

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. **IBBI/DC/36/2020**

29th October, 2020

Order

In the matter of Mr. Dushyant C Dave, Insolvency Professional (IP) under Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 read with section 220 of the Insolvency and Bankruptcy Code, 2016.

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/MON/2020/107/409/213 dated 14th July, 2020 issued to Mr. Dushyant C Dave, 1101, Dalamal Tower, B Wing, Free Press Journal Marg, Nariman Point, Mumbai, Maharashtra - 400021, who is a Professional Member of the Insolvency Professional Agency of Institute of Cost Accountants of India (IPA) and an IP registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-003/IP-N00061/2017-18/10502.

Background

- 1.1 The IBBI on 14th July, 2020 had issued the SCN to Mr. Dushyant C Dave, based on material available on record in respect of his role as interim resolution professional (IRP) and/ or resolution professional (RP) in corporate insolvency resolution process (CIRP) of Topworth Steels and Power Private Limited (CD). The SCN alleged contraventions of several provisions of the Insolvency and Bankruptcy Code, 2016 (Code), the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and the Code of Conduct under regulation 7(2) thereof. Mr. Dave replied to the SCN vide letter dated 24th July, 2020 and submitted additional responses vide letter dated 25th September, 2020.
- 1.2 The IBBI referred the SCN, responses of Mr. Dave 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. Dave availed an opportunity of personal e-hearing before the DC on 22nd September 2020.

Show Cause Notice

2. The IBBI has taken on record the order dated 29th January, 2020 of the Hon'ble National Company Law Tribunal, Mumbai Bench (AA) in the matter of State Bank of India vs. Topworth Steels & Power Private Limited *vide* which Mr. Dave was appointed as Interim Resolution Professional ('IRP') of CD. It was observed that Mr. Dave had issued public announcement in the matter on 29th February, 2020. Mr. Dave was also called upon to submit his reply vide email dated 25th April, 2020 and the reply was submitted on 28th April, 2020. The contraventions alleged in the SCN are summarized as follows:
 - 2.1 The CIRP in the matter of Topworth Steels and Power Private Limited was commenced vide order dated 29th January, 2020 of AA but the same was communicated to Mr. Dave on 28th February, 2020 and thereafter public announcement was made on 29th February, 2020. On 28th

February, 2020, Mr. Dave applied to IPA seeking Authorization for Assignment (AFA) which was issued on 20th March, 2020 with a validity of one year. However, in the meantime, Mr. Dave issued public announcement in the CIRP of the CD on 29th February, 2020 i.e. while not holding a valid AFA. Therefore, the IBBI *prima facie* held the view that Mr. Dave has violated Section 208(2)(a) & (e) of the Code and Regulation 7(2)(a), 7(2)(h) and 7A of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations), read with clauses 1, 2, 12 and 14 of the Code of Conduct as given in the First Schedule of the IP Regulations.

- 2.2 The IBBI has taken on record Consent Form-2, dated 2nd April, 2018 wherein Mr. Dave agreed to accept the appointment of IRP in the matter of CIRP of CD. In the Form, Mr. Dave certified that there are no disciplinary proceedings pending against him with the IBBI or IPA. Subsequently, the IBBI issued a SCN (SCN-1) on 31st October, 2019 in a different matter which was disposed of vide order dated 27th February, 2020. Hence, DC proceedings were pending on 29th January, 2020 when the CIRP of CD was admitted by AA. Further, Circular no. LA/010/2018 dated April 23, 2018 issued by IBBI also states that an IP shall not accept any fresh assignment as IRP, RP, liquidator, or a bankruptcy trustee under the Code, if a SCN is pending against him. Since, Mr. Dave certified in Consent Form 2 in the year 2018, that no disciplinary proceedings were pending against him with the IBBI, it was his responsibility to inform all the stakeholders and the AA about the latest development, i.e., concurrent DC proceedings going against him on the date of commencement of CIRP of CD. However, Mr. Dave failed to inform the stakeholders and the AA about the same. Therefore, the IBBI *prima facie* held the view that Mr. Dave has violated Section 208(2)(a) & (e) of the Code and Regulation 7(2)(a) and 7(2)(h) of the IP Regulations, read with clauses 1, 2, 11, 12 and 14 of the Code of Conduct as given in the First Schedule of the IP Regulations.

Submissions by Mr. Dave

3. Mr. Dave *vide* reply dated 24th July 2020 had submitted that the SCN is issued without sending the draft inspection report in accordance with Regulation 6 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017.
- 3.1 Further, with respect to the allegations in the SCN, he had submitted that the appointment of an IRP by an AA requires that the IRP does not have any pending disciplinary proceedings against him. Hence, once his appointment is made by the AA, and since there are no pending disciplinary proceedings as of February 28, 2020 (i.e. the date of communication of admission order dated January 29, 2020), he was to take charge of the affairs of the CD and comply with the order passed by AA.
- 3.2 The written consent by way of Form 2 in the matter of CD was provided by Mr. Dave on 2nd April, 2018 i.e. two years before the admission order passed by AA dated 29th January, 2020 which was delivered to Mr. Dave only on 28th February, 2020. Until 28th February, 2020, Mr. Dave was not even aware about the fact that the application of the CD was admitted by the AA since the applicant, i.e., State Bank of India (SBI), never informed him about the status of the same or any developments in the matter. In fact, the application from SBI was rejected by AA and there was no way to know that the application would be admitted. However, SBI had approached Hon'ble National Company Law Appellate Tribunal and got its application

admitted again after prolonged litigation and Mr. Dave was unaware about the same. Therefore, in the best interests of the CD, Mr. Dave immediately commenced the CIRP process with a public announcement the very next day, i.e., on 29th February, 2020 which if not done, would have been in violation of the Code and in contempt of the order of AA.

- 3.3 Mr. Dave submitted that the SCN-1 disposal date, the NCLT order date, and the NCLT Order delivery dates are not under his control and hence there is no violation whatsoever and it is completely a figment of imagination to cast aspersions of doubt on the IP and seek explanation from him by way of issue of the SCN thereby subjecting him to the disciplinary proceedings.
- 3.4 Mr. Dave had submitted that he has already filed an application before the AA regarding change of the Insolvency Commencement Date from 29th January, 2020 to 28th February, 2020 and the order is awaited. As on 28th February, 2020, there were no pending disciplinary proceedings against him and therefore, no regulations or provisions of the Code and its applicable rules and regulations have been violated.
- 3.5 SCN-1 was issued to Mr. Dave in a different matter on 31st October, 2019 (SCN 2) which was disposed by the DC *vide* order dated 27th February, 2020. The very next day, on 28th February, 2020, Mr. Dave applied for seeking the AFA which was provided on 20th March, 2020. The consent form for this assignment (Form 2) was taken on record by the IBBI on 2nd April, 2018 while SCN-1 was issued 19 months later on 31st October, 2019 and hence, no disciplinary proceedings were ongoing or pending against him when Form 2 was taken on record, nor were there any such proceedings ongoing or pending on February 28, 2020 when he commenced the CIRP for the CD upon receipt of the order passed by AA.
- 3.6 When Mr. Dave applied for AFA on 28th February, 2020, he anticipated that with no pending disciplinary proceedings, the process of issue of AFA would be smooth and would be immediately provided. However, there was an inadvertent procedural delay in the issuance of the AFA by the IPA and the AFA was issued on 20th March, 2020, i.e., 21 days from the date of application. On 6th March, 2020, the application for AFA was rejected by the IPA on the ground of accepting the assignment without holding a valid AFA, however, after due explanation, the IPA issued the AFA. The issuance of SCN in the present matter is hence a duplication of the same issue which has already been settled by the IPA by awarding him the AFA. Hence, on this ground alone, Mr. Dave requested that this SCN be quashed and struck off the record.
- 3.7 Mr. Dave had submitted that this SCN has been issued based on a complaint by the Promoters of the CD which was also made by the Promoters in an Application before AA but the AA immediately disposed of the application. Thus, Mr. Dave has submitted explanations at three separate forums in the IBC regime - the IPA, the AA and the IBBI. The IPA and the AA had already disposed of the issue in his favour and if these facts were known to the IBBI, the SCN would not have been issued.
- 3.8 Further, Regulation 7A refers to assignments that are accepted or undertaken after 31st December, 2019 but since Mr. Dave accepted the present assignment prior to 31st December, 2019, i.e., on April 2, 2018, he was under the impression that this Regulation did not apply for the present CIRP. However, as stated above, he requested the IBBI to consider that he was

eligible as on 28th February, 2020 and that an AFA could already have been authorized by that date if there weren't other inadvertent delays in the process. The AFA, in any case, was valid when Mr. Dave constituted the CoC as well as when he convened the 1st CoC meeting and all the times thereafter. Therefore, he submitted that there is no basis for any code of conduct violations as stated in the SCN as the entire CIRP has been conducted with complete transparency.

- 3.9 Mr. Dave submitted that he has also complied with Circular no. LA/010/2018 dated April 23, 2018 since Disciplinary Proceedings were not ongoing against him as on 28th February, 2020 and he did not accept any fresh assignment because consent in Form 2 for accepting the assignment was provided on 2nd April, 2018.
- 3.10 Mr. Dave submitted that he waited for more than 2 months for the communication regarding disposal of SCN-1 and also waited for more than 20 days for issuance of his AFA. His actions and responses were immediate, but due to circumstances beyond his control, he did not have the AFA in-hand when the order passed by AA was communicated to him on 28th February, 2020. Further, at the time of signing of Form 2 and as on 28th February, 2020, no disciplinary proceedings were pending against him which disbars/disallows him from taking up the present CIRP.
- 3.11 During the personal hearing held on 22.09.2020, Mr. Dave appeared before the DC. Mr. Dave reiterated the submissions made by him in his written reply to SCN. He further submitted that he has not committed any violation of any rule or regulation or code of conduct as laid down under the Code. He also requested for an early disposal of the SCN as the pendency of the SCN prevents him from taking any fresh assignments and affects him professionally as it happened while disposing the SCN-1.

Analysis and finding

4. The DC after considering the SCN, oral and written submissions of Mr. Dave and also the provisions of the Code and the regulations made thereunder proceeds to dispose of the SCN.
- 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 an IP to have AFA before undertaking any assignment after 31st 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 an 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 23rd July 2019, much before the cut-off date, 31st December, 2019 and adequate time was given to the professionals to obtain AFA from their respective IPAs.

4.3 The bye-laws of Insolvency Professional Agency of Institute of Cost Accountants of India defines in para 4(1)(b) 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 IP who intends to obtain AFA can make an application to the IPA under para 12A of said bye-laws.

4.4 Further, Section 208 of the Code also casts an obligation on the IPs 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 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;”

4.6 An IP is a special professional who is dealing with a CD in distress. The credibility of the processes under the Code depends upon the observance of the Code of conduct by the IRP/RP 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 *malafide* or with negligence.

- 4.7 In the present matter, DC notes that Mr. Dave gave consent for the CIRP of the CD on 2nd April, 2018 which was much prior to 31st December, 2019. However, due to various other issues, the CIRP of the CD commenced *vide* order dated 29th January, 2020. This commencement Order was only communicated to Mr. Dave *vide* email dated 28th February, 2020 sent by Hon'ble AA.
- 4.8 Mr. Dave had submitted that the application for commencement of CIRP of CD was rejected by the AA and thus, he was entirely unaware of the proceedings that ensued until the admission order dated 29th January, 2020 which was communicated to him *vide* email dated 28th February, 2020 by the Hon'ble AA. In this regard, the DC finds that the Hon'ble AA, *vide* order dated 19th November, 2018 rejected the application filed by SBI under section 7 of the Code for CIRP of the CD, however, this order was set aside by Hon'ble NCLAT *vide* order dated 19th August, 2019. Thereafter, the application for initiation of CIRP of CD was admitted by the AA *vide* order dated 29th January, 2020. The same was communicated to Mr. Dave *vide* email dated 28th February, 2020. Mr. Dave was not a party to the appeal filed before Hon'ble NCLAT by SBI and thus, he could not have known about the setting aside of the AA's order dated 19th November, 2018. The pendency of any application before AA for his appointment as IRP in the CIRP of CD was not within his knowledge. In such circumstances, the IP cannot be expected to inform the stakeholders or AA regarding the issue of SCN-1 against him by the IBBI.
- 4.9 The SCN-1 issued by IBBI against Mr. Dave in the matter of Siddhi Vinayak Logistics Limited was disposed of *vide* order dated 27th February, 2020 with a warning only and he received intimation regarding his appointment as IRP in the matter of CIRP of CD *vide* email dated 28th February, 2020. By this time, the SCN-1 was duly disposed of by the IBBI and thus, as on 28th February, 2020, no disciplinary proceedings were pending against him.
- 4.10 Regarding the issue of making public announcement in the matter of the CD on 29th February, 2020 while not holding a valid AFA, it is observed that the SCN 2 issued against Mr. Dave by IBBI was disposed of *vide* order dated 27th February, 2020 and the very next day, i.e., on 28th February, 2020, Mr. Dave applied to his IPA for an AFA. However, the issuance of AFA was rejected by the IPA on 6th March, 2020 on the ground of accepting of assignment without holding a valid AFA. Mr. Dave thereafter submitted his explanation to the IPA which was also put on IBBI portal on 9th March, 2020. Thereafter, the IPA issued the AFA to Mr. Dave on 20th March, 2020 with a validity of one year.
- 4.11 In the meanwhile, Mr. Dave made public announcement on 29th February, 2020 without holding a valid AFA from his IPA. In this regard, Regulation 12A (5) of the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 provides as under:

“(5) If the authorisation for assignment is not issued, renewed or rejected by the Agency within fifteen days of the date of receipt of application, the authorisation shall be deemed to have been issued or renewed, as the case may be, by the Agency.”

Thus, the AFA shall be issued or renewed by the IPA within a period of fifteen days from the

date of receipt of application and if the same is not issued, renewed or rejected by the IPA, the AFA shall be deemed to have been issued or renewed by the IPA. In the present case, the application for AFA which was rejected by the IPA on 6th March, 2020 was reconsidered by the IPA. The DC further notes that the AFA was subsequently issued by the IPA on 20th March, 2020 when adequate explanation was given by Mr. Dave. Further, the proviso to Regulation 7A of the IP Regulations clearly provides as under:

“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”

In the present case, the date of commencement of CIRP of CD is after 31st December, 2019 but the acceptance for the assignment has been given by Mr. Dave prior to 31st December, 2019 i.e. on April 2, 2018. Hence, DC takes a lenient view in this regard that he may not be held responsible.

5. An IP assumes a pivotal role in CIRP under the Code. He is the backbone of all such processes and success thereof hinges on the conduct and competence of the IP. He is the fulcrum of the process and link between the AA and CoC as also other stakeholders. Thus, he performs a wide array of responsibilities and duties which are bestowed upon him in the process.
6. The UNCITRAL Legislative Guide on Insolvency Law spells out the role of an 'insolvency representative' in the following words:

“[T]he insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially. Accordingly, it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime.”

Order

7. In view of the above, the Disciplinary Committee, in exercise of the powers conferred under Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, disposes of the SCN with the following directions:
 - (i) Mr. Dushyant C Dave is hereby warned that he shall not accept any new assignment without obtaining Authorisation for Assignment in view of Regulation 7A of the IBBI (Insolvency Professionals) Regulations, 2016 and in case of not having Authorisation for Assignment, he shall bring the same to the notice of the Adjudicating Authority without any delay.
 - (ii) A copy of this order shall be forwarded to the Insolvency Professional Agency of Institute of Cost Accountants of India where Mr. Dushyant C Dave is enrolled as a member.

(iii) A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, for information.

8. Accordingly, the show cause notice is disposed of.

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(Dr. Mukulita Vijayawargiya)

Whole Time Member, IBBI

Dated: 29th October 2020

Place: New Delhi