

**INSOLVENCY AND BANKRUPTCY BOARD OF INDIA**  
(Disciplinary Committee)

No. IBBI/DC/76/2021

27<sup>th</sup> August, 2021

**ORDER**

**In the matter of Mr. Pramod Kumar Sharma, Insolvency Professional (IP) under Section 220 of the Insolvency and Bankruptcy Code, 2016 read with Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 and Regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017.**

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/MON/2019/85 dated 15.01.2021, issued to Mr. Pramod Kumar Sharma, R/o H.No-16, Dasharath Kunj-B West Arjun Nagar, Agra, Uttar Pradesh - 282001 who is a Professional Member of the ICSI Institute of Insolvency Professionals and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-002/IP-N00110/2017-18/10258 dated 30.05.2017.

**Background**

1.1 Mr. Pramod Kumar Sharma was appointed as an interim resolution professional (IRP) for the corporate insolvency resolution process (CIRP) in the matter of International Recreation and Amusement Limited, Corporate Debtor (CD) *vide* order of the National Company Law Tribunal, Principal Bench, New Delhi in CP(IB)-297(PB)/2018, dated 10.08.2018 which admitted an application for CIRP under Section 7 of the Insolvency and Bankruptcy Code, 2016 (Code). The IRP was confirmed as the Resolution Professional (RP) by the NCLT *vide* its order dated 05.10.2018.

1.2 The IBBI, in exercise of its powers under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017 appointed an Inspecting Authority (IA) to conduct the inspection of Mr. Pramod Kumar Sharma *vide* order dated 10.02.2020 on having reasonable grounds to believe that Mr. Pramod Kumar Sharma had contravened provisions of the Code, Regulations and Circulars issued thereunder. A draft inspection report, prepared by the IA, was shared with Mr. Pramod Kumar Sharma on 05.07.2020, to which the Mr. Pramod Kumar Sharma submitted reply *vide* email dated 24.07.2020. The IA submitted the Inspection Report to IBBI on 10.08.2020.

1.3 The IBBI issued the SCN to Mr. Pramod Kumar Sharma on 15.01.2021, based on the material available on record in the inspection report in respect of his role as an IRP/RP in the CIRP of CD. The SCN alleged contraventions of provisions of the sections 17(2)(e), 18(1)(a) and (b), 28(1)(e) and (k), 208(2)(a) of Insolvency and Bankruptcy Code, 2016 (Code), Regulations 7(2)(h) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and clause 2 of the Code of Conduct thereof, regulations 16A(1), 20(2), 26(4) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (CIRP Regulations), regulation 4(4) and (7) of the IBBI(Inspection and Investigation) Regulation, 2017 (Inspection Regulations) and IBBI Circular No. IP/004/2018 dated 16.01.2018.

1.4 The IBBI referred the SCN, response of Mr. Pramod Kumar Sharma 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. Pramod Kumar Sharma availed an opportunity of e-hearing before the DC on 30.06.2021. Mr. Pramod Kumar Sharma was represented by Mr. G.P. Madaan, Advocate who made submissions during the e-hearing.

### **Alleged Contraventions and Submissions**

2. The contraventions alleged in the SCN and Mr. Pramod Kumar Sharma's written and oral submissions thereof are summarized as follows:

#### **I Contravention**

2.1.1 As per section 28(1) of the Code, the RP shall not take any action mentioned in sub-clause (a) to (m) without the prior approval of the Committee of Creditors (CoC). Sub-clause (k) to section 28(1) of the Code provides for transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business.

2.1.2 It is observed that in the 2nd CoC meeting held on 06.11.2018, Mr. Pramod Kumar Sharma proposed to CoC to rent out the Oyster Water Park on highest bid basis. The agenda to sub-lease the park was put to e-voting held from 18.11.2018 to 19.11.2018 and the agenda was defeated. The same issue was again deliberated in the 3<sup>rd</sup> CoC meeting held on 17.12.2018, wherein it was again dropped with observations:- *"A detailed discussion ensued on the same and it was deliberated that since the Oyster Park can be considered as a Crown Jewel of the assets of the Corporate Debtor the same should be left vacant for attracting any prospective resolution applicant. Accordingly, the proposal of renting out the Oyster Park was dropped."*

2.1.3 It is noted that on 02.03.2019, Mr. Pramod Kumar Sharma entered into a 'revenue sharing/ operation assistance agreement (on monthly minimum guarantee basis)' with CA Hospitality Private Limited for assistance in operation of the water park and allied services. As per the agreement terms, the operator was to pay to the CD a monthly minimum guarantee of Rs.32,00,000. If, in any month, the revenue of the operator exceeds the minimum guarantee amount of Rs. 32,00,000, then for that month, the operator shall pay to the CD the revenue share in the following ratio:

<b>RevenueSharing Ratio (Operator : CD)</b>	<b>Nature of Vendor Operation</b>
80:20	Food and Beverage
60:40	Locker and Costume

70:30	Operations/Ticketing
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2.1.4 It is therefore, clear that the CoC decided not to rent out the oyster water park and Mr. Pramod Kumar Sharma even then proceeded to enter into the revenue sharing agreement for the water park, against the decision of the CoC. Therefore, the IBBI was of the *prima facie* view that Mr. Pramod Kumar Sharma has violated section 28(1)(k) and 208(2)(e) of the Code.

### **I Submission**

2.2.1 Mr. Pramod Kumar Sharma, in his reply submitted that the approval of the CoC is required only when material contracts contrary to the ordinary course of business are being executed by the CD. He submitted that the issue of leasing out the oyster water park beach involved transfer of substantial rights of the CD to a third party in accordance with Section 108 of Transfer of Property Act, 1882 and therefore, the said resolution was placed for the consideration of the CoC wherein the same was rejected. The basis of the rejection of the resolution by the CoC was that the oyster park is a crown jewel of the assets of the CD, the same should be left vacant for attracting any prospective resolution applicant i.e. no third party right be created in the oyster water park beach.

2.2.2 Mr. Pramod Kumar Sharma submitted that he shelved the plan to lease out oyster beach in view of the decision taken by the COC. However, at the same time, it was also the statutory obligation as RP to keep the CD as going concern in view of Section 20(1) read with Section 23(2) of the Code while abiding by the decision of CoC in the 2nd Meeting. He mentioned that the CD did not have sufficient funds to manage the day-to-day operations of the oyster water park beach, because of which most of the senior managerial staff had already left the CD, due to liquidity crunch and irregularity in payment of salary. He further mentioned that the CD has no income source other than that of operation of oyster beach and the parking. Therefore, the cessation of operation of the oyster beach would have rendered the RP unable to retain the already thin majority of staff in view of the lack of income to pay their salary and ultimately, he would have failed in his statutory duty to keep the CD as going concern. It is important to mention here that to run the Water Park every year huge investment for maintenance and repairs has to be incurred and he had no money for such maintenance and repairs. Therefore, he contracted for assistance in operations of Water Park instead of renting out the Water Park and thereby run the Water Park so that initial investment can be met without transferring any right of the property of the CD. Therefore, he acted in accordance with the rules of ordinary course of business.

2.2.3 Mr. Pramod Kumar Sharma submitted that he took the decision to rope in a partner who can assist in the operation of the oyster beach. The arrangement was made on revenue sharing basis with minimum revenue guarantee wherein the CA Hospitality Private Limited was roped with limited right to assist him to run the oyster beach in order to keep the CD as going concern. In order to address the decision taken by the CoC, no leasehold

rights were created in favour of CA Hospitality Private Limited. Further, the agreement ensured that the CA Hospitality Private Limited assistance agreement would be terminated once the resolution applicant takes over the property of the CD during the operation of the agreement. He further submitted that Clause 9.2 to 9.5 of the said agreement took care of the objections of the CoC which rejected the leasing of the oyster beach. Further, the said agreement ensured that the salary of the existing employees of the CD could be paid which was an impossible task if the oyster beach operation was closed. He emphasised that the resolution plan was approved on 09.05.2019 in the 9th CoC meeting and was submitted to Hon'ble NCLT on 12.06.2019, the first date of hearing was 05.07.2019 and the agreement with operator was terminated w.e.f. 12.07.2019. Therefore, on the one hand he complied with his statutory obligation of keeping the CD as going concern and on the other hand kept the Water Park vacant for the successful resolution applicant as decided in the 2<sup>nd</sup> CoC of CD.

2.2.4 Mr. Pramod Kumar Sharma further submitted that the impugned revenue sharing agreement does not require the approval of the CoC under Section 28(1)(k) of the Code unlike the lease agreement which was rejected by the CoC. The instant revenue sharing agreement with CA Hospitality Private Limited with limited right of CA Hospitality Private Limited to assist the CD in the operation of the oyster beach involves no transfer of right and the same is a decision taken in ordinary course of business and does not amount to transfer of rights. He emphasised that on the distinction between the proposal made to the CoC which was regarding “renting out” the entire Oyster Water Park and the impugned action whereby the revenue sharing/ operation assistance agreement was entered into by him on behalf of the CD in order to ensure the continuance of the operations of the CD without transferring any substantial rights to the operator with the understanding that the said revenue sharing agreement would cease to be operational upon the approval of the resolution plan and the resolution applicant taking charge of the same. The inhibition of the CoC to deny the resolution for renting out the Oyster Water Park was that it must be vacant to attract any prospective resolution applicant, whereas if he had not entered into the revenue sharing agreement to manage the operations of the said Water Park, the same would have deteriorated and would have adversely impacted the possibility of receiving any resolution plans.

2.2.5 Mr. Pramod Kumar Sharma referred to observation of Hon'ble Supreme Court while interpreting the term ‘ordinary course of business’ under the Code in *Anuj Jain v. Axis Bank Limited and Ors.* (MANU/SC/0228/2020). He submitted that while understanding the impugned transaction in view of law laid down by Hon'ble Supreme Court in *Anuj Jain's* case, it becomes clear that his act of entering into operation assistance cum revenue sharing agreement with CA Hospitality Private Limited was nothing but the natural flow of transaction in which the operation of the said oyster beach was conducted prior to the CIRP commencement date. Therefore, it is squarely covered within the meaning of ‘ordinary course of business’, hence no COC approval was required. Therefore, he submitted that there is no violation of section 28(1)(k) and 208(2)(a) of the Code.

2.2.6 In his reply, Mr. Pramod Kumar Sharma stated that he filed an application seeking permission to run the water park before the Hon'ble NCLT but it was advised by the Tribunal that the Order on the Resolution Plan is expected soon and therefore, Water Park should be left vacant for the resolution applicant. However, the approval of the resolution plan is still pending before Hon'ble NCLT and in between two seasons have passed. Therefore, he stated that he discharged his duties diligently under section 20(1) read with section 23(2) of the Code.

2.2.7 Mr. Pramod Kumar Sharma submitted that while arriving to any conclusion the Hon'ble Board should keep in mind that in this CIRP the 100% Financial Creditors were individuals and majority of them acted upon the whims and fancies of few leaders. He stated that the mentality of these financial creditors was to use the CIRP process as a platform for recovery of money instead of maximizing the wealth of CD. He submitted that it is his inherent duty as a resolution professional to ensure the smooth conduct of the CIRP while maximizing the value of the assets of the CD and in the present case, it was imperative to enter into the revenue sharing agreement in order to maximize the value of oyster water park to even ensure the viability of the asset for the resolution applicant for when the CD is taken over by such resolution applicant. He lastly submitted that due to covid-19 pandemic, he has not run the water park, as a result of which the CD has incurred many crores liabilities in the form of fixed nature of expenses and some other expenditures.

## **II Contravention**

3.1.1 Regulation 4 of the Inspection Regulations provides how inspection is conducted under the Regulations. Sub-regulation (4) and Sub-regulation (7) of Regulation 4 are relevant and the same are given below:

*“4. Conduct of Inspection:*

...

*(4) It shall be the duty of the service provider and an associated person to produce before the Inspecting Authority such records in his custody or control and furnish to the Inspecting Authority such statements and information relating to its activities within such time as the Inspecting Authority may require.*

...

*(7) It shall be the duty of the service provider and an associated person to give to the Inspecting Authority all assistance which the Inspecting Authority may reasonably require in connection with the inspection.”*

3.1.2 It is noted that the IA sought certain documents pertaining to Oyster Water Park, however, Mr. Pramod Kumar Sharma did not share the details of the revenue and profits generated from Oyster Water Park by both parties, CD and CA Hospitality Private Limited, despite being asked twice *vide* emails dated 19.06.2020 and 23.06.2020. It is observed that the revenue sharing agreement entered between two parties mention that

the Management Review Committee (MRC) (comprising of three members - one member of Mr. Pramod Kumar Sharma's team, one working member from staff of CD and one representative of revenue sharing partner) shall submit its fortnightly report (with total sales data) to Mr. Sharma. Further, the agreements also states that the MRC shall meet on weekly basis to discuss the progress of water park and the issues arising therefrom. The said information is crucial for ascertaining the correctness of the cost incurred in CIRP process and whether the agreement entered between CD and CA Hospitality Private Limited was beneficial for the CD or not.

3.1.3 It is seen that Mr. Pramod Kumar Sharma took refuge of lockdown/restrictions of movement imposed on the individuals in view of Covid-19 pandemic and did not provide the data, when the fortnightly reports were available with him. Therefore, the IBBI was of *prima facie* view that Mr. Pramod Kumar Sharma by not providing the documents/ data has contravened sub- regulation (4) and (7) of regulation 4 of the Inspection regulations and Section 208(2)(a) of the Code.

## **II Submission**

3.2.1. Mr. Pramod Kumar Sharma denied that he failed to submit record/ documents to the IA. He submitted that he promptly replied to all the queries raised during inspection. He submitted that on 11.02.2020, he received notice of Inspection to which he replied promptly on 15.02.2020. On 17.02.2020, annexures were sought which were emailed on 18.02.2020 in six parts of the emails and clarification as sought was shared on 22.02.2020 without any delay. He submitted that on 05.06.2020, he was asked for inspection and some documents. he shared the documents on 11.06.2020 without any delay. On 15.06.2020, he informed the IA through phone as well as by email as to his availability and got the inspection done as per suitability of IA.

3.2.2 Mr. Pramod Kumar Sharma submitted that he submitted all the other documents with or before the reply to draft inspection report except accounts related documents. He stated that he submitted copy of provisional balance sheet and profit and loss account for financial year 2018-19 and 2019-2020. He annexed the audited balance sheet for FY 2017-18 and the revenue sharing between the CD and CA Hospitality.

## **III Contravention**

4.1.1 According to clause 2 of the Code of Conduct, an IP must not misrepresent any facts or situations and should refrain from being involved in any action that would bring disrepute to the profession. It is seen that in the 3rd CoC meeting held on 17.12.2018, the agenda for replacement of the RP Mr. Pramod Kumar Sharma with Mr. Avineesh Matta was put to vote. While declaring the result Mr. Sharma stated that pursuant to Section 27 of IBC, there is a requirement of at least 66% of voting shares to replace the Resolution Professional and since the total votes casted in favour of agenda item is less than 66%, therefore, the resolution is declared as defeated. The evoting results are given below:

S.NO.	CoC MEMBER	VOTE IN FAVOUR	VOTES AGAINST
1.	Financial creditors in class	49.06	39.72
2.	Financial creditors	5.55	5.67
	<b>TOTAL</b>	54.61	45.39

4.1.2 It is seen that the e-voting results for the agenda items of 2nd CoC meeting were declared by Mr. Pramod Kumar Sharma on the basis of total votes casted by Financial Creditors (FC), including Financial Creditors in Class as decided by Hon'ble NCLT in *Nikhil Mehta & Sons (HUF) V. M/s AMR Infrastructure Ltd.* It is noted that the entire CoC of CD consists of real estate allottees. However, the principle laid down in Nikhil Mehta's case was not applied by Mr. Pramod Kumar Sharma while determining the issue of replacement of RP in the 3rd CoC meeting and declared the resolution as defeated, even though the total votes in favour of the resolution was more than votes against the resolution.

4.1.3 It is observed that Mr. Pramod Kumar Sharma applied the principle laid down by Hon'ble NCLT in Nikhil Mehta's case in the 2<sup>nd</sup> meeting of the CoC but not to the agenda on replacement of RP in the 3<sup>rd</sup> meeting of the CoC. It is also observed that the principle laid down in Nikhil Mehta's case was applied by Mr. Pramod Kumar Sharma even before the order dated 18.03.2019 of Hon'ble NCLT. Therefore, the IBBI was of *prima facie* view that Mr. Pramod Kumar Sharma violated clause 2 of the Code of Conduct.

### III. Submissions

4.2.1 In his reply, Mr. Pramod Kumar Sharma submitted that the judgment in Nikhil Mehta's case was delivered on 29/09/2018 by Hon'ble NCLT Principal Bench, New Delhi. Following the judgment of Nikhil Mehta, Mr. Pramod Kumar Sharma was confirmed as RP in the present case on 05.10.2018. Mr. Sharma submitted that in *Nikhil Mehta's case*, there were mainly two issues namely: (a) Whether present and cast votes would be considered for approval of the plan; and (b) that the judgement applies only to the RP confirmation in so far as it relates to the special majority.

4.2.2 Mr. Pramod Kumar Sharma further submitted that with that understanding that *Nikhil Mehta's case (supra)* applies only for above two purposes without any change in threshold limits provided for any particulate Section. He emphasised that upto the 3rd CoC meeting, no process advisor was appointed by the CoC and acted as per his interpretation of the said Judgement. Mr. Sharma submitted that upon declaration of results of approval of plan in 9th CoC meeting, he took consultation of the process advisor (Adv Sumant Batra of B. Kesardass and Co.) who was appointed in the 6th CoC meeting. He submitted that he relied on the order in CA No. 88/ 2019 dated 18.03.2019 wherein the Hon'ble NCLT confirmed that the Nikhil Mehta (Supra) would apply in the instance CIR Process. He submitted that the remuneration of IRP was approved in the 1<sup>st</sup> CoC meeting on basis of members present and casting vote and his appointment as IRP was also approved. He stated that he interpreted the Nikhil Mehta judgement to be applied for a limited purpose whereas the resolution of remuneration of IRP was again

and again proposed in the CoC meetings and he did not draw even single penny as remuneration till the CIRP cost including IRP remuneration was approved by the CoC. Therefore, he submitted that he acted with utmost *bonafide* and that due to the different understanding that the said principle towards voting was applied accordingly.

4.2.3 It was due to the said ambiguity that he put other resolutions on hold till the time a clarification in this regard is given by Hon'ble Tribunal and accordingly CA No. 88 of 2019 was filed before Hon'ble Tribunal inter alia seeking directions that the subsequent decisions of CoC which will be approved pursuant to the applicable provisions of the Code shall be considered as approved on account of judgment delivered in *Nikhil Mehta's case* and that the RP need not approach the Hon'ble Tribunal every time to take its approval on the already approved decisions of CoC. This application was disposed of *vide* order dated 18.03.2019 by holding that the proceedings be held in accordance with law laid down in the judgment of this Hon'ble Tribunal in the case of *Nikhil Mehta's case (supra)*. He submitted that only after the judgment in the application, he started to apply the principle laid down in *Nikhil Mehta's case (supra)*.

4.2.4 Mr. Pramod Kumar Sharma stated that the proceedings before the COC were as such governed by the law laid down in the aforesaid judgment of Nikhil Mehta (Supra). He stated that the ratio of the said judgment is that in the event of a dead lock position and in the case of real estate (commercial and residential) allottees comprising 100% voting share in CoC, the aforesaid provisions must be read to mean that a resolution would be deemed to be passed if it is voted by highest number of Financial Creditors in the Class of Real Estate (Commercial and Residential) it would advance the object of progressive legislation rather than defeating it. As there was no dead lock situation in the present case, Mr. Sharma stated that he did not apply the *ratio* laid down on all the resolutions of the CoC till the time a clarification was given by the AA *vide* order dated 18.03.2019. Therefore, he declared the result of the impugned resolution based on his interpretation of the order of AA.

4.2.5 Mr. Sharma submitted that when he was approached by a Financial Creditor with regard to the issue of his replacement in view of the impugned resolution in view of law laid down in *Nikhil Mehta's case (Supra)*. Mr. Sharma *vide* email dated 5.01.2019 replied to the said Financial Creditor about his interpretation of the law laid down in *Nikhil Mehta's case (Supra)* and also gave a frank opinion to the concerned Financial Creditor as to approach the Hon'ble Tribunal under Section 27(3) of the Code for the replacement of RP. He submitted that RP has been replaced by the said resolution and the said resolution has been wrongly declared as defeated.

4.2.6 Mr. Pramod Kumar Sharma submitted that authorised representative (AR) represents more than 84% of voting rights of the Financial Creditors who himself is a qualified IP himself. He submitted that the AR also did not raise any issue with regard to the said interpretation of the voting and therefore, this suggests the possibility of more than one interpretation of the law laid down in *Nikhil Mehta's case (supra)*.



- 4.2.7 With respect to the violation of the clause 2 of the Code of Conduct, Mr. Pramod Kumar Sharma submitted that his *bonafide* is clear from the fact that he himself sought clarity on this aspect from the Hon'ble NCLT and in case there was any malice on his part, he would not taken the said action. The issue, according to him, was settled only after a clarification in this regard was given by the Hon'ble Tribunal and there is no provision under the Code to change the minutes of the CoC meeting which has already been circulated and approved. He submitted that the issue of application of the ratio laid down by *Nikhil Mehta's case (Supra)* with regard to issues other than appointment of RP inter alia in the approval of resolution plan is being considered by Hon'ble Tribunal and hence, the said issue has not attained finality till date.
- 4.2.8 He also submitted that the CoC being the concerned body to replace the RP under Section 27 of the Code never raised any objection in any meeting chaired by him, till the last meeting wherein the resolution plan was approved. If the CoC would have raised this issue, he would have accordingly sought necessary legal opinion on this issue and reported back to the RP. Therefore, he could not be accused of misrepresentation or that such an act brings disrepute to the profession.

#### **IV Contravention**

- 5.1.1 According to Section 28 of the Code, the RP cannot take any action mentioned in sub-clause (a) to (m) to clause (1) without the prior approval of the CoC. One such action requiring prior approval of the CoC is mentioned in sub-clause (e), which is as follows:

*“(e) giving instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;”*

- 5.1.2 It is observed that in the 1<sup>st</sup> CoC meeting held on 17.09.2018, Mr. Pramod Kumar Sharma proposed fixing a limit up to which the IRP was entitled to initiate a debit transaction with the financial institution/ banks maintaining accounts of the CD without the permission of the CoC. However, the said agenda was defeated in the CoC meeting. The same agenda was again placed in the 2nd CoC meeting dated 06.11.2018, which was again defeated. Therefore, no debit limit for conducting transactions, without the approval of CoC, was fixed by the CoC. It is further observed that Mr. Sharma did not place the agenda to fix a limit for the debit transactions in the subsequent CoC meetings and continued to undertake various debit transactions without such approval.
- 5.1.3 It appears from the bank statements of the CD that Mr. Pramod Kumar Sharma initiated various debit transactions without the authorization of CoC. It is clearly stated that prior approval of the CoC is mandatory for actions mentioned in section 28 of the Code and therefore, unauthorized withdrawals made by Mr. Pramod Kumar Sharma cannot be justified on the premise that expenditures were made to keep the CD a going concern

and it does not mitigate the nature of the contraventions committed.

5.1.4 Therefore, the IBBI was of the *prima facie* view that Mr. Pramod Kumar Sharma has contravened section 28(1)(e) of the Code.

#### **IV Submissions**

5.2.1 Mr. Pramod Kumar Sharma, in his reply submitted that the mandate of section 28(1)(e) of the Code is a matter of record however, this issue again has to be seen in view of the peculiarity of present CoC which consists solely of real estate buyers. The issue of debit transaction was raised by him in the 1<sup>st</sup> and 2<sup>nd</sup> CoC meetings wherein no objection was raised either by the individual financial creditors or AR. However, despite no objection being raised in CoC the said resolution was defeated twice in e-voting pursuant to 1<sup>st</sup> and 2<sup>nd</sup> CoC meeting. He submitted that the CoC constitutes 100% Financial Creditors who are investors and individuals, and majority of them acted upon the whims and fancies of few leaders. He submitted that the present CD would have been the first and only CIRP where neither any debit transactions limit was approved nor any such limit or alternative thereof was suggested. He also submitted that it is evident from the voting results and minutes of the meeting that these Financial Creditors have only two motive first, to recover their money and second, not to accept any agenda item that is proposed by the Resolution Professional. The minutes show that these financial creditors opposed all important agendas without keeping in the mind the spirit of law. Therefore, he was confronted with making choice between compliance of Section 28(1)(e) and Section 20 of the Code i.e. to keep the CD as a going concern.

5.2.2 Mr. Pramod Kumar Sharma submitted that he could not have discharged his task as an IRP of keeping the CD as going concern if he is not allowed to make necessary expenditure including employees' salary, other daily expenditure and therefore, was compelled to make a tough choice, in view of the peculiarity of the present CoC. He further submitted that he alone cannot ensure compliance of the provisions of the Code when the entire CoC chooses to abuse its powers and authority there by resulting in tying up his hands and rendering him unable to even perform the basic acts in compliance of the provisions of the Code. Keeping in view the larger objective of the Code to keep the CD as a going concern and to preserve the value of the assets of the CD, he submitted that he had no other option but to operate the bank account of the CD and carry out debit transactions which at the most can be termed as technical violation but with *bonafide* intent in the larger interest of all the stakeholders of the CD.

#### **V Contravention**

6.1.1 According to regulation 16A of the CIRP Regulations provides for authorised representative. The clause (1) of regulation 16A is given below:

*"16A. Authorised representative.*

*(1) The interim resolution professional shall select the insolvency professional, who is the choice of the highest number of financial creditors in the class in Form CA received under sub-regulation (1) of regulation 12, to act as the authorised representative of the creditors of the respective class:*

*Provided that the choice for an insolvency professional to act as authorised representative in Form CA received under sub-regulation (2) of regulation 12 shall not be considered.”*

- 6.1.2 As per the list of creditors submitted by Mr. Pramod Kumar Sharma, there are 235 financial creditors who filed Form C, whereas there were 1056 financial creditors who filed Form CA. Mr. Vivek Raheja was the authorised representative of the financial creditors who have filed Form CA. The creditors who filed Form C also belonged to a class of creditors and they should have been represented by an Authorised Representative. However, Mr. Sharma categorized financial creditors on the basis of registration of units.
- 6.1.3 It is observed that Mr. Pramod Kumar Sharma should have asked the financial creditors who have filed Form C to file their claims in the Form CA. The financial creditors who had their agreements to sub-lease/ license registered with sub-registrar office and the financial creditors having termination settlements cannot constitute a separate class of creditors. It is seen that during the whole CIRP, Mr. Pramod Kumar Sharma had AR for one sub-set of financial creditors and while the other financial creditors were representing themselves in the individual capacity. This led to a situation wherein hundreds of FCs were attending the CoC meetings and sometime led to disruptions in the meetings.
- 6.1.4 It is considered view of the IBBI that the all the real estate allottees form one class of creditors and thus, should be represented by one AR only. Therefore, the IBBI was of the *prima facie* view that Mr. Pramod Kumar Sharma violated regulation 16A(1) of the CIRP Regulations.

## **V Submissions**

- 6.2.1 Mr. Pramod Kumar Sharma submitted that he had very limited information with regard to the CD till advanced stage in view of non-cooperation from the suspended management of the CD. Based on the limited information, he published Form A on 13.08.2018 wherein at serial number 12 (class of creditors) and mentioned that the class of creditor could not be ascertained at that stage as no financial statement beyond 2014-15 was filled by CD with the concerned ROC. After receipt of claims, he found that apart from the real estate investor who entered into agreement to sublease/ license, there was another class who has entered into termination settlements with the CD wherein the CD agreed to cancel the allotment and provide refund with interest.

- 6.2.2 He further stated that there were certain other investors with whom agreement to sub-lease/ license as executed between CD and FC were registered before Sub-Registrar office. Accordingly, he realised that a separate class for this category of financial creditor was there and accordingly filed an application for appointment of AR before AA. The application was disposed by Hon'ble Tribunal by order dated 01.11.2018. He also stated that the process of appointment of AR by giving three choices as mandated under Regulation 16A could not be done, as he had to apply for the appointment of AR before AA within 2 days of verification of claims in accordance with Regulation 16A of CIRP Regulations and therefore, no AR could be appointed by the RP.
- 6.2.3 With regard to the allegation of classification of financial creditors, Mr. Sharma submitted that regulation 4A of CIRP Regulations stated that the RP shall ascertain the class of creditor by examining books of account and other relevant documents of CD, which in the present case was not available beyond financial year 2015-16 which fact is reflected in Form A published by him. Therefore, by the time he verified all the claim of the FCs, there was no option left to appoint a new AR.
- 6.2.4 He also submitted that the issue of class of creditor and its determination was included *vide* an amendment in CIRP Regulation with effect from 03.07.2018 whereas Form A was published on 13.08.2018. Therefore, there may be a honest difference of opinion with regard to interpretation of recently introduced law (with effect from 03.07.2018) on the basis of information available with the RP at relevant time. He stated that he submitted progress reports with the AA and also in various applications filed by him where he has submitted the same classification, but the classification was never objected to. He submitted that the issue is solely based on interpretation of law wherein more than one interpretation can be made especially in view of lack of judicial precedence with regard to newly introduced law. Therefore, he submitted that the same cannot be construed to be violation of Regulation 16A(1) of CIRP Regulations.

## **VI Contravention**

- 7.1.1 Section 17 of the Code deals with management of affairs of CD by the IRP. Sub-clause (e) of Clause (2) to section 17 of the Code is as below:

*“17. Management of affairs of corporate debtor by interim resolution professional–*

*...*

*(2) The interim resolution professional vested with the management of the corporate debtor, shall-*

*(e) be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor.*

*...”*

7.1.2 Section 18(a) of the Code provides the duties of the IRP and is reproduced below:

*“18. Duties of interim resolution professional. - The interim resolution professional shall perform the following duties, namely: -*

*(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to –*

*(i) business operations for the previous two years;*

*(ii) financial and operational payments for the previous two years;*

*(iii) list of assets and liabilities as on the initiation date; and*

*(iv) such other matters as may be specified.”*

7.1.3 The CIRP of the CD began on 03.05.2018 and as per Mr. Sharma the latest available audited balance sheet of the CD pertained to the year 2015-16. It is observed that no endeavour was made to prepare the financial statements for the period 2018-19 and 2019-20, when Mr. Sharma had control of the CD. Non-preparation of the financial statements of four financial years 2016-17, 2017-18, 2018-19 and 2019-20 displays negligence on the part of Mr. Pramod Kumar Sharma. The negligence on part of Mr. Sharma was clear from the fact that the books of accounts had not been completed despite engaging the auditors at a substantial fee of Rs. 12,96,000 (payable as on March 31, 2019) for statutory audit of FY 2016-17 & 2017-18, as ascertained from the cost sheet provided by Mr. Sharma.

7.1.4 It is seen that the IA insisted for providing the books of accounts of CD and then the provisional balance sheet for 2016-17 was provided *vide* email dated 24.06.2020 and *vide* email dated 08.07.2020, Mr. Sharma provided the audited balance sheet as on 31.03.2017 with the date of preparation as 25.06.2020. The provisional balance sheet for 2017-18 was provided on 14.07.2010 and that of 2018-19 was provided on 18.07.2020.

7.1.5 It is observed that Mr. Sharma did not make any efforts to prepare the books of account even though professional services of auditors was taken by him. It is seen that Mr. Sharma expedited the preparation of books of accounts of CD only upon the issue being raised by the IA, had the inspection not been conducted against him, the financial statements for the said preceding years might not have been prepared. It being the duty of an IP, Mr. Sharma should have made endeavour to complete the books of accounts of the CD based on the available information.

7.1.3 Thus, IBBI was of the *prima facie* view that Mr. Pramod Kumar Sharma has contravened sections 17(2)(e) and 18(e) of the Code.

## **VI Submissions**

7.2.1 Mr. Pramod Kumar Sharma submitted that books of account of CD could not be prepared due to lack of necessary information in view of the non-cooperation of the previous management of CD. He also submitted that extent of non-cooperation is such that the

application filed under section 19(2) of the Code seeking necessary information from previous management (CA No. 979 of 2018) is pending adjudication till date. Therefore, it was not possible to prepare books of account of the CD unless all the information was available with him and provided to the statutory auditors.

7.2.2 Mr. Sharma submitted that he was able to complete the process of preparing the books of account for the financial year 2016-17 with great difficulty, subject to receipt of information/documents as mentioned in CA 979/2018 regarding non-cooperation of previous management with various disclaimers. Mr. Sharma submitted that he provided the financial statements for FY 2017-18 (to extent of non-receipt of information/documents as was asked for in CA. 979 / 2018) upon insistence and without prejudice to any of his legal rights. He also submitted that since the statutory auditors were appointed for the FY 2016-17 and 2017-18, but the statutory auditors denied to do audit as their fees had not been paid.

7.2.3 He also submitted that the fees of statutory auditor for FY 2016-17 and 2017-18 was not paid till date (merely payable) as the books of account could not be prepared for the reasons mentioned above. Therefore, Mr. Sharma submitted that it is wrong to attribute negligence of duties on him while looking at all the antecedent facts and peculiarity of the CD in totality.

## **VII Contravention**

8.1.1 According to section 18 of the Code, it is mandatory for the IRP to perform certain duties stated in the provision. One such duty of IRP is to collate all claims submitted by creditors. The duty is provided in Section 18(b) of the Code which is given below:

*“18. Duties of interim resolution professional –  
The interim resolution professional shall perform the following duties, namely: -  
(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;”*

8.1.2 It is observed that one claim of Rs.57,33 ,587 filed by Yash Pal Kothari and Sharmila Kothari had been admitted twice by Mr. Sharma as seen from the list of stakeholders submitted by him. Admission of the same claim amount twice had the effect on the composition of CoC through alteration of voting shares, possibility of higher pay-out to such claimants than their actual dues, thereby, causing loss to the other claimants. Such mistakes may have greater ramifications, if the admitted amount of claim is relatively high. Therefore, Mr. Sharma showed callous approach towards his duties as enshrined in the Code.

8.1.3 Therefore, the IBBI was of the *prima facie* view that Mr. Pramod Kumar Sharma has contravened Section 18(b) and 208(2)(a) of the Code.

## **VII Submissions**

- 8.2.1 Mr. Pramod Kumar Sharma submitted that the process of claim verification is provided under Chapter 4 of the CIRP Regulations. As per Mr. Sharma, by series of judicial pronouncements, it is settled law that IRP/RP had no adjudication power under the Code and therefore, the RP had to rely upon information provided by individual creditors under affidavit especially when all the books of account of CD were not available. According to him, as per regulation 12, an RP has to admit claims of those claimants who filed their claims within 90 days from the commencement of CIRP. However, in this CIRP, he admitted claims till the 9<sup>th</sup> CoC held on 09.05.2019 i.e. the approval of resolution plan. Thereafter, there is no provision of admitting claims in the Code and therefore, he did not admit any claim.
- 8.2.2 Mr. Pramod Kumar Sharma submitted that the AA *vide* order dated 02.08.2019 directed him to admit claims filed even after approval of resolution plan by CoC. Pursuant to the directions of the AA, Mr. Sharma admitted all the claims that were filed after the date of last CoC i.e 09.05.2019. He submitted that the claimant has filed the claims on different dates by different email address. The first claim was filed on 03.10.2019 from national.digitalprints@gmail.com and another claim was filed on 17.10.2019 agarwalpiyush3@yahoo.co.in. Therefore, he submitted that it was a genuine mistake that the claim was admitted twice. He submitted that the mistake was unintentional and *bonafide*.
- 8.2.3 He further submitted that the claim of the concerned FC was accepted on 20.11.2019 and the moment the instant issue was brought before him, he took corrective measures based on clarifications sought from concerned financial creditors. He also submitted that the apprehension with regard to effect of admission of the claim on the voting shares in the composition of CoC is misplaced, as the aforesaid claim was submitted on 17.10.2019 and 03.10.2019 and accepted on 20.11.2019 after expiry of mandatory 270 days inclusive of exclusion period and approval of resolution plan at 9<sup>th</sup> CoC held on 09.05.2019 and consequent upon passing of NCLT Order. Therefore, the said claims were accepted after the CoC ceased to exist (as mandatory period of 270 days expired and resolution plan was approved by CoC) and only pursuant to the direction passed by AA by order dated 02.08.2019 which directed him to accept claim even after filing of the application under section 30 of the Code for the approval of resolution plan without insisting upon delay in filing of the claim and accordingly, these claims were admitted pursuant to the said order. Hence, Mr. Sharma submitted there was no effect whatsoever on the composition of CoC due to acceptance of claim as alleged. Therefore, he submitted that there was no violation of section 18(b) and section 208(2)(a) of the Code.

## **VIII Contravention**

- 9.1.1 Regulation 20 of the CIRP Regulation provides for service of notice by electronic means. Clause (2) of regulation 20 provides the contents of the subject line of an email of meeting schedule and the same is given below:

*“ 20. Service of notice by electronic means.*

*(2) The subject line in e-mail shall state the name of the corporate debtor, the place, if any, the time and the date on which the meeting is scheduled.”*

9.1.2 As per the documents available on record, it is observed that all the notices sent for CoC meetings via email did not state the name of the CD, the place, if any, the time and the date on which the meeting was scheduled. Regulation 20(2) of the CIRP Regulations clearly provides that the subject line in email shall state the name of the CD, place, if any, the time and date on which the meeting is scheduled. Therefore, every email for holding of CoC meeting shall have a subject line as provided in regulation 20(2) of the CIRP Regulations. It is observed that Mr. Pramod Kumar Sharma did not perform his duties diligently and did not take reasonable care which an IP is required under section 208(2)(a) of the Code. Therefore, the IBBI was of the *prima facie* view that Mr. Pramod Kumar Sharma contravened regulation 20(2) of the CIRP Regulations and section 208(2)(a) of the Code.

## **VIII Submissions**

9.2.1 In his reply, Mr. Pramod Kumar Sharma submitted that object behind the Regulation 20(2) of the CIRP Regulations was to make the members of CoC aware about date, time and place of scheduled CoC meeting and the name of the CD. He submitted that the agenda for the scheduled CoC meeting which was attached with all such service email clearly specified date, time and place of the scheduled CoC meetings and the name of the CD. He further submitted that he expects any prudent person to open and access a document such as the notice or agenda of any meeting for which an invitation is received and the said notice or agenda contains all the requisite information as is necessary. He also submitted that that in all the CoC meetings of the CD no member of CoC has raised any objection or complained about the lack of notice/understanding with regard to date, time and place of any CoC meeting and name of the CD till date. Therefore, he submitted that no prejudice had been caused to any of the stakeholders.

## **IX Contravention**

10.1.1 The process of holding voting through electronic means has been given in regulation 26 of the CIRP Regulations. Sub-regulation (4) to regulation 26 provides that RP shall announce and make a written record of the summary of the decision taken on a relevant agenda item with names of members of the CoC who voted for or against the decision or abstained. Sub-regulation (5) of regulation 26 of CIRP regulations provides that the record made under sub-regulation (4) shall be circulated to all participants by electronic means with 24 hours of the conclusion of voting. Sub-regulation (4) and (5) of regulation 26 of the CIRP Regulations provides as follows:

*“26. Voting through electronic means.*



...  
(4) *At the conclusion of a vote held under this Regulation, the resolution professional shall announce and make a written record of the summary of the decision taken on a relevant agenda item along with the names of the members of the committee who voted for or against the decision, or abstained from voting.*

(5) *The resolution professional shall circulate a copy of the record made under sub-regulation (4) to all participants by electronic means within twenty four hours of the conclusion of the voting.”*

10.1.2 It is observed that the e-voting results for the agenda items of 1st, 2nd, 3rd, 6th, 8th and 9th CoC meetings were not shared within 24 hours of conclusion of the voting. Mr. Pramod Kumar Sharma did not share the names of the members of CoC who voted for or against the decision or abstained from voting in the e-voting results as is mandatory under regulation 26(4) of CIRP Regulations. The objective of providing for disclosures is to ensure transparency in the process and boost confidence regarding the same among the CoC members. Mr. Sharma accepted that the e-voting results were not shared within 24 hours. Non-compliance of the provisions of the regulations, makes Mr. Sharma liable for not discharging his duties diligently and with reasonable care. Therefore, the IBBI was of the *prima facie* view that Mr. Pramod Kumar Sharma contravened sub- regulation (4) and (5) of regulation 26 of the CIRP Regulations and section 208(2)(a) of the Code.

## **IX Submissions**

10.2.1 With regard to the contravention, Mr. Pramod Kumar Sharma submitted that in view of the uniqueness and complexities of this CIRP where only real estate buyers were involved and also in view of the mutual rivalry amongst the groups of investors, he preferred not to disclose the names of FC in the voting results. He submitted that he was compelled to not release the voting preferences in order to safeguard the personal liberties of individual FC and their safety and security. He submitted that he was appointed as IRP/RP in few more assignments prior and after the present assignment and he has always disclosed the names of members of CoC who voted in favour of or against the resolution or absent from the resolution in respective CoC while declaring the result.

10.2.2 He stated that in the present case, the CIR process where no banks or financial institution was involved, the objective of regulation 26 could not be attained. He stated that sharing names of FCs would have given rise to rivalry among the CoC members and objective of the Code as a whole would be defeated. He submitted that in compliance with the said regulations, he submitted the name-wise list of the financial creditors who had voted in favour of or against any resolution in the 9th CoC before the AA with the application for approval of resolution plan. Therefore, he denied any malafide on his part in not publishing names of FC while declaring results of CoC meeting.

## **X Contravention**

11.1.1 As per Circular No. IP/005/2018 dated 16.01.2018, IP and other professionals appointed

by IPs conducting resolution processes are required to make disclosures in the interest of transparency. The IP and other professionals appointed by IP are mandatorily required to disclose his relationship with (i) the Corporate Debtor, (ii) other Professional(s) engaged by him, (iii) Financial Creditor(s), (iv) Interim Finance Provider(s), and (v) Prospective Resolution Applicant(s) to the Insolvency Professional Agency of which he is a member, within the time specified as under:

<b>Relationship of the Insolvency Professional with</b>	<b>Disclosure to be made within three days of</b>
Corporate Debtor	his appointment.
Other Professionals [Registered Valuer(s) / Accountant(s) / Legal Professional(s) / Other Professional(s)] appointed by him	appointment of the other Professional.
Financial Creditor(s)	the constitution of Committee of Creditors.
Interim Finance Provider(s)	the agreement with the Interim Finance Provider.
Prospective Resolution Applicant(s)	he supply of information memorandum to the Prospective Resolution Applicant.
If relationship with any of the above comes to notice or arises subsequently	of such notice or arising.

11.1.2 It is observed from the cost sheet provided by Mr. Pramod Kumar Sharma that assistance of M/s BDO India LLP was taken for purpose of forensic audit for a fee of Rs.22,50,000. However, in the relationship disclosure submitted by him, no disclosure about appointment of M/s BDO India LLP was made. It is also observed that relationship disclosure regarding the same was submitted only on 09.07.2020. Therefore, the IBBI was of the *prima facie* view that Mr. Pramod Kumar Sharma has contravened Circular No. IP/005/2018 dated 16.01.2018 and section 208(2)(a) of the Code.

## **X Submissions**

11.2.1 Mr. Pramod Kumar Sharma submitted that it is a *bonafide* error on his part. He submitted that it may have slipped his attention in view of the complexities involved in the present CIRP wherein such an error may occur unintentionally. He submitted that he has submitted the disclosure on 09.07.2020 and also affirms that no prior relationship or dealings ever existed between him and M/s BDO India LLP prior to handing over the impugned assignment of the forensic audit. Therefore, no prejudice has been caused to any party due to the unintentional failure to submit the disclosure. He submitted that he will be more vigilant in future while ensuring timely compliance of the impugned requirement.

## **Finding and Analysis**

12.1.1 The role of the RP is crucial and critical to fulfil the objective of the Code. It is imperative that the RP functions and discharges his/ her duties independently in a fair and

transparent manner and facilitate fulfilment of the objectives of the Code. Various checks and balances have been provided in the Code and Regulations made thereunder to ensure independent, fair and transparent functioning of the IRP/RP. It is the duty of an IRP/ RP to perform and discharge his/ her duties in accordance with the Code and the Regulations made thereunder, in letter and spirit.

12.1.2 The responsibilities of the IRP/RP under the Code require highest level of standards, calibre and integrity which inspire confidence and trust of the stakeholders and the society. The role of the RP is vital to the efficient operation of the insolvency and bankruptcy resolution process. The IP forms a crucial pillar upon which rests the credibility of the entire resolution process. For that purpose, the Code provides for certain duties, obligations for undertaking reasonable care and due diligence in the conduct of the insolvency process to establish integrity, independence, objectivity and professional competence in order to ensure credibility of both the process and profession as well.

12.1.3 Section 208 of the Code provides for the functions and obligations of the IP which provides *inter alia* that the IP shall abide by the Code of Conduct to take reasonable care and diligence when performing his duties and to perform his functions in such manner and subject to such conditions as may be specified. One of the conditions for registration as IP is that an IP shall at all times abide by the Code and Rules, Regulations and Guidelines made thereunder and the bye-laws of the insolvency professional agency with which he/she is enrolled.

13.1.1 With regard to approval by CoC, section 28(1) of the Code clearly guides RP in respect of certain actions requiring CoC's approval. It reads as follows:

*“28. Approval of committee of creditors for certain actions. –*

*(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely: -*

*(a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;*

*(b) create any security interest over the assets of the corporate debtor;*

*(c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;*

*(d) record any change in the ownership interest of the corporate debtor;*

*(e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;*

*(f) undertake any related party transaction;*

*(g) amend any constitutional documents of the corporate debtor;*

*(h) delegate its authority to any other person;*

*(i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;*

*(j) make any change in the management of the corporate debtor or its subsidiary;*

(k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;  
(l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or  
(m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.  
...”

13.1.2 In the instant matter, the DC notes that the CIRP of the CD commenced on 03.08.2018 *vide* order dated 03.08.2018 of the AA and Mr. Arun Chadha was appointed as interim resolution professional. Mr. Arun Chadha was replaced Mr. Pramod Kumar Sharma as interim resolution professional by the AA *vide* order dated 10.08.2018. The 1<sup>st</sup> meeting of the CoC was held on 11.09.2018 and Mr. Sharma was confirmed as resolution professional *vide* order dated 05.10.2018 of the AA. The CoC consisted of class of creditors for whom Mr. Vivek Raheja was appointed as the authorised representative on 07.09.2018 (constituting 93.86% of votes) and other financial creditors (constituting 6.14% of votes). On having reasonable grounds to believe that Mr. Pramod Kumar Sharma had contravened provisions of the Code, Regulations and Circulars issued thereunder, the IBBI constituted the IA *vide* order dated 10.02.2020 and its report was submitted on 10.08.2020. On the basis of the findings of the IA and other material available on record, the show cause notice was issued by IBBI.

13.1.3 The DC further notes that the agenda for renting out Oyster Water Park was discussed in the 2<sup>nd</sup> CoC meeting as well as 3<sup>rd</sup> CoC meeting and the agenda was rejected by the CoC in both the meetings. Despite the rejection of the agenda of renting of Oyster Water Park twice by the CoC, Mr. Pramod Kumar Sharma went ahead and entered into the revenue sharing agreement with CA Hospitality Pvt. Ltd. The DC notes the submission of Mr. Sharma that the decision to enter into the revenue sharing agreement was made in the ordinary course of business. Mr. Sharma stated that the revenue sharing agreement provided for a monthly minimum guarantee of Rs. 32,00,000/- and if the revenue exceeded the monthly minimum guarantee, then the operator shall pay revenue as per the sharing ratio (mentioned in para 2.1.3). According to Mr. Sharma, the revenue sharing agreement was necessary to maintain the going concern status of the CD and to meet the costs incurred to maintain the Water Park. Mr. Sharma also submitted that CD never ran the Oyster Water Park itself since incorporation and it was in the ordinary course of business that the Water Park was given to vendors for its operation every season. Even at the time of initiation of CIRP i.e. 03.08.2018, Oyster Water Park was run by vendor namely, Rhiti Sports and its contract expired after completion of season in the year 2018.

13.1.4 The Hon’ble Supreme Court in para 25.6.1 of *Anuj Jain vs. Axis Bank Limited and Ors.* ((2020)8SCC401), discussed the expression ‘ordinary course of business’ and observed:

“25.6.1 ... As regards the meaning and essence of the expression 'ordinary course of business', reference made by the Appellants to the decision of the High Court of Australia in *Downs Distributing Co.* (*supra*), could be usefully recounted as under:

*As was pointed out in Burns v. McFarlane the issues in Sub-Section 2(b) of Section 95 of the Bankruptcy Act 1924-1933 are "(1) good faith; (2) valuable consideration; and (3) ordinary course of business." This last expression it was said "does not require an investigation of the course pursued in any particular trade or vocation and it does not refer to what is normal or usual in the business of the debtor or that of the creditor." It is an additional requirement and is cumulative upon good faith and valuable consideration. It is, therefore, not so much a question of fairness and absence of symptoms of bankruptcy as of the everyday usual or normal character of the transaction. The provision does not require that the transaction shall be in the course of any particular trade, vocation or business. It speaks of the course of business in general. But it does suppose that according to the ordinary and common flow of transactions in affairs of business there is a course, an ordinary course. It means that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation." (emphasis supplied)*

- 13.1.5 The DC notes the submission of Mr. Sharma that the revenue sharing agreements were entered into prior to initiation of CIRP and it was in ordinary course of business to outsource operation of the water park by an outside vendor. The DC also notes that to maintain the going concern status, it was necessary to operate the water park as the CD was cash strapped and maintenance of water park and other expenses could not have been incurred unless revenue was generated. Therefore, the DC finds that Mr. Sharma did not contravene section 28(1)(k) of the Code.
- 14.1.1 With respect to the duty of an IP to submit all records, documents, statements etc. within such time as the inspecting authority may require, under Regulation 4(4) of the Inspection Regulations, the DC notes that an IP has duty to provide all assistance to the Inspecting Authority which it may require in connection with the inspection under Regulation 4(7) of the Inspection Regulations. Mr. Pramod Kumar Sharma was asked to submit details related to revenue generated by CD and CA Hospitality Pvt. Ltd. in terms of the revenue sharing agreement. The information was sought to ascertain whether the agreement was beneficial for the CD or not. The details were sought twice through emails dated 19.06.2020 and 23.06.2020, however, Mr. Pramod Kumar Sharma took the excuse of the lockdown restrictions/ pandemic situation for not being able to furnish the same.
- 14.1.2 The DC notes that the revenue sharing agreement provided that the fortnightly report will be prepared and submitted by the management review committee consisting of one member of RP's team, one working member from CD and one representative of revenue sharing partner. Mr. Sharma, in his reply, submitted that he provided all the documents asked for including the balance sheets for FY 2018-19 and 2019-20. The DC notes that the record of the revenue shared for April 2020 to July 2020 between CD and CA Hospitality Pvt. Ltd. is annexed alongwith the reply submitted by Mr. Sharma to the show cause notice.
- 14.1.3 The DC notes that though Mr. Pramod Kumar Sharma did not submit the documents sought by the IA, however, Mr. Sharma submitted these documents alongwith the reply to show cause notice which he could have given to IA. He contravened regulation 4(4) and (7) of the Inspection Regulations.

15.1.1 The DC notes that AA in the instant matter *vide* its order dated 05.10.2018 while approving the appointment of Mr. Sharma as IRP, held that:

*“Having heard the Ld. Counsel we find that the view taken by this bench in Nikhil Mehta and sons (HUF) & Ors. fully applied to the facts of the present case and Mr. Pramod Kumar Sharma the interim resolution professional has secured majority votes.*

*In view of above the application is allowed. Mr. Pramod Kumar Sharma the earlier IRP is confirmed as RP.”*

15.1.2 The AA in its order dated 28.09.2018 in *Nikhil Mehta & Sons (HUF)*'s case observed as follows:

*“ 3 8 . When the principles laid down in the aforesaid paragraphs as approved by Supreme Court are applied to the provisions of section 22(2) and other cognate provisions we find that threshold voting share for decision of the committee of creditor by sixty-six per cent would not be mandatory in the cases of class of creditors where the prospective buyers of Real Estate (Commercial & Residential) alone constitute the CoC. It has been seen that in such cases the total polled voting share is very small which in the present case is 52.78 per cent. Therefore, we would say that in case of deadlock the preference can be given to the decisions taken by the highest percentage in the committee of creditors and section 22(2) must be regarded as directory in nature in case CoC is comprised 100 per cent of class of creditors Real Estate (Commercial & Residential). Even otherwise we have already opined that the class of creditor like Real Estate (Commercial & Residential) are distinct than the other class of creditors which includes well organised financial institutions like bank, financial companies and non-banking financial companies, etc. Their representation in the committee of creditor is far smaller in number. Each individual Member has high "voting shares". On the contrary the class of financial creditor of Real Estate (Commercial & Residential) are scattered in thousands all over the country and is wholly unorganised. In choosing the authorised representative each one of them is not to participate for various reasons. Probably it is for the aforesaid reasons that in regulation 16A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016 a provision has been made for selecting an insolvency profession which is choice of highest number of financial creditor in the class to act as authorised representative of the creditor of the respective class. If such a distinction is not implied then there is inherent danger of section 12(2), 12A, 22(2), 27(2), 28(3), 30(4), 33(2) and 21(8) becoming unworkable and unconstitutional. It may thus be declared ultra vires. As the guidance available in various judgments of Hon'ble Supreme Court we may lean towards a construction which sustains the statute and we must also adopt an interpretation which makes the statute workable by advancing its object. Therefore, we are of the view that in the case of Real Estate (Commercial & Residential) comprising 100 per cent voting share in CoC the aforesaid provision must be read to mean that a resolution would be deemed to be passed if it is voted by highest number of financial creditors in the class of Real Estate (Commercial & Residential). It would make the court workable and would also advance the object of this progressive legislation rather than defeating it.”*

15.1.3 The DC notes that the e-voting results of minutes of 2<sup>nd</sup> CoC meeting dated 06.11.2018 that a total of 11 agenda items were put to vote. From total 11 agenda items, 4 agenda

items were approved since total votes casted in favour of the agenda item was more than the total votes casted against the agenda item. Whereas 7 agenda items were defeated since the total votes castes against the agenda items were more than the total votes casted in favour of the agenda item. The DC also notes from the e-voting result pattern that an agenda item has been declared as approved or defeated as per the total votes in favour or against the agenda, as held in *Nikhil Mehta’s case* and not according to the requirements of Section 27 of the Code. Further, all the e-voting results were declared based on total votes casted by FC (including FC in class) as decided by the Hon’ble NCLT in *Nikhil Mehta’s case*.

15.1.4 The DC, however, notes that despite the observations of AA to follow views held in the judgment of *Nikhil Mehta & Sons (HUF)’s case*, Mr. Sharma took a different stand for getting approval of agenda items in 3<sup>rd</sup> CoC meeting. The e-voting results of the 3<sup>rd</sup> CoC meeting (held on 17.12.2018) are reproduced below:

***“RESOLVED THAT pursuant to the provision of section 27 of Insolvency and Bankruptcy Code, 2016, the proposal of replacement of existing Resolution Professional (Mr. Pramod Kumar Sharma) with Mr. Avineesh Matta, be and is hereby approved.***

***RESOLVED FURTHER THAT the Committee of Creditor be and is hereby authorised to file an application to Adjudicating Authority i.e. Hon’ble National Company Law Tribunal, Principal Bench, New Delhi for the approval of replacement of Resolution Professional.”***

**E-Voting Results**

<b>Sr. No.</b>	<b>CoC Member Name</b>	<b>Votes in favour (%age)</b>	<b>Voted for against (%age)</b>
1.	Financial Creditors in Class	49.06	39.72
2.	Financial Creditors	5.55	5.67
	<b>Total Votes</b>	<b>54.61</b>	<b>45.39</b>

*Pursuant to Section 27 of Insolvency and Bankruptcy Code, 2016, there is a requirement of at least 66% of voting shares to replace the Resolution Professional. Since the total votes casted in favour of Agenda item is less than 66% therefore the resolution is declared as defeated.”*

15.1.5 The DC notes that an amendment was brought to Section 25A of the Code *vide* Insolvency and Bankruptcy code (Amendment) Act, 2019 w.e.f. 16.08.2019 inserting sub-clause 3A. the relevant portion of Section 25A reads as follows:

***“25A. Rights and duties of authorised representative of financial creditors. –***

***(3) The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions:***

*Provided that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share:*

*Provided further that if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor*

*(3A) Notwithstanding anything to the contrary contained in sub-section (3), the authorised representative under sub-section (6A) of section 21 shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than fifty per cent. of the voting share of the financial creditors he represents, who have cast their vote:*

*Provided that for a vote to be cast in respect of an application under section 12A, the authorised representative shall cast his vote in accordance with the provisions of subsection (3).”*

15.1.6 The DC, therefore, finds that by not applying the principle laid down in *Nikhil Mehta's* judgment to the agenda item 2 placed before the CoC in its 3<sup>rd</sup> meeting held on 17.12.2018, and applying the principle of voting threshold selectively to the 2<sup>nd</sup> CoC meeting, Mr. Pramod Kumar Sharma has followed a pick and choose policy and applied the principle selectively. It is noted that the agenda item 2 was regarding replacement of the resolution professional Mr. Pramod Kumar Sharma with one Mr. Avineesh Matta and the total votes in favour of the resolution was 54.61%. It is therefore, made out that Mr. Sharma did not act objectively and the principle laid down in *Nikhil Mehta's* judgment was applied selectively. The DC finds that Mr. Pramod Kumar Sharma, by not following directives of AA made in its order dated 05.10.2018 and by applying different voting pattern on the issue of replacement of RP in the 3<sup>rd</sup> CoC meeting, contravened regulation 7(2)(h) of the IP Regulations and clause 2 of the Code of Conduct.

16.1.1 With regard to fixing of limit on debit transactions, it is observed that section 28 of the Code provides for the actions on which the approval of CoC is necessary. One such action has been provided in sub-clause (e) to clause (1) of section 28 of Code which states that RP shall not give instructions to financial institutions maintaining accounts of the CD for a debt transaction from any such accounts in excess of the amount as may be decided by the CoC, without the prior approval of the CoC.

16.1.2 The DC notes that Mr. Pramod Kumar Sharma placed the agenda to fix a limit to initiate debit transactions with financial institutions/ banks in the 1<sup>st</sup> meeting of CoC and 2<sup>nd</sup> meeting of CoC, however both time the agenda was defeated. It is seen that still Mr. Sharma initiated various debit transactions without authorisation of the CD. Mr. Sharma in his defence submitted that the CoC consisted of individuals/ investors majority of whom acted on their whims and fancies. Mr. Sharma also submitted that the CoC



members acted with two motives, one of rejecting all the proposals made by the RP and second to recover their investment. The DC notes his submissions that under section 20 of the Code, it is his duty to maintain the CD as a going concern and he made the debit transactions to discharge this duty as to maintain the CD as a going concern it was necessary to pay salaries of the employees timely, the fixed expenses such as electricity charges etc. which CoC did not consider. He raised the issue that if the CoC did not fix any limit on debit transaction, would it mean that there is no limit fixed upon RP or that RP cannot undertake any debit transaction under section 28(1)(e) of the Code.

16.1.3 The DC notes that it is the duty of CoC to fix certain limit on debit transaction from the accounts of CD for managing its day to day affairs which the CoC did not do. The DC finds that though Mr. Pramod Kumar Sharma could not act as per Section 28(1)(e) of the Code as it was defeated in CoC meeting but he was duty bound under section 20 (1) of the Code to make endeavour to protect and preserve the value of the property of CD. Section 20(1) of the Code reads as under:

***“20. Management of operations of corporate debtor as going concern. –***

*(1) The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.”*

The DC finds that the CoC did not fix any limit for debit transaction by RP, hence, the issue of CoC’s approval under section 28(1)(e) of the Code as to excess amount in absence of initial limit being fixed, lead to a conflicting situation and it appears that Mr. Sharma gave priority to his duty to preserving and protecting the value of property of CD, which is the objective of the Code also. Hence, the DC takes a lenient view.

17.1.1 The DC observes that Regulation 16A(1) of the CIRP Regulations provides that an IP who is the choice of maximum number of FC in the class shall be selected to be the authorised representative of FC in the class. There were 235 financial creditors who filed Form C whereas they were required to file Form CA and therefore, were not represented on the CoC by an authorised representative.

17.1.2 The DC notes the submission of Mr. Pramod Kumar Sharma that he had limited information about the CD till advance stage due to non-cooperation of erstwhile management of CD. He further submitted that another class of claimants was of individuals who had entered into termination settlements with the CD where the CD had agreed to cancel allotment and provide refund with interest. There was another category of investors with whom agreement to sub-lease/ license was executed. Mr. Pramod Kumar Sharma submitted that he filed an application for appointment of authorised representatives before AA which was disposed *vide* order dated 01.11.2018. The AA in

its order directed the RP to follow the guidance provided by regulation 16A of the CIRP Regulations and disposed the application of RP.

- 17.1.3 The DC notes Mr. Sharma's submission that public announcement can be made only once at the time of start of CIRP but not later and he was unable to appoint authorised representative for the creditors who came to light in the later stage of CIRP. The DC is of the opinion that Mr. Pramod Kumar Sharma could have suggested the creditors to file the correct Form so that they could have been considered as financial creditors and an authorised representative could be appointed. The DC finds that Mr. Pramod Kumar Sharma filed application for appointment of authorised representative for another class of creditors before the AA, therefore, the DC takes lenient view as to violation of regulation 16A of the CIRP Regulations.
- 18.1.1 The DC observes that as per section 17(2)(e) of the Code, an IRP is vested with management of CD and is responsible for complying with the requirements under any law for the time being in force on behalf of the CD. Further, section 18(1)(a) of the Code requires that IRP shall collect all information relating to the assets, finances and operations of the CD for determination of financial position. It is observed that Mr. Sharma did not take any steps to prepare the books of account of CD based on the information available. The last available audited balance sheet of the CD was for the year 2015-16. It is only on the insistence of the investigating authority that Mr. Pramod Kumar Sharma got the provisional balance sheet prepared for the year 2016-17, 2017-18 and 2018-19. The preparation of the books was expedited only on insistence of the investigating authority. Mr. Sharma submitted that the books could not be prepared due to the non-availability of information and non-cooperation by erstwhile management. Further, he states that the auditors were not paid. He stated that the income tax returns could not be submitted as full details were not available and the same would be filed only when new management takes over.
- 18.1.2 The DC notes that Mr. Pramod Kumar Sharma was unable to prepare the audited balance sheets due to non-availability of details necessary for preparation of the same and therefore, finds that Mr. Pramod Kumar Sharma did not contravene section 17(2)(e) and 18(a) of the Code.
19. The DC observes that section 18(b) of the Code provides that the IRP shall receive and collate all the claims submitted by creditors to him pursuant to public announcement. Mr. Pramod Kumar Sharma received claims of one Mr. Yash Pal Kothari and Ms. Sharmila Kothari and included their claims twice as seen from the list of stakeholders. It is noted that these claims were received after the resolution plan was approved by CoC, in accordance with the directions of the AA *vide* order dated 02.08.2019. The DC notes that since the claims were included after the approval of the resolution plan by the CoC, the inclusion of the claims twice did not affect the composition of the CoC. Further, Mr. Sharma submitted that he took immediate corrective measures to rectify the inclusion of the name of claimants which reflect his *bonafide*. Therefore, Mr. Pramod Kumar Sharma did not contravene section 18(b) and 208(2)(a) of the Code.

20. The DC observes that Mr. Sharma did not mention name of the CD, the place, if any, time and the date on which the meeting of CoC is scheduled, resulting in contravention of regulation 20(2) of the CIRP Regulations and section 208(2)(a) of the Code. The DC notes that the emails sent by Mr. Pramod Kumar Sharma informing the CoC members about the CoC meeting did not contain the details as stated in regulation 20(2) of CIRP Regulations in the subject line of the email. Therefore, the DC finds that Mr. Pramod Kumar Sharma contravened regulation 20(2) of the CIRP Regulations and section 208(2)(a) of the Code by not mentioning the name of the CD, place of holding CoC meeting etc. in the subject of the emails sent to the CoC members for holding CoC meeting.
21. Regulation 26(4) of the CIRP Regulations makes it mandatory for the RP to make disclosure about the voting pattern, the objective being to ensure transparency in the process and boost confidence among the CoC members. As per the regulation 26(4) of CIRP Regulations, Mr. Pramod Kumar Sharma was to disclose the names of the members of CoC who voted for against the decision or abstained from voting. The DC notes that Mr. Pramod Kumar Sharma did not share the names of the members of CoC who voted for or against the decision or abstained from voting in the e-voting results for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> CoC meetings for maintaining safety and security of the members of CoC owing to the rivalry between different group of investors but the same were shared with the AA. The DC therefore, takes a lenient view.
22. The DC observes that Circular No. IP/005/2018 dated 16.01.2018 requires filing of relationship disclosures by IP. The DC notes that Mr. Pramod Kumar Sharma did not file the relationship disclosure timely with respect one M/s BDO India LLP which was to carry out forensic audit of the CD. The disclosure was delayed and made on 09.07.2020. Mr. Pramod Kumar Sharma has admitted that there was delay in filing the relationship disclosure. The DC therefore, finds that Mr. Pramod Kumar Sharma complied with requirements of Circular No. IP/005/2018 dated 16.01.2018 by filing the relationship disclosure form on 09.07.2020.

## **Order**

23. In view of the above, the DC finds that Mr. Pramod Kumar Sharma has violated section 208(2)(a) of the Code, 20(2) of CIRP Regulations, regulation 4(4) and (7) of the Inspection Regulations and regulation 7(2)(h) of the IP Regulations and clause 2 of the Code of Conduct of IP Regulations.
24. The DC, therefore, in exercise of the powers conferred under section 220 (2) of the Code read with sub-regulations (7), (8), (9) and (10) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and Regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017, hereby, issues the following directions:
  - (i) Mr. Pramod Kumar Sharma shall not seek or accept any process or assignment or render any services under the Code for a period of six months from the date of coming into force of this Order. He shall, however, continue to conduct and complete the assignments/ processes he has in hand as on date of this order.

(ii) This Order shall come into force on expiry of 30 days from the date of its issue.

25. A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Pramod Kumar Sharma is enrolled as a member.
26. 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.
27. Accordingly, the show cause notice is disposed of.

Dated: 27<sup>th</sup> August 2021  
Place: New Delhi

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(Dr. Mukulita Vijayawargiya)  
Whole Time Member, IBBI