

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/07/2018
23rd August, 2018

ORDER

In the matter of Mr. Mukesh Mohan, Insolvency Professional under sub-regulations (7) and (8) of regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 read with section 220 of the Insolvency and Bankruptcy Code, 2016.

Background

1. This order disposes of the show cause notice dated 8th May, 2018 (SCN) issued to Mr. Mukesh Mohan, 1106-1107, New Delhi House, Barakhamba Road, Connaught Place, New Delhi – 110001. He is a professional member of the Indian Institute of Insolvency Professionals of ICAI and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board) with registration No. IBBI/IPA-001/IP-P00018/2016-2017/10042. From the material available on record, the Disciplinary Committee (DC) observes as under:

1.1 In exercise of its powers under section 218 of the Insolvency and Bankruptcy Code, 2016 (Code) read with the IBBI (Inspection and Investigation) Regulations, 2017 (IIR), the Board, vide order dated 4th January, 2018, appointed an Inspecting Authority (IA) to conduct an inspection of Mr. Mukesh Mohan, on having reasonable grounds to believe that Mr. Mohan had contravened provisions of the Code, and regulations made, and directions issued thereunder. The IA submitted an interim inspection report on 16th February, 2018 under regulation 5 (1) of the IIR. On consideration of the said report, the DC, in exercise of the powers conferred under section 220 (2) of the Code read with regulation 5(4) of the IIR, vide an ex-parte interim order dated 8th March, 2018, debarred Mr. Mohan from undertaking any new assignment under the Code. After considering the written submission dated 23rd March, 2018 of Mr. Mohan and hearing him on 12th April, 2018, the DC, vide order dated 18th April, 2018, confirmed the directions contained in the ex-parte interim order dated 8th March, 2018.

1.2 The IA, after completion of inspection, shared the draft Inspection Report, vide email dated 26th March, 2018, with Mr. Mohan for his comments. After considering the comments of Mr. Mohan, the IA submitted the Inspection Report to the Board on 15th April, 2018. On consideration of the Inspection Report under regulation 11 of the IIR, the Board was of the *prima facie* opinion that sufficient cause existed to take actions under section 220 of the Code and accordingly issued the SCN to Mr. Mohan seeking his written reply and offering him an opportunity of personal hearing before the DC. The SCN alleged various contraventions of the provisions of the Code, the IBBI (Insolvency Professionals) Regulations, 2016 (IPR) and the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRPR). Mr. Mohan, after seeking additional time, submitted written reply vide letter dated 18th June, 2018. The Board referred the SCN, reply of Mr. Mohan to the DC and other material available on record to the DC for disposal in accordance with the Code and regulations made thereunder.

1.3 Mr. Mohan availed the opportunity of a personal hearing before the DC on 19th June, 2018 when he reiterated the submissions made in his written reply dated 18th June, 2018 and made a few additional submissions. He urged the DC to consider the two letters dated 6th January, 2018 and 9th January, 2018 written by the two financial creditors in the matter of Carnation Auto India Private Limited opposing re-issue of invitation for expression of interest (EoI). He was allowed one-week to submit the following documents, as desired by him:

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- (a) written contemporaneous records for the decision taken for appointing the valuers in four corporate insolvency resolution processes (CIRPs) undertaken by him as Interim Resolution Professional (IRP) / Resolution Professional (RP), the reasons for taking such decision, and the information and evidence in support of such decision, as required under clause 16 of the Code of Conduct in the first schedule of the IPR (Code of Conduct);
- (b) evidence of handing over the matters in respect of fraudulent transactions to the RP(s) who succeeded him in CIRPs of Carnation Auto India Private Limited and Athena Demwe Power Limited, for which Mr. Mohan was advised by the Committee of Creditors (CoC) to file applications before the Hon'ble Adjudicating Authority (AA) and which he failed to do; and
- (c) the record of the directorship of Dynamic Insolvency and Bankruptcy Services Pvt. Ltd. for the relevant period.

Alleged Contraventions

2. Mr. Mohan acted as IRP / RP of CIRPs of four corporate debtors (CD), namely, JEKPL Private Limited, Carnation Auto India Private Limited, Athena Demwe Power Limited, and Tirupati Inks Limited. The SCN alleges several contraventions of provisions of law by him in these CIRPs. In respect of contraventions alleged in the SCN, the submission of Mr. Mohan thereon and findings of the DC are as under:

2.1 In the matter of CIRP of JEKPL Private Limited

Contravention: In the matter of Export Import Bank of India Vs. Resolution Professional JEKPL Pvt. Ltd. [Company Appeal (AT)(Insolvency) No. 304 of 2017], the Hon'ble National Company Law Appellate Tribunal (NCLAT), vide order dated 8th December, 2017, directed Mr. Mohan to take into consideration the claim of the appellant, to request the CoC to notice the same and to bring it to the notice of the AA. However, Mr. Mohan failed to comply with the direction. The NCLAT took notice of this in its order dated 9th February, 2018 as under:

"It appears that in spite of our order dated 08.12.2017, the Resolution Professional Mr. Mukesh Mohan persuaded the matter before the Adjudicating Authority suppressing the aforesaid order passed by this Appellate Tribunal. A request was also made to take the matter out of turn. we issue notice on Mr. Mukesh Mohan to state as to why a proceeding for Contempt be not initiated against him."

Submission: The NCLAT was, however, pleased to drop the same vide order dated 20th March, 2018.

Finding: The submission that the NCLAT, vide order dated 20th March, 2018, has dropped the contempt proceeding is well appreciated. This, however, means that the contempt proceeding is closed. This does not mean that his conduct was regular and above board. It is observed from the said order of the NCLAT that Mr. Mohan tendered an unconditional and unqualified apology. He submitted that it was unintentional disregard of the order dated 8th December, 2017 and he had already submitted resignation in all four CIRPs. In view of this, the NCLAT did not proceed further, without going into the question whether disregard of the order dated 8th December, 2017 was intentional or not, and closed the contempt proceeding with a clear understanding that Mr. Mohan will not act in any manner in violation of any order passed by the NCLAT or the AA in future. The fact that Mr. Mohan suppressed and disregarded the directions of the NCLAT remains undisputed. An IP is an empowered, qualified and regulated professional with huge statutory responsibility towards stakeholders. He is an extended arm of the AA and is responsible for all compliances under the Code and other laws applicable to the

CD. He cannot, even by inadvertence or negligence, disregard or suppress an order of the NCLAT. There would be anarchy in the society if professionals responsible for upholding the law disregard the same. Such conduct of Mr. Mohan is unbecoming of an IP and in contravention of the provisions of section 208(2)(a) of the Code, regulation 7(2)(a) and (h) of the IPR and clauses 1, 2, 12, 14, 15 and 24 of the Code of Conduct.

2.2 In the matter of CIRP of Carnation Auto India Private Limited

2.2.1 Before examining each allegation in this matter, it is useful to take note of the undisputed facts from the material available on record as under:

(a) The CoC had two main financial creditors, namely, Punjab National Bank (PNB) and IFCI Venture Capital Funds with 82.85% and 16.47% voting power respectively.

(b) The agenda of the meeting of the CoC held on 5th December, 2017 contained a draft invitation for EoI for consideration of the CoC. This draft invitation did not carry a requirement of CA certificate. It, however, sought a resolution as under:

"Further Resolved that Mr. Mukesh Mohan be and is hereby authorised to finalise the Expression of Interest for Resolution Plan and to negotiate with the News Paper Agency / magazines"

(c) The minutes of meeting of the CoC held on 5th December, 2017 indicate that the CoC resolved about the manner of publication of the invitation. It did not resolve to authorise Mr. Mohan, as sought by him, to finalise the invitation for EoI. In this meeting, there was no discussion about the requirement of a CA certifying the eligibility of a resolution applicant.

(d) Mr. Mohan did not issue the invitation approved by the CoC in its meeting on 5th December, 2017. Instead in a meeting with forensic auditors and one of the financial creditors (PNB) on 21st December, 2017 (not a meeting of the CoC), Mr. Mohan requested PNB to vet the invitation for EoI. The invitation was finalised in that meeting and an officer of PNB signed the invitation in token of its approval. This invitation carried the requirement of CA certificate while the one approved by the CoC did not.

(e) Mr. Mohan issued the invitation for EoI, as finalised by him with PNB, on 26th December, 2017. The invitation carried the requirement of a CA certificate certifying the eligibility of a resolution applicant.

(f) In the invitation for EoI, the Board found deficiencies relating to (a) registration number and address and email of the IP, (b) the last date for submission of EoI, and (c) the requirement of CA certificate. Vide a letter dated 26th December, 2017, it required Mr. Mohan to issue a fresh invitation for EoI after removing the deficiencies.

(g) Mr. Mohan, vide letter dated 1st January, 2018, contested the deficiencies relating to (a) registration number, address and e-mail, and (b) the requirement of CA certificate. He submitted that the requirement of CA certificate has been approved by PNB and most of the deficiencies pointed out by the Board existed in other invitations for EoI. He admitted the deficiency relating to the last date for submission of EoI as a mistake by oversight by all members of the CoC and himself. He, therefore, offered to issue an addendum for the mistake/deficiencies pointed by the Board.

(h) The Board, vide letter dated 3rd January, 2018, reiterated its directions issued vide earlier letter dated 26th December, 2017.

(i) In the meeting of the CoC held on 5th January, 2018, Mr. Mohan placed a legal opinion confirming that the invitation for EoI issued on 26th December, 2017 was in accordance with the Code. After discussion, the CoC resolved: *"Resolved that it will not be feasible to release fresh Expression of Interest as directed by the IBBI."* It did not elaborate why it was not feasible, though it noted non-availability of resources. It authorised Mr. Mohan to file an

application before the AA under section 60 of the Code seeking directions in respect of fresh invitation for EoI and decisions on certain questions of law.

(j) Mr. Mohan filed an application before the AA on 11th January, 2018 seeking, among others, a direction whether RP should issue a corrigendum or a fresh invitation.

(k) The AA disposed of the application vide order dated 19th April, 2018 permitting the RP, who has replaced Mr. Mohan in the meantime, to publish a corrigendum.

2.2.2 Contravention: Mr. Mohan failed to comply with the direction dated 26th December, 2017 of the Board requiring him to issue a fresh invitation for EoI, after removing deficiencies observed by the Board in the invitation for EoI dated 26th December, 2017.

Submission: The issue of fresh invitation for EoI is sub-judice before the AA and, therefore, action of the IBBI in proceeding against him amounts to contempt of court. Mr. Mohan has further submitted that he placed a revised invitation for EoI, after removing deficiencies observed by the Board, for consideration of the CoC in its meeting on 5th January, 2018. However, the CoC rejected the proposal to issue a fresh invitation. The two financial creditors, namely, PNB and IFCI Venture Capital Funds Limited have reiterated this fact vide letters dated 6th January, 2018 and 9th January, 2018 respectively, to the Board.

Finding: The DC finds as under:

(a) The submission that the matter was sub-judice is not correct. It was not sub-judice either on the date of issue of the SCN or on the date of hearing before the DC. The AA has disposed of the matter vide order dated 19th April, 2018.

(b) As regards submission that the CoC rejected the proposal to issue a fresh invitation in compliance with directions of the Board, it must be noted that the Board issued directions in exercise of its powers under section 196 (1)(g) of the Code. The Code does not contemplate anywhere that the directions of the Board are subject to approval of the CoC. There are authorities to examine the propriety or competence of the Board to issue such directions. Certainly, the CoC is not the forum to take a view on statutory directions given by the Board to a registered IP. This poorly reflects the professional competence of Mr. Mohan as an IP. This also displays his impulse to disregard the direction of the Board, as he did with the directions of the NCLAT narrated in Para 2.1 above. By failing to comply with directions of the Board, Mr. Mohan contravened provisions of section 196(1)(g), 208(2)(a) and (e) of the Code, regulation 7(2)(h) and (i) of the IPR and clauses 2, 10, and 14 of the Code of Conduct.

(c) The submission that the CoC rejected the proposal to issue a fresh invitation is not correct. The CoC "*Resolved that it will not be feasible to release fresh Expression of Interest directed by IBBI*" and, therefore, decided to seek directions from the AA. The apparent reason for such decision of the CoC was non-availability of funds with the CD. The reason is obvious from (a) the letter dated 6th January, 2018 of PNB which states: "*It is important here to mention that the decision has been taken as there is no cash in the company*" and (b) the letter dated 9th January, 2018 of IFCI Venture Capital Funds Ltd. which states: "*In case, we consider release of fresh EOI then that will create huge financial pressure on the company*". It was incumbent on Mr. Mohan, who chaired the meeting of the CoC, to place the correct direction of the Board that the cost of fresh invitation would not form part of IRPC. Further, Mr. Mohan influenced the decision of the CoC by producing a legal opinion to the effect that the invitation issued was in conformity with section 25(2)(h) of the Code. Probably, the CoC would have decided differently, if Mr. Mohan had presented correct position about the cost of fresh invitation and

had not influenced by the legal opinion. Therefore, Mr. Mohan contravened provisions of section 208(2)(a) of the Code and regulation 7(2)(h) and (i) of the IPR and clauses 2, 3, 9, 10, 11, 12 and 14 of the Code of Conduct.

(d) The agenda and minutes make it clear that the CoC in its meeting on 5th January, 2018 did not consider any proposal or suggestion to issue a corrigendum. Vide letter dated 9th January, 2018 to the Board, IFCI Venture Capital Funds Ltd. which states: "... and hope that you will positively understand the current situation and appreciate if we may consider at the CoC to issue a corrigendum to the Expression of Interest and such cost shall be part of CIRP cost ..". Thus, after the meeting of the CoC, one financial creditor was willing to consider at the CoC to issue a corrigendum provided such cost was part of IRPC. In fact, there was never a proposal or suggestion before the Board or the CoC to consider issuing a corrigendum. Vide letter dated 1st January, 2018 to the Board, Mr. Mohan had offered an addendum in respect of one deficiency while refusing to admit two other deficiencies. Since it was not feasible to release a fresh EoI, the CoC wanted a direction from AA in this regard. In the application to the AA, Mr. Mohan, however, distorted the decision of the CoC and sought a direction whether RP should issue a corrigendum or a fresh invitation. He also added certain prayers which were not authorised by the CoC. For example, he prayed for a decision on the question of law as to whether the Board can initiate any action against the RP / CoC for non-compliance with direction of the Board. This only establishes that Mr. Mohan was pursuing his own personal agenda rather than that of the CoC. Thus, Mr. Mohan has not been straightforward and honest in either dealing with the Board, the AA or the CoC in contravention of provisions of section 208(2)(a) and (e), regulation 7(2) (a), (h) and (i) of the IPR and clauses 1, 2, 12, and 14 of the Code of Conduct.

2.2.3 Contravention: Mr. Mohan attempted to mislead the Board and the AA that the invitation for EoI, requiring a verification certificate from a CA, was approved by the CoC, whereas it was approved by only one creditor, namely, PNB, in a special meeting with the forensic auditors and not in a meeting of the CoC. He has justified that the invitation for EoI was in accordance with the best market practices and enclosed several invitations in support of his contention. However, not a single invitation enclosed by Mr. Mohan required a certificate from a CA certifying eligibility of resolution applicants.

Submission: The CoC, in its meeting held on 5th January, 2018, much after the publication of the invitation for EoI, has confirmed that the invitation for EoI was in accordance with section 25(2)(h) of the Code. Further, the IFCI Venture Capital Funds Limited, the only other financial creditor, who was not present in the meeting held on 21st December, 2017, has submitted a letter dated 9th January, 2018 to the effect that the invitation for EoI published on 26th December, 2017 was in compliance with section 25(2)(h) of the Code. At the hearing, Mr. Mohan submitted that the law does not require prior approval of invitation for EoI. The creditors, who constitute CoC, have given post facto approval after issue of invitation for EoI. Further, the best market practice was to call for a Banker's / CA certificate. Mr. Mohan submitted the invitations for EoI of Essar Steel India Limited, Ferro Alloys Corporation Limited, Admiron Life Sciences Private Limited, James Hotels Limited, and Monnet Ispat and Energy Limited in support of his contention.

Finding: The DC finds as under:

(a) The CoC approved the following invitation for EoI in its meeting on 5th December, 2017:

EXPRESSION OF INTEREST

for
RESOLUTION PLAN

of

CARNATION AUTO INDIA PRIVATE LIMITED

Carnation Auto India Private Limited is having the integrated multi brand auto solution network. **Carnation has more than 150 partners across country.**

Corporate Insolvency Resolution Process has been initiated by Punjab National Bank being Financial Creditors under Section 7 of Insolvency & Bankruptcy Code, 2016 against Carnation Auto India Private Limited, which has been admitted by the Adjudicating Authority.

Expression of Interest (EOI) for the Resolution Plan of Carnation Auto India Private Limited are invited from the interested Resolution Applicants. **Interested Resolution Applicants may submit their EOI by December 31, 2017, through Email or Speed/Registered post at the below mentioned address.**

Information Memorandum (IM) may be shared to interested Resolution Applicant after receiving an undertaking as required under section 29(2) of Insolvency and Bankruptcy Code, 2016, at the sole discretion of Committee of Creditors.

Committee of Creditors shall have right to reject any Resolution Plan without giving any reason to the applicant.

For any clarification, please write at ip.carnation@insolvencyprofessionals.org.in and gyanshree@yahoo.com by 15.12.2017.

(b) At the request of Mr. Mohan, one financial creditor (PNB) approved the following invitation for EOI on 21st December, 2017, which was issued on 26th December, 2017:

EXPRESSION OF INTEREST

for

RESOLUTION PLAN

of

CARNATION AUTO INDIA PRIVATE LIMITED

Carnation Auto India Private Limited is having the integrated Multi Brand Auto Solution **Franchisee** Network.

Corporate Insolvency Resolution Process has been initiated by Punjab National Bank being Financial Creditor under section 7 of Insolvency & Bankruptcy Code, 2016 against Carnation Auto India Private Limited, which **was** admitted by the Adjudicating Authority on **25.09.2017.**

Expression of Interest (EOI) for the Resolution Plan of Carnation Auto India Private Limited are invited from the interested Resolution Applicants.

Resolution Applicants to provide Audited Financial Statements of last three years alongwith KYC documents of the company and the promoters.

Preference will be given to the Resolution Applicants having experience in the same line of activity.

Resolution Applicants also to submit an Affidavit supported with CA Certificate that they are eligible to be Resolution Applicants under Insolvency and Bankruptcy Code, 2016, all amendments, Rules and Regulations made thereunder.

Information about the process shall be shared to the shortlisted Resolution Applicants by Committee of Creditor.

For any clarification, please write at ip.carnation@insolvencyprofessionals.org.in and gyanshree@yahoo.com latest by January 15, 2017.

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(c) It is obvious that the invitation approved by CoC was not issued. The invitation approved by a financial creditor was issued. The invitation issued is quite different from what was approved by the CoC, as is evident from the invitations reproduced under Para (a) and (b) above. The bold faces in the approved invitation, as at Para (a), did not appear in the invitation actually issued. The bold faces in the invitation actually issued, as at Para (b), did not appear in the approved invitation. Mr. Mohan engaged in private discussion with a member of the CoC to modify and finalise the invitation. By failure to issue the invitation that was approved by the CoC and issuing an invitation privately finalised with a financial creditor, Mr. Mohan contravened provisions of section 25(2)(h) of the Code, regulation 7(2)(h) of the IPR and clauses 5 and 17 of the Code of Conduct.

(d) The invitation approved by the CoC did not carry the requirement of CA certificate for eligibility. Despite this, Mr. Mohan claimed in several communications to the Board and the AA that the requirement of CA certificate was imposed by the CoC. Even in his application before the AA, Mr. Mohan stated: *"That the condition of CA Certificate was imposed by the Committee of Creditors for the first screening of the eligible Resolution Applicants."* The fact is that the requirement of a CA certificate was brought up by Mr. Mohan in private consultation with a financial creditor. Therefore, Mr. Mohan acted in contravention of provisions of section 25(2)(h) of the Code and clauses 1, 2, 3, 14 and 17 of the Code of Conduct.

(e) Mr. Mohan has justified his conduct by contending in the application to the AA: *"That the Expression of Interest was further fine tuned by Punjab National Bank, being the only secured creditor during the meeting held on December 21, 2017 at New Delhi."* This gives an impression that the invitation was merely fine-tuned, that too, by the only secured creditor, and that too, in a meeting of the CoC. The fine-tuning cannot yield a substantially different invitation from what was approved by the CoC, as demonstrated in Para c. above. A secured creditor has no right or privilege under the law to change or override a decision of the CoC. Further, the so-called fine-tuning was not done in a meeting of CoC, but in a private meeting with a member of the CoC. This amounts to serious breach of trust, lack of independence and impartiality in contravention of section 25(2)(h) of the Code which requires the RP to act with the approval of the CoC, regulation 7(2)(h) of the IPR and clauses 1, 2, 5, 12, 14 and 17 of the Code of Conduct.

(f) The above conduct raises serious doubt about the intention of Mr. Mohan. He had sought an authorisation from the CoC in the meeting dated 5th December, 2017 in his favour to finalise the invitation. The CoC, however, did not approve such authorisation. Thus, there was no scope for Mr. Mohan to modify or finalise the invitation outside the CoC. Even after failing to get authorisation from the CoC, as evident from the minutes of the meeting with forensic auditors on 21st December, 2017, Mr. Mohan and PNB finalised the invitation. Such finalisation is breach of trust and against the CoC in contravention of provisions of section 25(2)(h) and 208(2)(a) of the Code, regulation 7(2)(h) of the IPR and clauses 1, 2, 3, 5, 9 and 14 of the Code of Conduct.

(g) The submission that the approval of PNB, which is the only secured creditor with 83% voting power, is adequate is not tenable in law. The Code and regulations made thereunder does not empower a secured creditor or a creditor with a certain threshold of voting power to substitute the CoC. The Code provides for an institutional mechanism in the form of CoC to take decisions and prescribes that such decisions shall be taken in a meeting of the CoC. If the law provides for a certain manner of doing something, it must be done in that manner only. Further, a meeting has certain inherent advantages over private discussion with each of the

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members of the CoC. It allows deliberation and evaluation of different options and exchange of views before arriving at an informed decision. A decision by a member, who has the voting power required to take a decision, cannot substitute, or override the unanimous decision of the CoC taken in a meeting. This demonstrates not only Mr. Mohan's inadequate understanding of the provisions of the Code, but also acute bias in favour of an influential creditor and urge to justify his conduct by any means. Such conduct to side with the largest financial creditor and terming its decision as the decision of the CoC seriously compromises the independence and impartiality of the IP in contravention of provisions of section 25(2)(h) of the Code, regulation 7(2)(h) of the IPR and clauses 1, 3, 5, 10, 12 and 14 of the Code of Conduct.

(h) The submissions that the law does not require prior approval of invitation for EoI and the CoC has granted post facto approval in its meeting on 5th January, 2018 to the invitation issued on 26th December, 2017 are preposterous. The need for post facto approval arises only in case of urgency. There is nothing on record to show that there was an urgency publish the invitation without having the approval of the CoC. Further, when CoC has granted ex-ante approval, the need for post facto approval does not arise. Importantly, the CoC refused authorisation to Mr. Mohan to modify the invitation. It did not even delegate authority to PNB to modify it. Unfortunately, Mr. Mohan did not issue the invitation even after having the approval of the CoC. Further, if Mr. Mohan considered that the approval of PNB on 21st December, 2017 required post facto approval, the minutes of the said meeting should have recorded so. Mr. Mohan should have sought approval of the CoC immediately thereafter. He would not have waited for the Board to red flag it and to reject his suggestion of addendum to seek post facto approval of CoC. In any case, there is no record in the minutes of the meeting dated 5th January, 2018 to the effect that the CoC granted post facto approval. It merely states that the invitation issued was in compliance with section 25(2)(h) of the Code. Therefore, Mr. Mohan not only failed to run the CIRP as envisaged under section 23 of the Code which obliges him to run the entire CIRP, but also to comply with section 25(2)(h) of the Code, which mandates him to act with the approval of the CoC.

(i) Mr. Mohan has fairly stated that the CoC has confirmed the invitation much after the publication. Admittedly, (a) the CoC has confirmed that the invitation is in accordance with the Code; it did not grant post facto approval; and (b) the said confirmation is much after the publication of invitation. Section 25(2)(h) of the Code requires the RP to "*invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of the committee of creditors, having regard to the complexity and scale of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans;*". This section requires that the invitation shall specify criteria keeping in view the complexity and scale of business. Such criteria, being commercial matters, need approval of the CoC, and not of one creditor only or the RP. Such approval must be prior or at best contemporaneous, as evident from the language, "as may be laid down with the approval of the committee of creditor". This implies that the criteria cannot be laid down without the approval of the CoC. As stated in the Statements of Objects and Reasons appended to the Insolvency and Bankruptcy Code (Amendment) Bill, 2017, this provision is intended to "*enable the resolution professional, with the approval of the committee of creditors, to specify the eligibility conditions ...*". It envisages that the approval of the CoC enables the RP to specify the criteria. It does not envisage a situation whereby the criteria are laid down first by the RP and these are approved subsequently by the CoC. Post facto approval would render section 25(2)(h) of the Code a dead provision as it would have no useful purpose. Thus, Mr. Mohan contravened provisions of section 23, 25(2)(h) and 208(2)(a) and (c) of the Code,

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regulation 7(2)(a) and (h) of the IPR and clauses 1, 2, 3, 10, 12, 14 and 24 of the Code of Conduct.

(j) A perusal of the invitations for EoI of Essar Steel India Limited, Ferro Alloys Corporation Limited, Admiron Life Sciences Private Limited, James Hotels Limited, and Monnet Ispat and Energy Limited, as supplied by Mr. Mohan in his reply, reveal that none of these invitations carry a requirement of a CA certificate certifying eligibility of a resolution applicant. Some of these require a CA certificate in respect of networth. The eligibility certificate and net worth certificate are not the same thing. Determination and certification of networth is in the professional domain of a CA. Determination and certification of eligibility of a resolution applicant, particularly keeping in view the provisions of section 29A of the Code, is not in the professional domain of an IP. Thus, Mr. Mohan attempted to mislead the Board and the AA that CA certificate certifying eligibility of resolution applicants is the best market practice, in contravention of provisions of section 25(2)(h), 29A and 208(2)(a) of the Code, regulation 7(2)(h) of the IPR and clauses 1, 2, 3, 10, 12 and 14 of the Code of Conduct.

(k) Mr. Mohan has been changing his stance for explaining his conduct. In his letter dated 1st January, 2018 to the Board, he submitted that the invitation issued by him was approved by the CoC in its meeting on 5th December, 2017. Then he changed his stance to say that the invitation was approved by the only secured creditor and such approval is adequate. At the hearing, he submitted that the CoC has granted post facto approval in its meeting on 5th January, 2018, and the law does not require prior approval of the CoC. He resorted to several misrepresentations to mislead the authorities. For example, he misrepresented that requirement of CA certificate for eligibility of resolution applicants was the best market practice. He submitted to the Board that last date for submission of EoI in the invitation was a mistake by oversight by all members of the CoC and himself, while the invitation issued was not even approved by the CoC. In the CoC approved invitation, the last date was 31st December, 2017 and there was no mistake. In the invitation issued, the last date for seeking clarification was 15th January, 2017, which was a mistake, arising from irregular acts of Mr. Mohan and the CoC did not have a role in the matter. Mr. Mohan has been resorting to implausible explanations, reflecting poorly on his integrity in contravention of regulation 7(2)(h) of the IPR and clauses 1, 2, 3, 12 and 24 of the Code of Conduct.

2.2.4 Contravention: Mr. Mohan outsourced his responsibility of certifying eligibility to a CA. He outsourced the responsibility to an interested party, namely, resolution applicant to obtain and submit a certificate from a CA that the resolution applicant is eligible to submit resolution plans. He introduced the requirement of a certificate from a CA, which is not envisaged in the law, adding to cost in terms of time and money.

Submission: While denying the allegation, Mr. Mohan has submitted that this was the best market practice, and the CoC has approved it. He has further stated that the Board subsequently prohibited outsourcing by a circular dated 3rd January, 2018.

Finding: The DC finds as under:

(a) The circular dated 3rd January, 2018 prohibiting outsourcing of responsibilities by an IP is only a clarification. It is not a new prescription. It is obvious from section 206 of the Code that only an individual registered as an IP with the Board can render services as an IP. The Board registers an individual as an IP on being satisfied of his conduct and competence. Further, the CoC engages an IP of its choice for availing his services. Thus, the responsibilities of an RP

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under the Code must be discharged by an individual who is registered with the Board as an IP and is chosen by the CoC to act as RP. There would be chaos if the responsibilities of an IP are outsourced to people who are not qualified, registered and authorised to render services as an IP. Thus, Mr. Mohan contravened provisions of section 206 of the Code.

(b) Assuming that outsourcing was permissible prior to the date of issue of circular, one has to follow certain basic norms. For example, a responsibility may be outsourced to a professional who is competent for the task. Mr. Mohan outsourced verification of eligibility of a resolution applicant to a CA who is not professionally qualified to undertake this responsibility. Further, he did not identify a CA for verification of eligibility on his behalf; he asked the interested party, namely, resolution applicant, to obtain a certificate from a CA. This compromised the integrity of the process, and thereby his ability to protect and preserve the value of the property of the corporate debtor. Thus, Mr. Mohan contravened the provisions of section 20 and 208(2)(a) of the Code, regulation 7(2)(h) of the IPR and clause 1, 2, 5, 10 and 14 of the Code of Conduct.

2.2.5 Contravention: Mr. Mohan outsourced claim verification to *India Juris*, a related party.

Submission: While denying the allegation, Mr. Mohan has submitted that he only required a legal opinion for assisting him in discharge of his responsibilities. Further, he is authorised to appoint professionals and the CoC has approved the payment to *India Juris*.

Finding: The authority of an IP to appoint professionals is undisputed. However, this authority needs to be exercised responsibly. One needs to adopt certain basic norms while appointing a professional. It is extremely important to avoid conflict of interest and maintain independence and impartiality, particularly when an IP engages a related party. Mr. Mohan has no explanation as to why he engaged a related party for claim verification, other than that he has authority to do so. Therefore, he contravened the provisions of section 208(2)(a) of the Code, regulation 13 of the CIRPR, regulation 7(2)(a) and (h) of the IPR and clauses 1, 5, 9, 10 and 14 of the Code of Conduct.

2.2.6 Contravention: Instead of appointing one, Mr. Mohan used the services of a forensic auditor, who was earlier appointed by one of the financial creditors in the same account. Further, the forensic audit report had adverse findings with regard to irregular transactions - preferential transactions, undervalued transactions, extortionate transactions and fraudulent trading or wrongful trading. The CoC directed Mr. Mohan, in its meeting dated 5th January, 2018, to file an application in respect of irregular transactions before the AA. Mr. Mohan, however, failed to do so.

Submission: On coming to know that a forensic auditor appointed by one of the financial creditors had already started the said audit, Mr. Mohan decided to continue with the same auditor as the appointment of a new one would incur additional cost and time. He, however, extended the scope of the work. Further, the CoC in its meeting held on 10th January, 2018 granted time to the members of the suspended Board of Directors to submit clarifications on the findings in the forensic audit. In its meeting on 16th February, 2018, the CoC granted one more opportunity to them to submit their comments on the forensic audit by 19th February, 2018. The members of the suspended Board of Directors submitted their comments on the forensic audit on 5th March, 2018. Since the CoC accepted Mr. Mohan's resignation on 5th March, 2018, he was neither in a position to nor obligated to proceed further in the matter.

Finding: The DC finds as under:

(a) An IP is duty bound under section 20 of the Code to protect and preserve the value the assets of the Corporate Debtor. He is also duty bound under section 25(2)(j) read with section 43, 45, 50 and 66 of the Code to identify and recover the assets lost in irregular transactions. These are inherent powers of the RP and the Code does not envisage any role of the CoC in irregular transactions. He may engage the services of professionals, including forensic auditor, to assist him for this purpose. It is pertinent to note the thinking of the Bankruptcy Law Reforms Committee (BLRC), which conceptualised the Insolvency and Bankruptcy Code, 2016, in respect of such transactions as under:

“Treating recoveries from vulnerable transactions

The Committee discussed the possibility of identifying and recovering from vulnerable transactions. These are transactions that fall within the category of wrongful or fraudulent trading by the entity, or unauthorised use of capital by the management. There are two concepts that are recognised in other jurisdictions under this category of transactions: of fraudulent transfers, and fraudulently preferring a certain creditor or class of creditors. If such transactions are established, then they will be reversed. Assets that were fraudulently transferred will be included as part of the assets in liquidation.

The Committee recommends that all transactions up to a certain period of time prior to the application of the IRP (referred to as the “look-back period”) should be scrutinised for any evidence of such transactions by the relevant Insolvency Professional. The relevant period will be specified in regulations. At any time within the resolution period (or during the Liquidation period if the entity is liquidated) the relevant Insolvency Professional is responsible for verifying that reported transactions are valid and central to the running of the business. There should be stricter scrutiny for transactions of fraudulent preference or transfer to related parties, for which the “look back period” should be specified in regulations to be longer.”.

(b) A forensic audit is conducted to detect and gather evidence of frauds, misappropriation, embezzlement, or such other white-collar crime and to recover the assets lost through irregular transactions. It is, therefore, necessary that a person appointed to conduct forensic audit has no conflict of interests whatsoever. It is not in the fitness of things that the RP engages a forensic auditor, who has already been engaged by one of the stakeholders in the same matter. Such an auditor may not always be fair to all stakeholders. The submission that Mr. Mohan appointed the auditor who was already engaged by a financial creditor to save time and cost is not tenable, as this can be at cost of vitiating the very purpose for which a forensic audit is conducted. Further, it is perplexing that saving time at the stage of appointment was important for Mr. Mohan. It was, however, not material at all for processing the forensic report and filing an application before the AA. Therefore, Mr. Mohan contravened the provisions of section 208(2)(a) and (c) of the Code, regulation 7(2)(a) and (h) of the IPR and clauses 1, 2, 3, 5, 10, 14 and 24 of the Code of Conduct.

(c) While one can appreciate that the views of the CD and of the CoC are considered before filing the application, it is difficult to appreciate that the CoC would debate, consider and decide the matter in several meetings (5th January, 2018; 10th January, 2018; 16th February, 2018; and 5th March, 2018) for many months, while the RP is a silent spectator. The Code puts the RP on driver’s seat as regards irregular transactions are concerned and does not envisage any role for the CoC in the matter. In any case, after the direction of the CoC on 5th January, 2018, Mr. Mohan got two months to file an application. Instead of filing the application, as chairman, he

anticipated and entertained further deliberation on the irregular transaction in three subsequent meetings of the CoC. Strangely, he explains that since the CoC accepted his resignation on 5th March, 2018, he could not file the application, as if the acceptance of the resignation was a unilateral action of the CoC. Further, after acceptance of resignation by the CoC, Mr. Mohan continued in office till 14th March, 2018 when his resignation was approved by the AA. Mr. Mohan did not file the application even during this period. Section 25(2)(j) of the Code explicitly obliges the RP to file applications for avoidance of transactions in accordance with Chapter III of the Code to preserve and protect the assets of the CD. This leads to an inescapable conclusion that Mr. Mohan knowingly and deliberately did not file the application for avoidance of the irregular transactions as required by the Code before the AA in breach of his statutory duties. He abdicated his authority in favour of the CoC and allowed the CoC to usurp his authority. Further, even after the direction of the CoC to him to file the application, he did not do so and thereby contravened the provisions of sections 20, 23, 25(2)(j), 43, 45, 50, 66, and 208(2)(a) and (e) of the Code, regulation 7(2)(a) and (h) of the IPR and clauses 2, 3, 5, 10, 12, 14 and 24 of the Code of Conduct.

2.3 In the matter of CIRP of Athena Demwe Power Limited

2.3.1 Contravention: Mr. Mohan did not appoint a forensic auditor but used the services of a forensic auditor, who was earlier appointed by one of the financial creditors in the same account. Further, the forensic audit report had adverse findings with regard to irregular transactions. The CoC in its meeting on 5th January, 2018 authorised Mr. Mohan to engage a particular Advocate to file an application before the AA. Mr. Mohan, however, failed to do so.

Submission: There is no mandate under the Code or the Rules and regulations issued thereunder that the IRP/RP cannot appoint as forensic auditor a person who has a working relationship with any of the members of the CoC. Since an auditor had already started work and continuing with the same seemed the most time-effective option. However, the scope of the work was modified. Further, the forensic auditor submitted the final audit report on 2nd February, 2018. Mr. Mohan in the meeting of the CoC on 12th February, 2018 reiterated that '*the legal council is required*'. Further, he did not get attachments referred in the forensic audit report till his resignation.

Finding: The DC finds as under:

(a) A RP, who is responsible for running a CD and guarding the interests of all stakeholders of the CD, cannot appoint anyone as forensic auditor just because there is no specific prohibition in law in this regard. The law casts at least a duty of care and due diligence and duty to preserve and protect the assets of the CD on the RP. This duty requires a RP to engage a professional who does not have any conflict of interests. A forensic auditor is appointed for a purpose. Such appointment must not frustrate the purpose. *The BLRC observes: "... The IRP is overseen by an "Insolvency Professional" (IP) who is given substantial powers. The IP makes sure that assets are not stolen from the company, and initiates a careful check of the transactions of the company for the last two years, to look for illegal diversion of assets. Such diversion of assets would induce criminal charges."* Therefore, Mr. Mohan contravened the provisions of section 208(2)(a) and (e) of the Code, regulation 7(2)(a) and (h) of the IPR and clauses 1, 2, 3, 5, 10, 14 and 24 of the Code of Conduct.

(b) It appears that Mr. Mohan was acting as post office among the CoC, members of the suspended board of directors of the CD and the forensic auditor. He received forensic report

form forensic auditor, placed it before the CoC, received comments of the members of the suspended board of directors, and forwarded the comments of suspended board of directors to the forensic auditor for comments. The Code does not expect an RP to be a pass through as regard forensic report is concerned. Mr. Mohan even failed to act as pass through, as he did not file the application even after the CoC directed him to do so and identified a particular Advocate for the purpose. It is strange that a forensic auditor appointed by IP does not give attachments to the RP. It can only happen only if the forensic auditor has allegiance to somebody else, not IP. This confirms that appointment of forensic auditor by a person other than RP has compromised the audit. The RP compromised it further by not filing the application before the AA. Thus, Mr. Mohan contravened the provisions of sections 20, 23, 25(2)(j), 43, 45, 50, 66, 208(2)(a) and (e) of the Code, regulations 7(2)(a) and (h) of the IPR and clauses 2, 3, 5, 10, 14 and 24 of the Code of Conduct.

2.3.2 Contravention: Mr. Mohan failed to include liquidation value in the information memorandum and failed to submit complete information memorandum in time.

Submission: Since the valuers appointed by Mr. Mohan were not approved by the CoC, liquidation value could not be arrived at. It was, therefore, beyond his control.

Finding: An IP is an empowered professional. He cannot plead helplessness that the valuers appointed by him were not approved by the CoC. Regulation 27 of the CIRPR at the relevant time required the IRP to appoint two valuers within seven days of his appointment. The law does not envisage any role of the CoC in the appointment of the valuers. Further, the CoC even did not exist at the time the IRP was required to appoint valuers. This is yet another instance of procrastination and abdication of responsibility in favour of the CoC in contravention provisions of section 208(2)(a) and (e) of the Code, regulation 27 and 36 of the CIRPR, regulation 7(2)(h) of the IPR and clauses 2, 10, 12, 13, 14 and 24 of the Code of Conduct.

2.4 In the matter of CIRP of Tirupati Inks Limited

2.4.1 Contravention: Mr. Mohan handed over custody of the assets of the CD to the members of suspended board of directors ignoring his statutory duties.

Submission: The handover of the custody of the assets of the CD to a member of the suspended Board of Directors has been within the knowledge of the CoC.

Finding: It is the duty of the IRP / RP under the Code to take custody of all assets of the CD and preserve and protect their value. It also duty of the IRP / RP to exercise the powers of the board of directors. The Hon'ble Supreme Court in the matter of Innoventive Industries Ltd. vs. ICICI Bank and Anr. (2017) 1 SCC 407 observed: "*According to us, once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management...*". Mr. Mohan did exactly what the law prohibits: allowed the suspended board of directors to regain control over the CD. Further, an act done with the knowledge of the CoC does neither make it legal nor does it absolve the IRP / RP of his responsibility. It is also important to note that Mr. Mohan did not handover the assets with the knowledge of the CoC. He handed over the assets on his own and subsequently he informed it in a meeting of the CoC. The minutes of the CoC dated 30th November, 2017 reads: "*Chairman informed that after taking over the assets of the company the same is handed over to the member of suspended board of director for the keeping the same to safe custody, as there was no funds available in the company account...*". Thus, handing over the assets to the suspended directors of the CD

is in contravention of provisions of section 17, 18(f), 20 and 23 of the Code, regulation 7(2)(h) of the IPR and clauses 2, 10, 12, 14 and 24 of the Code of Conduct.

2.4.2 Contravention: One of the valuers engaged by Mr. Mohan was providing consulting services to a financial creditor.

Submission: There is no embargo under the law on engaging a valuer recommended by one of the members of the CoC.

Finding: 'No embargo' does not entitle an IP to do anything that is not explicitly prohibited. There is always an embargo on doing something inappropriate, more so by an IP. He has duty to preserve and protect the value of the assets of the CD and to maintain complete independence in the professional relationship. How does one maximise the value of the assets of the CD, which is the solemn objective of the Code, unless one has an objective and credible value of the underlying assets? This requires utmost professional independence. Further, the CoC did not exist at the time the IRP was required to appoint valuers. How did he get recommendation of a member of the CoC, unless there is some private understanding between the RP and a person, who is likely to become a member of the CoC? Ignoring the private understanding for a moment, it is clear that Mr. Mohan contravened the provisions of section 208(2)(a) and (e) of the Code, regulation 7(2)(h) of the IPR and clauses 1, 2, 5, 10 and 14 of the Code of Conduct.

2.5 As IRP / RP across CIRPs

2.5.1 Contravention: Mr. Mohan appointed the same valuers in all the four CIRPs. He failed to supply any record of due diligence for selecting the same valuers thereby raising concerns of his impartiality and objectivity.

Submission: Mr. Mohan has submitted that the CoC has ratified the appointment of the valuers and no objection has been raised either by the CD or the creditors. He is not related to any of the valuers. Further, there are no rules, regulations or guidelines stipulating that the same valuer cannot be appointed by an IRP/RP in more than one account being handled by the RP. The valuers appointed in the four CIRPs are as under:

CIRP of	Valuer 1	Valuer 2
JEKPL Private limited	RBSA Valuation Advisers LLP*	Duff and Phelps
Carnation Auto India Private Limited	RBSA Valuation Advisers LLP	G D Rao & Associates
Athena Demwe Power Limited	RBSA Valuation Advisers LLP	Parth Financials and Industrial Consultancy Services
Tirupati Inks Limited	RBSA Valuation Advisers LLP	Parth Financials and Industrial Consultancy Services

* Appointed by IRP, Mr. Dinkar T Venkatasubramanian, not Mr. Mohan.

Finding: The submission that the CoC has ratified the appointments of valuers is amusing. Neither does the law envisage a role of the CoC in the appointment of the valuers nor does the CoC exist at the time the IRP is required to appoint valuers. At the hearing on 19th June, 2018, Mr. Mohan sought time to provide written contemporaneous records for the decision to appoint valuers, as required under clause 16 of the Code of Conduct. Instead of providing such records, Mr. Mohan, vide letter dated 25th June, 2018, has provided a list of valuation assignments these valuers had, establishing their credibility. Thus, it is clear that there is no contemporaneous records and the appointments have not been made impartially and objectively in contravention of provisions of regulation 7(2)(h) of the IPR and clauses 14, 16 and 19 of the Code of Conduct.

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2.5.2 Contravention: Mr. Mohan failed to send correspondences from his registered email Id and his communications and notices did not carry his address and registration number as an IP, in contraventions of the directions of the Board vide mail dated 6th March, 2017.

Submission: The Board has issued a circular on 3rd January, 2018 reiterating the requirements conveyed earlier vide mail dated 6th March, 2017. The issue of circular to this effect clearly indicates that there was confusion earlier.

Finding: There was a communication dated 6th March, 2017 clearly advising every IP to use registration number and registered email address in his correspondences and there was no confusion. Mr. Mohan, therefore, contravened provisions of section 208(2)(a) of the Code.

2.5.3 Contravention: Mr. Mohan resigned from all four CIRPs jeopardising them. He resigned in the matter of Carnation Auto India Private Limited on 7th February, 2018. In the matter of Tirupati Inks Limited, he resigned on 7th February, 2018, after 114 days into the process. In the resignation to the CoC, he stated that he was resigning as bills of service providers were not paid, while the bills were not actually submitted to CoC for payment. In the said matter, he stated before the NCLAT that he was resigning because of pre-occupation. He also resigned on the same day in the matter of Athena Dewane Power Limited. In the matter of JEKPL Private Limited, he resigned on 9th March, 2018 on personal reasons and health issues.

Submission: Mr. Mohan resigned in the matter of Carnation Auto India Private Limited due to personal, rather than professional, pre-occupation, health issues. He resigned in the matter of Tirupati Inks Limited due to certain personal and health issues on 7th February, 2018 and his resignation was accepted by the AA without any adverse comments on his professional capacity. He resigned in the matter of JEKPL for personal and health issues on 9th March, 2018, that is, after approval of resolution plan on 1st February, 2018.

Finding: The only hope for a sinking ship is its Captain. He cannot run away leaving the sinking ship in the mid-sea. The Code provides for an IP to run a CD in distress. He cannot run away from the CD when it needs the IP the most. Mr. Mohan ran away from all four CIRPs jeopardising the life of four CDs and the interests of their stakeholders. Further, Mr. Mohan provides different excuses for leaving the CIRPs at different times or before different fora. For example, in the matter of Tirupati Inks Limited, Mr. Mohan has submitted that he resigned due to personal and health issues. However, in his resignation to the CoC, he has stated that he was resigning as bills of service providers were not paid. He has stated before the NCLAT that he resigned because of pre-occupation. It establishes that Mr. Mohan conveniently changes his stance to suit the circumstance. Mr. Mohan thus contravened provisions of sections 17, 20, and 23 of the Code, regulation 7(2)(a) of the IPR and clauses 1, 2, 3, 12, 14, and 24 of the Code of Conduct.

2.5.4 Contravention: Mr. Mohan included the cost of public announcement as part of IRPC against explicit prohibition.

Submission: The regulations specify that the applicant shall bear expenses of public announcement which may be reimbursed by the CoC to the extent it ratifies them. The CoC has ratified the expenses and hence there is no violation.

Finding: Ratification of an expense and its inclusion in IRPC are two different matters. There was an explicit prohibition at the relevant time on inclusion of expenses on public

announcement in IRPC, which is paid in priority over any other creditor. By including the expense on public announcement in IRPC, Mr. Mohan has disturbed priority in payment in contravention of provisions in section 208(2)(a) and (e) of the Code, regulation 6(3) of CIRPR, regulation 7(2)(a) of the IPR and clauses 10, 14 and 24 of the Code of Conduct.

2.5.5 Contravention: Mr. Mohan charged hefty fees for his services and ensured that his related parties get the works without any due diligence.

Submission: Mr. Mohan has submitted: *"There is no provision in the Code and Rules and regulations made thereunder for deciding the professional fee of an Insolvency Professional"* and *"Where the CoC have approved the fees, it is not open to the Board to pass a value judgement on the same, by way of the present proceeding"*. Further, in each case, fee has been decided by the CoC. Wherever related party consultant has been appointed, he has made due disclosure.

Finding: Clause 25 of the Code of Conduct explicitly requires an IP to provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken and is not inconsistent with the applicable regulations. Further, absence of law does not entitle an IP to charge any fee he wishes. Thus, Mr. Mohan contravened the provisions of section 20 of the Code, regulation 7(2)(h) of the IPR and clauses 10, 24, and 25 of the Code of Conduct.

3. Conclusion

3.1 An IP is a key pillar of the institutional infrastructure of insolvency and bankruptcy regime all over the world. The UNCITRAL Legislative Guide on Insolvency Law envisages the role of an IP in the words: *"However appointed, the insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially. Accordingly, it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime."* It is important to understand and appreciate the role of an IP envisaged under the Code. The BLRC visualised IP as under:

"This entire insolvency and bankruptcy process is managed by a regulated and licensed professional namely the Insolvency Professional or an IP, appointed by the adjudicator. In an insolvency and bankruptcy resolution process driven by the law there are judicial decisions being taken by the adjudicator. But there are also checks and accounting as well as conduct of due process that are carried out by the IPs. Insolvency professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process."

3.2 In case of a CIRP under the Code, an IP is vested with a whole array of statutory and legal duties and powers. He exercises the powers of the board of directors of the CD under CIRP, manages its operations as a going concern, makes every endeavour to protect and preserve the value of its property and complies with applicable laws on its behalf. He takes important business and financial decisions having substantial bearing on such persons and its stakeholders, negotiates deals, settles claims, resolves conflict of interests, conducts meetings of the CoC creditors, invites and examines resolution plans, reports on irregular transactions

and discharges other onerous responsibilities. He conducts the entire insolvency resolution process - he is the fulcrum of the process and the link between the Adjudicating Authority and stakeholders - debtor, creditors - financial as well as operational, and resolution applicants. He is, in fact, the driving force and the nerve-centre in an insolvency proceeding. The Hon'ble High Court of Bombay in *Jotun India Private Limited and Ors. vs. PSL Limited* (2018)145 SCL 601(Bom) observed: "*What is, however, of crucial importance is that unlike SICA, once an application filed under IBC either by a financial/operational creditor is admitted, the Board of Directors of the company are immediately displaced and the management of the company rests in the hands of IRP.*"

3.3 By his conduct and action, Mr. Mohan has caused serious irreparable damage to the fledgling insolvency profession. Without attempting to summarise the galore of contraventions by him, as recorded in the preceding Paragraphs, it is useful to briefly capture the persona of Mr. Mohan as under:

(a) Mr. Mohan has displayed absolute contempt for professional propriety. He made atrocious assertions to defend himself. For examples, there is no embargo under the law on engaging a valuer recommended by a member of the CoC; there is no law stipulating that the same valuer cannot be appointed in more than one account, there is no mandate under the law that the IRP/RP cannot appoint a forensic auditor who has been engaged by a financial creditor in the same account; there is no provision in law for deciding the professional fee of an IP; there is no law which requires prior approval of eligibility criteria by the CoC; he has authority to appoint any professional, etc. He has used such assertions to justify his manifestly unlawful conduct.

(b) Wherever Mr. Mohan has authority under the law, he has either abdicated it, failed to invoke it or abused it. He came across irregular transactions in two CIRPs. Instead of dealing with them, he allowed the CoC to deliberate about irregular transactions over several meetings for months together to decide what should be done with such transactions. The Code empowers only RP to file an application before the AA and does not envisage any role of the CoC in the matter. Yet, Mr. Mohan did not file application on his own. Even after the CoC directed him to file applications with the AA, he did not do. He outsourced some of his responsibilities. He abused his authority to appoint valuers and forensic auditors who are not independent of the stakeholders. He also appointed relatives without following due process. On the other hand, he tried to usurp authority of the CoC. He sought an authorisation from the CoC to modify the invitation for EoI.

(c) Mr. Mohan has demonstrated utter disdain for the authorities as well as the laws of the land. He disregarded the direction of the NCLAT in the matter of JEKPL Private Limited as well as the directions of the Board in the matter of Carnation Auto India Private Limited. He engaged in private communication with a financial creditor for finalising the eligibility criteria in invitation for EoI, while the law required him to have approval of the CoC. He did not file applications in respect of irregular transactions even after having complete information and direction from the CoC to do so, ignoring statutory obligation.

(d) Mr. Mohan has been changing his stance from time to time conveniently and effortlessly. For example, he initially stated that the invitation for EoI had been approved by the CoC. When he failed to give evidence of the same, he stated that the invitation was approved by the only secured financial creditor. When he found it difficult to drive the point that a secured creditor

is not the same as the CoC, he stated that the CoC has given post facto approval much after the publication of invitation for EoI. Similarly, he changed his stance for resignations.

(e) Mr. Mohan has been making false statements. He enclosed several invitations for EoI and stated that these EoI carried the requirement of CA certificate for eligibility of resolution applicants, which was the best practice. However, not a single invitation carried such a requirement. He stated that the invitation was only fine-tuned by a creditor, while the fact is that he substituted the invitation approved by the CoC by an invitation finalised him and a creditor.

(f) He often acted beyond his authority. The CoC authorised him to file an application to seek directions in respect of fresh invitation for EoI and decisions on certain questions of law. However, Mr. Mohan filed an application seeking a direction whether RP should issue a corrigendum or a fresh invitation. He added certain prayers which were not authorised by the CoC, claiming that those were approved by the CoC. For example, he prayed for a decision as to whether the Board can initiate any action against the RP / CoC for non-compliance with direction of the Board. Further, Mr. Mohan never suggested issuing a corrigendum either to the Board or to the CoC, but prayed for the same before the AA.

(g) Mr. Mohan made several attempts to mislead the authorities and the CoC. He stated that the invitation was approved by the CoC, while it was approved by a financial creditor. He stated that requirement of CA certificate for eligibility of resolution applicants was the best practice, while not a single invitation had this requirement. He placed a legal opinion to the effect that the invitation was in conformity with section 25(2)(h) of the Code and based on the same, he obtained a similar confirmation from the CoC. He then stated that such confirmation by the CoC is the post facto approval of the CoC. While the CoC took a view that fresh invitation was not feasible in view of resource constraints, Mr. Mohan submitted that the CoC rejected the proposal to issue fresh invitation.

(h) Mr. Mohan abandoned sinking ships before reaching destination by resigning from all four CIRPs jeopardising the life of four corporate debtors and interests of related stakeholders. He handed control over a CD to the members of the suspended board of directors against the statutory mandate to preserve and protect the value of assets of the CD.

3.4 It is useful to glean the following principles from this order:

(a) No single creditor, whether secured or unsecured, irrespective of its voting power or share, can substitute the CoC. A RP must not engage in private communication with a creditor irrespective of his voting power.

(b) The IP must have approval of CoC for laying down the eligibility criteria under section 25(2)(h) of the Code. This cannot be a post facto approval.

(c) The IP is the sole authority for taking a view on irregular transactions and filing applications before the AA seeking appropriate relief. The CoC has no authority to decide the merits of such transactions and whether to file and when to file the application before the AA. It can, however, raise a concern if the RP does not discharge his duties, including his duties in respect of irregular transactions, in accordance with Code.

(d) The work of a forensic auditor and a registered valuer have a substantial bearing on outcome of a CIRP, particularly on maximization of value of the assets of the CD. The IP must ensure that the professionals, including forensic auditors and registered valuers, engaged by him to assist him in CIRP must not have any conflict of interest.

(e) An IP must perform his defined role under the Code and must not usurp other's role and must not allow others to usurp his role.

3.5 The conduct of Mr. Mohan in all the four CIRPs seen in the light of statutory responsibilities of an IP and the objectives of the Code leaves no doubt that he has acted in contravention of several provisions of the Code and regulations made thereunder, and thereby rendered himself a person not fit and proper to continue as IP, deserving the harshest punishment. In particular, Mr. Mohan contravened provisions of –

- (a) sections 17, 18(f), 20, 23, 25(2)(h) and (j), 29A, 43, 45, 50, 66, 196(1)(g), 206, 208(2)(a) and (e) of the Code;
- (b) regulation 7(2)(a), (h) and (i) of the IBBI (Insolvency Professionals) Regulations, 2016;
- (c) clauses 1, 2, 3, 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 24, and 25 of the Code of Conduct appended to the IBBI (Insolvency Professionals) Regulations, 2016; and
- (d) regulations 6(3), 13, 27(a), and 36 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

4. Order

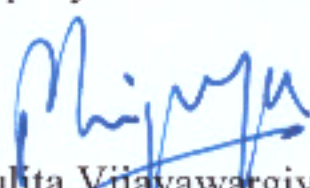
4.1 In view of the above, the Disciplinary Committee, in exercise of the powers conferred under section 220 (2) of the Code read with sub-regulations (7) and (8) of regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017, hereby cancels the registration of Mr. Mukesh Mohan as Insolvency Professional, having Registration No. IBBI/IPA-001/IP-P00018/2016-2017/10042 and debars him from seeking fresh registration as an insolvency professional or providing any services under the Insolvency and Bankruptcy Code, 2016 for ten years.

4.2 This order shall come into force on expiry of 30 days from the date of its issue.

4.3 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Mukesh Mohan is enrolled as a professional member and the Insolvency Professional Entity of which he is a partner or director.

4.4 A copy of this order shall be forwarded to the Secretary, National Company Law Tribunal, New Delhi for information.


(Dr. M. S. Sahoo)
Chairperson, IBBI


(Dr. Mukulita Vijayawargiya)
Whole Time Member, IBBI

Dated: 23rd August, 2018
Place: New Delhi