

## 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 Indian Institute of Insolvency Professionals of ICAI ('hereinafter IIIPI'), seeking a certificate of registration as an Insolvency Professional (hereinafter 'IP'). The IIIPI recommended to the Insolvency and Bankruptcy Board of India (hereinafter 'Board') for registration of the applicant as an IP on 9<sup>th</sup> September, 2017 with an observation:

*"A criminal proceeding u/s 120B and 420 of IPC is pending before Chief Judicial Magistrate, Chandigarh against the applicant since 2013. This was during his employment with the Company M/s. Emson Organics Ltd as a Whole Time Director (Not Promoter)."*

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, the Board noted the observation of the IIIPI, as stated in Para 1 above. 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 an email dated 25<sup>th</sup> September, 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. He was also offered a personal hearing in the matter.

3. In response, the applicant communicated, vide an email dated 29<sup>th</sup> September, 2017, that he would be meeting the concerned officer of the Board on 3<sup>rd</sup>/4<sup>th</sup> of October, 2017 'for *explaining the documents regarding the pending case*'. The applicant met the concerned officer of the Board on 5<sup>th</sup> October, 2017 and explained to the officer that while he was employed with [REDACTED] ('Company') as a Whole-Time Director between 2011 to 2013, certain staff members of the company colluded to misuse credit facilities from a Bank without his knowledge and he put his signatures on some papers in good faith without verifying the content. Subsequently, the Bank filed a complaint against the company and as he was a Whole Time Director at the relevant time, he was made party under section 120B and 420 of the IPC. He did not submit any document. Vide mail dated 20<sup>th</sup> October, 2017, he was asked if he has anything to submit, he may do so before 25<sup>th</sup> October, 2017, failing which a final decision would be taken based on available material. However, no response was received.

4. I have considered the application, the recommendation of the IIIPI, the explanation submitted by the applicant to the concerned officer of the Board and material available on record and proceed to dispose of the application.

5. I observe the following:

- a. A criminal proceeding u/s 120B and 420 of IPC is pending before Chief Judicial Magistrate, Chandigarh against the applicant since 2013. I find that sections 120B and 420 of the IPC deal with offences like criminal conspiracy, and cheating and dishonestly inducing delivery of property, which attract imprisonment upto seven years.
- b. The applicant has submitted testimonials in support of his application from his current employer, [REDACTED] where he is working as Director since August, 2013 and from his employer, [REDACTED] where he worked as CFO from May, 1995 to March, 2011. He did not provide any credential from [REDACTED] where he worked as a Whole Time Director during 2011-13. The criminal proceeding relates to his role as a Whole Time Director of [REDACTED].
- c. The applicant is currently in employment. He has submitted: *'the last working day would be one day prior to the date of grant of IP License'*.

6. Let me now turn to the purpose of the Insolvency and bankruptcy Code, 2016 (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. I find that the applicant has over 22 years of experience in responsible positions such as CFO, General Manager, Director, Whole Time Director, etc. Without getting into merits of the criminal proceeding, I find it difficult to appreciate the contention of the applicant that he, as a Whole Time Director, signed on papers without verifying the content. This does not speak well of the reputation, character and competence of the applicant. As an IP, he would be exercising the powers of the Board of Directors of corporate debtors and certainly, the society and the economy cannot afford to have an IP, who signs the papers without verifying the content. A corporate debtor cannot be entrusted to such persons during resolution period under the Code. It is not surprising that the applicant did not provide a testimonial from [REDACTED], but provided testimonials from employers prior to and after this period. This does not display *bonafide* on the part of the applicant.

8. As a Whole Time Director, the applicant is a key managerial person under section 2(51) of the Companies Act, 2013. Under section 166(3) of the Companies Act, 2013, *"a director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall*

*exercise independent judgment.” In **N. Narayan v. Adjudicating Officer, SEBI** (Civil Appeal Nos.4112-4113 of 2013), the Hon’ble Supreme Court vide its order dated April 26, 2013 observed “Company though a legal entity cannot act by itself, it can act only through its Directors. They are expected to exercise their power on behalf of the company with utmost care, skill and diligence. This Court while describing what is the duty of a Director of a company held in **Official Liquidator v. P. A. Tendolkar** (1973) 1 SCC 602 that a Director may be shown to be placed and to have been so closely and so long associated personally with the management of the company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of business of the company even though no specific act of dishonesty is provide against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the company even superficially.” By his own admission, the applicant has failed to discharge (signed papers without verifying content) the responsibilities as a Whole Time Director. Certainly, he is not a person fit to discharge the responsibilities of the Board of Directors of a corporate debtor under resolution.*

9. The reputation, character and competence of the applicant are of 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, 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. It is important to keep a person, whose antecedents are doubtful, away from this noble profession. The Hon’ble Supreme Court in **Avtaar Singh v. Union of India & Ors. [With SLP [C] Nos.4757/2014 and 24320/2014]** observed “it cannot be disputed that the whole idea of verification of character and antecedents is that the person suitable for the post in question is appointed. It is one of the important criteria which is necessary to be fulfilled before appointment is made. An incumbent should not have antecedents of such a nature which may adjudge him unsuitable for the post.”

11. It is a puzzle for me to understand as to how the applicant would get relieved from his employer one day before the Board grants registration. The Board grants registration to eligible individuals; it does not grant registration from a date 3 months / six months in advance, to enable an applicant to meet the requirements of registration before that date.

12. 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. Besides, as on the date of application, he is in employment and hence not eligible 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 [REDACTED] for registration as an Insolvency Professional. I would expect the IIPI, which is a front-line regulator, to exercise the required due diligence in future while enrolling an individual as a member and recommending to the Board his registration as an IP.

Date: 14 November, 2017  
New Delhi

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