

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/166/2023

12th May 2023

ORDER

In the matter of Mr. S. Shivshanker, 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. COMP-11012/236/2022-IBBI/242/704 dated 13.02.2023, issued to Mr. S Shivshanker, House No. A 102, Swaraj Illam, Shreya Block, Ponni Delta, North Kallanai Road, T.V. Koil Post, Tiruchirappalli- Near Srengam Shirdi Sai Baba Temple, Tiruchirappalli, Tamil Nadu, 620005 (hereinafter referred as “IP”) 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-P-02141/2020-2021/13294.

1. Background

- 1.1 The National Company Law Tribunal, Chennai, (AA) had admitted the application under Section 9 of the Code for corporate insolvency resolution process (CIRP) of M/s Udeshtech Equipments and Engineering Private Limited (CD) vide Order dated 4.06.2021 and Mr. S Shivshanker was appointed as IRP *vide* the same order.
- 1.2 The IBBI, in exercise of its powers under section 218 of the Code read with regulations 7(1) and 7(2) of the IBBI (Inspection and Investigation) Regulations, 2017, appointed an Investigating Authority (IA) to conduct investigation in the matter of the CD. The IA served a notice of investigation to the IP 19.10.2022. Pursuant to the said notice, the IP replied *vide* emails dated 26.10.2022. The IA submitted the Investigation Report to the IBBI on 4.11.2022.
- 1.3 The IBBI issued the SCN on 13.02.2023 based on findings in the Investigation Report in respect of his role as IRP. The IP submitted his reply to the SCN on 20.02.2023.
- 1.4 The IBBI referred the SCN, response of the IP to the SCN 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. The IP availed the opportunity of personal hearing through virtual mode before the DC on 25.04.2023 with his advocate Mr. A. G. Sathyanarayana . A request was made for additional submissions, which was granted. The additional submissions were received on 10.05.2023.

2. Alleged Contraventions, Submissions of IP and Findings

The contraventions alleged in the SCN and submissions by Mr. S. Shivshanker are summarized as under:

3. (i) Contravention I

Non-conduct of the CIRP proceedings

(ii) Contravention II

Non-submission of CIRP forms with the Board

- 3.1 It is noted that CIRP of the CD was initiated by the NCLT, Chennai Bench vide its order dated 04.06.2021 and the IP was appointed as IRP, which was communicated to him by the Registry vide e-mail dated 14.06.2021. However, no further steps had been taken by him for conducting the CIRP of the CD or to manage the affairs of the CD as a going concern.
- 3.2 It is noted that intimation of the initiation of the CIRP by publishing public announcement in FORM-A was also not made by him in accordance with regulation 6 of the IBBI (Resolution Process for Corporate Persons), Regulations, 2016.
- 3.3 It is further noted that vide e-mail dated 15.06.2021 applicant Operational Creditor (OC) had informed the IP regarding the filing of a withdrawal application, however, the same cannot be taken as grounds to await the outcome of the application for over a year and to not conduct the CIRP proceedings, especially when the same was not filed in accordance with regulation 30A(1)(a) of CIRP Regulations that requires the withdrawal application to be filed by the applicant through the IRP and that no stay on the admission order was also passed.
- 3.4 It is further noted that AA vide its order dated 04.07.2022 directed the OC to file fresh application through IRP. Thus, he failed to conduct the CIRP of CD on the pretext of awaiting the conclusion of an incorrectly filed withdrawal application before the AA thereby compromising the interests of the stakeholders of the CD.
- 3.5 It is further noted that the AA vide its order dated 19.09.2022 has also observed as follows:

"9. Before parting, it is required to be noted that the registry of this Tribunal has sent a copy of order dated 04.06.2021 regarding commencement of CIRP vide email to the IRP on 14.06.2021 the Applicant/ RP in the said matter has not caused public announcement in FORM- A in accordance to the statutory provisions and the attendant regulations i.e. within a period of 3 days from the date of initiation of CIRP. In fact no further steps were undertaken by the IRP and A search of the IBBI website (www.ibbi.gov.in) reveals that the FORM A pertaining to the initiation of CIRP of the Corporate Debtor was never uploaded on the site and no status report was ever filed before this Tribunal by the IRP. Hence, we are of the view that there is a dereliction of duty on the part of the IRP."

- 3.6 Accordingly, the Board held the *prima facie* opinion that that, the IP has inter alia violated Sections 17, 18, 20, 208(2)(a) and (e) of the Code, Regulations 40A of the CIRP Regulations and Regulation 7(2)(h) of IP Regulations read with Clause 1, 2, 13 and 14 of the Code of Conduct.
- 3.7 As second contravention, it is noted that as per regulation 40B of CIRP Regulations, IRP/RP shall file the Forms, along with the enclosures thereto, on an electronic platform of the Board as per the stipulated timelines. However, it is observed that no Forms along with the enclosures thereto have been submitted by the said IP to the Board on an electronic platform of the Board.
- 3.8 Accordingly, the Board was of the *prima facie* view that, he has *inter alia* violated, Section 208(2)(e) of the Code, Regulations 39A(4) and 40B of the CIRP Regulations and Regulation 7(2)(h) of IP Regulations read with Clause 19 of the Code of Conduct.

Submission by IP

- 3.9 The IP submitted that the CIRP commenced on 04.06.2021 when Insolvency Resolution Professional was appointed on the application filed by the Operational Creditor m/s Ostberg India Pvt. Ltd., against the Corporate Debtor m/s Udeshtech Equipments and Infrastructure Ltd., for a claim amount of Rs.7,72,464/-. The Applicant-OC was directed to pay a sum of Rs.2,00,000/- to the IRP for meeting out necessary expenses.
- 3.10 He further submitted that on 12.06.2021, The Applicant-OC had attempted to serve the Order dated 04.06.2021 to him but to the wrong e-mail id shivshanker92@gmail.com, instead to the correct e-mail id shivshanker93@gmail.com, which eventually bounced as not delivered.
- 3.11 He submitted that on 15.06.2021, OC through their Counsel on Record S.Rama Narayanan (Kannan) Advocate and Notary of M/s. Sampathkumaar Associates had again forwarded the said Order to the correct mail-id informing about his appointment as IRP and with a specific request not to proceed since the Applicant-OC has lost huge sums and is under financial crisis is filing an application u/s 12A for withdrawal before the Hon'ble NCLT, Chennai.
- 3.12 He submitted that order of the Hon'ble NCLT- Chennai dated 04.06.2021 was communicated on 15.06.2021 through mail and by registered post on 17.06.2021.
- 3.13 On 1.8.2022, Hon'ble NCLT I.A. No. 460 of 2022, for withdrawal of the main application, observed that IRP alone should file the Withdrawal Application.
- 3.14 He further submitted that I.A. No. 807 of 2022 was filed by him through his counsel Mr. A. G. Sathyanaryana, Advocate which was allowed on 19.09.2022 by Hon'ble NCLT-Chennai with a direction to IBBI for further inquiry and necessary action and fix the lapses if any. Accordingly Investigating Authority was appointed by IBBI. The notice of investigation by the Investigating Authority was issued on 19.10.2022 under Regulation 8(1) of the Inspection and Investigation Regulations, which was replied on 26.10.2022.
- 3.15 The IP submitted that since the original Applicant (Operational Creditor) had already requested

at the first instance not to proceed further with the CIRP under the pretext it has preferred an I.A.No.460 of 2022 for withdrawal, he bonafidely believed that this application would be allowed. Since the said Applicant (Operational Creditor) had served the copy of the application for withdrawal dated 14.06.2021 and the proof of fee payment of Rs.1000 through Bharat Khosh on 15.06.2021, he was precluded from effecting the paper publication under Form A.

- 3.16 He submitted that there was no malafide intent on his part from proceeding with the paper publication and that there was no intentional lapse on his part for not effecting the paper publication in Form A, since the process of Withdrawal had commenced prior to the three day's time frame as contemplated under the regulations of IBBI.

Findings

- 3.17 In furtherance of his cause, extensive reliance on jurisprudence has been placed. However, before delving with those, it is pertinent to highlight the framework as envisaged under the Code and regulations made thereunder. Section 12A of the Code reads as *“The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified.”* However, CIRP Regulations further clarified the procedure as detailed below:

“30A. Withdrawal of application

(1) An application for withdrawal under section 12A may be made to the Adjudicating Authority

(a) before the constitution of the committee, by the applicant through the interim resolution professional;

(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:

Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

(2) The application under sub-regulation (1) shall be made in Form FA of the Schedule-I accompanied by a bank guarantee-

(a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application under clause (a) of subregulation (1); or

(b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of regulation 31, till the date of filing of the application under clause (b) of sub-regulation (1).

(3) Where an application for withdrawal is under clause (a) of sub-regulation (1), the interim resolution professional shall submit the application to the Adjudicating Authority on behalf of the applicant, within three days of its receipt.

(4) Where an application for withdrawal is under clause (b) of sub-regulation (1), the committee shall consider the application, within seven days of its receipt.

(5) Where the application referred to in sub-regulation (4) is approved by the committee with ninety percent voting share, the resolution professional shall submit such application along with the approval of the committee, to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(6) The Adjudicating Authority may, by order, approve the application submitted under subregulation (3) or (5).

(7) Where the application is approved under sub-regulation (6), the applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, as determined by the interim resolution professional or resolution professional, as the case may be, within three days of such approval, in the bank account of the corporate debtor, failing which the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code.

FORM FA

APPLICATION FOR WITHDRAWAL OF CORPORATE INSOLVENCY RESOLUTION PROCESS

[Under Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016]

[Date]

To
The Adjudicating Authority

[Through the Interim Resolution Professional / Resolution Professional]
[name of corporate debtor]

Subject: Withdrawal of Application admitted for corporate insolvency resolution process of [name of corporate debtor]

1. [Name of applicant], had filed an application bearing [particulars of application, i.e, diary number/ case number] on [Date of filing] before the Adjudicating Authority under [Section 7 / Section 9/ Section 10] of the Insolvency and Bankruptcy Code, 2016. The said application was admitted by the Adjudicating Authority on [date] bearing [case number].

2. I hereby withdraw the application bearing [particulars of application, i.e, diary number/ case number] filed by me before the Adjudicating Authority under [Section 7 / Section 9/Section 10] of the Insolvency and Bankruptcy Code, 2016.

3. I attach the required bank guarantee as per sub-regulation (2) of regulation 30A.

(Signature of the applicant)

Date:

Place:

[Note: In the case of company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary/designated partner and in the case of other entities, an officer authorised for the purpose by the entity]

3.18 Briefly, as per design principles, the application of withdrawal can be filed prior to constitution of CoC, however, IRP has to file application with AA in a prescribed form along with the Bank Guarantee. Therefore, there was apparent error on part of the applicant that instead of following the established procedure through IRP, he directly went to AA for adjudication on his withdrawal application. Mr. S Shivshanker as IRP had several options to correct this anomaly. Firstly, he could have initiated the CIRP as he is required to do after the order of admission and secondly, he was in apt position to approach to AA for seeking clarity on the wrongful deed of the applicant to submit the application directly with AA. He chooses neither of the option and left the case to get finality by itself. This being the first case being dealt by Mr. S Shivshanker holds no ground to justify his passive approach.

3.19 The DC notes that it was the duty of the IP to conduct CIRP proceedings once the AA has passed admission order and he was appointed as IRP. However he pleaded his case on grounds of factual

position and jurisprudence on the subject. He argued that his passive approach was outcome of the applicant OC's request about filing of withdrawal application by them with specific request not to proceed with further process. In has further been mentioned in the said email dated 15.06.2021, he was intimated that the OC was under financial crisis and they were not able to pay even fee of IRP as fixed by the AA. Therefore in want of any financial commitment to initiate the process and non-availability of the Bank Guarantee, he was in no position to pursue the application under Form FA. Ultimately the CIRP was withdrawn on the revised application filed by IRP. The DC is of the view that these circumstances are unique to the case and inclined to take a lenient view in this case.

- 3.20 Further, the DC takes note of the order of NCLT Delhi Bench-II in the matter of *M/S Propertree Real Estate Solution Pvt. vs. M/s. Unibera Developers Pvt. Ltd.*, NCLT, Delhi Bench dated 1.12.2021, in IB- 868(ND) 2018, dismissing the application for withdrawal, the NCLT held as follows:

"We are aware that the Section 12A of the IBC makes it mandatory on the part of the Applicant to file the withdrawal application before this Adjudicating Authority with the approval of CoC. Also, the Regulation 30A (a) makes it mandatory on the part of the Applicant to move the withdrawal application through IRP, if it is a case of withdrawal before the Constitution of the Committee of Creditors. If it is a case of withdrawal after constitution of CoC, as per provision of Regulation 30 A(b), the application for withdrawal has to be filed through the Interim Resolution Professional with approval of 90% of voting share of the Committee of Creditors. Further, the application has to be moved in form FA. In the present case, the Applicant has not followed the law. He has neither obtained the consent from the Committee of Creditors, nor they have followed the procedure under Regulation 30A. When this Bench questioned of the IRP as to why he has constituted the CoC despite the fact that the parties have settled the issue, he explained that he is bound under law to constitute the Committee within 7 days from the date of receipt of claims. However, the matter relating to charge of exorbitant fee for a short period and constitution of CoC in hurried manner needs to be enquired. Hence, we refer the matter to IBBI, which has a proper jurisdiction, to enquire into the matter."

- 3.21 Furthermore, it is observed that in the case of *Abhishek Singh v Huhtamaki PPL Ltd. & Anr.* SLP (Civil) No. 6452 of 2021, the Supreme Court, in paragraph 40 has held as below:

"Both the parties have relied upon paragraph 82 of the judgment in the case of Swiss Ribbons (supra). According to the appellant, the NCLT ought to have exercised its inherent powers under Rule 11 of the NCLT Rules whereas for the intervenors it is submitted that this Court had observed that power under Rule 11 would be exercised after hearing all concerned parties. It may be noted that at the time when the application for withdrawal of the proceedings was filed the CoC was not constituted as such there could not have been any other concerned parties except the OC, CD and IRP. It was only because of the delay caused by the NCLT in disposing of the applications under section 12A of IBC and Regulation 30A of IBBI Regulations that large number of creditors filed their claims. The inherent powers are to be invoked in order to meet the ends of justice which, in our opinion, the NCLT failed to invoke."

- 3.22 The DC also takes note of the submissions of Mr. Shivshanker that he did not undertake any activity under the CIRP of CD due to ongoing settlement between the erstwhile directors of CD and OC informed by OC on 15.06.2021. The CD was admitted on 04.06.2021 and the order was sent through email to Mr. Shivshanker on 14.06.2021. The OC had filed application for withdrawal of CIRP on 14.07.2021 which was registered by AA on 23.04.2022 and dismissed by AA on 22.08.2022 observing that there is no provision for withdrawal of company petition by AA. Thereafter, Mr. Shivshanker filed application under section 12A of the Code before AA on 28.07.2022 which was disposed of on 19.09.2022.
- 3.23 The DC takes notes of the order of NCLT, New Delhi Court-II dated 01.12.2021 in CIRP of Unibera Developers Pvt Ltd. where the IRP was questioned as to why he has constituted the CoC despite the fact that the parties have settled the issue while in the case in hand the AA made remarks on non-activity by Mr. Shivshanker in CIRP of CD.
- 3.24 Laid down procedure is self-explanatory and is required to be followed in letter and spirit. Evolving jurisprudence, largely draws its strength from case specific circumstances. Further, jurisprudence not in any way challenged the validity of the regulation 30A of the CIRP Regulations. Hence just relying on jurisprudence, without seeking any direction from the AA is clear mistake on part of the IRP. As explained above due to peculiar circumstances related to the case, a lenient view is being taken with caution to Mr. Shivshanker for being careful in the future.

4. Order

- 4.1 In view of the forgoing discussion, the DC finds the conduct of Mr. S Shivshanker in violation of sections 17, 18, 20, 208(2)(a) and (e) of the Code, Regulations 39(A)(4), 40A and 40B of the CIRP Regulations and Regulation 7(2)(h) of IP Regulations read with Clause 1, 2, 13 and 14 of the Code of Conduct. However considering the *bona fide* belief caused by the email of the applicant OC, DC takes a lenient view in the matter.
- 4.2 The DC notes that contraventions on the part of Mr. S. Shivshanker are procedural in nature and largely resulted due to ignorance of provisions of the Code and regulations made thereunder. Keeping observations of AA in his case in mind, DC warns Mr. S. Shivshanker to be more careful in handling pending assignments and he is further directed to undergo pre-registration educational course specified under regulation 5(b) of the IP Regulations from the IPA where he is registered. Mr.S. Shivshanker shall accept or undertake any further assignment under the Code only after successful completion of the preregistration education course.
- 4.3 This Order shall come into force immediately in view of para 4.2 of the order.
- 4.4 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professional of ICAI where Mr. S Shivshanker is enrolled as a member.
- 4.5 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal.

4.6 Accordingly, the show cause notice is disposed of.

-sd/-

(Sudhaker Shukla)

Whole Time Member, IBBI

Dated: 12th May, 2023

Place: New Delhi