

**APPELLATE PANEL OF ICSI INSTITUTE OF INSOLVENCY
PROFESSIONALS**

Appeal No. 1 of 2020

(Date of virtual hearing: 13th October 2020)

(Arising from the Order of Disciplinary Committee of ICSI IIP, dated 7th September 2020
in ICSI IIP/06/2020)

Parties Present:

Mr. Vinod Kothari

Appellant: In Person

For ICSI IIP:-

Dr. Binoy J. Kattadyil

MD, ICSI IIP

Ms. Poonam Shukla

Company Secretary

Ms. Radhika

Asst. Director, Legal

Ms. Mandavi Bhargava

Research Associate

- 1.** This appeal has been filed by the appellant Mr. Vinod Kothari against the following order dated 7th September, 2020 passed by the Disciplinary Committee (DC) of the ICSI IIP :-

'4.2 In view of the above, the DC hereby warns Mr. Kothari to be extremely careful, diligent, strictly act as per law and similar action should not be repeated.

4.3 Further, the DC directs that Mr. Vinod Kothari shall not accept any new assignment without obtaining Authorization for Assignment in view of Regulation 12A of Bye Laws of ICSI Institute of Insolvency Professionals from the date of coming into force of this Order.'

- 2.** The background of this case is that in exercise of its powers under Part III (1) of the Disciplinary Policy of ICSI IIP, the Agency had issued a Show Cause Notice to the Appellant on 16/06/2020 asking him to show cause as to why appropriate disciplinary action should not be taken against him for alleged violation of the provisions of Regulation 7A of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 in undertaking the assignment as the Voluntary Liquidator of M/s IL&FS Portfolio Management Services Ltd without holding a valid authorization for the assignment. The Agency had alleged that the Appellant had been appointed as the Voluntary Liquidator on 16th March 2020 and

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accordingly a public announcement was made of 18th March 2020, when the Appellant did not hold a valid authorization for assignment.

3. The Appellant had submitted his detailed response on 20/06/2020 detailing the sequence of events to contend that he had not acted in violation of Regulation 7A.
4. After giving the Appellant a personal hearing on 25th August, 2020, the DC passed the impugned order on 7th September 2020.
5. In the appeal, the Appellant has assailed the impugned order on two main grounds:
 - a. The DC had not considered the oral submission of the Appellant that the Agency could not have independently issued the SCN without the DC first examining the alleged violation and authorizing the issue of SCN as contemplated in Part II of the Policy
 - b. The DC had misdirected itself to pass the impugned order in spite of the fact that it itself has recorded that the Appellant had accepted the assignment on 1st March 2019 itself and also without adjudicating whether his case was covered under the proviso to Regulation 7A.
6. We have held virtual meeting on 9th October, 2020 wherein Appellant did not appear~~ed~~. In order to give another opportunity to the Appellant another virtual meeting was fixed on 13th October, 2020.
7. We held virtual hearing on 13th October, 2020 and heard the oral submissions of the Appellant and Dr. Binoy, representative of ICSI IIP.
8. Before detailing the submissions of the parties, since the provisions of Regulation 7A is the core issue, the Panel considers it appropriate to extract the said Regulation.
Regulation 7A: "An insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid authorization for assignment on the date of such acceptance or commencement of such assignment, as the case may be:

Provided that provisions of this regulation shall not apply to an assignment which an insolvency professional is undertaking as on-

- a) 31st December, 2019; or*
- b) the date of expiry of his authorization for assignment.*

9. At the outset, the Panel pointed out to the Appellant that his first ground relating to the procedural aspect that the Agency could not have issued the SCN without a recommendation from DC will not survive as both under Bye Law 23 of the Bye Laws of ICSI Institute of Insolvency Professionals (ICSI IIP) and Part III (1) of the Disciplinary Policy of ICSI IIP, the Agency is authorized to issue the SCN *suo-moto*, meaning thereby that DC recommendation is not needed. It was also pointed out to him that in his reply to the SCN, he had not taken up this issue before DC. Ongoing through the said provisions, the Appellant agreed to drop this issue.

10. In so far as the applicability of Regulation 7A is concerned, the Appellant argued that as is explicitly evident from the Regulation itself, it deals with two independent situations – one is the acceptance of an assignment and the other is actual commencement. No one can commence an assignment without his accepting an assignment and the acceptance always precedes commencement. Drawing the attention of the Panel to the proviso to Regulation 7A, he urged that this proviso should be read in conjunction with the main Regulation 7A and if read so, it will be evident that Regulation 7A will not apply to a case wherein acceptance had taken place before 31st December 2019 even though the actual commencement may be after that date.

11. The Appellant submitted that as per the details and evidence of records produced by him, it is abundantly clear that the Appellant had accepted the assignment much prior to 31st December, 2019 (the date of commencement of amended regulation). Referring to Annexure 2 to the appeal which is a proposal given by the Appellant on 1st March 2019 and accepted by the company on the same date, he submitted that, it would indicate that there was an agreed mandate of acceptance of the assignment on that date. He also pointed out as evidenced by Annexure 3 to the appeal, even that the Board of the company had also passed a resolution on 3rd May, 2019 approving the proposal given by the Appellant. Referring to Annexure 4, he submitted that the company had communicated about the acceptance of the Appellant as the Liquidator.

12. He further submitted that even though the mandate of accepting the assignment was executed as early as on 1st March 2019, which is even before Regulation 7A was notified, the shareholders of the company passed a resolution for voluntary liquidation only on 16th March, 2020 and thereafter public announcement was made on 18th March, 2020.
13. He further submitted that under the scheme of the Code, there will always be a time lag from the date of acceptance of an assignment and commencement of the same. As an example he referred to Sections 7 of the Code according to which along with the application to NCLT to initiate the corporate insolvency process, the financial creditor has to furnish the name of a resolution professional to act as an interim resolution professional along with the consent of the resolution professional in Form 2. Once the resolution professional gives his consent in Form 2, it is the date of acceptance of the assignment. The commencement would begin only when the Adjudicating Authority passes an order admitting the Section 7 application. Similarly, in a voluntary liquidation, the commencement would begin only when the shareholders pass a resolution.
14. Summing up his submissions, the Appellant stated that while the DC itself had noted that the date of commencement was on 1st March 2019, that is long before 31st December 2019, without deciding whether Regulation 7A would apply in such a case, it had passed the impugned order on the ground that the Appellant had submitted that the error committed by him was inadvertent and unintended on his interpretation of law. According to the Appellant, he never made any submission before the DC as recorded in the impugned order.
15. He submitted that when he had not either violated or acted in breach of the Regulations, even a warning would be a black mark in his long career of over 35 years and as such the impugned order should be set aside.
16. Mr. Binoy, representing ICSI IIP stated that the case of the Appellant is not the first case wherein the Agency/DC has initiated action wherein the engagement commenced after 31st December 2019 even though the acceptance was prior to that date. According to him, DC had differentiated cases wherein both the acceptance and commencement of engagement were after 31st December, 2019 from those where the acceptance was before that date and commencement was after that date. In the first set of cases, DC has imposed a fine while in the second set of cases as that of the

Appellant, only warning was given. He also referred to some cases decided by the DC of IBBI wherein a similar view, as in the case of the Appellant, had been taken by the DC of IBBI.

17. The Panel has considered the pleadings and the submissions of the Appellant and the representative of ICSI IIP.

18. The Panel notes that the Appellant has dropped his objection on the procedural aspect as recorded in para 8 ante and as such this issue is closed.

19. In so far as the facts that the assignment was accepted on 1st March, 2019 and that the engagement commenced on 16th March, 2020 are concerned, there is no dispute as the DC had itself accepted these facts as seen from para 4.1 of the order wherein the DC has observed:

“On perusal of document and information on record, the Disciplinary Committee (DC) is of the view that the date of commencement was 16th March 2020 whereas Mr. Kothari accepted the assignment on 1st March 2019. During the personal hearing, Mr. Kothari submitted the error committed by him was inadvertent and unintended based on his interpretation of law”

20. Having so observed, the DC had passed the impugned order of giving a warning. A reading of the above would indicate that the DC has not given any finding as to whether or not, the proviso to Regulation 7A was applicable. The order of warning appears to have been given on the assumption that the said proviso was not applicable and also on the basis of the alleged oral submissions of the Appellant that he had committed an error. Before this Panel, the Appellant has categorically stated that he had not made any such oral submission as attributed to him by the DC. The DC has not considered the various submission made by the Appellant on the applicability of Regulation 7A in his case.

21. In so far as the present case is concerned, there is no dispute on facts. Hence, the short question that arises for consideration is whether or not, this case is covered under the proviso to Regulation 7A. While Regulation 7A mandates holding of a valid Authorization for Assignment (AFA) for acceptance or commencement of an assignment after 31st December 2019, the proviso exempts the application of

Regulation 7A to an assignment which the IP is undertaking as on 31st December, 2019.

22. According to Mr. Kothari, since he had accepted the assignment as early as in March 2019, proviso to Regulation 7A is applicable in his case. He argued that since the main provision of in Regulation 7A talks of acceptance or commencement, the proviso should also conform to the same and if done so, the proviso should cover the acceptance of an assignment before 31st December 2019 also. The functions of a proviso to a main provision is to except and deal with a case which would otherwise fall with the general language of the main provision and hence the proviso need not conform to the main provision as urged by Mr. Kothari. While the main provision of Regulation 7A mandates that after 31st December 2019, an IP should have a valid AFA on the date of acceptance or commencement of such assignment, as the case may be, the proviso exempts from this mandate of an assignment which the IP is undertaking as on 31st December 2019. While the main provision of Regulation 7A speaks of “acceptance” or “commencement”, the proviso speaks of “undertaking”. What does the term “undertaking” mean in the context of Regulation 7A? Generally, when a person accepts an assignment, it amounts his undertaking to complete the assignment. In other words, his undertaking starts from the date of acceptance of an assignment, except that he can commence the assignment only after the requisite approval. Viewing this manner, in the opinion of the Panel, the expression “an assignment which an IP is undertaking” would comprise of every activity in respect of the assignment, viz, acceptance, commencement, completion, getting the final approval of the AA and sometimes even during implementation of the resolution plan. Thus, in the opinion of the Panel, the proviso to Regulation 7A exempts an IP from holding a valid AFA in respect of an assignment, which as on 31st December 2019 stood at any stage of the above activities.

23. Since in the present case, the Appellant has accepted the assignment as early as in March 2019, the Panel is of the considered view that his case is covered under the proviso to Regulation 7A and hence the appellant has not acted in violation or in breach of Regulation 7A even though the Liquidation process commenced after 1st January 2020.

24. Mr. Binoy, representative of ICSI IIP submitted that similar decisions have been given by the DC in other cases also and even DC of IBBI has also taken a similar view. In this regard, he referred to two cases decided by DC IBBI. In one of the

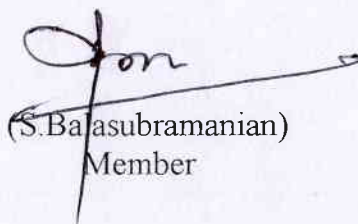
cases referred to by Mr. Binoy- (in the matter of **Mr. Ravi Sharma**)- both acceptance and commencement were after 31st December 2019 and hence, the DC IBBI rightly did not apply the proviso to Regulation 7A. In the other case- (in the matter of **Mr. Arun Rajabhau Joshi**), without deciding whether proviso to Regulation 7A was applicable or not, DC of IBBI disposed of the matter on the ground that DC of ICSI IIP had already decided the matter. Hence both the cases have no relevance in the present proceeding.

25. However, the Panel notes that in a decision uploaded in the web site of IBBI on 15th October 2020- (in the matter of **Mr. Kishan Gopal Somani**) the DC of IBBI has rightly held that even though the NCLT passed an order of Liquidation approving the appointment of the resolution professional as the Liquidator only on 14/01/2020, since the resolution professional had given his written consent to the NCLT on 28th November 2019 prior to coming into effect of requirement of AFA, it did not find any lapse on the part of the said resolution professional. On this finding, DC IBBI disposed of the SCN without any direction against Mr. Somani. This finding also supports the opinion of this Panel that proviso 7A would apply to cases where an IP had accepted an assignment before 31st December 2019 even if the commencement is after that date.

26. Since the Panel has held that the case of the Appellant is covered under the proviso to Regulation 7A, he has not acted either in violation or in breach of Regulation 7A. Accordingly, the order of DC, ICSI IIP dated 7th September 2020 is set aside.



(P.K Malhotra)
Chairperson



(S. Balasubramanian)
Member



(Ranjeet Pandey)
Member

Dated: November 3, 2020
Place: New Delhi