

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/47/2020

01st December 2020

In the matter of Mr. Sanjay Kumar Agarwal, 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 (Code).

Background

1. This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/SCN/2020/01/173 dated 14th February 2020, issued to Mr. Sanjay Kumar Agarwal, Draupadi Mansion, 3rd Floor, 11 Brabourne Road, Kolkata, West Bengal- 700001 who is a Professional Member of the Indian Institute of Insolvency Professionals of ICAI and an Insolvency Professional registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P00062/2017-18/10140.
- 1.1 In exercise of its power under section 218 of the Code read with the IBBI (Insolvency Professional) Regulations, 2016, the IBBI has taken on record the First Information Report (bearing FIR Number- RC. 1(A)/2020-D) registered on 10th February 2020 with Central Bureau of Investigation (CBI), Anti-Corruption Bureau (ACB), Dhanbad, Addl. Superintendent of Police, CBI, ACB, Dhanbad arrested Mr. Agarwal on 11th February 2020 for demanding and accepting an illegal gratification of Rs. 5 Lakhs from complainant, Mr. Amit Sarawgi at office of M/s Khetsidas Machine Tool Works Private Limited at Manjhiladih, Giridih. The case was registered under Section 7 of Prevention of Corruption Act, 1988 and Mr. Agarwal was produced by the CBI before the Court on 12th February 2020 and he was sent to judicial custody at district Jail, Dhanbad on 12th February 2020 for a period of 14 days. The Special Judge, CBI-cum-Additional Sessions Judge-XI, Dhanbad on request of CBI remanded Mr. Agarwal from judicial custody to custody of CBI for a period of 3 days i.e. 72 hours vide its Order dated 13th February 2020.
- 1.2 The IBBI on 14th February 2020 had issued the SCN to Mr. Sanjay Kumar Agarwal, based on examination of material available on record including the FIR registered with CBI and order of the Special Judge, CBI in respect of his role as interim resolution professional (IRP)/ resolution professional (RP) in corporate insolvency resolution process (CIRP) of Adi Ispat India Pvt Ltd. (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. Sanjay Kumar Agarwal replied to the SCN vide letter dated 3rd June, 2020 and also provided his additional reply vide email dated 6th August, 2020.
- 1.3 The IBBI referred the SCN, response of Mr. Sanjay Kumar Agarwal to the SCN, additional reply dated 6th August, 2020 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. Sanjay Kumar Agarwal availed an opportunity of personal hearing (e-mode) before the DC on 11th August, 2020 when he reiterated the submissions made in his written reply and also made a voluntary undertaking. Thereafter, in support of his submissions made during the course of personal hearing he submitted the voluntary undertaking vide email dated 12th August 2020.

Show Cause Notice

2. The contraventions alleged in the SCN are summarised as follows:
 - 2.1 The Hon'ble National Company Law Tribunal (NCLT)- Kolkata, vide order dated 22nd November, 2019 admitted M/s Adi Ispat Pvt. Ltd, the CD under the CIRP and appointed Mr. Agarwal as an IRP under the matter on the recommendation of the financial creditor i.e. State Bank of India.
 - 2.2 A complaint was filed on 03rd February, 2020 against Mr. Agarwal by Mr. Amit Sarawgi (the complainant) inter alia alleging that Mr. Agarwal has demanded an illegal favour of Rs. 2 Lakhs per month for showing leniency in the Insolvency Resolution Process and extended the CIRP period from 9 months to 2 years and also demanded one-time bribe of Rs. 20 Lakhs for obtaining favourable Forensic Audit/ Valuation Report from his chosen Forensic Auditor/Valuer and for extending help to the promoter in re-possession of Plant/Company.
 - 2.3 Taking note of the aforesaid complaint, CBI, ACB registered the aforesaid FIR against Mr. Agarwal on 10th February 2020 wherein it observed that the complaint and the verification report (of Shri Abhay Kumar) prima facie discloses commission of cognizable offence punishable under Section 7 of Prevention of Corruption Act, 1988 (PCA).
 - 2.4 Addl. Superintendent of Police, CBI, ACB, Dhanbad arrested Mr. Agarwal on 11th February, 2020 and he was sent to judicial custody at District Jail, Dhanbad on 12th February, 2020 for a period of 14 days.
 - 2.5 CBI moved application seeking police remand (custody of CBI) from the judicial custody for a period of 3 days which was granted by the Hon'ble Special Judge, CBI-cum- Additional Sessions Judge-XI, Dhanbad vide its order dated 13th February 2020.
 - 2.6 In this connection, it is to be noted that the IBBI had granted a certificate of registration as an IP to Mr. Sanjay Kumar Agarwal under Regulation 7 of the IP Regulations which inter alia provide that an IP shall, at all times continue to satisfy the requirements under Regulation 4 of the said IP Regulations including the condition of fit and proper person as stipulated vide regulation 4(g) of IP Regulations. Among others, integrity, reputation and character are considered to be key determinant of an individual being a fit and proper person.
 - 2.7 Upon careful examination of the aforesaid FIR and order of the Hon'ble Special Judge, CBI-cum-Additional Sessions Judge-XI, Dhanbad, it is observed that Mr. Agarwal has apparently breached the maxims of the Code of Conduct stipulated vide IP Regulations, which in turn tantamount to bringing disrepute to the profession. The presence of foresaid FIR Mr. Agarwal's remand from judicial custody to police for the alleged

offences involving demand of bribe, raises serious questions regarding Mr. Sanjay Kumar Agarwal being 'fit and proper' to continue as IP.

- 2.8 The conduct of IP leading to arrest, have contravened multiple provisions of the Code including section 208(2)(a) of the Code, regulation 7(2)(a), 7(2)(b), 7(2)(f), 7(2)(h) and 7(2)(i) of the IP Regulations and clauses 1,2,3,5,9,12,14,17,24 and 28 of the Code of Conduct specified thereunder. These contraventions are of serious nature and make one liable for being discontinuance as an IP and taking any assignment under the Code. Therefore, actions against Mr. Agarwal under Section 220(2) to (5) of the Code including cancellation of registration may be taken. The IBBI in exercise of the powers conferred by regulation 11 of the IP Regulations issued show cause against Mr. Agarwal for aforesaid contraventions.

Submission by Mr. Sanjay Kumar Agarwal:

3. Mr. Agarwal submitted his reply to the SCN vide letter dated 3rd June, 2020 and also provided his additional reply vide email dated 6th August, 2020 which is summarised as follows:
- 3.1 It has been submitted by Mr. Agarwal that the FIR was lodged by Mr. Amit Sarawgi, the erstwhile director of the Corporate Debtor on 10.02.2020. On basis of the FIR, Mr. Agarwal was arrested on 11.02.2020 and sent to judicial custody on 12.02.2020 for a period of 7 days. Initially, Mr. Agarwal filed a bail petition before the Ld. Special Judge, CBI, Dhanbad which stood rejected on 24.02.2020. From the order rejecting the bail petition Mr. Agarwal filed an appeal before the Hon'ble High Court at Ranchi but due to the Covid-19 pandemic situation appeal could not be taken up. As such Mr. Agarwal had to be in the judicial custody for a considerable period of time. However, since the investigating agency could not file the charge sheet within a statutory period of 60 days from date of lodging of FIR, Mr. Agarwal applied for default bail and was released on 08.05.2020.
- 3.2 It is evident that the FIR has not been brought to any logical conclusion even after expiry of three months as till date no charge sheet has been filed within the statutory period of 60 days. That is the reason why Mr. Agarwal was granted bail due to non-filing of the charge sheet. As such till date there is no proof of the charges made in the FIR for illegal gratification allegedly demanded by Mr. Agarwal. FIR is neither recorded on oath or cross verified it is not conclusive.
- 3.3 Since there is no charge sheet the Court is also not in a position to come to a logical conclusion regarding the veracity of the police complaint or alleged commission of offence made by the erstwhile director. The entire basis for issuance of the SCN under Regulation 11 of IP Regulations is the FIR lodged before CBI and judicial custody of Mr. Agarwal. Since, there is no proof of allegations made in the FIR and there is no veracity of the allegations made by the erstwhile director till date, the entire basis of issuance of SCN is very feeble and does not have any independent legal legs to stand on its own.
- 3.4 Further, SCN under IP Regulations cannot be issued without any independent documentary evidence or proof in the possession of the IBBI itself. A disciplinary proceeding and a police complaint or a FIR or a police case are independent of each

- other and FIR lodged either before CBI or before any other police authority cannot have any bearing or influence on a disciplinary proceeding as two proceedings are independent of each other.
- 3.5 Also Mr. Agarwal is as an experienced RP having handled 9 assignments of high value, he was aware CIRP cannot be extended beyond 330 days and it is inconceivable that he would assure the ex-Directors to extend CIRP from 9 months to 2 years. Also the allegation that Mr. Agarwal reassured Mr. Sarawgi for repossession of their plant and factory is false as the bidding process in CIRP is transparent, legal and conducted/monitored in CoC meeting and detailed report is filed before AA and IBBI. IP's job is entirely administrative and to facilitate smooth functioning and has no role in deciding extension of CIRP period or who acquires the company.
- 3.6 Mr. Agarwal submits that the FIR is a desperate attempt by Mr. Sarawgi to cover up illegalities committed by him by non-auditing of account of CD, diverting funds out of CD by creating false liabilities, misappropriated funds, illegal removal of stocks and misrepresented figures before statutory authorities to evade tax liabilities. Financial statements of CD were audited after initiation of CIRP and ex-director of CD signed the director's report despite being suspended. Mr. Agarwal had intimated Mr. Sarawgi to restore such funds and stock position which were illegally diverted but Mr. Sarawgi had threatened him with false charges.
- 3.7 The second charge in the FIR that Mr. Agarwal demanded one-time gratification of a sum of Rs. 20 lakhs for obtaining favorable forensic/ valuation report is baseless and is not supported by any documentary evidence. Forensic Audit/ valuation is done by a firm with approval of CoC based on quotation received and M/s. P.S Roy & Associates had the lowest bid and was appointed by CoC. As all these actions of IP were monitored and controlled by CoC and it was beyond IP's powers to give false promises.
- 3.8 Mr. Agarwal submitted that the allegation in regards to recovery of cash sum of Rs. 3 Lakhs by CBI on 11.02.2020 was a trap by Mr. Amit Sarawgi, money was handed over to Mr. Agarwal by Mr. Sarawgi for part refund of a sum of Rs. 10 lakhs which was illegally withdrawn from the current account with Andhra Bank in the name of Adi Ispat Pvt. Ltd. Mr. Sarawgi had said that he will make a refund of Rs. 5 Lakhs and will refund it on 11.02.2020 at the factory site. He had insisted on payment in cash despite IP requesting for a transfer of sum through bank account and that carrying that amount through train would be risky but due to financial position of CD being poor and Mr. Agarwal was in urgent need of funds for statutory compliances he had agreed and had intended to deposit the amount in the bank account of the CD.
- 3.9 Mr. Agarwal further reiterated his submissions in SCN Reply in his additional reply dated 06.08.2020 and also stated that that FIR does not constitute substantive evidence but is mere untested/ unverified version of complainant. The FIR was filed by ex-Directors in an attempt to stall the CIRP. Hence, FIR cannot be used as a primary evidence of truth of its contents as it cannot be substituted for evidence given on oath.
- 3.10 Mr. Agarwal also submitted that SCN has been issued at a premature stage, as CBI is yet to file charge sheet as they are yet to collect sufficient evidence for the trial and in any case charge sheet is not binding on learned Court as it is merely the opinion of Investigating Authority.

- 3.11 Mr. Agarwal also stated that the FIR filed against him is false and frivolous and he has previously performed his duty with due diligence and hard work, to the satisfaction and appreciation of CoC and Hon'ble NCLT.
- 3.12 During the personal hearing dated 11th August, 2020, the counsel for Mr. Agarwal, reiterated the submissions made by Mr. Agarwal in his reply dated 3rd June 2020 and 6th August 2020 and additionally submitted that the Mr. Agarwal would submit a voluntary undertaking before the IBBI to the effect that he would not take up any fresh assignment to act either as an IRP, RP or as a Liquidator, till he is exonerated from charges of the aforesaid criminal case. The signed voluntary undertaking was provided by Mr. Agarwal vide e-mail received on 12th August 2020. In addition to voluntary undertaking, Mr. Agarwal has also informed that he has intimated to the CoC his inability to conduct further CIRP process of this matter.
- 3.13 Further, Mr. Agarwal vide e-mail dated 26-11-2020 informed the IBBI that he has filed a Writ Petition before Hon'ble High Court of Jharkhand challenging the jurisdiction of CBI to register FIR at the instance of Mr. Amit Sarawgi, assuming "Resolution Professional" as "Public Servant" under PCA, for quashing of the FIR and seeking stay on further investigation.

Analysis and Findings:

4. The DC after taking into consideration the SCN, the reply to SCN, the oral and written submission of Mr. Sanjay Kumar Agarwal and also the provisions of the Code, rules and the regulations made thereunder finds as follows:
- 4.1 Under the Code, the RP plays a central role in resolution process of the CD, he is appointed by the Adjudicating Authority as an officer of the Court to oversee the resolution process and it is the duty of the RP to conduct CIRP with integrity, transparency and accountability in the process ensuring that all the stakeholders are kept informed. Thereby ensuring an effective insolvency regime, which would in turn foster public confidence. Therefore, it becomes imperative for an IP to perform his duties with utmost care and diligence. Section 208(2) of the Code provides that every insolvency professional shall abide by the Code of conduct. It reads 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;”*
- 4.2 It is the duty of the IP to ensure that his conduct would not undermine the credibility of the process. Therefore, while granting certificate of registration to an IP they are subjected to follow the Code of Conduct specified in the First Schedule to the IP Regulations to ascertain that the IP is a fit and proper individual. In this regard, clauses(a), (b),(f),(h) and (i) 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;
- (b) at all times continue to satisfy the requirements under Regulation 4;
- (f) take adequate steps for redressal of grievances;
- (h) abide by the Code of Conduct specified in the First Schedule to these Regulations;
- and
- (i) abide by such other conditions as may be imposed by the Board.”

- 4.3 It has been observed that FIR was lodged against Mr. Agarwal by the ex-director of the CD on 10th February 2020 and based on FIR filed, Mr. Agarwal was arrested on 11th February 2020 and sent to judicial custody on 12th February 2020 for a period of 7 days. The bail petition before the Ld. Special Judge, CBI, Dhanbad was rejected on 24th February 2020. An appeal before the Hon’ble High Court at Ranchi on rejection of the bail petition could not be taken up due to the Covid-19 pandemic and subsequent lockdown. Hence, Mr. Agarwal had to be placed in the judicial custody for a considerable period of time. However, since the investigating agency could not file the charge sheet within a statutory period of 60 days from date of lodging of FIR a default bail was granted on 8th May 2020.
- 4.4 The DC has considered the fact that the FIR against Mr. Agarwal is yet to culminate into a charge sheet however, the submission of Mr. Agarwal that the issuance of SCN only on the basis of FIR and subsequent remand orders is not tenable. The Regulation 11 of the IP Regulations gives power to the IBBI to issue SCN based on findings of an inspection, investigation or on material otherwise available on record, if the facts *prima facie* disclose a contravention of the Code, Rules or the Regulations thereof. Regulation 11 of the IP Regulations states as follows:
“11. *Disciplinary proceedings.*
(1) *Based on the findings of an inspection or investigation, or on material otherwise available on record, if the Board is of the prima facie opinion that sufficient cause exists to take actions permissible under section 220, it shall issue a show-cause notice to the insolvency professional.*”
- 4.5 The DC notes that a trap proceeding was conducted by CBI against Mr. Agarwal wherein he was caught accepting an amount of Rs. 3 lakhs from Mr. Amit Sarawgi (complainant to CBI). However, it has been contended by Mr. Agarwal that the said amount was accepted as a part refund of Rs. 10 lakhs illegally withdrawn from the current account of CD held with Andhra Bank by the ex-Director. The DC notes that as informed by Mr. Agarwal, a criminal writ petition has also been filed before Hon’ble High Court of Jharkhand against CBI praying that the Petitioner is not a public servant and, for quashing the FIR and any other proceeding emanating therefrom and the matter is not yet fully decided.
- 4.6 The DC has also taken in record the voluntary undertaking submitted by the Mr. Agarwal stating that he would not take up any fresh assignment under the Code, till he is exonerated from the criminal case.

ORDER

5. In view of the above, the DC, in exercise of the powers conferred under Section 220 (2) of the Code read with sub-regulations (7), (8) and (10) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, issues the following directions:
- (i) Mr. Sanjay Kumar Agarwal shall not seek or accept any assignment in any capacity under the Code, till he is exonerated of the charges.
 - (ii) A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Sanjay Kumar Agarwal 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, New Delhi, for information.
6. Accordingly, the show cause notice is disposed of.

Dated: 01st December 2020
Place: New Delhi

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(Dr. Mukulita Vijayawargiya)
Whole Time Member, IBBI