

# **INSOLVENCY AND BANKRUPTCY BOARD OF INDIA**

## **(Disciplinary Committee)**

No. IBBI/DC/222/2024

20 June 2024

### **ORDER**

**In the matter of Mr. Uday Narayan Mitra, Insolvency Professional 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. IBBI/COMP/2022-23/00990(IBBI/C/2022/00722)/845/122 dated 12.03.2024, issued to Mr. Uday Narayan Mitra, (hereinafter also 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/Board) with Registration No. IBBI/IPA-001/IP-P00793/2017-2018/11360.

#### **1 Background**

- 1.1 The Hon’ble National Company Law Tribunal, Kolkata Bench (AA) vide its Order dated 26.09.2019, admitted the application under Section 9 of the Code for corporate insolvency resolution process (CIRP) of Kohinoor Paper and Newsprint Private Limited (Corporate Debtor / CD). Mr. Uday Narayan Mitra was appointed as Interim Resolution Professional (IRP) vide the above-said Order and later he was confirmed as Resolution Professional. The AA *vide* its Order dated 12.07.2021 ordered for liquidation of the CD and Mr. Uday Narayan Mitra was appointed as liquidator.
- 1.2 The IBBI, in exercise of its powers under Section 218 of the Code, read with Regulation 7(1) and 7(2) of Insolvency and Bankruptcy Board of India (Inspection and Investigation), Regulations, 2017 (Inspection and Investigation Regulations), appointed an Investigating Authority (IA) to conduct investigation in respect of a complaint received by the Board in the liquidation process of the CD.
- 1.3 Based on the findings of the investigation as mentioned in the Investigation Report submitted by the IA, IBBI issued SCN to Mr. Uday Narayan Mitra *vide* letter dated

12.03.2024. The SCN alleged contraventions of several provisions of the Code, the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (CIRP Regulations), the IBBI (Liquidation Process) Regulations, 2016 (Liquidation Process Regulations) and the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations). The reply of the IP on the SCN was received by the Board on 25.03.2024.

- 1.4 The SCN, response of the IP to the SCN and other materials available on record were referred to the Disciplinary Committee (DC) for disposal of the SCN. The IP availed an opportunity of personal hearing before the DC on 06.06.2024.

## **2 Alleged Contraventions, Submissions of IP and Findings**

The contravention alleged in the SCN, submissions by the IP and findings of the DC are summarized as follows:

### **Issue regarding fee charged**

- 2.1 In the SCN reference to Regulation 39D of CIRP Regulations has been made which reads as under:

*“While approving a resolution plan under section 30 or deciding to liquidate the corporate debtor under section 33, the committee may, in consultation with the resolution professional, fix the fee payable to the liquidator, if an order for liquidation is passed under section 33,-----“.*

- 2.2 It was observed that the Committee of Creditors (CoC) in its 12th meeting, while passing a resolution to liquidate the CD had also resolved as under:

*“RESOLVED FURTHER THAT upon passing of an order for liquidation of the Corporate Debtor under section 33 of the Insolvency and Bankruptcy Code, 2016, the committee of creditors do hereby decide and pray to the Adjudicating Authority for appointment of Mrs. Mamta Binani, Registered Insolvency Professional having IBBI Registration No. IBBI/IPA-002/IP-N00086/2017-28/10227 as the Liquidator of the Corporate Debtor in place of the Resolution Professional at a following fee excluding out of pocket expenses at actuals:*

- 1. A sum of Rs.2,25,000.00 per month plus out of pocket expenses and taxes at actuals, for the period used for revival of the Corporate Debtor/Sale as going concern.*

*If the aforesaid revival/sale fails, for the balance period of the liquidation, the liquidator shall be paid monthly fees of Rs.2,25,000.00 per month plus out of pocket expenses and taxes at actuals, which will be duly adjustable against the following ad valorem fee as per table below:*

<b>Particulars</b>	<b>Fee Percentage</b>
<i>On sale of assets within 6 months after the date of failure of revival</i>	<i>2% of the realized amount</i>
<i>On sale of assets after 6 months after the date of failure of revival but before 9 months</i>	<i>1.5% of the realized Amount</i>
<i>On sale of assets after 9 months after the date of failure of revival</i>	<i>1% of the realized amount</i>

- 2.3 The SCN notes that the CoC had resolved to appoint Mrs. Mamta Binani as liquidator and had proposed remuneration for her as stated above. However, the AA vide order dated 12.07.2021 while ordering liquidation of the CD had appointed Mr. Uday Narayan Mitra as the liquidator instead of Mrs. Mamta Binani. The relevant extract of AA's observations in this regard is as follows;

*"Though the CoC has recommended the appointment of Mrs. Mamta Binani as the Liquidator, this Adjudicating Authority has no discretion to appoint anyone else except the Resolution Professional as the Liquidator, for which he has given his consent for the same. We have considered the submission made by the Ld. Counsel appearing for the Applicant and perused the records. This is a case where no Resolution Plan was approved by the CoC and the 330 days period of CIRP has expired on 21/08.2020. Therefore, there is no alternative but to order the liquidation of the Corporate Debtor. This Bench, therefore, hereby orders as follows: - (i) IA No. 1174/KB/2020 filed by Mr Uday Narayan Mitra, RP of Kohinoor Paper and Newsprint Private Limited, the Corporate Debtor, is allowed and the Corporate Debtor is ordered to be liquidated in terms of section 33(2) of the Code read with sub-section (1) thereof In the present case Mr. Uday Narayan Mitra, Resolution Professional has given his consent to act as the Liquidator of the Corporate Debtor in terms of section 34(1) of the Insolvency and Bankruptcy Code, 2016, this Adjudicating Authority hereby appoints Mr. Uday Narayan Mitra [Reg. No. IBBI/IPA-001/IP-P00793 /2017-2018/11360], E-mail ID: udaynarayanmitra@yahoo.co.uk, telephone no. 94335 32994, as liquidator as provided under section 34(4)(c) of the Code, subject, however, to his*

*possessing a valid Authorisation for Assignment (AFA) issued by the Insolvency Professional Agency (IPA) of which he is a professional member, in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2019.”*

- 2.4 The SCN therefore notes that the fee proposed by CoC in 12<sup>th</sup> CoC was a person specific fee and was payable only in the event of Mrs. Mamta Binani being appointed as liquidator. In the absence of CoC fixing the fee of Mr. Uday Narayan Mitra as liquidator, his fee as liquidator after being appointed so by the AA would be governed Regulation 4(2) of Liquidation Process Regulations which provides that:

*" The fee payable to the liquidator shall be in accordance with the decision taken by the committee of creditors under regulation 39D of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016”.*

- 2.5 It was however observed upon perusal of the 8<sup>th</sup> progress report filed by the IP before the AA that he himself admitted of having received liquidator's fee of Rs. 26,20,160/- for period up to 30.06.2022 citing the decision of CoC in its 12<sup>th</sup> meeting. The fact that Mr. Uday Narayan Mitra drew monthly fee even when the monthly fees for him during the liquidation process was not fixed for him was further confirmed in the deliberations in 12<sup>th</sup> SCC meeting.
- 2.6 The SCN states that when the fees was proposed for Ms. Mamata Binani, but she was not appointed as the Liquidator and also AA in its order dated 12.07.2021 did not specify the fees to be charged by Mr. Uday Narayan Mitra, his fees should have been in terms of Regulation 4 of the Liquidation Process Regulations.
- 2.7 The SCN notes that in the eighth meeting of the Stakeholders' Consultation Committee (SCC) held on 22.09.2022, the SCC took note of the above fees charged and collected by Mr. Uday Narayan Mitra upto 30.06.2022 and asked him not to withdraw any further amount on account of Liquidator's fee till finalisation of liquidation process. Subsequently, the SCC in its 12<sup>th</sup> meeting held on 26.07.2023

noted that Mr. Uday Narayan Mitra had demanded an amount of Rs 31,59,450 and in that regard, the SCC noted that no monthly fee was fixed for Mr. Uday Narayan Mitra during the liquidation process of the CD and he has already charged and received the fee of Rs. 28,20,774/- without sale of any assets of the CD. The fee of Mr. Uday Narayan Mitra was ratified by the SCC as special case with clear direction to not withdraw any further amount.

- 2.8 Thus, the SCN observes that the fee of Mr. Uday Narayan Mitra was not as per Regulations and was not charged as reasonable reflection of the work necessarily and properly undertaken by him in the liquidation process of the CD. His conduct of drawing fees in terms of the 12th CoC meeting as approved by CoC, which was actually the fees for Ms. Mamta Binani, and not in terms of Regulation 4 of Liquidation Process Regulations and is against the provisions of the Code and Regulations made thereunder.

#### **Submissions by the IP**

- 2.9 Mr. Uday Narayan Mitra has submitted that he was and still, under the bonafide belief/view that the scale of fees recommended for Liquidator is equally applicable to him as Liquidator.
- 2.10 The IP has referred to Regulation 4(1) of the Liquidation Process Regulations 2016 which stipulates that fees payable to the Liquidator shall be in accordance with the decision taken by CoC under Regulation 39D of the CIRP Regulations which in turn stipulates that while deciding to liquidate the corporate debtor under section 33, CoC may, in consultation with the resolution professional, fix the fee payable to the liquidator, if an order for liquidation is passed under section 33. At the relevant time the IP was the Resolution Professional and chaired the meeting where fees for the Liquidator was fixed. Subsequently, he was appointed liquidator by Hon'ble NCLT.
- 2.11 The IP has further submitted that he has received a total fee of Rs.26,20,160/- from 12.07.2021 to 30.06.2022. From 1.7.2022 to 28.6.2023 he has not received any fees at all. Although he had claimed his fees for that period but nothing has been sanctioned yet and therefore there is no question of him accepting any monetary consideration

without being sanctioned. The IP has submitted that he has not caused any loss, nor has he gained anything unlawfully.

- 2.12 The IP has further submitted that he had submitted Receipt and Payment Account upto 30.06.2022, and the same was deliberated upon by the SCC members. He had informed the SCC that he has drawn his remuneration of Rs. 26,20,160/- upto 30.06.2022 as agreed in the 12th CoC meeting and thereafter no payment was drawn. The SCC members agreed with the same and asked him not to draw any further amount on account of Liquidator's Fees till finalisation of the Liquidation Process and to draw the fees of IP in future from the realisation of sale of assets of the CD as described in the fee table to be payable to Liquidator in the 12<sup>th</sup> CoC meeting. In reply, the IP had informed to SCC that he has already stopped raising bills and no amount was drawn by him after June 2022 towards liquidator's fee and he was totally in agreement with views expressed by the SCC members. As such, the liquidator's remuneration of Rs 26,20,160/- which has been paid upto 30.06.2022 will be adjusted from the final ad valorem fee payable to Liquidator.
- 2.13 The IP has clarified that he could not have the opportunity to sell the assets during his tenure because of the stay arising out of the orders of Hon'ble NCLT. The same was also mentioned in agenda item no 8 of 12th SCC meeting held on 26.07.2023. As such regulation 4 (2) of Liquidation Process Regulations is not applicable to him for taking a decision about his payment for the work done.

### **Findings of the DC**

- 2.14 The DC notes that under regulation 39D of the CIRP Regulations, while deciding to liquidate the corporate debtor, the CoC in consultation with the Resolution Professional, has the liberty to fix the fee payable to the liquidator in case the liquidation order is passed. Further, Regulation 4(2) of the Liquidation Process Regulations provides that in all other cases where the fee of liquidator is not fixed by the COC, the liquidator will be entitled to percentage of amount realised and distributed in terms of clause (b) of Regulation 4(2) of Liquidation Process Regulations.
- 2.15 It is important to refer regulation 39D of the CIRP Regulations which provides as follows:

*“While approving a resolution plan under section 30 or deciding to liquidate the corporate debtor under section 33, the committee may, in consultation with the resolution professional, fix the fee payable to the liquidator, if an order for liquidation is passed under section 33,-----.”*

2.16 The DC notes that the above-mentioned regulation empowers the CoC to fix the fee for liquidator in case an order of liquidation is passed. In the instant matter, the DC observes that the CoC in its 12<sup>th</sup> meeting had resolved to appoint another IP, Ms. Mamta Binani as liquidator of the CD and had also fixed the fee for carrying out functions as liquidator. However, the AA while passing Order of liquidation for the CD had appointed Mr. Uday Narayan Mitra as liquidator of the CD. Although the fee has been fixed in reference to particular name, but given the nature of work, the duties of Mr Mitra, in any way can't be different which other identified liquidator may have performed. The fee is ought to reflect to role and function of the Liquidator owing to the complexity of the affairs of CD. Any IP appointed as liquidator has to perform the duties enshrined under the Code and regulations framed thereunder.

2.17 Though it is evident that Mr Mitra drew his fee on presumptive grounds, however circumstances do not point towards any malafide intensions. The DC further notes that after changes made in the regulations *vide* amendment on 16.09.2022, Mr. Mitra made full disclosure about his fee to the SCC. It has been recorded in the eighth meeting of the SCC held on 28.09.2022 that –

*“The Liquidator submitted Receipt and Payment Account upto 30.06.2022, the same was deliberated upon by the SCC members. The Liquidator informed the SCC that he has drawn his remuneration of Rs. 26,20,160/- upto 30.06.2022 as agreed in the 12<sup>th</sup> CoC meeting and thereafter no payment was drawn. The SCC members agreed with the same and asked liquidator not to draw any further amount on account of Liquidator's Fees till finalisation of the Liquidation Process and to draw his fees in future from the realisation of sale of assets of the CD as described in the fee table to be payable to Liquidator in the 12<sup>th</sup> CoC meeting. In reply Liquidator informed that he has already stopped raising bills and no amount was drawn by him after June 2022 and he is totally in agreement with views expressed by the SCC members.”*

- 2.18 The DC also notes the defence of the IP that there was a stay on the liquidation proceeding by the AA and therefore no sale of asset could have been done. This contention is only partially true because he had sufficient time at hand for carrying out the auctions in between. It was also brought to the notice of DC that there were several other litigations which impeded the liquidation process.

### **3. ORDER**

- 3.1. In light of the above and after perusal of the material available on record, the DC observes that the CoC in its 12<sup>th</sup> meeting had resolved to appoint one Ms. Mamta Binani as liquidator for the CD and accordingly fee for her as liquidator was approved. However, the AA had rejected this proposal and appointed Mr. Mitra as liquidator. In such circumstances, the IP did not had the opportunity to once again seek approval of the CoC, as the CoC becomes *functus officio* once liquidation order of CD is passed. Further, when the amendment was brought into the Liquidation Process Regulations on 16.09.2022, thereby empowering the SCC to fix the fee of the liquidator, the IP disclosed his fee to the SCC in its meeting on 28.09.2022. The SCC had already taken cognizance of the same and had made its decision accordingly. There seems to be no reason to interfere with the decision of the SCC on the issue at this belated stage.
- 3.2. In view of the foregoing, and also noting the fact that Mr. Mitra has attained the maximum age prescribed for being eligible for continuation of the AFA, thereby making him ineligible to get any assignment as IRP/ RP/ Liquidator a lenient view is being taken.
- 3.3. The DC in exercise of the powers conferred under section 220 of the Code read with regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017 and Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 hereby brings on record that Mr. Uday Narayan Mitra (Registration No. IBBI/IPA-001/IP-P00793/2017-2018/11360) was needed to be extremely careful and diligent in performance of his duties under the Code. It is noted that the SCC represented by Union Bank of India, in an application filed with AA, observed that his performance continued to be unsatisfactory and resulted in unavoidable litigation. Apart from question marks being posed on his performance, he had played no role in realization or distribution of asset and therefore as per SCC decision he is not entitled to get any fee for the period



beyond 30.6.2022 up to his relinquishment of his duties as Liquidator and thus his pending claims if any, stands forfeited.

- 3.4. In view of the Order made in para 3.3 above, this Order shall come into force immediately.
- 3.5. A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Uday Narayan Mitra is enrolled as a member.
- 3.6. A copy of this order shall be sent to the CoC/SCC of all the Corporate Debtors in which Mr. Uday Narayan Mitra is providing his services, if any, and the respective CoC/SCC shall decide on continuation of his services in the respective CD.
- 3.7. 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.
- 3.8. Accordingly, the show cause notice is disposed of.

Sd/-

(Sudhaker Shukla)

Whole Time Member, IBBI

Dated: 20 June 2024

Place: New Delhi