligence while performing his duties and to perform his functions in such manner and subject to such conditions as may be specified. Further, the Code of Conduct specified in the First Schedule of the IP regulations enumerates a list of code of conduct for insolvency professionals including maintaining of integrity and professional competence for rendering professional service, representation of correct facts and correcting misapprehension, not to conceal material information and not to act with *mala fide* or with negligence.
- 4.8 The DC finds that an order has been passed against Mr. Kothari on 7.09.2020 by the Disciplinary Committee of IPA for accepting assignment as Liquidator after 31.12.2019 without holding a valid AFA in the matter of IL&FS Portfolio Management Services Limited, and warned him to be extremely careful, diligent, strictly act as per law and similar action should not be repeated for contravention of regulation 7A of IP Regulations. However, the IP had filed an appeal before the Appellate Panel of ICSI Institute of Insolvency Professionals against the decision of the Disciplinary Committee of the IPA and the Appellate Panel vide order dated 03.11.2020 set aside the order of Disciplinary Committee of IPA and held that IP had not acted either in violation or in breach of Regulation 7A of the IP Regulations.

### **Order**

5. In view of the above, this DC, in exercise of the powers conferred under Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, disposes of the SCN without any direction against Mr. Vinod Kumar Kothari.
- 5.1 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Kothari is enrolled as a member.
- 5.2 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.
6. Accordingly, the show cause notice is disposed of.

Dated: 11<sup>th</sup> November 2020  
Place: New Delhi

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(Dr. Mukulita Vijayawargiya)  
Whole Time Member, IBBI