

BHUPESH GUPTA V/S INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
AND ORS.

Present: Dr. Rajansh Thukral, Advocate with
Dr. Surekha Thukral, Advocate and
Mr. Subham Gupta, Advocate for the petitioner.

Mr. Satya Pal Jain, Addl. Solicitor General of India
with Mr. Arun Gosain, Advocate for the respondents.

Notice of motion for 04.08.2022.

Mr. Arun Gosain, Advocate accepts notice on behalf of the respondents, and seeks time to file reply. May do so, on or before the next date of hearing with a copy in advance to the counsel opposite.

It is the contention of counsel for the petitioner that the impugned order dt. 10.05.2022 has been passed by the Chairperson of respondent No.1 (respondent No.2) purporting to act as a Disciplinary Committee under Section 220 (2) of the IBC; that under proviso to sub-section (1) of Section 220 of IBC, the members of Disciplinary Committee shall consist of whole time members of respondent No.1 only; that the Chairperson of respondent No.1 cannot therefore be the Disciplinary Committee; and in the respondent No.1-Board, apart from Chairperson, there are three whole time members and others as specified in Section 189 of the IBC. He contends that there is inherent lack of jurisdiction for the Chairperson of respondent No.1 to act as a Disciplinary Committee, and therefore the impugned order warrants interference.

Mr. Satya Pal Jain, Addl. Solicitor General of India contends that no objection of this nature was raised before respondent No.2 during the course of hearing before him, and the petitioner therefore cannot be permitted to raise that objection because the order passed is adverse to him. He further contends that the Chairperson has supervisory jurisdiction, and it cannot be said that he was not competent to act as a Disciplinary Committee under Section 191 of IBC.

Prima facie, the exercise of disciplinary jurisdiction by the respondent No.2 appears to be prohibited under proviso to sub-section 1 of Section 220 of IBC which enables only whole time members of respondent No.1 to be the members of the Disciplinary Committee. It is settled law even consent does not confer jurisdiction in such cases and so there cannot be a waiver on the aspect of jurisdiction in such circumstances.

Since, there is inherent lack of jurisdiction for respondent No.2 to conduct disciplinary proceedings, prima facie, his order is vitiated.

Therefore, there shall be interim suspension of the order dt. 10.05.2022 passed by respondent No.2/Chairperson of respondent No.1 until further orders.

(M.S. RAMACHANDRA RAO)
JUDGE

(H.S. MADAAN)
JUDGE

02.06.2022
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INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/96/2022

10th May, 2022

Order

In the matter of Mr. Bhupesh Gupta, Insolvency Professional (IP) under section 220 of the Insolvency and Bankruptcy Code, 2016 read with regulation 13 of the Insolvency and Bankruptcy Board of India (Investigation and Investigation) Regulations, 2017 and regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/INSP/2020/39/440/2561 dated 18.10.2021 issued to Mr. Bhupesh Gupta who is a Professional Member of ICSI Institute of Insolvency Professionals (ICSI-IPA) and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-002/IP-N00030/2016- 17/10067.

Background

- 1.1. In exercise of its powers under Section 218 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Regulation 3(2) and 3 (3) of the IBBI (Inspection and Investigation) Regulations, 2017 (Inspection Regulations), the IBBI appointed the Inspecting Authority (IA), vide its order dated 28th April 2020 to conduct inspection of Mr. Bhupesh Gupta pertaining to observations made in order of Disciplinary Committee (DC) dated 21.04.2020 in the matter of Mr. Bhupesh Gupta. In compliance with Regulation 6(1) of the Inspection Regulations, IA had shared the Draft Inspection Report (DIR) with Mr. Gupta and response to the same was received vide his email dated 30.06.2021. Thereafter, IA submitted the Final Inspection Report (FIR) on 03.08.2021, in accordance with Regulation 6(4) of the Inspection Regulations.
- 1.2. The IBBI issued the SCN to Mr. Bhupesh Gupta on 18.10.2021 based on the material available on record including the inspection report in respect of his role as an Interim Resolution Professional (IRP), Resolution Professional (RP) and Liquidator in Corporate Insolvency Resolution Process (CIRP) and Liquidation of Supreme Tex Mart Ltd. (Corporate Debtor-CD). Mr. Bhupesh Gupta replied to the SCN vide letter dated 04.12.2021.
- 1.3. Mr. Bhupesh Gupta availed an opportunity of virtual personal hearing before DC on 26.04.2022 where he was represented by Mr. G P Madaan, Advocate and Mr. Aditya Madaan, Advocate. The DC has considered the SCN, the reply to SCN, oral submissions of Mr. Bhupesh Gupta, other material available on record and proceeds to dispose of the SCN.

2. Alleged Contraventions, Submissions and Analysis and Findings

- 2.1. A summary of contraventions alleged in the SCN, Mr. Gupta's written and oral submissions thereon and their analysis with findings of the DC are as under

3. Contravention I

Monitoring of receipts of claim of CD

- 3.1. CIRP of CD commenced on 29.09.2017 and Mr. Gupta was appointed as IRP in the matter. On 30.05.2018, an order was passed by Hon'ble Additional District Judge (ADJ), Ludhiana in the insurance claim proceeding in the matter of Oriental Insurance Company Limited (OICL) v. M/s Supreme Yarn Ltd., (now known as Supreme Tex Mart Ltd) and directed OICL to pay principal amount and interest at the rate of 9% p.a. to CD. Later on, ex-directors of CD offered OICL to make payments at interest rate of 6% p.a. in case the payment is made before 07.08.2018 (i.e., within two weeks).
- 3.2. On 08.08.2018, Hon'ble NCLT, Chandigarh Bench, (AA) passed the liquidation order of the CD and Mr. Gupta was appointed as Liquidator. Meanwhile, Mr. Kuldeep Singh, ex-director of CD agreed to settle the claim at interest rate of 6% p.a., instead of 9% p.a. and accepted the demand draft towards full and final settlement of the insurance claim. All these proceedings and settlement activities took place during the tenure of Mr. Gupta and he failed to take notice of the said settlement activities and loss of interest to CD.
- 3.3. Section 25(2)(b) of the Code states that an IP should represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings. Accordingly, Mr. Gupta *prima-facie* failed to represent the CD before the Hon'ble Additional District Judge, Ludhiana. Such action of Mr. Gupta resulted in loss amounting Rs. 2.35 crore (difference in rate of interest) to the CD. It is also observed that Mr. Gupta filed application under section 66 & 67 of the Code before Hon'ble AA on 24.05.2019, only after the said issue was flagged by erstwhile IA constituted under inspection order dated 04.05.2019, who have conducted inspection of Mr. Gupta. In view of the above, it is alleged that the said conduct of Mr. Gupta is *prima-facie* not in consonance with section 25(2)(a), 25(2)(b), 208(2)(a) and 208(2)(e) of the Code and regulation 7(2)(a) and regulation 7(2)(h) of the IP Regulations read with clause 2 and 14 of the Code of Conduct provided in the First Schedule of the IP Regulations.

Submissions

- 3.4. Mr. Gupta submitted that he has undertaken all necessary due diligence during the CIRP and Liquidation process of the CD and there are no shortcomings concerning the process. He was appointed as IRP on 11.10.2017 and then confirmed as RP on 09.11.2017 by the CoC comprising of 12 Banks and the had presented the Information Memorandum (IM) in the 3rd CoC meeting held on 27.12.2017 at Ludhiana. Further, IM and agenda contains the details in the matter of OICL vs. Supreme Yarn Ltd. (now known as Supreme Tex Mart Ltd.) at Sr. No. 9, which clearly shows that the matter was within his knowledge but the same was pending in the court.
- 3.5. Mr. Gupta submitted that duly intimated about the commencement of the CIRP proceedings to all the concerned persons including the Directors, Mr. Ajay Gupta,

and Promoter, Mr. Kuldeep Singh, who was the unit head of yarns units of the CD as well as Mr. Gaurav Gupta, the company secretary of the CD. Further, he has attached the documents which were filed by these persons before the Court, overlooking his authority and responsibility, from which the conspiracy made by them is clearly shown. It is evident from the documents submitted that various affidavits and resolution passed were done by the suspended directors and by the company secretary of the CD and he had no connection with all such actions done in an independent capacity. Furthermore, the above acts were done by Mr. Ajay Gupta, Mr. Gaurav Gupta, and Mr. Kuldeep Singh without approval and knowledge of Mr. Gupta.

- 3.6. Mr. Gupta further submitted that as soon as he got the knowledge of the illicit and illegal actions of the suspended directors and other employees of the CD, he started procuring relevant documents to file an appropriate application before AA against the ex-directors and employees of the CD. The above issues have already been raised in the application filed with the AA under section 66 & 67 of Code vide Application bearing IA 418 of 2019 dated 24.05.2019 which is sub-judice. Therefore, the issue raised in the SCN dated 18.10.2021 is sub-judice and no parallel proceedings can be initiated until the disposal of the said application pending before AA.
- 3.7. Mr. Gupta further submitted that the proceeds of the insurance claim were duly received in the account of the CD and the same has been appropriated towards business operations of the CD following the provisions of the Code and Regulations thereunder. Hence, there remains no further consideration of issues concerning funds that were paid to the CD through demand draft by the OICL. The amount received from the insurance claim was duly acknowledged by him and that the amounts received and paid to and from the bank accounts of the Company were being duly monitored. There is absolutely nothing to reflect that he has failed to perform his statutory duties and he has made innumerable efforts with utmost sincerity to maximize the value of the assets of the CD while complying with the provisions of the Code and maintaining the Company as a going concern.
- 3.8. Without prejudice to the above, it is yet again clarified that all the payments made, were duly approved by the Chief Financial Officer being Key Managerial Personnel of the CD as well as the Financial Consultants before being approved by him, and utmost care was afforded to making such payments as he is aware of his statutory responsibilities.
- 3.9. Section 25(2)(b) of the Code states that IP should represent and act on behalf of the CD with third parties, exercise rights for the benefit of the CD in judicial, quasi-judicial, or arbitration proceedings, and given this provision, it is stated that he had been representing the CD before various courts and authorities through the advocates appointed for the cases in different courts as well as through the employees appointed by the CD.
- 3.10. Mr. Gupta submitted that with regard to the issue about the difference in the interest rate and thereafter loss (if any) incurred by the CD is before the AA. He has already filed an application before AA. The application has been duly filed with all the facts and now the matter is pending with the Adjudicating Authority. He reiterated that since the matter is sub-judice before the Hon'ble Adjudicating Authority, therefore the proceedings under this show cause notice are not tenable legally also.

Analysis & Findings

- 3.11. The DC notes that there was resolution passed in the meeting of Executive Committee of the CD held on 02.11.2017 where it was stated that the CD is to file an execution petition before Additional District Judge, Ludhiana for execution of arbitral award in favour of CD and against OICL and Mr. Ajay Gupta, suspended director of CD was resolved to sign and verify the execution petition and take all the necessary steps and even authorized to receive any amount under the execution and issue receipt thereof. With regard to the insurance claim, the Arbitration Case No. 11 dated 21.04.2009 (an objection petition under section 34 of the Arbitration and Conciliation Act, 1996) filed by Oriental Insurance Company Limited (OICL) was pending wherein the CD was arrayed as respondent no. 1.
- 3.12. The CIRP against CD was admitted on 29.09.2017 and Mr. Gupta was appointed as IRP and later confirmed as RP. On 30.05.2018 about 8 months after Mr. Gupta was appointed as IRP (then RP), Hon'ble ADJ, Ludhiana delivered an order to pay principal amount and interest at the rate of 9% p.a. to CD. Thereafter, Mr. Ajay Gupta, director of the suspended board of CD filed affidavit dated 30.08.2018 agreed for offer of principal amount of Rs. 4,87,14,101/- along with interest @ 6% pa. ADJ, Ludhiana vide order dated 01.09.2018 disposed of the execution petition after handing over of demand draft of Rs. 8,30,77,161/- to Mr. Kuldeep Singh, director of the suspended board of CD.
- 3.13. Section 25(2)(a) of the Code provides that RP shall take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor. Section 25(2)(b) provides that RP shall represent and act on behalf of the CD with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings.
- 3.14. The DC observes that Mr. Gupta has not taken over the custody and control of all the assets of the CD, including the business records of the CD. Mr. Gupta submits that he presented the IM in the 3rd CoC meeting held on 27.12.2017 at Ludhiana which contained the details in the matter of OICL vs. Supreme Yarn Ltd. (now known as Supreme Tex Mart Ltd.) at Sr. No. 9, clearly showing the knowledge of matter with him. Still, Mr. Gupta did not represent and act on behalf of the CD in judicial, quasi-judicial or arbitration proceedings and allowed members of suspended board of directors of CD to continue representing the CD and sign affidavits on behalf of CD. Mr. Gupta's failure to take custody and control the assets of the CD has resulted in loss amounting Rs. 2.35 crore (difference in rate of interest) to the CD.
- 3.15. Further, the DC is unable to accept the submission of Mr. Gupta that such acts were done by the suspended management of CD without his knowledge and approval since it has been stated by Mr. Gupta during hearing that the amount of insurance claim was credited to the account of the CD. The DC observes that despite incurring the loss of Rs. 2.35 crore by the suspended management to the CD, Mr. Gupta had filed IA 418 of 2019 before AA under section 66 & 67 of Code raising the similar issues on 24.05.2019 which is after the said issue was flagged by erstwhile IA constituted under inspection order dated 04.05.2019.

3.16. Hence DC finds that Mr. Gupta has contravened section 25(2)(a), 25(2)(b), 208(2)(a) and 208(2)(e) of the Code and regulation 7(2)(a) and regulation 7(2)(h) of the IP Regulations read with clause 2 and 14 of the Code of Conduct provided in the First Schedule of the IP Regulations.

4. Contravention - II

Monitoring of payments out of claim amount so received

4.1. It is observed that Mr. Gupta have failed to provide the following documents to the IA:

- Monthly Cash Flow Statements/ similar internal control report (if any) of CD for relevant period (i.e. period during which IP was RP/Liquidator)
- Details of related party- Name, addresses, nature of transactions entered into with each of them (purchases, loans, etc.)
- Indicate the accounting software used and provide the electronic data of books of accounts of CD for relevant period (i.e., period during which IP was RP/Liquidator)
- All bank statements of CD for relevant period (i.e., period during which IP was RP/Liquidator)
- List of payments made out of the insurance claim amount received. (Including the assumptions made in determining so e.g. LIFO, FIFO or any other such assumption)
- Details of signatories in all Bank accounts active during CIRP, in case, any person other than IP was authorized.

4.2. Regulation 7(2)(g) of the IP Regulations specifies an IP to maintain records of all assignments undertaken by him under the Code for at least three years from the completion of such assignment. Accordingly, it is observed that Mr. Gupta have failed to provide documents to the IA. In view of the above it is alleged that the said conduct of Mr. Gupta is *prima facie* not in consonance with Regulation 7(2)(g) of the IP Regulations read Section 208(2)(a) and 208(2)(e) of the Code along with clause 16 of the Code of Conduct provided under the First Schedule of IP Regulations.

Submissions

4.3. Mr. Gupta submitted that he had duly served the hard copies of all relevant documents to the IA with the reply dated 30.06.2021. He also sent an email to the concerned authority duly informing them that the hard copies of the reply along with the relevant annexures were sent through speed post to the IA for its consideration before submitting the FIR which has not been served till date to him. However, the SCN clearly fails to highlight the documents relied and annexed by him along with the reply to the DIR which was received sent to the inspecting authority on 30.06.2021 and confirmed via email on 01 .07.2021. The part B of the SCN have observations on payments out of the claim amount received and in response to that it is stated that all such reports and data information were there in the registered office of the CD, which was duly been handed over to the new Liquidator as per order of AA.

- 4.4. Mr. Gupta submitted that he was relieved as the Liquidator from the CD due to certain health issues vide order dated 01.11.2019 where it was made clear that the records of the Company are required to be handed over to the newly appointed Liquidator immediately. He, in conformity with the provisions of the Code and its regulations and the directions of the AA, handed over all the documents pertaining to the CD to the newly appointed Liquidator in its true letter and spirit.
- 4.5. Mr. Gupta further submitted that that regulation 7(2)(g) of IP Regulations mandates that he shall maintain the records of the assignments undertaken for three years from the "Completion" of such assignment. However, in the present case where the Liquidator has changed in an ongoing liquidation process, there arises no question of completion as the liquidation process of the CD was still ongoing and all the relevant records about the same had to be handed over to the new Liquidator in compliance with the order of AA. The completion of the process in the present case would be the passing of the dissolution order by AA under section 54 of the Code, where all the assets of the CD are utilized to pay off the liabilities of the CD. It is no secret that the dissolution order in the present case has not been passed till date and was certainly not done so during his tenure.
- 4.6. Mr. Gupta submitted that clause 16 of Code of Conduct under IP Regulations should apply to an IP wherein the CIRP or liquidation is a process that is currently ongoing or has been completed by the RP/Liquidator. However, since the documents and the records have been transferred by him to the newly appointed Liquidator, all the documents and records that substantiate the bona fide and reasonable decisions taken by him are currently held by the new liquidator. Therefore, it cannot be said that mere compliance of the orders of AA as well as the performance of statutory duty to afford all cooperation to the newly appointed Liquidator would amount to any action that is negligent or in violation of the Code of Conduct in any manner or even the provisions of the Code for that matter.
- 4.7. Mr. Gupta further submitted that since he has handed over the record of CD to new Liquidator in compliance of AA's order, therefore the required information as was available with him was duly submitted and it was duly informed that in case there is any further information that is required by the IA, the same can be obtained from new Liquidator of the CD.
- 4.8. Mr. Gupta submitted that if an IP is required to maintain complete records of the decisions taken by him during his/her tenure of appointment when the process is still underway and has not been completed, it would be ridiculous for an IP to keep in his possession all documents, bank statements, ledger accounts, etc. after ceasing to be the RP/Liquidator and at best he would only keep the necessary and essential information with him and not all the documents evidencing every small little payment being made by the CD. In the present case, since the units of the CD were at four different locations and all records of the CD were at the registered Office, there was no reason to retain the records by him, especially because the newly appointed Liquidator had legally become the custodian of the said documents and records.

- 4.9. Mr. Gupta submitted that the promoters/directors have filed affidavits etc. wrongfully, illegally and fraudulently, and clandestinely. All the details have been procured by him and after collating the entire information and documents, he has filed application No. 418 of 2019 before AA on 24.05.2019, claiming a sum of Rs. 2,35,49,408/- from OICL and for appropriate action against all the respondents under sections 66 & 67 of the Code which is pending before AA. Since the matter is already sub-judice, therefore IBBI cannot take any decision in this regard.
- 4.10. Mr. Gupta submitted that to ascertain the actual factual position about the payments made during that period, there is no restriction on the IBBI to obtain said information from the newly appointed Liquidator of the CD. Rather Section 218(3) and 218(4) of the Code confers wide powers upon the IA to investigate any person or place, which has not been done by the IA in this case.

Analysis & Findings

- 4.11. Regulation 7(2)(g) of IP Regulations provides that IP shall maintain records of all assignments undertaken by him under the Code for at least three years from the completion of such assignment. Regulation 2(1)(a) of IP Regulation define assignment to mean any assignment of an IP as IRP, RP, Liquidator, bankruptcy trustee, authorised representative or in any other role under the Code. It is unrelated to status of CD.
- 4.12. The DC takes note of the submission of Mr. Gupta that he had handed over the records of the CD to the new Liquidator in compliance with the Hon'ble Tribunal's order.
- 4.13. Further, when IA requested new Liquidator, Mr. Ravinder Goel for the said information and record. He vide his reply dated 05.04.2021 has informed as follows:
1. *Monthly Cash Flow Statements/ similar internal control report (if any) of CD for relevant period (i.e. period during which said IP was RP/Liquidator)*
Reply - This record would be available with previous Liquidator Sh. Bhupesh Gupta. At the time of taking charge, he has provided us audited balance sheet for FY 2018-19 & for period from 01.04.2019 to 31.10.2019 and copies of various registers/books maintained by him...
 4. *All bank statements of CD for relevant period (i.e. period during which said IP was RP/Liquidator)*
Reply - No bank statement of CD for the said period has been provided to present Liquidator. The copies of the same would be available with Sh. Bhupesh Gupta.
 5. *List of payments made from the insurance claim amount from Oriental Insurance Company Limited received in Sep, 2018. (including the assumptions made in determining so eg. LIFO, FIFO or any other such assumption)*

Reply - This list of payment would be available with Sh. Bhupesh Gupta as he has not provided any such details to present Liquidator.

6. *Details of signatories in all Bank accounts active during CIRP, in case, any person other than IP was authorized.*

Reply - The RP/ Previous Liquidator Sh. Bhupesh Gupta was maintaining and operating account of CD with various banks. However he has not provided us any details of such accounts. He has provided us detail and cheque books of only one liquidation account being maintained with SBI civil lines Ludhiana. The same account is being continued by present Liquidator with him as authorized signatory.

- 4.14. The DC is of the view that the stand taken by Mr. Goel (new Liquidator) that he does not have the records of deposit of insurance amount does not appear to be correct as the amount should have been deposited in CD's account in 2018-19 and Mr. Gupta had handed over audited Balance Sheets of FY 2018-19 and for the period from 01.04.2019 to 31.10.2019 to the new Liquidator Mr. Goel (as admitted by him). Moreover, if he does not have bank statements, he can always get the copies from banks. In view of the above, DC is inclined to accept Mr. Gupta's assertion that the records are available with the new Liquidator and should be obtained from him.

5. Order

- 5.1 In view of the above, the DC, in exercise of the powers conferred under section 220 (2) of the Code read with sub-regulations (7) and (8) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and Regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017, hereby suspends the registration of Mr. Bhupesh Gupta for a period of 2 years for not taking the custody and control of the CD and for letting the suspended management to settle the insurance claims after the initiation of the CIRP of the CD. In this case, the director of the suspended board of CD filed affidavit offering interest on insurance claim @6% p.a. from @9% and execution petition was disposed of on 01.09.2018 on such settlement terms. However, Mr. Gupta had filed IA 418 of 2019 before AA under section 66 & 67 of the Code raising the similar issues on 24.05.2019 after a long delay of about 8 months and also, after the said issue was flagged by erstwhile IA constituted under inspection order dated 04.05.2019. Since this gross negligence of Mr. Gupta caused a loss of interest on insurance claim to the tune of Rs. 2.35 crore to the CD, the DC also imposes a monetary penalty equal to 50% of the fee received by Mr. Gupta as RP and Liquidator to this CD.
- 5.2 This Order shall come into force on expiry of 30 days from the date of its issue.
- 5.3 Mr. Gupta shall deposit the monetary penalty directly to the Consolidated Fund of India (CFI) under the head "penalty imposed by IBBI" on <http://bharatkosh.gov.in> within 45 days from the date of issue of this order and submit a copy of the transaction receipt to the IBBI.

- 5.4 A copy of this order shall be sent to the CoC of all the Corporate Debtors in which Mr. Gupta is providing his services, if any. The CoC may decide whether to continue his services or not. In case, CoC decide to discontinue his services, CoC may file an appropriate application before AA.
- 5.5 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Bhupesh Gupta is enrolled as a member.
- 5.6 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.
- 5.7 Accordingly, the show cause notice is disposed of.

-Sd-
(Ravi Mital)
Chairperson, IBBI

Dated: 10th May, 2022
Place: New Delhi