

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/146/2023

30th January 2023

ORDER

In the matter of Mr. Pankaj Sham Joshi, Insolvency Professional (IP) under Section 220 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 and Regulation 13 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017.

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/INSP/2022/145 dated 12th December 2022, issued to Mr. Pankaj Sham Joshi, having registered address as Block 9, Sudarsan CHS, Mahant Road, Vile Parle (East), Mumbai City, Maharashtra - 400057 (herein referred as “IP”) who is a Professional Member of the ICSI Institute of Insolvency Professionals and an Insolvency Professional registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-002/IP-N00507/2017-2018/11556.

1. Developments in relation to insolvency resolution process of the CD

1.1. The Hon’ble NCLT, Mumbai Bench (AA) vide order dated 10th October 2019 admitted the application under section 7 of the Code by financial creditor, Canara Bank for initiating Corporate Insolvency Resolution Process (CIRP) of KGS Sugar & Infra Corporation Limited (CD) and Mr. Balady Shekar Shetty (Reg. No. - IBBI/IPA-002/IP-N00213/2017-18/10665) was appointed as the Interim Resolution professional who was later confirmed as Resolution Professional. Mr. Balady Shekar Shetty (herein referred as “erstwhile RP”) was replaced by Mr. Pankaj Sham Joshi as Resolution Professional (RP) vide NCLT, Principal Bench Order dated 27th May 2020.

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

2.1. The Board, in exercise of the powers conferred to it under section 218 of the Code read with the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations 2017 (Inspection Regulations), appointed an Inspecting Authority (IA) to conduct inspection of Mr. Pankaj Sham Joshi for his assignment in the CIRP of the CD. In compliance with regulation 6(1) of Inspection Regulations, IA shared the Draft Inspection Report (DIR) with the IP on 20th June 2022 to which response from IP was received on 05th July 2022. Thereafter, IA submitted the Inspection Report (IR) to the Board on 04th August 2022 in accordance with regulation 6(4) of the Inspection Regulations.

2.2. Based on the material available on record including the Inspection Report, the Board issued the SCN to Mr. Pankaj Sham Joshi on 12th December 2022. The SCN has prima-facie observed contravention of sections 208(2)(a) and 208(2)(e) of the Code, regulations 36A(5), 36A(6), 36A(10), 36A(11), 36A(12) of IBBI (Insolvency

Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), and regulation 7(2)(h) read with clauses 3, 9, 12, 14 and 17 of the Code of Conduct of IBBI (Insolvency Professional) Regulations, 2017 (IP Regulations). The IP has replied to the SCN on 26th December 2022.

- 2.3. The SCN, written submissions of IP and other materials available on record was referred to the Disciplinary Committee (DC) for disposal of SCN. The IP availed an opportunity of personal hearing before DC on 11th January 2023 through virtual mode wherein along with him his advocate was also present.

3. Alleged contraventions and submissions of IP

Contraventions as observed in the SCN and the submissions of IP thereof are summarized below:

3.1. Contraventions Observed

Invitation for expression of interest

- 3.1.1. Regulation 36A(5) of the CIRP Regulations provides for submission of Expression of Interest (EOI) by the prospective resolution applicant meeting the requirements of the invitation for EOI within time specified in the invitation. Further, Regulation 36A(6) of the CIRP Regulations provides for rejection of the EOI received after the time specified in the invitation for EOI.
- 3.1.2. The Board noted that in the CIRP of the CD, Form G was issued on 17th January 2020 and the last date for receipt of EOI was 10th February 2020. The IP was appointed as RP vide Adjudicating Authority Order dated 14th May 2020.
- 3.1.3. In the 7th meeting of the Committee of Creditors (CoC), held on 03rd April 2020, wherein the request of M/s Dwarkadhish Sakhar Karkhana Limited (DSKL) to submit EOI was rejected on the ground that it was received after the prescribed last date of submission of EOI. It is pertinent to note that Mr. Pankaj Sham Joshi was also invitee to the meeting and hence was fully aware of the facts related to the case.
- 3.1.4. The Board observed that after taking charge as RP in the CIRP of the CD, the IP vide e-mail dated 5th June 2020 requested DSKL to submit EOI within 10 days despite being aware that CoC in its 7th CoC meeting had already rejected the request of DSKL to submit EOI after closing date prescribed in the invitation for EOI. By this action the IP has overturned the decision of CoC taken in 7th CoC meeting.
- 3.1.5. The Board further noted from perusal of minutes of 9th CoC meeting that EOIs were received from 14 prospective resolution applicants and out of those, only 5 were eligible. If 5 eligible PRAs were not considered adequate, then issue of fresh invitation for EOIs was the only option in accordance with Regulation 36A(6). However, in this case, the IP requested DSKL to submit EOI belatedly to submit EOI after specified date.

This conduct of IP was adversely commented upon by Hon'ble National Company Law Tribunal and Hon'ble National Company Law Appellate Tribunal vide orders dated 1st March 2021 and 28th June 2021 respectively.

- 3.1.6. The Board further observed that by allowing DSKL to submit EOI belatedly, the IP has bypassed the provisions contained in Regulation 36A(10), (11) and (12) of the CIRP Regulations which requires the RP to issue a provisional list of eligible prospective resolution applicants to CoC as well as to all prospective resolution applicants, opportunity to such prospective resolution applicants to make objections to inclusion or exclusion of a prospective resolution applicant, if any and issue of final list of prospective resolution applicant after considering any objections respectively.
- 3.1.7. The Board further noted from the minutes of 9th CoC meeting that Mr. Vinit Gangwal (authorised representative of Samata Nagari Sahakari Patsanstha Maryadit) suggested to IP to publish a fresh Form G extending the date of submission of EOI as there may be a greater number of entities which would be interested to submit the resolution plan but which might be under the impression that the last date for submission of EOI had expired. However, the IP took upon himself to argue for DSKL and tried to make strong case for it mentioning that regulatory provisions are not of mandatory nature. The minutes of 9th meeting of the CoC reflects that the IP took lots of effort and did a lot of canvassing to convince the CoC to agree to accept the belated receipt of EOI from DSKL and also to allow it to take part in resolution process of the CD.
- 3.1.8. The Board was therefore of the *prima facie* view that the IP has acted malafidely and has *inter-alia* violated Section 208(2)(a) and 208(2)(e), Regulation 36A(5), 36A(6), 36A(10), 36A(11) and 36A(12) of the CIRP Regulations, Regulation 7(2)(h) of IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with Clause 3, 9, 12, 14 and 17 of the Code of Conduct as specified in the First Schedule of IP Regulations (Code of Conduct).
- 3.2. **Submissions made by the IP**
 - 3.2.1. The IP in his response to SCN has submitted that the last date for submission of EOI as mentioned in Form G was 10th February 2020. The DSKL submitted its EOI on 12th March 2020 and the erstwhile RP responded by stating the said EOI cannot be considered since the last date for submission of EOI had expired. The IP has stated that the erstwhile RP had not considered the EOI submitted by DSKL on its merits and did not hold DSKL as ineligible as per the eligibility criteria set by the CoC.
 - 3.2.2. The IP has further submitted that DSKL had again requested the members of the CoC and the erstwhile RP to allow him to participate in the resolution process. Therefore, on 02nd April 2020 the erstwhile RP wrote to DSKL and informed that DSKL's request to participate in the resolution process will be placed before the CoC in the upcoming CoC meeting. Therefore, during the 7th CoC meeting, which was held on 03rd April 2020, the erstwhile RP represented to the COC that he was in receipt of an email from DSKL

on 02nd April 2020 requesting to be allowed to participate in the resolution process of the CD. The CoC however resolved to reject the request of DSKL.

- 3.2.3. The IP has asserted in his submission that the decision of CoC to reject DSKL's application was taken on a literal interpretation of Regulation 36A(6) of CIRP regulations and the existing judicial precedents in this regard was not informed to it. The CoC was also not informed that there was no provision under the Code, its rules or regulations which permitted re-issuance of Form G for inviting further expression of interest from any PRA.
- 3.2.4. The IP has also highlighted the impact of COVID-19 on the CIRP as there was lockdowns imposed and there was uncertainty on the businesses and economy in general. Therefore, it was getting difficult to find adequate number of PRAs to successfully resolve and rescue a CD. Accordingly, to increase the chances of a successful resolution and rescue of CD and also endeavor to maximise the value of the assets of the CD, the IP in the sole interest of the CD decided to afford an opportunity to DSKL to re-submit its EOI. Further, the COC had resolved unanimously to allow DSKL to participate in the resolution process of the CD and to submit its resolution plan within the same time as the other eligible prospective resolution applicants.
- 3.2.5. The IP has directed attention to clause 13(1)(b) of the Model Bye-Laws provided under the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 which casts duty on IP to endeavor to maximise the values of the assets of the CD. The IP has also placed reliance on the decision of NCLT in the matter of *ICCI v Unimark Remedies Ltd. (MA No. 1529/2018 in CP No. 1579 of 2018)* and Hon'ble Supreme Court decision in *Kalpraj Dharamshi & Another Vs. Kotak Investment Advisors Ltd. & Another (2021 SCC Online SC 204)*, wherein according to IP the Adjudicating Authority had permitted the submission of EOI and/or Resolution Plan beyond the prescribed period by upholding the objective of the Code of maximizing the value of assets of the CD.

3.3. **Summary Findings**

- 3.3.1. Regulation 36A(5) and (6) of the CIRP Regulations provides as below –
*“(5) A prospective resolution applicant, who meet the requirements of the invitation for expression of interest, may submit expression of interest within the time specified in the invitation under clause (b) of sub-regulation (3).
(6) The expression of interest received after the time specified in the invitation under clause (b) of sub-regulation (3) shall be rejected.”*
- 3.3.2. The DC notes that DSKL had submitted its EOI in the instant CIRP after the expiry of time specified in the invitation for EOI and therefore it was rejected by the CoC in its 7th meeting.
- 3.3.3. Thereafter, the prospective resolution applicant namely DSKL had pursued to erstwhile

RP and the IP for permission to submit the EOI. The request was put forward for consideration of CoC and the CoC in its 9th meeting held on 13th June 2020 had permitted for submission of EOI by DSKL.

- 3.3.4. The DC takes note of the arguments supplied by the IP with respect to the maximization of value of assets and approval of CoC as accorded in its 9th Meeting. Nevertheless, statute, leaves no room to RP for expediency or scope of interpretation of provisions in favour of any party. The RP is duty bound to bring all the facts before the CoC for taking appropriate decision. Again, post facto approval, after inviting fresh EOI from DSKL does not help the cause of Mr. Pankaj Sham Joshi either.
- 3.3.5. However, dearth of resolution applicant during the Covid time could be a compelling reason for RP to behave in a manner in which he behaved to enhance the number of the participants. In this context too, the onus to take calls which are contrary to provisions of the Code and regulations frame thereunder, does not rest either with RP or CoC.
- 3.3.6. Given the fact that during the hearing Mr. Pankaj Sham Joshi has tendered unconditional apology for his omissions which were not of mala-fide nature, and also keeping in view the later developments related to not opening of resolution plan submitted by DSKL and that CoC was presented with resolution plans submitted by GIACL and Hemant Hari Dhatrak (consortium of individuals) and was duly considered by them and in accordance with the decision of CoC Resolution Plan submitted by GIACL has been submitted for the approval of AA, the DC is inclined to take a lenient view.

4. **Order**

- 4.1. The DC, in exercise of the powers conferred under section 220 (2) of the Code read with regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017 hereby warns and directs Mr. Pankaj Sham Joshi to be more careful and cautious while dealing with the provisions of the Code and the Rules and Regulations made thereunder.
- 4.2. A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Pankaj Sham Joshi is enrolled as a member.
- 4.3. 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.
- 4.4. Accordingly, the show cause notice is disposed of.

-sd/-

(Sudhaker Shukla)

Whole Time Member, IBBI

Date: 30th January 2023

Place: New Delhi