

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/135/2022

20th October, 2022

ORDER

This Order disposes the Show Cause Notice (SCN) No. IBBI/IP/INSP/2021/89/3632/567 dated 28.06.2022 issued to Mr. Abhijit Guhathakurta, Insolvency Professional under section 220 of the Insolvency and Bankruptcy Code, 2016 read with regulation 13 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017 ('Inspection Regulations') and regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations 2016 ('IP Regulations'). Mr. Abhijit Guhathakurta is a Professional Member of Insolvency Professional Agency of Institute of Cost Accountants of India (IPAICAI) and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board/IBBI) with Registration No. IBBI/IPA-003/IP-N000103/2017-2018/11158.

1. Developments in relation to resolution of the CD

- 1.1. The Show cause notice (SCN) issued by the Board includes contraventions of the provisions of the Insolvency and Bankruptcy Code, 2016 (Code) and regulations made thereunder in respect of running the insolvency process of Siva Industries and Holdings Limited (CD) by the insolvency professional, Mr. Abhijit Guhathakurta as Resolution Professional.
- 1.2. The CIRP of the CD was initiated *vide* order dated 05.07.2019 by the Hon'ble NCLT, Chennai Bench (AA) on an application filed by IDBI Bank Limited under section 7 of the Code and Mr. Savan Godiawala was appointed as an Interim Resolution Professional who was later replaced by Mr. Abhijit Guhathakurta as the Resolution Professional *vide* order of AA dated 10.09.2019. The AA passed an order for liquidation *vide* order dated 12.08.2021 and Mr. Ayyamplalayam Venkatesan Arun was appointed as the Liquidator. The Liquidation order was passed in continuation of the dismissal order dated 12.08.2021 passed in an application which was filed under section 12A of the Code seeking withdrawal of CIRP of the CD. Being dissatisfied with the common order dated 12.08.2021 passed by the AA, the promoter of the CD preferred the two Appeals before the NCLAT which in turn dismissed the same *vide* common judgment dated 28.01.2022. Being aggrieved by the order of NCLAT, promoter of CD filed appeal before Supreme Court. Thereafter, the Supreme Court *vide* judgment dated 03.06.2022, quashed and set aside the judgment delivered by the learned NCLAT; and allowed the application filed by the RP before the AA for withdrawal of CIRP of the CD under section 12A of the Code and Regulation 30A of the CIRP regulations.

2. Issuance of Show Cause Notice (SCN) and hearing before Disciplinary Committee (DC)

- 2.1. The Board, in exercise of its powers under section 218 of the Code read with the IBBI Inspection Regulations, appointed an Inspecting Authority (IA) to conduct the inspection *vide* order dated 19.07.2019. The IA under sub-regulation (1) of Regulation 6 of the Inspection Regulations shared the Draft Inspection Report (DIR) with Mr. Abhijit Guhathakurta *vide* email dated 07.02.2022, to which Mr. Abhijit Guhathakurta submitted reply *vide* email dated 23.02.2022. The IA submitted the Inspection Report to the Board on 23.03.2022.
- 2.2. The Board referred the SCN response of Mr. Abhijit Guhathakurta and the material available on record, to the DC for disposal of the SCN in accordance with the Code and Regulations made thereunder. Mr. Abhijit Guhathakurta was given opportunity of virtual personal hearing before DC on 22.08.2022 and physical personal hearing on 23.09.2022 which was availed by him and Mr. Abhijit Guhathakurta along with his advocates, namely, Mr Nalin Kohli, Senior Counsel and Mr. Manmeet Singh were present during the hearing.

3. Alleged contraventions and submissions of the IP

Contraventions alleged in the SCN and Mr. Abhijit Guhathakurta's submissions thereof are summarized below:

3.1. Contravention with regard to payment of the pre-CIRP dues:

- 3.1.1. It is noted that CIRP of the CD commenced on July 5, 2019. It is observed on perusal of the minutes (Agenda item no 5) of the 5th Committee of Creditors (CoC) meeting held on November 13, 2019, that Mr. Abhijit Guhathakurta updated the CoC about the key developments subsequent to previous meetings. One of the matters on which Mr. Abhijit Guhathakurta updated the CoC in its 5th meeting was regarding payment of pre-CIRP dues to some of the vendors of CD. Under Agenda item no. 5 under the heading "BEML Update", Mr. Abhijit Guhathakurta apprised the CoC members about the meeting which took place on October 30, 2019, between BEML, IDBI Bank and Mr. Abhijit Guhathakurta, wherein BEML inter alia requested him to resolve the issue of payment to concerned vendors. The minutes further records that Mr. Abhijit Guhathakurta apprised BEML that these dues were prior to insolvency commencement date (ICD) and needs to be claimed by the claimants under the provisions of the Code and Regulations made thereunder and also that payment to such operational creditors

could be made only upon obtaining approval of the CoC. The minutes thereafter state that BEML further requested Mr. Abhijit Guhathakurta to seek approval from CoC to allow BEML to make the said payments, which were in the nature of pre-CIRP dues, directly to the vendors.

- 3.1.2. It is further observed that based on the update given under agenda item no. 5, Mr. Abhijit Guhathakurta placed a separate agenda no. 9 titled "*To consider, discuss and approve essential vendor payments pertaining to the period before the insolvency commencement date with respect to BEML project*" for discussion and voting in the same CoC meeting, After discussion, a resolution was put for e-voting to approve essential vendor payments amounting to Rs. 463.26 lakh to six vendors pertaining to the period prior to ICD with respect to BEML project subject to due verification of the claims of these vendors.
- 3.1.3. It is also noted that e-voting on the said resolution garnered 65.29% vote supporting the resolution and the resolution was declared passed. As per Section 14(1) (b) of Code, there is prohibition on transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets, or any legal right or beneficial interest therein during moratorium declared by the order passed by Adjudicating Authority.
- 3.1.4. It is thus, evident that Mr. Abhijit Guhathakurta was fully aware that dues of the vendors of the CD for which BEML requested for payment pertaining to pre-CIRP period and as per Section 14(1) (b) of the Code, the same could not have been paid during moratorium. Still, Mr. Abhijit Guhathakurta allowed discussion on this agenda and even put a resolution for voting by CoC members, and declared it passed as a routine matter requiring 51% votes of CoC. It is also noted from the records of discussion mentioned under agenda item no. 5 of 5th CoC meeting that Mr. Abhijit Guhathakurta apprised BEML that payment to such operational creditors could be made only upon obtaining approval of the CoC. Neither the Code nor the Regulations made thereunder provide for such provision allowing payment of pre-CIRP dues with the approval of CoC. This incorrect statement of Mr. Abhijit Guhathakurta attributed the CoC in agreeing to vote on resolution for payment of pre-CIRP dues. Moreover, CoC approval cannot legitimise an action prohibited under the Code. As an RP, it is Mr. Abhijit Guhathakurta's responsibility to ensure that CIRP is conducted as per the provisions of the Code and Regulations made thereunder.
- 3.1.5. Mr. Abhijit Guhathakurta has, thus, failed to appreciate the essence and purpose of

declaration of moratorium under Section 14 of Code. The payments pertaining to pre-CIRP dues during moratorium are in contravention of Section 14 of Code. Therefore, approval of CoC for such illegal payments cannot exonerate Mr. Abhijit Guhathakurta from his duty to abide by the provisions of Code including maintaining moratorium of CD.

- 3.1.6. In view of the above, the Board is of the prima facie view that Mr. Abhijit Guhathakurta has inter-alia violated Section 14(1) (b), Regulation 7(2) (a) and 7(2) (h) of IBBI (Insolvency Professional) Regulations, 2017 ('IP Regulations') read with Clause 1, 2, 3, 5 and 14 of the Code of Conduct as specified in the First Schedule of IP Regulations (Code of Conduct).

3.2. Submissions of Mr. Abhijit Guhathakurta

- 3.2.1. Mr. Abhijit Guhathakurta submitted that he had acted *bona fide*, transparently and in good faith throughout his professional engagement and in the discharge of his obligations under the Code and regulations thereunder. Significantly, even the Show Cause Notice does not make out any passing observation whatsoever regarding any mala fide intent of the Insolvency Professional.
- 3.2.2. With respect to the observations stating alleged violations of section 14 of the Code , on behalf of Mr. Abhijit Guhathakurta it was submitted that the payments towards the pre-CIRP claims of the six creditors ("Project Vendors" or "Vendors") amounting to a total of INR 4.64 crore was made directly by Bharat Earth Movers Limited ("BEML"). However, such payments were stated to be fully compliant with the provisions of the Code and the regulations made thereunder.
- 3.2.3. Mr. Abhijit Guhathakurta submitted that the CIRP of the Corporate Debtor commenced on 5th of July 2010 ("Insolvency Commencement Date" or "ICD") with a meagre cash balance in its accounts amounted to INR 11 Lakhs only. It is pertinent to mention that on ICD there were no cashflows or funds coming into the accounts of the Corporate Debtor and therefore, there was a significant dearth of monies required to maintain the going concern status of the Corporate Debtor or even to protect the assets of the Corporate Debtor. With a view to maintaining the status of the Corporate Debtor as a going concern so that one could achieve maximum value for it, at that stage, significant funds were required. He further added that the CoC comprising of around eight (08) banks was not in a position to take a joint decision on urgent basis for release of funds

in this regard and further funding for keeping the Corporate Debtor as a going concern was not expected to be received in a hurry or in sufficient amount.

- 3.2.4. Mr. Abhijit Guhathakurta submitted that the subject matter of the Show Cause Notice concerns the contract entered into between BEML and the Corporate Debtor for the Supply Erection and Commissioning (E&C) and Land Procurement for 18 Nos. of Wind Turbine Generators (WTGs) of 1 MW capacity each ("Project"). BEML had issued to SIHL a letter of intent dated March 01, 2012, for the purpose of the Project. The Project was valued at approx. INR 108 crore. During the course of the Project, the Corporate Debtor had received a total settlement/credit of INR 73 crore from BEML prior to the commencement of the CIR Process. A meeting was called by BEML to highlight the law-and-order problems at the Project Site and to discuss the same with the IP. Meeting was held with BEML on 08th August 2019 inter alia to understand status of the Project and also a discussion on the receivables of the Corporate Debtor under the said Project. Another meeting was also held on 30th October 2019 with BEML.
- 3.2.5. On behalf of Mr. Abhijit Guhathakurta it was said that due to significant delays in the execution of the Project, in 2017, much prior to commencement of the CIR Process, on account of orders of the Hon'ble Debt Recovery Tribunal at the instance of one of the lender banks of SIHL, BEML was restrained from making any payments to SIHL. Subsequently, in a tripartite arrangement between SIHL, its lenders and BEML in 2017, it had been agreed that for the work done by vendors/ sub-contractors, their dues, which were otherwise earlier paid through and by the Corporate Debtor, would henceforth be paid directly to the vendors/subcontractors from a special lender-controlled escrow account set up for this purpose, without SIHL being entitled to the said funds. Therefore, historically, from 2017 itself, the Corporate Debtor had no entitlement to the monies to the extent that the same were payable to the vendors/sub-contractors for the work undertaken by the vendors/sub-contractors for the Project.
- 3.2.6. It was stated that during the meeting held on 08th August 2019, BEML informed that according to BEML, because the contract had already been terminated and BEML was proceeding to have the balance work to be offloaded to a third party at the risks and cost of the Corporate Debtor, no further payment was to be released to SIHL, as per the terms and conditions of the purchase order based on completion of different phases. However, according to BEML, the Corporate Debtor was eligible for an amount of INR

7.24 crore, out of which it had already paid a sum of Rs INR 1.15 crore. Therefore, the only eligibility of the Corporate Debtor was INR 6.09 crore, which BEML refused to pay since the balance portions of the works of the Project were being proposed to be undertaken by it at the risk and costs of the Corporate Debtor.

- 3.2.7. It was mentioned that during the meeting, BEML informed Mr. Abhijit Guhathakurta that many labourers and vendors of the Corporate Debtor had been agitating for release of their pending dues at the project site and were therefore creating a severe law and order situation leading to serious operational difficulties. This had also resulted in the intervention of the local administration and the police authorities who attempted to resolve the issue. BEML was under pressure to resolve the situation at the Project as the completion and unhindered use of the Project was critical for it to meet its targets committed to Government of India. Given the national importance of the Project because of public money being involved therein, BEML being a Public Sector Undertaking, requested that the historical arrangement of paying the vendors/sub-contractors be continued. Therefore, it requested the IP to help confirm the outstanding dues to the vendors/contractors of the Corporate Debtor.
- 3.2.8. In the circumstances, even though BEML had refused to release any funds to the Corporate Debtor, the IP held negotiations with BEML and suggested that the only way the IP could consider taking BEML's proposal of paying any amounts directly to the sub-contractors/vendors for consideration and sanction/ consent, if any, of the CoC is required. Furthermore, BEML would have to also ensure payment of the amount eligible to be paid to the Corporate Debtor, i.e., approx. INR 6.09 crore. Hard negotiations on behalf of the IP led to BEML agreeing to pay INR 6 crore to the Corporate Debtor with a condition that BEML would continue to hold INR 1 crore (approx.) till the completion of the Project by BEML at the risk and cost of Corporate Debtor. The above arrangement pursuant to which an amount of INR 5 Crore was to be received by the SIHL was deemed a critical and an expedient step for it to continue as a going concern.
- 3.2.9. Accordingly, Mr. Abhijit Guhathakurta stated that he updated the CoC of the Corporate Debtor regarding the meeting with BEML officials on 08 August, 2019 in the 2nd CoC meeting held on 21st August, 2019. The arrangement and the offer of the BEML was discussed at the 5th CoC meeting held on 13th November, 2019. The total value of payments by BEML put for CoC's vote was INR 4.64 crore as against a total amount of

INR 4.85 crore worth of payments recommended by BEML. The CoC, in its 5th meeting held on 13th November 2019, by the requisite majority, in its commercial wisdom, approved the direct payment by BEML or the essential vendor payments amounting to INR 4.64 crore which had arisen prior to the commencement of the CIR Process. It is pertinent to note that the CoC would not have permitted such payment if it was diminishing value of the Corporate Debtor in any manner or in any manner amounted to a preferential payment for an operational creditor at the expense of the secured financial creditors. Such payment was permitted only because the same resulted in inflow of significant funds into the Corporate Debtor which would not have come in otherwise. Further, it is pertinent to note that IDBI Bank also participated in the meeting held on 30th October, 2019 with BEML together with the IP. Mr. Abhijit Guhathakurta submitted that he had acted transparently in this entire period and his role as the IP in the settlement was purely to facilitate the negotiations and the payments which ultimately proved crucial to the functioning of the Corporate Debtor as a going concern and also maximized value for all stakeholders.

3.2.10. Mr. Abhijit Guhathakurta submitted that he did not take any call on this matter on his own but left it to the wisdom of the CoC to consent to this financial arrangement for the benefit of the Corporate Debtor. He submitted that the above facts make it evident that the transaction in question by no stretch of imagination was illegal or unauthorized. On the contrary, he submitted that only due to the IP's negotiations and posturing with BEML, that BEML released INR 5 crore to the Corporate Debtor. The Corporate Debtor through the CoC and the IP in having managed to receive the said amount of INR 5 crore in fact created significant value for the Corporate Debtor out of a contract which had been terminated due to Corporate Debtor's breach prior to commencement of the CIR Process. These funds so generated enabled the Corporate Debtor to function as a going concern.

3.2.11. As stated above, in 2017 it had already been agreed by the Corporate Debtor that the amount payable to vendors would be paid directly to vendors/ sub-contractors, through an especially designated account controlled by the lenders and without any entitlement of any nature to such amounts of the Corporate Debtor. Therefore, INR 4.64 crore paid directly to the vendors/ sub-contractors in the present case was in any event never from the resources of the Corporate Debtor. It is humbly submitted that any suggestion that the IP violated Section 14 is, therefore, untenable in the facts of the present case.

- 3.2.12. It was further observed that Section 20(2) of the Code states that the IRP/RP, as the case may be, must endeavor to maintain the Corporate Debtor as a going concern and further necessitates that the IRP/RP take all such actions required to keep the Corporate Debtor as a going concern. This duty required of the IP by the Code to maintain the status of the Corporate Debtor as a going concern, in the facts of the present case, assumed additional importance due to the lack of cashflows and the availability of a meagre amount in the bank accounts of the Corporate Debtor.
- 3.2.13. During the hearing, the counsel for Mr. Abhijit Guhathakurta concluded his arguments by stating that there are no observations of the IP having acted in a *mala fide* manner in the SCN. The negotiations and arrangement were with BEML, which is a Government of India enterprise. The CoC was kept informed at all stages and in fact, IDBI also directly participated in discussions with BEML on 30th October, 2019. BEML had expressly refused to release any monies to Corporate Debtor, and it was only because it was under pressure to resolve the disruption and law and order issues created at the Project site by vendors and labourers, that it agreed that if CoC were to give its consent for direct payment to vendors, which would help it resolve the situation at its Project site, that it would make the payment of INR 5 crore to the Corporate Debtor.
- 3.2.14. Mr. Abhijit Guhathakurta submitted that all such payments were made only to small vendors, again, in relation to a project being monitored by the Government of India and to resolve the law-and-order situation. The payments to the vendors of the Corporate Debtor have not been made by the IP or by the Corporate Debtor out of its own resources. BEML directly had made such payments to the sub-contractors only in order to resolve the impasse affecting its Project, and because of the law-and-order situation created by the sub-contractors at the Project site.
- 3.2.15. He reiterated that BEML was in any event paying the sub-contractors of SIHL in an account controlled by the lenders from 2017 and the Corporate Debtor was not entitled to receive these funds for its use. Therefore, in 2019, when the IP placed the matter before the CoC for its consent for IN 4.64 crore to be paid to the sub-contractors directly by BEML, it was also consistent with the arrangement arrived by SIHL, BEML and its lenders in 2017 prior to commencement of CIRP.
- 3.2.16. In consideration of getting the formal consent of CoC for the direct release of funds, the IP and the CoC managed to ensure that BEML release INR 5 crore. This resulted in direct and significant benefit to the Corporate Debtor as such amounts were utilized to

maintain SIHL as going concern at a time when the Corporate Debtor desperately required funds to continue as a going concern. The IP only assisted in verification of these claims and placing the matter before CoC for its approval for such payments, which were ultimately made by BEML from its own resources post approval from CoC.

3.3. Summary Findings

3.3.1. The DC notes that section 14 of the Code provides in express terms, prohibition of certain actions against the corporate debtor which may interrupt the resolution process except the supply of essential and critical services. Section 14 of the Code reads as follows:

“14. Moratorium.

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: -

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the

use or continuation of the license or a similar grant or right during moratorium period;

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances.

(3) The provisions of sub-section (1) shall not apply to — (a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority; (b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”

3.3.2. The provision on ‘Moratorium’ envisages prohibition on institution of suits by or against the CD, transfer, alienation or disposal of any of the assets or legal right or beneficial interest of the CD, action to foreclose, recover or enforce any security interest created by CD in respect of his property. The moratorium under the Code refers to the period wherein no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, can be instituted or continued against the CD.

3.3.3. The moratorium mechanism facilitates the continued operation of the business and allows the debtor a breathing space for re-organising its affairs. The BLRC in its report has made following observations:

“...One of the goals of having an insolvency law is to ensure the suspension of debt collection actions by the creditors, and provide time for the debtors and creditors to re-negotiate their contract. This requires a moratorium period in which there is no collection or other action by creditors against debtors.”

- 3.3.4. The adjudicating authority is required to declare moratorium under section 14(1) of the Code which commences with the commencement of the CIRP. The purpose of instant stay is to prevent fleecing of the debtor’s assets before orderly distribution to creditors can be affected.
- 3.3.5. In the present case, the DC notes from the minutes (Agenda item no 5) of the 5th CoC meeting dated November 13, 2019, that Mr. Abhijit Guhathakurta apprised the CoC members about the meeting which took place on October 30, 2019, between him, BEML and IDBI Bank, wherein BEML, *inter alia*, requested him to resolve the issue of payment to concerned vendors of the CD. It was recorded in the minutes that Mr. Abhijit Guhathakurta apprised BEML that these dues were prior to insolvency commencement date and needs to be claimed by the claimants under the provisions of the Code and Regulations made thereunder and also that payment to such operational creditors could be made only upon obtaining approval of the CoC. The minutes thereafter state that BEML further requested Mr. Abhijit Guhathakurta to seek approval from CoC to allow BEML to make the said payments, which were in the nature of pre-CIRP dues, directly to the vendors.
- 3.3.6. The DC notes that in view of the request of BEML, Mr. Abhijit Guhathakurta placed an agenda no. 9 titled *"To consider, discuss and approve essential vendor payments pertaining to the period before the insolvency commencement date with respect to BEML project"* for discussion and voting in the 5th CoC meeting and after discussion, a resolution was put for e-voting to approve essential vendor payments amounting to Rs. 463.26 lakh to six vendors pertaining to the period prior to ICD with respect to BEML project subject to due verification of the claims of these vendors and declared it passed as a routine matter requiring 51% votes of the CoC. However, Mr. Abhijit Guhathakurta erred on this count as minutes nowhere suggest that he apprised the meeting, at any stage, that CoC is not competent under the statute to take decision on the subject which statute otherwise explicitly provides that payment against pre-CIRP dues is not negotiable in any circumstances.

3.3.7. The DC finds that the payment of pre-CIRP dues of one set of creditors tantamount to preferential treatment to certain creditors. There is no evidence on record to suggest that Mr. Abhijit Guhathakurta has approached to AA on this issue to seek directions.

3.3.8. The Hon'ble National Company Law Appellate Tribunal in the matter of Indian Overseas Bank Vs Mr. Dinkar T. Venkatsubramaniam, Resolution Professional for Amtek Auto Ltd. (Company Appeal (AT) (Insolvency) No. 267 of 2017) observed as follows:

“Having heard learned counsel for the Appellant, we do not accept the submissions made on behalf of the Appellant in view of the fact that after admission of an application under Section 7 of the ‘I&B Code’, once moratorium has been declared it is not open to any person including ‘Financial Creditors’ and the appellant bank to recover any amount from the account of the ‘Corporate Debtor’, nor it can appropriate any amount towards its own dues”.

Thus, once the moratorium is in force, the financial creditor/operational creditor has to prefer its claim before IP, which is considered along with other claims as per law.

3.3.9. The DC notes from the records of discussion mentioned under agenda item no. 5 of 5th CoC meeting that Mr. Abhijit Guhathakurta apprised BEML that payment to such operational creditors could be made only upon obtaining approval of the CoC. The DC also notes the submission of Mr. Abhijit Guhathakurta that he did not take any decision in this matter on his own and it was the CoC which approved the same for the benefit of the CD and its stakeholders. The aforestated contention of Mr. Abhijit Guhathakurta is not sustainable because neither the Code nor the Regulations made thereunder provide for such provision allowing payment of pre-CIRP dues with the approval of CoC. This incorrect statement of Mr. Abhijit Guhathakurta attributed the CoC in agreeing to vote on resolution for payment of pre-CIRP dues. Moreover, CoC's approval cannot legitimise an action prohibited under the Code and Commercial decision of CoC cannot violate or supersede the express provisions of law.

3.3.10. The Supreme Court in *Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta (2019)* reinstated the existence of certain intrinsic assumptions relating

to the CoC on which the principle of ‘commercial wisdom’ has been recognised. The assumptions are: that the CoC has taken into account the fact that the corporate debtor needs to maintain itself as a going concern during the insolvency resolution process; that it needs to maximize the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. Therefore, the Hon’ble Court held that when the CoC exercises its commercial wisdom to arrive at a business decision to revive the CD, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors.

3.3.11. Thus, any action approved by the CoC must strictly be in compliance of the provisions of the Code and the rules and regulations made thereunder. The CoC while exercising their commercial wisdom to arrive at a business decision must necessarily take into account the provisions of the Code and regulations made thereunder. Therefore, the decision of the CoC to ratify and approve the payment to vendors of the CD, in preference to other creditors, can by no stretch of imagination come within the purview of commercial wisdom of CoC.

3.3.12. It is the duty of the IP to take reasonable care and diligence while performing his duties and to observe the compliance of the provisions of the Code and the regulations. There are various obligations which the IP needs to perform under the Code. Section 208 (2) provides that every insolvency professional shall abide by the Code of conduct. It reads as follows:

“208. Functions and obligations of insolvency professionals.

(2) Every insolvency professional shall abide by the following code of conduct: –

(a) to take reasonable care and diligence while performing his duties;

(b) to comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member;

(c) to allow the insolvency professional agency to inspect his records;

(d) to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and (e) to perform his functions in such manner and subject to such conditions as may be specified.”

3.3.13. Section 25 of the Code provides that IP shall preserve and protect the assets of the CD and must take immediate custody and control of all the assets of the CD. Section 25 reads as follows:

25. Duties of resolution professional. –

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) 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;

(c) raise interim finances subject to the approval of the committee of creditors under section 28;

(d) appoint accountants, legal or other professionals in the manner as specified by Board;

(e) maintain an updated list of claims;

(f) convene and attend all meetings of the committee of creditors;

(g) prepare the information memorandum in accordance with section 29;

(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations 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.

(i) present all resolution plans at the meetings of the committee of creditors;

(j) file application for avoidance of transactions in accordance with Chapter III, if any; and

(k) such other actions as may be specified by the Board.”

3.3.14. As an RP, it is Mr. Abhijit Guhathakurta's responsibility to ensure that CIRP is conducted as per the provisions of the Code and Regulations made thereunder. It has to be understood that conduct and performance of a RP have a substantial bearing on the survival of an ailing entity. He, therefore, is expected to function with a strong sense of

urgency and with utmost care and diligence. Moreover, if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the Rule is that if this was not so, the statutory provision might as well not have been enacted. Section 14 of the Code, therefore, by necessary implication, prohibits this power from being exercised in any manner other than the manner set out in the said provision of the Code.

3.3.15. The DC notes that there cannot be an exceptional or special treatment to any corporate entity in any CIRP. While reinforcing the rule of law, every company is to be given the same level playing field, irrespective of its size or the influence of people behind them. Under the existing laws, once CIRP is initiated against a CD and a moratorium is imposed, the provisions of IBC take precedence over all other laws of the country. In the instant case, payment of pre-CIRP dues to the vendors of the CD through BEML and that too in preference of other creditors had the effect of causing disturbance in the moratorium as envisaged in the provisions of section 14 of the Code. The resolution process will be rendered meaningless, if the assets of the CD are allowed to be disintegrated during the process. Thus, in view of the observations made hereinabove, the DC is of the view that Mr. Abhijit Guhathakurta has acted in contravention of section 14 and section 208(2)(a) and (e) of the Code.

4. Order

- 4.1. In view of the above, contraventions in terms of wrongful payment of pre-CIRP dues to the vendors in case of his dealings in respect of Siva Industries and Holdings Limited through BEML is established beyond doubt which is not consistent with section 14 of the Code.
- 4.2. The contravention is established beyond doubt. Central point of debate is whether such contravention can be ignored as it stems from the actions which are firstly not taken with any mala-fide intension and secondly are taken as a requirement oozing out from commercial judgement to run the Corporate Debtor as a going concern. As DC I have no evidence which can raise doubts about intensions of Mr. Abhijit Guhathakurta not being bona-fide. The case for running the CD as a going concern is strong, and evidence suggests that settlement of pre-CIRP dues became of crucial importance for the CD to survive the initial period. However, procedural lapses about not informing the CoC about the requirement of the code and not approaching to AA to seek

direction point towards dereliction of duty by Mr. Abhijit Guhathakurta.

- 4.3. In the balance, DC hereby strictly warns Mr. Abhijit Guhathakurta for avoiding such contraventions in future. To keep reminding the IBC ecosystem and its players that areas of explicit prohibition are no go areas and if one venturing into such territory he needs to approach AA for further direction before suo-moto taking call on the basis of wrong interpretation of the provisions, DC hereby imposes monetary penalty as detailed in para 4.4 below.
- 4.4. In view of the above, the Disciplinary Committee, in exercise of the powers conferred under section 220 (2) of the Code read with Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and Regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017 hereby imposes a penalty on Mr. Abhijit Guhathakurta of Rs Five lakhs and directs him to deposit the penalty amount directly to the Consolidated Fund of India (CFI) under the head of “penalty imposed by IBBI” on <https://bharatkosh.gov.in> within 45 days from the date of issue of this order and submit a copy of the transaction receipt to the Insolvency and Bankruptcy Board of India.
- 4.5. The Order shall come into force immediately with direction to deposit the penalty as per para 4.4.
- 4.6. A copy of this order shall be forwarded to the Insolvency Professional Agency of Institute of Cost Accountants of India where Mr. Abhijit Guhathakurta is enrolled as a member.
- 4.7. 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.

Accordingly, the show cause notice is disposed of.

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(Sudhaker Shukla)

Whole Time Member, IBBI

Dated: 20th October, 2022

Place: New Delhi