

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 ICSI Insolvency Professionals Agency, seeking a certificate of registration as an Insolvency Professional (hereinafter 'IP'). The application was forwarded by the ICSI Insolvency Professionals Agency to the Insolvency and Bankruptcy Board of India (hereafter, 'Board') on 3rd April, 2017 with a recommendation for registration.
2. According to regulation 4(g) of the Regulations, no individual is eligible to be registered as an IP if he is not a fit and proper person. Among others, integrity, reputation and character are taken into account to determine if an individual is a fit and proper person. While considering the aforesaid application for registration as an IP, it was observed that a criminal proceeding had been initiated by CBI against the applicant. The Board asked for further information while processing the application. It formed a *prima facie* opinion that the registration ought not to be granted to the applicant, as he was not found to be a fit and proper person to be registered as an IP. The Board communicated, vide its letter dated 27th July, 2017, its *prima facie* opinion along with the reasons for the same and provided an opportunity to the applicant to show cause as to why his application should not be rejected.
3. In response, the applicant, through letter dated 1st August, 2017 of his legal counsel, M/s. Pamasis Law Chambers, made two broad submissions. First, regulation 4(d) makes a person ineligible for registration if he has been convicted by any competent court for an offence punishable for a term exceeding six months or for an offence involving moral turpitude. Being an accused in a criminal case would not ipso facto lead to a disqualification for registration as an IP. Second, he has already filed a discharge application. He requested for an opportunity of hearing. He was heard on 4th September, 2017 when he reiterated what is stated in his letter dated 1st August, 2017.
4. I have considered the application, the recommendation of the ICSI Insolvency Professionals Agency, the submission made by the applicant and material available on record. Before I proceed to examine the two submissions made by the applicant, it is useful to look at the charge sheet carefully and the role an IP is expected to play.
5. I find from the charge sheet filed by the CBI before the Court of Special Judge, CBI, Nagpur that in pursuance of a criminal conspiracy, the accused, including the applicant,

allegedly attempted to cheat the State Government of Chhattisgarh to the tune of more than Rs.80,000 crore value of iron ore reserves estimated to be over 280 million tons by using forged documents for grant of mining lease. The said act of the accused, according to the charge sheet, disclose the commission of offences punishable under section 120B read with sections 420, 511, 468 and 471 of the Indian Penal Code, 1860 and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988. I find that the offences allegedly against the accused are criminal conspiracy, cheating and dishonestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document, etc. and each of these offences are punishable with imprisonment upto seven years.

6. Let me now turn to the purpose of the Code and the role of an IP therein. The Code essentially provides a market mechanism for time bound and orderly resolution of insolvency, wherever possible, and ease of exit, wherever required. This ensures ease of doing business and the most efficient use of resources all the time. An IP plays an important role in resolution, liquidation and bankruptcy processes of companies, and individuals. Take the example of corporate insolvency resolution process of a company. When a company undergoes this process, an IP is vested with the management of the affairs of the company and he exercises the powers of its board of directors. Such a company could be one of the largest companies in India with probably Rs.5 lakh crore of market capitalisation. He becomes the custodian of the property of such a company and manages the affairs of the company as a going concern. Further, he examines each resolution plan to confirm that it does not contravene any of the provisions of the law for the time being in force. These responsibilities require the highest level of integrity, reputation and character. In sync with the responsibilities, the Regulations require the Board to take into account integrity, reputation and character of an individual for determining if an applicant is a fit and proper person. The Board needs to take into account the charge sheet, including the gravity of the offence and the punishment such offences may attract, if charges are established, to determine if the applicant has the required integrity, reputation and character to be eligible for registration as an IP.
7. The SEBI regulations have similar provisions for determining fit and proper persons. While dealing with regulation 20 of the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012 in the matter of U. P. Stock Exchange Brokers vs. SEBI (Civil Writ Petition 45893 of 2012), the Hon'ble Allahabad High Court, vide its order sated 23rd May, 2014, observed: *“Financial integrity, reputation, character and honesty are matters which have a serious bearing on the objective, transparent and fair functioning of the securities market.”*
8. While dealing with regulation 3 of the Securities and Exchange Board of India (Criteria for Fit and Proper Person) Regulations, 2004, the Hon'ble Securities Appellate Tribunal, vide its order dated 6th September, 2006, examined the amplitude of fit and proper person as under: *“Good reputation and character of the applicant is a very material consideration which must necessarily weigh in the mind of the Board (SEBI) in this regard. Reputation is what others perceive of you. In other words, it is the subjective opinion or impression of others about a person and that, according to the Regulations, has to be good. This impression or opinion is generally formed on the basis of the association he has with others and/or on the basis of his past conduct. A person is known by the company he keeps. In the very nature of things, there cannot be any direct evidence in regard to the reputation of a person whether he be an individual*

or a body corporate. In the case of a body corporate or a firm, the reputation of its whole time director(s) or managing partner(s) would come into focus. The Board as a regulator has been assigned a statutory duty to protect the integrity of the securities market and also interest of investors in securities apart from promoting the development of and regulating the market by such measures as it may think fit. It is in the discharge of this statutory obligation that the Board has framed the Regulations with a view to keep the market place safe for the investors to invest by keeping the undesirable elements out. The Regulations apply across to all sets of regulations and all intermediaries of the securities market including those who associate themselves with the market and they all have to satisfy the criteria of “fit and proper person” before they could be registered under any of the relevant regulations and this criteria they must continue to satisfy throughout the period of validity of their registration and throughout the period they associate with the market. The purpose of the Regulations is to achieve the aforesaid objects and make the securities market a safe place to invest. One bad element can, not only pollute the market but can play havoc with it which could be detrimental to the interests of the innocent investors. In this background, the Board may, in a given case, be justified in keeping a doubtful character or an undesirable element out from the market rather than running the risk of allowing the market to be polluted.”

9. It is thus clear that reputation and character of the applicant is a material consideration. What is material is what others feel about the applicant who has been charge-sheeted for offences such as criminal conspiracy, cheating and dishonestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document, which attract imprisonment up to seven years. Does such a person inspire confidence of the stakeholders who can entrust him with property of lakhs of crores for management under corporate insolvency resolution process? Pendency of serious criminal proceedings against the applicant adversely impacts his reputation and makes him not a person fit and proper to become an IP.
10. Now let me turn to the submissions by the applicant. His submission regarding regulation 4(d) is correct. If he had been convicted for an offence which is punishable for less than six months, he would be eligible. However, he is not considered a fit and proper person under regulation 4(g)(i) which requires the Board to consider his reputation, integrity and character, and not just absence of conviction required under regulation 4(g)(ii). Keeping the role of IP in view, the Code of Conduct for IPs in the Regulations requires that an IP must maintain integrity by being honest, straightforward, and forthright in all professional relationships. He must not misrepresent any facts or situations and should refrain from being involved in any action that would bring disrepute to the profession. All that the regulations prohibit are the charges against the applicant.
11. It is important to keep a person, which antecedents are doubtful, away from this noble profession. The Hon’ble Supreme Court in Delhi Administration and Ors vs. Sushil Kumar, decided the matter as follows: *“It is seen that verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to a post under the State. Though he was found fit and was provisionally selected, on account of his antecedent record, the appointing authority found it not desirable to appoint a person of such record and the view taken by the appointing authority in the background of the case cannot be said to be unwarranted as though the candidate was discharged or acquitted of the criminal offences, the same has nothing*

to do with the question. What would be relevant is the conduct or character of the candidate to be appointed to and not the actual result thereof. If the actual result happened to be in a particular way, the law will take care of the consequences. The consideration relevant to the case is of the antecedents of the candidate. Appointing Authority, therefore, has rightly focussed this aspect and found him not desirable to appoint.”

12. As regards submission that the applicant has filed a discharge application dated 30th January, 2016, I find that in response dated 6th May, 2016, CBI has submitted before the Court: *“the accused / applicant had actively participated in the criminal conspiracy and knowing fully well that he was not the Director of M/s. Jayaswal Neco Limited, he fraudulently signed the letter dated 29.01.2007 addressed to the Regional Controller of Mine, Indian Mines Bureau, Nagpur posing himself as Director of M/s. Jayaswal Neco Limited which contained various false...”*. It is for the competent court to determine whether applicant is right or CBI is right. Filing of discharge application does not alter the reputation of the applicant unless he is discharged.
13. In view of the foregoing, I find that pendency of serious criminal proceeding, as noted above, against the applicant adversely impacts his reputation and makes him not a person fit and proper for registration as an IP. In exercise of the powers conferred on the Board under regulation 8(3)(b) of the Regulations, I, therefore, reject the application of [REDACTED] for registration as an Insolvency Professional.

Date: 12th October, 2017
New Delhi

(Dr. Navrang Saini)
Whole Time Member
Insolvency and Bankruptcy Board of India