

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/19/2020
13th March 2020

Order

In the matter of Mr. Arun Kumar Gupta, Insolvency Professional (IP) under Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 read with Section 220 of the Insolvency and Bankruptcy Code, 2016 (Code).

Appearances before Disciplinary Committee on 31st January 2020	
For Noticee	Mr. Arun Kumar Gupta, In Person, Mr. Arik Banerjee, Advocate.
For Board	Mr. Umesh Kumar Sharma, Chief General Manager, and Ms. Rashi Gupta, Research Associate.
Appearances before Disciplinary Committee on 17th February 2020	
For Noticee	Mr. Arun Kumar Gupta, In Person, Mr. Joy Saha, Senior Advocate Mr. Arik Banerjee, Advocate Mr. S.M. Gupta, FCS
For Board	Mr. Umesh Kumar Sharma, Chief General Manager, and Ms. Rashi Gupta, Research Associate.

1. Background

- 1.1 This Order disposes of the Show Cause Notice (SCN) dated 15th November 2019 issued to Mr. Arun Kumar Gupta, P15, Bentinck Street, 3rd Floor, Kolkata, West Bengal, 700001, who is a Professional Member of the Indian Institute of Insolvency Professional of ICAI and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board) with Registration No. IBBI/IPA-001/IP-P00013/2016-2017/10037.
- 1.2 In exercise of its power under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017, the Board vide Order dated 25th February 2019 appointed an Inspecting Authority (IA) to conduct an inspection of Mr. Arun Kumar Gupta, on having reasonable grounds to believe that the IP had contravened provisions of the Code, Regulations, and directions issued thereunder.
- 1.3 The Board on 15th November 2019 had issued the SCN to Mr. Arun Kumar Gupta, based on findings of an inspection in respect of his role as an interim resolution professional (IRP) and / or resolution professional (RP) in corporate insolvency resolution process (CIRP) of M/s Divya Jyoti Sponge Iron Pvt Ltd. The SCN alleged contraventions of several provisions of the Insolvency and Bankruptcy

Code, 2016 (Code), the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and the Code of Conduct under regulation 7(2) thereof, the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (CIRP Regulations). Mr. Arun Kumar Gupta replied to the SCN vide letter dated 16th November 2019 and also submitted additional written responses subsequent to personal hearing on 31st January 2020 and 17th February 2020.

- 1.4 The Board referred the SCN, response of Mr. Arun Kumar Gupta to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder. Mr. Arun Kumar Gupta availed an opportunity of personal hearing before the DC on 31st January 2020 along with his counsel Mr. Arik Banerjee when he reiterated the submissions made in his written reply and made a few additional submissions. After the personal hearing on 31st January 2020, a request was received from Mr. Arun Kumar Gupta for another personal hearing which was granted by the DC on 17th February 2020. On 17th February 2020, Mr. Arun Kumar Gupta was represented by Mr. Joy Saha (Senior Advocate) and Mr. Arik Banerjee (Advocate). Mr. S.M. Gupta, FCS also accompanied Mr. Arun Kumar Gupta for the personal hearing. During the personal hearing, the submissions made by Mr. Arun Kumar Gupta were reiterated and a few additional submissions were also made.

2. Consideration of SCN

The DC has considered the SCN, the reply to SCN, oral submissions of Mr. Arun Kumar Gupta, his counsels Mr. Joy Saha and Mr. Arik Banerjee during the course of personal hearing, additional documents submitted by the RP, other material available on record and proceeds to dispose of the SCN.

3. Alleged Contraventions, Submissions, Analysis and Findings

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

3.1 Contravention:

As per the minutes of 1st CoC meeting and 2nd progress report filed before NCLT, the IRP took up the issue of appointment of valuers in 1st CoC meeting dated 20.09.2017 while he was appointed as IRP on 23.08.2017. As per Regulation 27 of CIRP Regulations (prior to amendment dated 6th Feb 2018), the IRP was required to appoint the valuers within 7 days of his appointment as IRP. The IRP failed to appoint valuers within the prescribed timeline. The RP submitted in his reply dated 8.04.2019 to the Board that the valuers were appointed within 5 days of insolvency commencement date however, the valuers have informed that they would only act after their fee is paid or is approved by CoC. Thus, RP failed to

perform his duty. This is in violation of Section 208(2)(a) and (e) of the Code, Regulation 27 of CIRP Regulations and Regulation 7(2)(a) and 7(2)(h) of the IP Regulations, read with clause 13 of the Code of Conduct as given in the First Schedule of the IP Regulations.

Submission:

RP submits that the SCN does not clearly lay down why IBBI has come to a conclusion that valuers were not appointed within 7 days of appointment of IRP since in the SCN, IBBI has already acknowledged that valuers were appointed within 5 days of appointment of IRP. The RP produced emails dated 28.8.17 addressed to both valuers as evidence to show that they were appointed within 7 days. Email dated 18.9.2017 by one of the valuers to RP was also submitted which show that they started to work before 1st CoC meeting held on 20.9.2017. The RP submits that the valuers accepted their appointment by IRP and started to work but only requested confirmation on approval of their fee. They refused to confirm final appointment till their fee is ratified by CoC. Upon request from the valuers and after discussion with applicant financial creditor, necessary advance was also paid to valuers before 1st CoC meeting by applicant financial creditor. Further, there was no reason for appointment of other valuers since the original valuers accepted initial appointment and started work.

It is also submitted by the RP that in the draft inspection report dated 25.03.2019, there was an allegation that only Regulation 27 had been violated, which was duly replied to by the RP. However, in SCN, the Board is of the view that the RP violated Section 208(2)(a) and (e) of the Code, Regulation 27 of CIRP Regulations and Regulation 7(2)(a) and (h) of IBBI (Insolvency Professional) Regulations, 2016 read with Clause 13 of the Code of Conduct in Schedule 1 of the said Regulations. Thus, RP submits that he has not been given a chance to reply to the new allegations before the issue of SCN which is against the principles of natural justice.

Analysis:

The Code casts strenuous responsibilities on an IRP/ IP to run the affairs of the firm in distress as a going concern and to maximize the value of the assets. As the key objective of the Code is maximization of the value of the assets, one needs transparent and credible determination of value of assets to facilitate comparison and informed decision making. The valuations serve as reference for evaluation of choices, including liquidation, and selection of the choices that decides the fate of the firm.

The Code facilitates and empowers the IP to discharge his responsibilities effectively under the provisions of the Code. Regulation 27 of the CIRP Regulations provides, *“The interim resolution professional shall within seven days of his appointment, appoint two registered valuers to determine the liquidation*

value of the corporate debtor in accordance with Regulation 35:...”

In the present case, CIRP commenced on 23.08.2017. The IRP appointed Mr. Shubhasish Majumder as a valuer vide email dated 29.08.2017 which begins with the words, “I am glad to appoint you as a valuer...”. Further, on the same day (i.e. 29.08.2017), an email was also sent to Mr Basudev Dey which also begins with, “I am glad to appoint you as a valuer...”. These emails manifest that the appointment of valuers was done by the IRP within a period of seven days as stipulated under Regulation 27 of CIRP Regulations. However, in the 1st CoC meeting dated 20.09.2017, the following resolution 13(e) was approved by the members of CoC,

“Confirmation of appointment of Mr. Shubhasish Majumder and Mr. Basudev Dey, Government approved valuers as the valuers under Regulation 27 of the Regulations. Their professional fees will be a part of the Insolvency Resolution Process costs.”

This resolution was approved with 94.8% majority and also provided ‘RP to get their fees paid by the Corporate Debtor’s bank account directly.’”

During the personal hearing, the RP submitted that the above resolution was moved only to seek approval of fee payable to valuers since they have already been appointed vide email dated 29.08.2017. Even though, as per the allegation in SCN, the valuers informed the IRP that they would only act after their fees had been paid or approved by the CoC, it is evident from the emails exchanged between IRP and valuers that the valuers started their work, however, requested for confirmation on approval of their fees. Further, it has also been observed that Mr. Subhasish Majumdar and Mr. Basudev Dey submitted their report on 9th November 2017 and 10th November 2017 respectively.

The issue for consideration under the circumstances (where the valuers seek confirmation on approval of fees) is whether the IRP should approach other valuers to take up the valuation exercise. In such a situation, it may be presumed that the other valuers may also seek confirmation on approval of their fees since professionals may not be inclined to work with a distressed Corporate Debtor without such confirmation of their fees. If the IRP would have approached other valuers, he might have missed the timeline of seven days.

Further, Regulation 27 of the CIRP Regulations lays down provisions for ‘appointment of valuers’ which the IRP has done within the timeframe as prescribed *i.e.* seven days.

It has also been submitted by the RP that he has not been given a chance to reply to the new allegations in SCN where the Board took the view that RP violated Section 208(2)(a) and (e) of the Code, Regulation 27 of CIRP Regulations and Regulation 7(2)(a) and (h) of IP Regulations read with Clause 13 of the Code of Conduct in Schedule 1 of the said Regulations, while in the draft inspection report dated

25.03.2019, there was an allegation that only Regulation 27 had been violated which is against the principles of natural justice. However, this submission is not tenable since he has been given an opportunity to respond to the SCN (which includes all the alleged contraventions) which he duly availed of by submitting his written responses dated 16.11.2019 and thereafter also availed of the opportunity of personal hearing before the Disciplinary Committee to reply on all the alleged contraventions.

Findings:

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.

In the present case, it can be observed from the emails dated 29.08.2017 that the IRP appointed two valuers within 5 days of commencement of CIRP. Thus, the IRP cannot be held liable for contravention of Regulation 27 of CIRP Regulations. Consequently, there is no contravention of Section 208(2)(a) and (e) of the Code and Regulation 7(2)(a) and 7(2)(h) of the IP Regulations, read with clause 13 of the Code of Conduct as given in the First Schedule of the IP Regulations.

3.2 Contravention:

It was observed from minutes of 4th CoC meeting dated 12.12.2017 that the RP apprised CoC about application filed by Mr. Sunil Jain before Hon'ble NCLT praying for stay of CIRP proceedings. The RP further apprised CoC that Mr. Sunil Jain refused to be part of the enterprise valuation exercise till disposal of this application. It is observed from minutes of 5th CoC meeting dated 18.12.2017 (read with 5th progress report dated 10.01.2018) that the RP was denied access to the factory premises during his visit along with CoC members and valuers on 14.12.2017 by security personnel upon instructions of Mr. Sunil Jain. This shows that the RP failed to take timely steps to take effective control and custody of the assets of CD. He should have deputed his representative at the factory at the time of commencement of CIRP. Further, despite knowledge that Mr. Sunil Jain was not cooperating with the RP, it was resolved to add him as signatory to the bank accounts of the company during 5th CoC meeting. Even after hostile behaviour of Mr. Sunil Jain he was involved in the operations of CD. Thus, the RP has violated sections 18(1)(f), 23(2), 25(2)(a) and 208(2)(a) & (e) of the Code as well as Regulation 7(2)(a) and (h) of the IP Regulations read with clauses 3, 5 and 14 of the Code of Conduct.

Submission:

The RP submits that this allegation principally concerns the wrongful, illegal and contumacious act of Mr. Sunil Jain on 12.12.2017 and 14.12.2017 by which he has sought to restrict and/or prevent the visit of the RP and CoC to factory premises for which RP cannot be held responsible. He took immediate effective

steps to restrict such acts on part of Mr. Sunil Jain.

RP further submits that the CD in this case is a small private company which did not have professionals like CEO or CFO who were running its operations separately from its promoters. The operations of the company were being managed by the Director, Mr. Sunil Jain himself. There was no managerial staff in the registered office. Even during CIRP, no other employee interacted with the IRP or RP. All representations were made to IRP or RP or CoC by Mr. Sunil Jain only. No other director attended any CoC meeting. All applications, appeals, complaints, police complaint against the IRP or RP or CoC have been made by Mr. Sunil Jain. Thus, RP believed that replacing Mr. Sunil Jain and divesting him of his responsibilities completely and immediately in the given situation would have resulted in chaos. The company was already operating at minimal utilization and the IRP thought that in the given situation, the director Mr. Sunil Jain could not be dispensed with. The IRP also consulted the CoC in this regard and the item was also put to vote which was approved by CoC with overwhelming majority. Mr. Sunil Jain was also present in the same meeting and he agreed to accept responsibility and did not show any reluctance.

Further, in the 1st month of insolvency proceedings, he could not have sensed that Mr. Sunil Jain will turn hostile and will not cooperate in future. There was no issue between August and December. Also, when the RP visited the factory before 14.12.2017 for its inspection, he did not face any resistance from the workers or employees of CD. When Mr. Sunil Jain resisted RP and CoC to enter the factory premises on 14.12.2017, the RP supplemented the existing security guards at the factory premises by employing more security guards to protect the factory and the incident was reported by the RP to Hon'ble NCLT and an application under section 19 was filed. RP stated that 'taking custody' does not mean taking physical custody of the factory. He regularly visited the factory and reviewed working of the CD, its assets and security arrangements. The IP has also pointed out an incorrect fact stated in SCN that 'Mr. Sunil Jain was added as a signatory to the Bank account in 5th CoC meeting'. The correct fact, as stated by IP, is 'RP was added as signatory'. He further stated that he expects the Board to display same level of seriousness that the Board expects from IPs as issue of SCN has serious implications on career and reputation of IP and thus, SCN should be prepared after due care and review.

Further, it is stated that draft inspection report dated 25.03.2019 alleged violation of Section 23, clause 3 and 5 of Code of Conduct but the SCN alleged violation of Section 18(1)(f), 23(2), 25(2)(a) and 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and (h) of IP Regulations and Clause 3, 5 and 14 of Code of Conduct. He submits that he has not been given a chance to reply to the new allegations in SCN which is in violation of principles of natural justice.

Analysis:

Under the Code, an IP plays a central role in resolution, liquidation and bankruptcy processes. He takes important business and financial decisions that may have substantial bearing on the interests of all stakeholders. In such a scenario, it becomes imperative for an IP to perform his duties with utmost care and diligence. He must also manage, preserve and protect the assets of the distressed CD and is also required to ensure continuance of the business operations of the CD.

Section 18 of the Code casts specific duties upon the IRP. Clause (f) of Section 18 provides as follows: -

“(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including -

- i. assets over which the corporate debtor has ownership rights which may be located in a foreign country;*
- ii. assets that may or may not be in possession of the corporate debtor;*
- iii. tangible assets, whether movable or immovable;*
- iv. intangible assets including intellectual property;*
- v. securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;*
- vi. assets subject to the determination of ownership by a court or authority; ...”*

Further, Section 25 of the Code also casts several duties on the RP and provides, *“(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; ...”

Thus, the IRP/ RP is duty bound to take control and custody of the assets of the CD. Under the SCN, two allegations have been made against the RP which are as below:

- a) That the RP failed to take effective control and custody of the assets of the CD and
- b) That the RP added Mr. Sunil Jain as a signatory to the Bank accounts of the CD during 5th CoC meeting and further permitted him to partake in the operations of the CD despite his hostile behaviour.

Both the above allegations are dealt with separately. With regard to the first allegation, it is observed that in accordance with the provisions of Section 18(1)(f) and 25(2)(a) of the Code, an IRP/ RP is required to take control and custody of all assets of CD. However, both the sections neither provide for any time limit within which such custody should be taken, nor does it provide for taking physical

possession of the assets of the CD. Moreover, in certain unavoidable circumstances, it may be difficult to take 100% physical control over the assets of the CD. In such a situation, the IRP may take symbolic control over the assets of the CD.

It is submitted by the RP that before 14.12.2017, he did not face any resistance from the workers or employees of the CD and thus, he could not contemplate non-cooperation/ resistance by them in future. Further, it is also submitted that when Mr. Sunil Jain resisted RP and CoC to enter the factory premises on 14.12.2017, the RP supplemented the existing security guards at the factory premises by employing more security guards to protect the factory and the incident was also reported by the RP to Hon'ble NCLT by filing an application under section 19 of the Code.

Further, during the personal hearing, the RP submitted that he only took symbolic control over the assets of the CD from the time of commencement of CIRP since the need for taking physical control or replacing the existing security was not felt considering the circumstances of the present case.

Undisputedly, the IRP should have taken complete control over the assets of the CD by replacing the existing personnel with the personnel in whom he can repose his trust. If the IRP would have replaced the existing personnel, he would not have suffered resistance to enter the factory premises on 14.12.2017. Furthermore, the RP allowed Mr. Sunil Jain to manage the day to day affairs of the CD.

As regards the second allegation, it has been observed from the minutes of 5th CoC meeting that RP and not Mr. Sunil Jain was added as signatory. Thus, the allegation in the SCN is found to be incorrect.

It has also been submitted by the RP that he has not been given a chance to reply to the new allegations in SCN where the Board took the view that RP violated Section 18(1)(f), 23(2), 25(2)(a) and 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and (h) of IP Regulations and Clause 3, 5 and 14 of Code of Conduct, while in the draft inspection report dated 25.03.2019, there was an allegation that Section 23 of the Code and Clauses 3 and 5 of Code of Conduct had been violated which is against the principles of natural justice. However, this submission is not tenable since he has been given an opportunity to respond to the SCN (which includes all the alleged contraventions) which he duly availed of by submitting his written responses dated 16.11.2019 and thereafter also availed of the opportunity of personal hearing before the Disciplinary Committee to reply on all the alleged contraventions.

Findings:

The soul of the Code is resolution of insolvency of the CD which can be achieved through maximization of the value of the assets of the CD. In the present case, it has been submitted by the counsel of the RP, during the personal hearing, that the CIRP has been successfully completed within the prescribed period of 180 days. It

has also been observed from the minutes of 8th CoC meeting dated 14.02.2018 that the CoC expressed its gratitude to the RP for his hard work and congratulated him for his efforts to complete the CIRP in respect of CD within 180 days since 23.8.2017.

Further, in the absence of any time limit within which control and custody must be taken of the assets of CD by the IRP/ RP, RP cannot be held liable. Moreover, the Code is also silent on the issue that actual physical control of the assets must be taken or symbolic control is also considered as sufficient. In such a situation, it cannot be said that RP has acted in contravention of Section 18(1)(f), 23(2) and 25(2)(a). Consequently, he cannot be held liable for violation of section 208(2)(a) and (e) of the Code as well as Regulation 7(2)(a) and (h) of the IP Regulations read with Clause 3, 5 and 14 of the Code of Conduct as given in the First Schedule of the IP Regulations.

3.3 **Contravention:**

As per provisional balance sheet as on 23rd August 2017, the closing stock of CD was Rs 27,74,69,889.42 while as per the valuation reports submitted to RP (dated 9.11.2017 and 10.11.2017) by valuers Mr. Shubhasish Majumder and Mr. Basudev Dey, liquidation values of the stock were reported as Rs 6,70,43,000 and Rs. 6,18,40,000 respectively. It was admitted by RP in his reply dated 8.04.2019 to the Board that the difference in value of inventories was highlighted by him in 3rd CoC meeting dated 14.11.2017. Further, the RP sought explanation from Mr. Sunil Jain on the difference in value of inventories. There is no specific provision in the Code or Regulations which requires seeking such explanations from ex-directors. The RP should have appointed the forensic auditor immediately on receiving valuation reports, but forensic auditor E&Y was appointed on 2.1.2018 i.e. after a delay of two months after consultation with CoC during 5th CoC meeting. As per section 25(2)(d), in order to preserve and protect the assets of the CD, RP shall appoint accountants, legal or other professionals. The Code does not envisage any role of CoC in this matter.

This is in violation of Section 25(2)(d) and 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and 7(2)(h) of the IP Regulations read with clause 14 of the Code of Conduct as given in the First Schedule of the IP Regulations.

Submission:

It is submitted that explanation was called from Mr. Sunil Jain and/ or the suspended board of directors because the RP and CoC deemed it appropriate to seek explanation before taking adverse action on the basis of principle of natural justice. Thus, the directors were asked to review the valuation report and provide feedback on the assumptions considered by the valuers with respect to quantity, location, grade, price etc. of the inventories, but the explanation was never provided. Thereafter, necessary steps were taken for conduct of forensic audit.

It is also submitted that forensic auditor was appointed by RP himself without seeking prior approval of CoC. The RP only informed CoC. The appointment of forensic auditor was made after obtaining quotes from different auditors, discussing the scope of work, signing of non-disclosure undertakings, sharing of primary information and other steps which took some time. The application under section 43, 45, 50 and 66 was filed after receipt of Forensic Audit Report and not on mere suspicion. Further, it is submitted by the RP that there is no concept of forensic auditor in the Code and hence a suggestion that forensic auditor should have been appointed by the RP is outside the Code and cannot form a valid reason to issue a SCN.

It is submitted by the RP that draft inspection report dated 25.03.2019 alleged violation of Sec 25(2)(j) and clause 14 of Code of Conduct but the SCN alleged violation of Sec 25(2)(d) and 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and (h) of IP Regulations and Clause 14 of Code of Conduct. He submits that he has not been given a chance to reply to the new allegations in SCN which is in violation of principles of natural justice.

Analysis:

The responsibilities of CoC and IP are clearly demarcated by the Code. The CoC must not encroach upon the role of IP and must not allow the IP to encroach upon its role. Similarly, the IP must not compromise his independence in favour of the CoC.

Section 25 (2)(d) of the Code provides:

*“2. For the purposes of sub-section (1), the resolution professional shall undertake the following actions namely: -
(d) appoint accountants, legal and other professionals in the manner as specified by Board;”*

Thus, as per provisions of Section 25(2)(d), the RP shall appoint professionals himself. He is neither permitted to delegate his duties to others nor can he abdicate his authority in favour of CoC. If the law provides for a certain manner to do something, it must be done in that manner only. Thus, the RP shall appoint professionals (including forensic auditor) himself without seeking approval of CoC.

The counsel for the RP during the personal hearing submitted that there is no specific provision under the Code which allows the RP to appoint forensic auditor and there is no concept in the Code for appointment of forensic auditor. However, the submission of RP is untenable since a forensic auditor is also a professional who can be appointed by the RP himself under the provisions of Section 25(2)(d) of the Code. However, from the minutes of 5th CoC meeting dated 18.12.2017, it has been observed that the RP informed the CoC about his discussion with the

forensic auditors for appointment. Item 14 of the minutes of 5th CoC meeting clearly provides,

“The RP also placed the draft engagement letter received from Ernst and Young among the Committee for comments.

The Committee discussed the matter and approved the appointment and other terms and scope of work of the assignment.”

Thus, from the minutes, it is clear that the CoC discussed the appointment of forensic auditors and ‘approved the appointment and other terms and scope of work of the assignment’.

Further, regarding the allegation that the RP should have appointed the forensic auditor immediately upon receiving the valuation report and not after a delay of two months i.e. 2.01.2018, it has been submitted by the counsel for the RP that the RP cannot be held liable since no time limit for conduct of forensic audit has been prescribed under the erstwhile provisions of the Code.

It has been observed that the provision relating to model timeline for CIRP has been introduced by inserting Regulation 40A to the CIRP Regulations w.e.f. 03.07.2018, but they do not prescribe any timeline for appointment of forensic auditor. In the absence of any timeline for appointment of forensic auditor, the RP may not be held liable.

It has also been submitted by the RP that he has not been given a chance to reply to the new allegations in SCN where the Board took the view that RP violated Section 25(2)(d) and 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and (h) of IP Regulations and Clause 14 of Code of Conduct, while in the draft inspection report dated 25.03.2019, there was an allegation that Section 25(2)(j) and clause 14 of Code of Conduct had been violated which is against the principles of natural justice. However, this submission is not tenable since he has been given an opportunity to respond to the SCN (which includes all the alleged contraventions) which he duly availed of by submitting his written responses dated 16.11.2019 and thereafter also availed of the opportunity of personal hearing before the Disciplinary Committee to reply on all the alleged contraventions.

Findings:

The RP sought approval of CoC for appointment of forensic auditor in the 5th CoC meeting dated 18.12.2017 and thereby compromised his independence in favor of CoC. However, in the absence of any timeline for appointment of forensic auditor under the provisions of the Code, the RP cannot be held liable for making a delay in the appointment of forensic auditor.

Since the RP has abdicated his authority in favor of CoC and allowed them to approve appointment and other terms and scope of work of the assignment of

forensic audit, he has contravened the provisions contained in Section 25(2)(d) and 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and 7(2)(h) of the IP Regulations read with clause 14 of the Code of Conduct as given in the First Schedule of the IP Regulations.

4. **Conclusion:**

- 4.1 A key supporting institution under the Code is insolvency profession. An IP exercises the powers of the Board of Directors of the firm under resolution, manages its operations as a going concern, and complies with applicable laws on behalf of the firm. 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. The process culminates in a resolution plan that maximises the value of assets of the firm. This presupposes availability of many competing resolution plans and identifying the best of them. The key is generation of many promising resolution plans. This requires provision of and access to complete and accurate information about the firm for prospective resolution applicants and continued operation of the firm.
- 4.2 The Code casts this duty on the IP. He organises all information relating to the assets, finances and operations of the firm, receives and collates the claims, prepares information memorandum, and provides access to relevant information, so that there is complete symmetry of information among the entitled stakeholders, while maintaining confidentiality. He thus addresses the market failure arising from information asymmetry. The resolution balances the interests of the stakeholders. This requires the services of a third person who does not side with any stakeholder and has no conflict of interests. The law casts this duty on the IP and makes several provisions to ensure his integrity, objectivity, independence and impartiality. It also requires him to be a fit and proper person. Given the responsibilities, an IP requires the highest level of professional excellence.
- 4.3 In this matter, the DC observes that Mr. Arun Kumar Gupta displayed a casual approach during the conduct of CIRP. When a CD is admitted into CIRP, the Code shifts the control of a CD to creditors represented by a CoC for resolving its insolvency. The CoC holds the key to the fate of the CD and its stakeholders. Thus, several actions under the Code require approval of the CoC. On the other hand, the IP must maintain absolute independence in discharge of his statutory duties under the Code. In the present matter, the RP compromised his independence and sought approval of CoC for appointment of forensic auditor thereby abdicating his authority in favor of the CoC.
- 4.4 Thus, Mr. Arun Kumar Gupta has displayed utter misunderstanding of the provisions of the Code and Regulations made thereunder. He has, therefore, contravened provisions of:

(a) Sections 25(2)(d) and 208(2)(a) and (e) of the Code,

(b) Regulation 7(2)(a) and 7(2)(h) of the IBBI (Insolvency Professionals) Regulations, 2016 read with clause 14 of the Code of Conduct under the said Regulations.

5. Order

- 5.1 The DC is conscious of the fact that the profession of IP is in a stage in which IPs are striving to learn. Even though it is incumbent upon them to build and safeguard the reputation of the profession which should enjoy the trust of the society and inspire confidence of all the stakeholders, they may not be kept away from practicing the profession especially in the absence of any *malafide* intention and more so when the objective of the Code i.e. resolution has been achieved within the prescribed timelines.
- 5.2 In view of the above, the DC, in exercise of the powers conferred under Regulation 13 (3) (b) of the IBBI (Inspection and Investigation) Regulations, 2017 and Section 220 (2) of the Code read with sub-regulations (7) and (8) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, disposes of the SCN with the following directions:
- 5.2.1 In view of the circumstances of the present case concerning the CIRP of CD, the RP is hereby warned to be extremely careful and diligent while performing his duties under the Code. Further, he must strictly act in accordance with the provisions of law and similar contraventions shall not be repeated.
- 5.3 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professional of ICAI where Mr. Arun Kumar Gupta is enrolled as a member.
- 5.4 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, New Delhi, for information.
- 5.5 Accordingly, the show cause notice is disposed of.

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(Dr. Navrang Saini)

Whole Time Member, IBBI

Dated: 13.03.2020

Place: New Delhi