

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

IN THE MATTER OF APPLICATION OF MR. VIMAL PRAKASH DUBEY FOR GRANT OF CERTIFICATE OF REGISTRATION AS AN INSOLVENCY PROFESSIONAL UNDER REGULATION 7 OF THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY PROFESSIONALS) REGULATIONS, 2016

ORDER

UNDER REGULATION 8(3)(b) OF THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY PROFESSIONALS) REGULATIONS, 2016

1. Mr. Vimal Prakash Dubey, a resident of Flat No. 602, Dayashreeji, Near R.B.I Quarters, Gokuldham, Goregaon (East), Mumbai - 400 063 (hereinafter 'the applicant') had submitted an application under regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (hereinafter 'the Regulations'), through the ICSI Insolvency Professional Agency, seeking certificate of registration as an Insolvency Professional (hereinafter 'IP'). The application was forwarded by the ICSI Insolvency Professionals Agency to the Insolvency and Bankruptcy Board of India (hereafter, 'the Board') on 27th January, 2017 with a recommendation for registration.
2. As per regulation 4(g) of the Regulations, no individual shall be eligible to be registered as an IP if he is not a fit and proper person. Among others, integrity, reputation and character are taken into account to determine if an individual is a fit and proper person. While considering the aforesaid application for registration, it was observed that three criminal proceedings are pending against the applicant under section 58A(10) of the Companies Act, 1956 (hereinafter 'the Act') before the Additional Chief Metropolitan Magistrate (40th Court), Girgaon, Mumbai (hereinafter 'the CMM') for contravention of section 58A(9) of the Act. The Board accordingly formed a *prima facie* opinion that the registration ought not be granted to the applicant, as he is not a fit and proper person to be registered as an IP. It communicated, vide its communication dated 8th February, 2017, its *prima facie* opinion along with the reason for the same and provided an opportunity to explain why his application should be accepted, within 15 days of the receipt of the communication.
3. The applicant has, vide his communications dated 9th February, 2017, 20th February, 2017 and 11th March, 2017, submitted the background to the three criminal proceedings. He has submitted that M/s. Zenith Birla (India) Limited (hereafter 'the Company') had accepted deposits from public under section 58A of the Act during 2010 and 2011. Subsequently, the applicant served the Company as its company secretary from 18.06.2013 to 30.07.2016. The Company failed to repay the deposits in accordance with the terms and conditions of such deposit. Based on three sets of applications by about 1200 depositors, the Company Law Board (hereafter 'the CLB'), in exercise of its powers under section 58A(9) of the Act, after providing an opportunity of hearing, directed the Company, by three separate orders dated 08.11.2013, 14.02.2014 and 18.08.2014, to repay deposits to applicant depositors by a date stipulated in those orders. These orders provided that if the Company did not repay as directed, the depositors shall approach Registrar of Companies who shall initiate prosecution proceedings against the Company and its officers in accordance with the law. The Company,

however, failed to comply with the aforesaid three orders of the CLB. On such failure, the Assistant Registrar of Companies, Maharashtra (hereafter 'the ROC') has filed three complaints (No. 4427/ss/2014, No. 4428/ss/2014, and No. 2141/ss/2015) against the Company, the applicant and others under section 58A(10) of the Act before the CMM for contravention of section 58A(9) of the Act, that is, non-payment of deposits as directed by the three orders dated 08.11.2013, 14.02.2014 and 18.08.2014 of the CLB. He has further submitted: "In fact the non payment of deposits in the ordinary course is of civil in nature. But non payment of deposits as per orders of CLB take the nature of criminal liability".

4. In this background, the applicant has explained as under:
 - (a) He was not employed with the Company when it accepted the public deposits. Even when he was employed, he was a company secretary, simpliciter. He had informed the Board of Directors about repercussions of default on account of non-repayment to depositors. Further, no company secretary has ever been convicted of an offence for non-repayment of deposits as per orders of the CLB.
 - (b) The Company was facing financial crunch and hence could not pay depositors. It is in the process of applying for resolution under section 10 of the Insolvency and Bankruptcy Code, 2016 (hereafter, Code) and he hopes that it will pay off its depositors before trial of the aforesaid three proceedings begins.
 - (c) In another matter before City Session Court, Mumbai, the property of Rs.80 crore of promoters of the Company has been attached for repayment to depositors. In the next hearing, order asking to repay all depositors of the Company (out of attached property) is very much likely to be passed and in that case, the depositors would have no cause for action.
 - (d) Non-repayment of deposits and non-compliance with orders of the CLB (by the Company) does not cast any doubt on his integrity, reputation and character and, therefore, he is a fit and proper person to be registered as an IP.
5. I have considered the application, the recommendation of the ICSI Insolvency Professionals Agency, the explanations submitted by the applicant and material available on record. I proceed to examine the explanations submitted by the applicant.
6. I find that the explanations provided by the applicant explain his limited role as company secretary of the Company and the financial crunch of the Company responsible for default in repayment to depositors. He has also explained that the cause of action for depositors would disappear soon as the Company is in the process of applying for resolution under the Code and the City Session Court is likely to pass an order to repay the depositors from the attached property. I observe that the applicant had appeared on behalf of the Company before the CLB in all three sets of applications and had made some such explanations (for example, financial crunch, extension of time for repayment, etc.). After taking such explanations into account, the CLB passed the aforesaid three orders. He and or the Company may submit these explanations again before the CMM, who would take a view in the matter. The CLB and the ROC are competent authorities who have followed the due process respectively for issuing the three orders and for filing three complaints before the CMM. And the CMM would dispose of the three complaints after following the due process. The Board can neither substitute these competent authorities nor can second guess their decisions.

7. What is relevant for the Board are the admitted facts, namely: (a) the Company has failed to repay deposits in accordance with the terms of conditions of such deposits; (b) the CLB has passed three orders, after hearing the Company and the applicant, directing the Company to repay to depositors by a stipulated time and the Company has failed to repay as per orders of the CLB; (c) the non-repayment in compliance with the three orders of the CLB attracts criminal liability; and (d) the ROC has filed three criminal proceedings against the applicant, among others, for non-compliance with the three orders of the CLB and these proceedings are pending. The Board needs to take into account these facts to determine if the applicant is a fit and proper person for registration as an IP keeping the explanation to regulation 4 in view. The said explanation reads as under:

"Explanation:

For determining whether an individual is fit and proper under these Regulations, the Board may take account of any consideration as it deems fit, including but not limited to the following criteria-

- (i) integrity, reputation and character,*
- (ii) absence of convictions and restraint orders, and*
- (iii) competence, including financial solvency and net worth."*

8. Before I proceed further, it is useful to understand the purpose of the Code and the role of an IP therein. The Code essentially provides a market determined and time bound mechanism for orderly resolution of insolvency, wherever possible, and ease of exit, wherever required. This ensures ease of doing business and the most efficient use of resources. An IP plays an important role in resolution, liquidation and bankruptcy processes of companies, and individuals. Take the example of corporate insolvency resolution process of a company. When a company undergoes this process, an IP is vested with the management of the affairs of the company and he exercises the powers of its board of directors. Such company could be one of the largest companies in India with probably Rs.5 lakh crore of market capitalisation. He becomes the custodian of the property of such a company and manages the affairs of the company as a going concern. Further, he examines each resolution plan to confirm that it does not contravene any of the provisions of the law for the time being in force. These responsibilities require the highest level of integrity, reputation and character. In sync with the responsibilities, the Regulations require the Board to take into account integrity, reputation and character of an individual for determining if an applicant is a fit and proper person.

9. The SEBI regulations have similar provisions for determining fit and proper persons. While dealing with regulation 20 of the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012 in the matter of U. P. Stock Exchange Brokers vs. SEBI (Civil Writ Petition 45893 of 2012), the Hon'ble Allahabad High Court, vide its order dated 23rd May, 2014, observed:

"Financial integrity, reputation, character and honesty are matters which have a serious bearing on the objective, transparent and fair functioning of the securities market."

10. While dealing with regulation 3 of the Securities and Exchange Board of India (Criteria for Fit and Proper Person) Regulations, 2004, the Hon'ble Securities Appellate Tribunal, vide its order dated 6th September, 2006, examined the amplitude of fit and proper person as under:

"Good reputation and character of the applicant is a very material consideration which must necessarily weigh in the mind of the Board (SEBI) in this regard. Reputation is what

others perceive of you. In other words, it is the subjective opinion or impression of others about a person and that, according to the Regulations, has to be good. This impression or opinion is generally formed on the basis of the association he has with others and/or on the basis of his past conduct. A person is known by the company he keeps. In the very nature of things, there cannot be any direct evidence in regard to the reputation of a person whether he be an individual or a body corporate. In the case of a body corporate or a firm, the reputation of its whole time director(s) or managing partner(s) would come into focus. The Board as a regulator has been assigned a statutory duty to protect the integrity of the securities market and also interest of investors in securities apart from promoting the development of and regulating the market by such measures as it may think fit. It is in the discharge of this statutory obligation that the Board has framed the Regulations with a view to keep the market place safe for the investors to invest by keeping the undesirable elements out. The Regulations apply across to all sets of regulations and all intermediaries of the securities market including those who associate themselves with the market and they all have to satisfy the criteria of "fit and proper person" before they could be registered under any of the relevant regulations and this criteria they must continue to satisfy throughout the period of validity of their registration and throughout the period they associate with the market. The purpose of the Regulations is to achieve the aforesaid objects and make the securities market a safe place to invest. One bad element can, not only pollute the market but can play havoc with it which could be detrimental to the interests of the innocent investors. In this background, the Board may, in a given case, be justified in keeping a doubtful character or an undesirable element out from the market rather than running the risk of allowing the market to be polluted."

11. It is thus clear that reputation and character of the applicant is a material consideration. What is material is what others feel about the applicant who has three criminal proceedings pending against him. It is also material what kind of association the applicant has with the Company which has been repeatedly contravening the provisions of the Act and ignoring several directions of the CLB and whom he was representing before the CLB for these contraventions. Does such a person inspire confidence of the stakeholders who can entrust him with property of lakhs of crores for management under corporate insolvency resolution process? Pendency of three criminal proceedings against the applicant adversely impacts his reputation and makes him not a person fit and proper to become an IP.
12. In view of the foregoing, I, in exercise of powers under regulation 8(3)(b) of the Regulations, reject the application of Mr. Vimal Prakash Dubey for registration as an Insolvency Professional.

Date: March 14, 2017
Place: New Delhi

M. S. Sahoo
(Dr. M. S. Sahoo)
CHAIRPERSON

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA