

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/181/2023

27th June 2023

ORDER

In the matter of Mr. Anand Chandra Swain, 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) bearing no. IBBI/IP/INSP/2022/127/103/690 dated 31.01.2023, issued to Mr. Anand Chandra Swain who is a Professional Member of the Institute of Insolvency Professionals of ICSI and an Insolvency Professional registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-002/IP-N00162/2017-18/10431.

1. Background

- 1.1 The National Company Law Tribunal, Amravati Bench, (AA) had admitted an application under section 9 of the Code for Corporate Insolvency Resolution Process (CIRP) of M/s Kei-Rsos Maritime Limited (CD) vide order dated 28.08.2019 and Mr. Anand Chandra Swain was appointed as Interim Resolution Professional (IRP) vide the same order. Thereafter, Mr. V Mahesh was appointed as an RP vide order dated 24.12.2019 passed by the AA.
- 1.2 The Insolvency and Bankruptcy Board of India (the Board), in exercise of its powers under Section 218(1) of the Insolvency and Bankruptcy Code, 2016 (Code) read with Regulation 3(2) and 3(3) of the IBBI (Inspection and Investigation) Regulations, 2017 (Inspection Regulations), appointed the Inspecting Authority (IA) to conduct the inspection of records pertaining to assignment of CD handled by Mr. Anand Chandra Swain.
- 1.3 The draft inspection report (DIR) was shared with Mr. Anand Chandra Swain vide email dated 29.06.2022 by the IA. The submissions of Mr. Swain to the DIR were received by the IA vide email dated 13.07.2022. The IA submitted an inspection report to the Board vide report dated 01.08.2022.
- 1.4 The Board issued an SCN to Mr. Anand Chandra Swain on 31.01.2023 based on findings in the Inspection Report with respect role of Mr. Anand Chandra Swain as an Interim Resolution Professional of the CD. Mr. Swain did not file his reply to the SCN.
- 1.5 The Board referred the SCN, the response of Mr. Swain to the DIR, 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.
- 1.6 An opportunity for the personal hearing to Mr. Swain was granted on 26.05.2023 through

virtual mode. On the scheduled date and time of virtual hearing, DC waited for 15 minutes for Mr. Swain to join the virtual hearing, but Mr. Swain did not join the virtual hearing and he did not pick up the phone call too. Hence the DC decided to grant one more opportunity to Mr. Swain for a personal hearing through virtual mode on 08.06.2023 which was duly informed to Mr. Swain vide email dated 29.05.2023. Mr. Swain, again not taking any cognizance of the notice, refrained from appearing before the DC for the personal hearing through virtual mode on 08.06.2023 and his phone call too remained unresponsive despite several attempts. With no other option left, the DC proceeds to dispose of the SCN based on materials available on record and the initial reply of Mr. Swain to the DIR presuming that Mr. Swain has nothing further to add.

2. Alleged Contraventions, Submissions of IP, and Findings

The contraventions alleged in the SCN and submissions (in response to the DIR) by Mr. Anand Chandra Swain are summarized as under:

Contravention

3. Contravention-I: Circulation of incorrect minutes

- 3.1 The section 25(3) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) provides that the IRP shall take a vote of the members of the Committee of Creditors (CoC) present in the meeting, on any item listed for voting after the discussion on the same. Furthermore, Regulation 25(5)(b) of the CIRP Regulations provides that the IRP shall seek a vote of the members who did not vote at the meeting on the matters listed for voting, by an electronic voting system in accordance with regulation 26 where the voting shall be kept open for at least twenty-four hours from the circulation of the minutes.
- 3.2 The Board has observed from the progress report dated 18.12.2019 submitted to the AA wherein Mr. Swain, submitted that in the 1st CoC meeting held on 01.10. 2019 submitted as under *“After conclusion of discussion and deliberation, the resolution as per agenda circulated were put to vote of the only member of CoC, who in turn expressed that the voting in resolutions need approval of the head office and requested for two days for the same accordingly the meeting was concluded awaiting the voting result on resolutions. Since, the voting result was not intimated to the IRP for the next two days, a minutes was circulated approving all the resolutions on 3rd of the October 2019 as it is mandatory to circulate the same within 48 hours under the law”*.
- 3.3 Thus, it is noted that as no reply was received within 2 days, Mr. Swain recorded all the proposed resolutions as ‘approved’. Furthermore, it is his submission to the Board that later on, CoC dissented from the said resolutions vide email dated 30.10.2019 and, thereafter the IRP circulated the revised minutes.
- 3.4 The conduct of Mr. Swain, treating all resolutions as approved, in the absence of any confirmation by the member of the CoC is against the spirit of the Code. Mr. Swain could

not have stepped into the shoes of financial creditors to decide upon the proposed resolutions only because the creditors failed to vote in the said timelines.

- 3.5 The voting rights of the creditors are to be exercised by them only, and from the facts of the 1st CoC meeting, it is noted that the financial creditor eventually dissented from the proposed resolutions, however on the contrary the Mr. Swain had treated the resolution as approved.
- 3.6 In view of the above, the Board was of the *prima facie* view that Mr. Swain has inter-alia violated Section 208(2)(a) and (e) of the Code, Regulation 25(3) and 25(5)(b) of the CIRP Regulations and Regulation 7(2)(a) and (h) of IP Regulations read with Clauses 1,2, 5,12, 14 and 16 of the Code of Conduct as specified in the First Schedule of IP Regulations (Code of Conduct).

Submission made by Mr. Swain

- 3.7 Mr. Swain did not file his reply to the SCN, however, he had filed his submissions to the DIR wherein Mr. Swain stated that even after the expiry of 48 hours of circulation of the minutes of the 1st CoC meeting to the only member of the CoC, no objection was received from their side until 30 days. Mr. Swain further stated that he was replaced by the CoC without appointing any new Resolution Professional, these facts have been informed to the AA in an application filed against the CoC for cooperation and the AA has passed the necessary order to his effect.

Analysis and Findings

- 3.8 Regulation 25 (5) (b) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that the Resolution Professional shall: “(b) seek a vote of the members who did not vote at the meeting on the matters listed for voting, by electronic voting system in accordance with regulation 26 where the voting shall be kept for at least twenty-four hours from the circulation of the minutes.” Apparently, Mr Swain made no efforts to pursue with the CoC member for closing the vote.
- 3.9 It is an admitted fact that Mr. Swain circulated the minutes of the 1st CoC meeting held on 01.10.2019 mentioning that the agenda put in the voting has been approved. On perusal of the progress report dated 18.12.2019, para 10, reveals that the member of the CoC had requested two days to vote on the agenda fixed in the CoC meeting on confirmation from the head office, but they did not vote within the time sought for the voting. Thereafter the Mr. Swain circulated the minutes mentioning that the resolutions were approved by the CoC. If there was no confirmation from the CoC about the resolutions, Mr. Swain should not have treated the said resolutions as passed. The Code and Regulations framed thereunder do not authorize IRP/RP to treat the resolutions passed if no confirmation on voting is received from members of CoC.
- 3.10 Though regulations 24 (7) of the CIRP regulations mandate that the IRP shall circulate the minutes of the meeting to all participants by electronic means within forty-eight hours of

the said meeting, it does not mean that the IRP shall exercise the power vested with the CoC and declare the agenda approved if no confirmation from CoC is received with respect to resolutions placed in the CoC meeting. In such a scenario, Mr. Swain should have mentioned the correct facts in the minutes circulated instead of recording and circulating the minutes as resolutions passed.

- 3.11 Accordingly, the DC holds that IRP has done contravention on this count and has done an act that is not under his authority.

4. Order

- 4.1 Mr. Swain has erred in his judgement in interpreting non availability of clear verdict from the sole CoC member as approval. The Regulation 26 (4) of the CIRP regulations provides that, *“At the conclusion of a vote held under this regulation, the resolution professional shall announce and make a written record of the summary of the decision taken on a relevant agenda item along with the names of the members of the committee who voted for or against the decision, or abstained from voting”* non confirmation of voting at best can be interpreted as abstention and not taken as approval.
- 4.2 Again Mr. Swain by not responding to the SCN and not appearing for hearing scheduled by the DC twice stands as testimony that he willfully undermined the authority of the DC so constituted under the provisions of the Code.
- 4.3 In view of the foregoing discussion and materials available on the record, the DC finds that Mr. Anand Chandra Swain has not done his duty diligently while conducting the CIRP process of the CD and transgressed his authority in treating the resolutions as approved when the CoC had not communicated its approval on the resolutions. Further non-submission of any reply to the SCN and not appearing before DC in the personal hearing, not once but twice and not responding to phone calls, shows non-cooperative attitude of Mr. Swain to his Regulator, which warrants stern action against Mr. Swain.
- 4.4 The DC, in exercise of the powers conferred under section 220 (2) of the Code read with Regulation 13 of the Inspection Regulations hereby suspends the registration of Mr. Anand Chandra Swain for a period of one year.
- 4.5 The DC also takes note of non-cooperation on part of the sole CoC member i.e. Indian Bank SAMB Branch, Chennai South. In case, the CoC member has taken timely steps, unfortunate incident of misinterpretation of mandate may not have arisen. Time bound resolution is closely knit with the value maximization maxim of the Code. Taking nearly a month in communicating the decision is against the objectives of the Code. This order may be brought to the notice of higher authorities of the Bank for taking suitable action against erring official as they may deem fit.
- 4.6 This Order shall come into force after 30 days from the date of this order.
- 4.7 A copy of this order shall be sent to the CoC of all the Corporate Debtors in which Mr.

Anand Chandra Swain is providing his services, if any.

- 4.8 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Anand Chandra Swain is enrolled as a member.
- 4.9 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.
- 4.10 Accordingly, the show cause notice is disposed of.

Date: 27th June 2023
Place: New Delhi

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