

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

IN THE MATTER OF APPLICATION OF [REDACTED] 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. [REDACTED] (hereinafter 'the applicant') had submitted an application under regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (hereinafter 'Regulations'), through the [REDACTED], seeking certificate of registration as an Insolvency Professional (hereinafter 'IP'). The application was forwarded by the [REDACTED] to the Insolvency and Bankruptcy Board of India (hereafter, 'Board') on 31st January, 2017 with a recommendation for registration.
2. Under regulation 7(2)(a) of the Regulations, the registration of an IP is subject to a condition that he shall at all times abide by the code of conduct as specified in the First Schedule to the Regulations. Clause 23 of the said code of conduct requires that an IP must not engage in any employment. Accordingly, a person cannot hold registration as an IP and be in employment simultaneously. While considering the aforesaid application for registration, it was observed that the applicant is employed with [REDACTED] as [REDACTED]. The Board, therefore, formed a *prima facie* opinion that the registration ought not be granted to the applicant, as he does not meet the conditions of registration as an IP. It communicated, vide its letter 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. In reply, the applicant has, vide communication dated 9th February, 2017, provided two explanations. First, clause 23 of the code of conduct suggests that an IP must not engage in any employment with the entity where he is appointed (as a resolution professional, liquidator, bankruptcy trustee, etc.). To justify this explanation, he has submitted that the objective of the code of conduct is to maintain independence and to avoid conflict of interest. Second, the requirements of the code of conduct cannot be used to determine eligibility for registration as an IP. Therefore, he should be granted registration.
4. I have considered the application, the recommendation of [REDACTED], the explanations submitted by the applicant, and material available on record. I proceed to examine the two explanations submitted by the applicant.
5. Clause 23 of the code of conduct reads as under:

“23. An insolvency professional must not engage in any employment, except when he has temporarily surrendered his certificate of membership with the insolvency professional agency with which he is registered.”

6. A plain reading of the above clause makes it clear that an IP must not ‘engage in any employment’, repeat ‘any employment’. It envisages that a person must not play two roles - profession and employment - simultaneously. It is like the requirement that a person in employment must not practise as an Advocate and vice versa. The solemn objective behind such a requirement is that a professional must have undivided loyalty and unflinching attention towards his professional obligations. It assumes further significance in case of an IP who renders time critical services under the Insolvency and Bankruptcy Code, 2016. This Code, for example, mandates resolution plan to be submitted within 180 days of the resolution commencement date and if it is not done, the corporate person is pushed into liquidation. It is, therefore, beyond comprehension to have an employed person as an IP. The clause, however, allows an IP to temporarily surrender registration and thereafter engage in employment. This is only an exception and even the exception does not allow a person to engage in employment without surrendering registration.
7. The applicant has submitted that an IP is prohibited from employment with that entity where he is appointed as a resolution professional, liquidator, bankruptcy trustee, etc. as the objective is to maintain independence and to avoid conflict of interest. I find that the prohibition is comprehensive, that is, no employment whatsoever. The objective of the clause is total commitment for the profession. This clause is not intended to address the issues of independence or conflict of interests. There are specific provisions in the relevant Regulations to address such issues. Take the example of regulation 3(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The said regulation reads as under:

“3(1) An insolvency professional shall be eligible to be appointed as a resolution professional for a corporate insolvency resolution process of a corporate debtor if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor.

Explanation– A person shall be considered independent of the corporate debtor, if he:

(a) is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013 (18 of 2013), where the corporate debtor is a company;

(b) is not a related party of the corporate debtor; or

(c) is not an employee or proprietor or a partner:

(i) of a firm of auditors or company secretaries in practice or cost auditors of the corporate debtor; or

(ii) of a legal or a consulting firm, that has or had any transaction with the corporate debtor amounting to ten per cent or more of the gross turnover of such firm,

in the last three financial years.”

8. The regulation 3(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 prohibits an IP from being appointed as a resolution professional of a corporate debtor if he is not independent of the corporate debtor. Read with section 149(6)(e)(i) of the Companies Act, 2013, an IP is not independent if he has been an

employee of the corporate debtor or its holding, subsidiary or associate company in any of the preceding three financial years. He is also not independent if he has been an employee of a firm of auditors or company secretaries in practice or cost auditors of the corporate debtor in the last three financial years. There are similar provisions in respective transaction related Regulations to deal with independence and conflict of interests. Hence the contention of the applicant about the objective of the code of conduct is misplaced. I, therefore, do not agree with the first explanation of the applicant.

9. Regulation 7(2)(a) requires an IP to abide by the code of conduct at all times. This code does not allow him to engage in employment, as explained above. However, the applicant here is engaged in employment. Assuming that a requirement in the code of conduct is not an eligibility requirement, as claimed by the applicant, what purpose would it serve if he is granted registration as an IP if he is not to render services as an IP? Further, how can the Board grant registration to a person in employment? He would be violating the code of conduct the moment he is granted registration as an IP and consequently violate regulation 7 of the Regulations. I, therefore, do not find the second explanation of the applicant tenable.
10. In view of the foregoing, I, in exercise of powers under regulation 8(3)(b) of the Regulations, reject the application of [REDACTED] for registration as an IP.

Date: March 02, 2017
Place: New Delhi

(M. S. SAHOO)
CHAIRPERSON
INSOLVENCY AND BANKRUPTCY BOARD OF INDIA