

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/120/2022

5th August, 2022

ORDER

This Order disposes the Show Cause Notice (SCN) No. IBBI/IP/INSP/2020/62/3595/359 dated 30th May, 2022 issued to Mr. Aditya Agrawal, Insolvency Professional under section 220 of the Insolvency and Bankruptcy Code, 2016 (Code) read with regulation 13 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017 (Inspection Regulations) and regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations 2016 (IP Regulations). Mr. Aditya Agrawal is a Professional Member of Indian Institute of Insolvency Professionals of ICAI (IIIP-ICAI) and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board/IBBI) with Registration No. IBBI/IPA-001/IP-P00529/2017-2018/10954.

1. Developments in relation to resolution of the CD

- 1.1. The Hon'ble NCLT, Allahabad Bench (AA) vide order dated 16.01.2020 admitted the application under section 9 of the Code for initiating Corporate Insolvency Resolution Process (CIRP) of Shree Basant Oils Limited (CD). The AA appointed Mr. Kamal Kumar Agarwal as an Interim Resolution Professional (IRP) who was replaced by Mr. Aditya Agrawal, Resolution professional (RP) vide order dated 12.06.2020. However, the CD was directed to be liquidated vide order dated 14.12.2021 and Mr. Manish Agarwal was appointed as Liquidator.

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

- 2.1. On having reasonable grounds to believe that Mr. Aditya Agrawal had contravened certain provisions of the Code, Regulations and Circulars issued thereunder, the Board, in exercise of the powers conferred to it under section 218 of the Code read with the Inspection Regulations, appointed an Inspecting Authority (IA) to conduct the inspection of Mr. Aditya Agrawal vide order dated 15.02.2021. A draft inspection report (DIR), prepared by the IA, was shared with Mr. Aditya Agrawal on 04.08.2021 and a revised draft inspection report was also shared on 03.09.2021, to which Mr. Aditya Agrawal submitted reply vide email dated 17.09.2021. The IA submitted the Inspection Report to the Board on 26.11.2021.
- 2.2. Based on the material available on record including the Inspection Report, the Board issued the SCN to Mr. Aditya Agrawal on 30.05.2022. The SCN alleged contravention of section 24(3)(b), 208(2)(a) and (e) of the Code, regulation 19(1) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), regulations 7(2)(a) and (h) of IP Regulations, clauses 1, 2, 3, 10, and 14 of Code of Conduct of IP Regulations. Mr. Aditya Agrawal submitted his reply to SCN vide e-mail dated 26.06.2022.

2.3. The Board referred the SCN, written and oral submissions of Mr. Aditya Agrawal, 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. Aditya Agrawal availed an opportunity of personal hearing before DC on 01.08.2022 through virtual mode and he along with Advocate G.P Madaan were present and further submissions were made in reply to SCN was reiterated with some additional submissions. An additional reply to SCN was submitted by IP on 04.08.2022.

3. Alleged contraventions and submissions of the IP

Contraventions alleged in the SCN and Mr. Aditya Agrawal's submissions thereof are summarized below:

3.1. Contravention

Regarding failure in serving notices of CoC meetings to suspended management:

3.1.1 Section 24 (3)(b) of the Code provides that the RP shall give notice of each meeting of the committee of creditors (CoC) to members of the suspended Board of Directors or the partners of the corporate persons, as the case may be. Further, regulation 19(1) of CIRP Regulations *inter alia* provides that a meeting of the committee shall be called by giving not less than five days' notice in writing to every participant.

3.1.2 It is observed that Mr. Agrawal failed to serve the notices of the 5th CoC to the 9th CoC meetings to the suspended management/Directors of the CD. Mr. Agrawal has admitted in reply to DIR that the notices were not served to the erstwhile Board of Directors since the agendas in these meetings were in conflict with the interest of the ex-management. However, the Code or the regulations made thereunder do not have any provisions which prevent suspended management to attend meeting of CoC where agendas in conflict of interest of them are to be discussed.

3.1.3 In view of the above, the Board is of the *prima facie* view that Mr. Agrawal has *inter alia* violated section 24 (3)(b), 208(2)(a) and 208(2)(e), Regulation 19(1) of CIRP Regulations, regulation 7(2)(a) and 7(2)(h) of IP Regulations read with Clause 1, 2, 3, 10 and 14 of the Code of Conduct.

3.2. Submissions made by the IP

3.2.1 Mr. Agrawal submitted that the agenda items for the 5th to 9th CoC meeting included the following items: -

- (i) Report of the forensic auditor to confirm from the dealings of the CD over the last 2-3 years.
- (ii) Confirmation of findings as to whether recent business or transactions of the CD has been carried on by the ex-Directors with intent to defraud creditors of the CD or for any fraudulent purpose.
- (iii) Discussion over the applicability of section 66(1) of the Code i.e., fraudulent trading or wrongful trading by the ex-management of CD.

- (iv) Whether the transactions conducted by the ex-management were properly backed by proper due diligence as there were some shell entities which were related parties in respect of the CD.

3.2.2 In view of the above context, Mr. Agrawal states that majority of the discussions in the meetings pertained to whether the ex-Directors entered into unfair dealings with the related parties and whether proper diligence was exercised in the conduct of business of CD. These contentious issues, if discussed before the suspended Board of Directors would make them privy to the confidential discussions on the possible actions contemplated by the CoC in pursuant to the derelictions as highlighted in the Forensic Audit Report. Considering the fact that suspended Board of Directors of the CD are related and interested parties with respect to the discussions in the CoC, the Notice was not served upon them.

3.2.3 Mr. Agrawal finds it imperative to be noted that this practice is applied in case of Board Meetings of the Directors of a Company. As per the Secretarial Standard- 1 (SS-1) on Meetings of the Board of Directors, issued by the Institute of Company Secretaries of India (ICSI) which is mandated to be followed by every company by virtue of section 118(10) of the Companies Act, 2013 in terms of paragraph 3.2 of SS-1, a Director shall neither be reckoned in quorum nor be entitled to participate in respect of an item of business in which he is interested. Further, if the item of business is a related party transaction, then the interested Director is not allowed to be present at the meeting, whether physically or through electronic mode, during discussions and voting on such item. It is also pertinent to mention that if a director is an interested party with respect to the agenda discussed in the meeting, then he shall not be allowed to participate or vote on the same.

3.2.4 Moreover, the Minutes of all the CoC meetings from 5th CoC till 9th CoC Meeting had been served on the suspended Board of Directors of the CD. Apart from the aforesaid the suspended management failed to attend 1st, 2nd, 3rd and 10th meeting. The non-issue of Notice of CoC meeting was raised only after an application for avoidance of transaction and non-cooperation was filed by Mr. Agrawal. Hence, it is abundantly clear that the objections raised by the suspended management at this stage is only an afterthought in order to raise superficial issues to escape liability to provide documents and to protect themselves from the avoidance application, where they are likely to be implicated for fraudulent conduct of business.

3.2.5 In view of the foregoing reasons, it is submitted by Mr. Agrawal that any discussions pertaining to the possible actions against the fraudulent conduct of business done by the suspended management in their presence would be hit by conflict of interest and it would have been highly improper to do so in the fitness of things. It was due to this reason alone that Mr. Agrawal refrained from issuing the Notices of the CoC Meetings to them.

3.2.6 During the personal hearing, Mr. Agrawal admitted that he had committed an error in not sharing the notice, however, he prayed that the lapse was technical in nature and no *mala fide* intention was held. He further submitted that his actions was towards safe-guarding the interests of the stakeholders. In the additional reply to SCN, Mr. Agrawal submits that *Vijay Kumar Jain Vs. Standard Chartered Bank and Ors.* (2019) 20 SCC 455 is not

applicable as the matter was regarding receipt of resolution plan to be discussed before the CoC.

3.3. Findings

3.3.1 The section 24(3) and (4) of the Code regarding circulation of notice in the CoC Meetings provides as follows:

“24. Meeting of committee of creditors. –

*...(3) The resolution professional **shall** give notice of each meeting of the committee of creditors to-*

(a) members of committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5);

(b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

(c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent. of the debt.

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings...”

3.3.2 From a bare perusal of the provision of the Code it is observed that it is mandated that the RP is bound to give notice of each CoC meeting to the members of the CoC as well as the directors of the suspended management. Reference is drawn to the judgement of the Hon’ble Supreme Court matter in *Vijay Kumar Jain Vs. Standard Chartered Bank and Ors.* (2019) 20 SCC 455 wherein it well settled that the erstwhile member of the Board of Directors have a right to participate in each and every meeting regardless of the confidentiality of the information being discussed as follows,

“Section 24(3)(b) is important in that, the resolution professional has to give notice of each and every meeting of the committee of creditors, inter alia, to members of the suspended Board of Directors. Like operational creditors who may attend and participate in such meetings, provided the aggregate dues owing to them are not less than ten per cent of the total debt, both such operational creditors and erstwhile members of the Board of Directors have no vote...

9. This statutory scheme, therefore, makes it clear that though the erstwhile Board of Directors are not members of the committee of creditors, yet, they have a right to participate in each and every meeting held by the committee of creditors, and also have a right to discuss along with members of the committee of creditors all resolution plans that are presented at such meetings under Section 25(2)(i).”

3.3.3 Mr. Agrawal has submitted that in the 5th to 9th CoC meetings, unfair dealings by the suspended Board of Directors with the related parties was being discussed and that their presence would have hindered actions being initiated against them. However, the DC finds that the alleged fraudulent/ avoidance transactions had already taken place and the records of the same and books of accounts of the CD was available with the RP, based on which the Forensic Audit Report had been prepared. That the express statutory right of the

suspended Directors to participate in CoC meetings cannot be taken away based on the mere presumption of likely hinderance especially when discretion has not been allowed to the RP to decide the participation in CoC meetings. Hence, the DC finds that, irrespective of the context, contravention of relevant provision of statute is established. However, there was no *mala fide* intention on behalf of Mr. Agrawal. This is substantiated by the remedial measures in keeping CoC informed and serving the minutes to all the stakeholders. It is also observed that suspended management was invited for the 10th meeting and they preferred not to join the meeting.

4. Order

- 4.1. In view of the submission made by Mr. Aditya Agrawal, and materials available on record, DC notes that Mr. Aditya Agrawal should have been more careful and vigilant in conducting the CIRP and should have updated his professional knowledge and kept up with the IBC jurisprudence advanced by the Supreme Court.
- 4.2. The DC is also of the considered opinion that the lapse committed by Mr. Aditya Agrawal is relatively minor as no serious consequences have ensued and the lack of presence of the Directors does not invalidate the CoC meetings. That the RP in his mistaken belief sought to protect the interests of the stakeholders and even subsequently shared the minutes of the 5th to 9th CoC meeting with the suspended management of CD and that these can be considered as mitigating actions.
- 4.3. In view of the above, the Disciplinary Committee, 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 13 of IBBI (Inspection and Investigation) Regulations, 2017, the SCN is disposed of with caution to Mr. Aditya Agrawal for being more careful in future while handling CIRPs. In case, such repetitive instances are noticed in future, the matter will be treated as willful negligence and action will be taken accordingly.
- 4.4. The Order shall come into force with immediate effect in view of the directions in para 4.3.
- 4.5. A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Aditya Agrawal is enrolled as a member.
- 4.6. 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.
- 4.7. Accordingly, the show cause notice is disposed of.

Dated: 5th August, 2022
Place: New Delhi

-Sd-
(Sudhaker Shukla)
Whole Time Member, IBBI