

IBBI Asseverates its Disciplinary Stance on the Dutiful Profession of an Insolvency Professional

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The Insolvency and Bankruptcy Board of India (IBBI) has time and again reiterated that the role of Insolvency Professional ('IP') is sacrosanct for achieving the legislative intent behind the Insolvency and Bankruptcy Code, 2016 ('I&B Code') itself. It has expressed vide its various circulars and orders that even a slight deviation from the scope of duties endowed upon the Insolvency Professional under the Code will attract strict penalization and disciplinary action from the Board.

The Board recapitulated its intent by pulling up the socks of all the working IPs through its recent order passed against an eminent IP, Mr. Vijay Kumar Garg. The order highlights how an IP's role is of utmost vitality to any Corporate Insolvency Resolution Process ('CIRP') and his dutifulness the breath and soul of the Code. Key take-aways from the order have been discussed below.

Backdrop of the Disciplinary Action against Mr. Vijay Kumar Garg

The Disciplinary Committee ('DC') of the IBBI in the recent order dated 8th June 2020 had significantly penalized the Resolution Professional of the Infamous M/s Gitanjali Gems Limited ('GGL'), Nakshatra World Limited ('NWL') and Nakshatra Brands Limited ('NBL'), Mr Vijay Kumar Garg for contravening several provisions of the Code[iiii].

The IA carried out investigations against Mr. Garg with respect to his role as the Interim Resolution Professional ('IRP')/ Resolution Professional ('RP') for the ongoing CIRP of above mentioned companies managed by renowned diamond entrepreneur, Mr. Mehul Choksi.

The controversy emanated from the appointment of Duff & Phelps, a multinational advisory firm, by Mr. Garg, in the capacity of the Resolution Professional ('RP') of GGL, NWL & NBL, for providing support services/assistance in the impugned CIRP.

The Scope of Appointment of Professionals by the Resolution Professional

The IRP and the RP in the endeavor to protect and preserve the value of the property of the Corporate Debtor and manage the operations of the Corporate Debtor as a going concern derives the power to appoint professionals such as accountants, lawyers & valuers etc. from section 20(1)(a) and section 25 (2)(d) of the I&B Code, 2016. Further the regulations (34 & 35) of the Code and the explanations thereto clearly suggests that the expenses incurred by the RP/IRP shall include the fees paid to the appointed professionals under the provisions stated earlier in the paragraph.

The contention of Mr Garg in support of the appointment of Duff & Phelps was that the intent of the legislature was not to direct the Insolvency Professionals to limit the appointment of only individual professionals and thereby exclude the firms/companies/partnerships/groups. However this argument was discarded by the IBBI.

The IBBI clearly emphasized that rationale behind the intent of the fairly recent legislation was unambiguous. It was stated in the order dated 8th June 2020 that the section 20(1)(a) and section 25

(2)(d) of the I&B Code, 2016 bestows upon the IRP & RP to only appoint qualified and regulated individual/firms/group of professionals, who renders services for which they can be held accountable professionally. The Board further clarified that firms and companies are not excluded from appointment as long as they are duly registered with the regulators of their particular profession.

The aforesaid clarification by the Board comes as a shot in the arm for the companies/entities which are involved in providing support services in all major professional fields but are not duly registered with the respective regulators of the professional services being rendered by them. For example, a firm of Company Secretaries registered with the regulator i.e the Institute of Company Secretaries of India (ICSI) can provide professional services and not any company of regular business having certain Company Secretaries as their employees. Similarly a law firm duly regulated by the Bar Council of India (BCI) may be appointed by the IPs to provide legal support in the litigations related to the CIRP or the liquidation process.

The rationale behind the clarification is to introduce the mechanism of checks and balances in the CIRP or the Liquidation process, akin to the other professional bodies such as the ICSI or the BCI, which adhere to a model set of rules and Code of Conduct and also initiate disciplinary action against any lapse of duty by its respective member professionals.

It was also contended by Mr. Garg that a bar on the appointment of a firm/group/company to support the RPs would cause multiplicity of professionals with absolutely no synergy between the services rendered, which in turn would lead to higher costs of the CIRP and increased financial burden on the Financial Creditors and Corporate Debtors.

The DC completely discredit the above argument by stating that integrating the professional services received by the RP during the course of the CIRP, is the job ONLY of the RP and that the same cannot be outsourced to a third party.

The Board propagating the significance of an Insolvency Professional Entity ('IPE') further suggested that in order to avail the backend support services with regards to the CIRP, there was no law in force barring the RP to be associated as a director/Partner in any of the duly registered IPEs.

The Board further held that the emphasis on a comparison between an IPE, whose only object in law is to provide the backend support to the RP, and a company/LLP like Duff & Phelps in the instant case, was misplaced. It was stated that a company /LLP on one hand, generally pursues its activities as per the objects contained in its charter and can apply for registration for all legal objects. As such, no restrictions are imposed on incorporation of a company/LLP in terms of net worth, holding of shares, majority capital contribution by its members, composition of Board/ Partnership etc. (which exists in case of IPEs). An IPE, on the other hand, as the DC stated, is recognized by the Board in accordance with Regulation 12 (1) of the IP Regulations if its sole objective is to provide support services to IPs, who are its partners or directors, as the case may be. A company or a LLP is a genus, an IPE is a specie whereof.

The Board after carefully perusing the scope of work envisaged in the minutes of the CoC meetings as well as the engagement letters issued by the RP in favour of Duff & Phelps came to a conclusion that D&P was only engaged to provide infrastructure, personnel and back office support services which cannot be classified as "professional services" involving skill or even a "profession" falling within the definition given in the Black's Law Dictionary. Further, Duff & Phelps could not be

regarded as an IPE since it has not been recognized by the Board under Regulation 12 of the IP Regulations. Thus, D&P does not fall within the definition of the term “professional”.

Reasonableness of Fee

The IBBI keeping in view the Circular No. IBBI/IP/013/2018 dated 12th June 2018^[iv], whereby it is mandated that the fees payable should always be reasonable, concluded that the fee as finalized with Duff & Phelps was exorbitant. As per the findings of the IA, it was observed that Duff & Phelps were engaged for providing infrastructure, personnel and back office support for the CIRP for an astonishing amount, 19 times of the Fee payable to the RP.

The Board further disabused from the arguments of the RP whereby the reasonableness of the fee of Duff & Phelps was asserted on the pretext of inherent peculiarities and complexities involved in the task at hand. The few services provided by Duff & Phelps, as put forward by the RP, involved liaising with CBI, EOW etc., claim verifications and conducts of CoC meetings etc. The Board further held that services like liaising are those which should have been undertaken by the RP himself or his employees as a part of his professional services and should not have been delegated to a third party.

The Board on perusal of the information and observations made available by IA held that scope of work of Duff & Phelps i.e (i) initial analysis and strategy, (ii) taking control of business, (iii) monitoring business and cash, (iv) assisting in development of business resolution plan, (v) finalizing the resolution plan, and (vi) approval of resolution plan, did not form the part of the job of a professional. The aforesaid are the jobs of the RP himself, the Resolution applicant, the CoC. Thus paying such exorbitant fees for the delegated services is highly unreasonable and is thereby squandering of the creditors money.

Other Observations

The Disciplinary Committee of the Board also held the following:

- Appointment of a professional is based on the need. Only when professional expertise is not available inside the CD, the IRP may appoint a professional from outside. It is an independent responsibility of the IRP based on his professional assessment. He must make such appointment on merits, not under the influence of a creditor or any other person.
- It is not permissible for an IP to tie-up with a third party and bid for a work jointly, whereby the IP and the third party are collectively appointed on their collective strength. This amounts to converting a noble profession to a business and manipulating the market for insolvency professional services through anti-competitive, tie-in arrangement. An IP, who wishes to compete on his own merit and does not indulge in nefarious tie-in arrangements, would never get any assignment.
- By not appointing a professional and by appointing a person (Duff & Phelps) who is not a professional, Mr. Garg has deprived the CD of professional services.

Sanction by the IBBI

The Board penalized Mr. Vijay Kumar Garg for 25% of fee payable to him as per agreed terms and conditions in CIRPs of GGL, NBL and NWL where he had acted as an IRP/RP. He was further

directed to undergo pre-registration educational course from the IPA of which he is a member and pass the Limited Insolvency Examination again to build his capacity to take up assignments on his own. It was also directed that no amount beyond the reasonable fee, as determined by the Expert Committee, would be paid to Duff & Phelps.

Conclusion

The notable findings and observations of the IBBI, in the opinion of the author, are going to positively impact the pre-defined working sphere of an Insolvency Professional.

The Board while defining the scope of section 20(1)(a) & section 25(2)(d), for appointment of professionals and the reasonableness of the fee thereto, has also propagated the importance of an Insolvency Professional Entity as recognized by the Code. The board, in the authors view has not limited the scope of appointment of working professionals to provide support for the CIRPs but has impliedly pushed the IPs to be members or to avail services of established IPEs under the Code. The Board has further made the intention clear that the IPs in order to seek support services are not allowed to appoint companies/firms that fall outside the scope of being a professional.

The latest amendment in the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 dated 30th June 2020 has further crystallized the stance of the board. As per the amended regulation 12 (1) (a), the sole objective of an IPE is to provide 'Support Services' to all the Insolvency Professionals. The amendment in the afore mentioned regulations have impliedly broadened the role of IPEs, by empowering them to provide support services to any IP and not just the IPs who are partners or directors of such entities.

The Board also makes it intentions clear that the IPs are appointed by the Adjudicating Authority on prior approval of the COC and are thereby paid handsomely for executing the cumbersome process involved for the impending CIRPs or Liquidations. The list of duties and responsibilities of an IP in a CIRP have been detailed in the Code and Regulations made thereunder. Delegation of the expressly mentioned duties, under the garb of complexities involved in the case, to a third party (not being a professional) shall be construed by the board as a major deviation on the part of the IP and thereby shall attract penal implications.

The solitary rationale behind the decision made by the Board will provide an impetus to diligence in the CIRP on the part of the IPs and thus lead to effective realization of the object of the I&B Code, 2016 i.e. to protect the interest of the stakeholders, the creditors and maximization of assets.

Reference

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[ii] [AAA Insolvency Professionals LLP](#) - Insolvency Professional Entity in India.

[iii] The IBBI in the order dated 8th June 2020 against Mr. Garg relied upon the report filed by the Inspecting Authority ('IA'), duly constituted by the Board vide section 218 of the I&B Code read with the IBBI (Inspection and Investigation) Regulations, 2017. He was found to have contravened not only the provisions of the Insolvency and Bankruptcy Code, 2016 (Code) but also the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) the Code of Conduct under its

regulation 7(2), the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (CIRP Regulations) and IBBI Circular No. IBBI/IP/013/2018 dated 12th June 2018

[iv] Under Circular No. IBBI/IP/013/2018 dated 12th June 2018 explicit directions have been given for the IPs to ensure that the fee payable to Registered Valuers and other Professionals, and other expenses incurred by him during the CIRP are reasonable.

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