

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/68/2021

5th March, 2021

ORDER

In the matter of Mr. Venkatesan, 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/INSP/2019/28/217/466 dated 28.07.2020, issued to Mr. Venkatesan, R/o D-301, Sreevatsa Residency, 10 G N Mills Post, Mettupalayam Road, Coimbatore, Tamil Nadu – 641029 who is a Professional Member of the Indian Institute of Insolvency Professionals of ICAI and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P00123/2017- 18/10265 dated 30.05.2017.

Background

- 1.1 Mr. Venkatesan, was appointed as an interim resolution professional (IRP) for the corporate insolvency resolution process (CIRP) in the matter of Tecpro Systems Limited, Corporate Debtor (CD) *vide* order of the National Company Law Tribunal, Principal Bench, New Delhi in CP(IB)-197(PB)/2017, dated 07.08.2017 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 Committee of Creditors (CoC) constituted by the company in the first CoC meeting held on 13.09.2017.
- 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. Venkatesan *vide* order dated 04.12.2019 on having reasonable grounds to believe that the Mr. Venkatesan had contravened provisions of the Code, Regulations and Circulars issued thereunder. A draft inspection report dated 14.02.2020, prepared by the IA, was shared with Mr. Venkatesan, to which the Mr. Venkatesan submitted reply dated 10.03.2020. The IA submitted the Inspection Report to IBBI on 10.04.2020.
- 1.3 The IBBI issued the SCN to Mr. Venkatesan on 28.07.2020, based on the findings in the inspection report in respect of his role as an IRP/RP in the CIRP of CD and material available on record. The SCN alleged contraventions of provisions of the sections 18(1)(f), 19(2), 25(2)(a), 28(1)(h), 206, 208(2)(a) and (e) of Insolvency and Bankruptcy Code, 2016 (Code), Regulations 7(2)(a) and (h) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and clauses 2, 3, 5, 10, 14 and 16 the Code of

Conduct thereof, Regulations 23, 24, 33 and 34 of the IBBI (Insolvency Resolution Process for corporate persons) Regulations 2016 (CIRP Regulations) and IBBI Circular No. IBBI/IP/013/2018 dated 12.06.2018, IBBI Circular No. IP/003/2018 dated 03.01.2018 and IBBI Circular No. IP/004/2018 dated 16.01.2018.

- 1.4 The IBBI referred the SCN, response of Mr. Venkatesan 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. Venkatesan availed an opportunity of e-hearing before the DC on 14.10.2020. Mr. Venkatesan was represented by Mr. Pradeep Joy, Advocate who made submissions during the e-hearing.

Alleged Contraventions and Submissions

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

I Contravention

- 2.1.1 According to sections 20 and 25 of the Code, the IRP and RP respectively are to appoint the professionals during CIRP. Further, according to Regulation 27 of the CIRP Regulations, the RP shall appoint two registered valuers which is crucial to formulate a compliant resolution plan. In order to protect the interests of all stakeholders, IP has to ensure that the process of appointment of registered valuers is without involvement of any particular stakeholder and that the whole process of valuation exercise should be independent of any particular stakeholder. None of the provisions of the Code or regulations provide for involvement of financial creditors in appointment of registered valuers.
- 2.1.2 It is observed that Mr. Venkatesan failed to exercise independence in the appointment of valuers in the CIRP of the CD. From the very beginning, there was excessive involvement of Edelweiss Asset Reconstruction Company Limited (Edelweiss), one of the financial creditors (FC), in the appointment of valuers and while acting as IRP, Mr. Venkatesan had allowed Edelweiss to control the appointment of valuers. It is evident from the various emails exchanged between Edelweiss, the valuers and Mr. Venkatesan, that all the issues with respect to the scope of assignment and the fee of the valuer have been discussed between Edelweiss and valuers. Mr. Venkatesan merely acted on the directions of Edelweiss and appointed the valuers Deba Engineers and ITCOT Consultancy. Such excessive involvement of one FC in appointment of valuers raises doubts about the independence and genuineness of the valuation report in the mind of other stakeholders, inducing the valuers to offer a valuation of convenience catering to the need of that particular stakeholder. Therefore, the IBBI was of a *prima facie* view that Mr. Venkatesan violated Section 208(2)(a) and 208(2)(e) of the Code, Regulations 7(2)(a) and 7(2)(h) of the IP Regulations read with Clause 5 of the Code of Conduct in the Schedule 1 of the said IP Regulations.

I Submission

- 2.2.1 With regard to the aforesaid contravention, Mr. Venkatesan submitted that Regulation 27 of the CIRP Regulations as existed on 10.08.2017 required the appointment of registered valuer within 7 days of the appointment of the IRP for determination of the liquidation value of CD. The appointment of registered valuers was to be made by 17.08.2017 even before the formation of CoC.
- 2.2.2 The appointment of registered valuers involved advance payment and other payment terms. The CD did not have surplus cash flows to meet any CIRP costs and therefore, support of Edelweiss who initiated CIRP was availed. The views of Edelweiss were taken for fixing the payment terms since the CoC did not exist on the date of appointment of valuers.
- 2.2.3 Mr. Venkatesan stated in his reply that the negotiations with respect to fee and other aspects to be undertaken by valuers is reflected in the email dated 22.08.2017 between ITCOT and Mr. Venkatesan. Similar discussions were held with Deba Engineers also. All information required by the valuers was provided by him except the information on assets of CD on exclusive basis to Edelweiss which they provided, and the Reports/ Bills were addressed to him.
- 2.2.4 Mr. Venkatesan further submitted that the 1st CoC meeting was held on 13.09.2017, wherein the appointment of the two valuers by Mr. Venkatesan was informed to all members of CoC and the costs to be incurred for such exercise was formally ratified by the CoC. The valuation report of the valuers was presented to the CoC in its second meeting (before IBBI revised regulation dated 06.02.2018 which provided for presentation of values after receipt of resolution plan). The CoC which is equivalent to a representative group of the stakeholders of CD did not have any objections to the valuation determined by the two registered valuers.
- 2.2.5 Mr. Venkatesan further submitted that the assets of the CD that has been valued are land and buildings, plant & machinery and securities and financial assets and also submitted the basis of such valuation as observed in the report by the registered valuers. Therefore, Mr. Venkatesan submitted that the valuations were carried out by the registered valuers in an independent manner without any interference from anyone (Mr. Venkatesan or Edelweiss) and he refuted that any contravention was made by him.

I Finding and Analysis

- 2.3.1 An important function of the IRP/RP is to manage the operations of the CD as a going concern and to do so the IRP/RP can appoint accountants, legal or other professionals as may be necessary. Section 20 of the Code provides for management of operations of the corporate debtor as a going concern, which is reproduced below:

“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.

(2) For the purposes of sub-section (1), the interim resolution professional shall have the authority-
(a) to appoint accountants, legal or other professionals as may be necessary;
...”

2.3.2 A duty is also cast upon an RP to preserve and protect the assets of the CD and to be able to do so, an RP can appoint accountants, legal or other professionals in the manner as specified by the Board. Section 25 of the Code is reproduced below:

“25. Duties of resolution professional. –

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

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

...

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

...

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

Thus, the primary objective of the IRP/RP is to manage the operations of CD as a going concern and to fulfil this objective the IRP/RP can appoint accountants, legal or other professionals in the manner specified by Board.

2.3.3. Regulation 27 of the CIRP Regulations provides for appointment of registered valuers and the same is reproduced below:

“27. Appointment of registered valuers.

The resolution professional shall within [seven days of his appointment, but not later than forty-seventh day from the insolvency commencement date], appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35: Provided that the following persons shall not be appointed as registered valuers, namely:

(a) a relative of the resolution professional;

(b) a related party of the corporate debtor;

(c) an auditor of the corporate debtor at any time during the five years preceding the insolvency commencement date; or

(d) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director.”

2.3.4 An important aspect of the resolution process is the functioning of the IRP/RP independent of the stakeholders of the CD, financial or operational or any other creditor, which is necessary to fulfil the objective of the Code to maximise value of assets. The appointment of professionals under sections 20 and 25 of the Code and the appointment of registered valuers is provided to enable the RP to fulfil his duties under the Code.

Keeping the above legislative framework in mind, the act of Mr. Venkatesan of allowing the appointing registered valuers by one of the FC is to be seen.

2.3.5 The DC notes the submissions of Mr. Venkatesan that the appointment of the valuers is necessarily to be made within 7 days from date of receipt of order of Adjudicating Authority, as per the erstwhile Regulation 27 of the CIRP Regulations. He took support of Edelweiss for making advance payment to the valuers as the CD did not have surplus cash flows to meet any CIRP costs as well as for public announcements etc. Further, at the time of appointment of the registered valuers, the CoC did not exist and hence, views of Edelweiss was sought in fixing payment terms. Mr. Venkatesan justified that the negotiations were undertaken by him which is reflected in email dated 22.08.2017.

2.3.6 The DC notes that an amendment was made to regulation 27 of CIRP Regulations vide Notification No. IBBI/2018-19/GN/REG031, dated 03.07.2018 (w.e.f. 04.07.2018) which provided for appointment of registered valuers by RP within seven days of his appointment, but not later than forty-seventh day from the insolvency commencement date. Mr. Venkatesan was appointed in August 2017 and the registered valuers were also appointed as per the erstwhile regulation 27, before the constitution of CoC. Therefore, DC finds that Mr. Venkatesan acted as per the CIRP Regulations prevalent then, in appointment of valuers within seven days. Further, the CD did not have cash flow to make advance payments, thereby justifying the involvement of Edelweiss who made the advance payments to the registered valuers. In view of all the facts and circumstances, the DC finds that Mr. Venkatesan has not contravened the provisions of the Code and CIRP Regulation as alleged.

II Contravention

3.1.1. As per Circular No. IP/003/2018 dated 03.01.2018 titled as “Insolvency Professional not to outsource his responsibility”, specific duties and responsibilities are cast upon an IP under the Code read with Regulations made thereunder and IP is not to outsource any of his duties and responsibilities under the Code. Further, Circular No. IBBI/IP/013/2018 dated 12.06.2018 titled ‘Fee and other Expenses incurred for CIRP’, all the details of fee and expenses that can be charged / incurred for CIRP has been given. As per section 206 of the Code, no person shall render his services as insolvency professional under the Code without being enrolled as a member of an insolvency professional agency and registered with the Board.

3.1.2. Mr. Venkatesan entered into an agreement with Ernst & Young LLP (EY) on 16.09.2017 for providing restructuring/IBC advisory services with respect to CD including preparation of Information Memorandum (IM). As per the engagement letter of EY, Mr. Venkatesan has included a clause pertaining to success fee, as per which EY will charge a success fee linked to the recovery of the debt by the CoC. It has been observed that as per the engagement letter of EY, Mr. Venkatesan has agreed and allowed use of his name by EY and other EY firms to perform the services and in correspondence including proposals, from EY or other EY firms. Mr. Venkatesan instead of complying with the

Circular dated 03.01.2018, assigned all the work to be done by an IP to EY including the preparation of IM which is the primary duty of the IP.

- 3.1.3. The act of Mr. Venkatesan of outsourcing his duties and responsibilities including preparation of IM to EY is violative of Circular No. IP/003/2018 dated 03.01.2018 which casts a duty upon the IP to perform certain tasks under the Code while acting as IP and that an IP shall not outsource any of his duties and responsibilities under the Code.
- 3.1.4. The act of Mr. Venkatesan of including success fee which is payable to EY, linked with the recovery of the debt is in contravention of Circular No. IBBI/IP/013/2018 dated 12.06.2018 titled 'Fee and other Expenses incurred for CIRP'. The result of providing for such success fee would be that the same will be part of CIRP cost and binding on the CD to pay the cost. However, the circular is not applicable to the fee charged by the professional appointed by the IP nor can an IP bind a CD to pay cost which is result of benefits to other stakeholders.
- 3.1.5. The act of Mr. Venkatesan by providing in terms of agreement and allowing EY and other EY firms to use his name in correspondence and while performing the services is violative of Section 206 of the Code, according to which a person can use the word Insolvency Professional for her/ him only if he fulfils the condition mentioned in Section 206 i.e. he/ she needs to be enrolled as a member of an insolvency professional agency and registered with the Board.
- 3.1.6. Mr. Venkatesan has therefore, contravened Section 206, 208 (2)(a) and 208(2)(e) of the Code, Regulation 7(2)(a) and (h) of the IP Regulations read with Clause 5 of the Code of Conduct, Circular No. IBBI/IP/013/2018 dated 12.06.2018 and Circular No. IP/003/2018 dated 03.01.2018.

II Submission

- 3.2.1. With regard to the aforesaid contravention, Mr. Venkatesan submitted in his reply that as per the engagement letter, EY was to advise on multiple matters during CIRP. Further, EY was required to provide only advice and assistance and that the responsibility of taking decisions solely lies with the IP. He submitted that he has been discharging the duties and functions specified in the Code by taking final decisions in all matters.
- 3.2.2 Mr. Venkatesan submitted that Circular dated 03.09.2018 is aimed at actions where any duty of IP is fully outsourced and does not require the IP to perform any additional procedures on verifying the veracity of such actions. He submitted that the scope of work in "Preparation of IM" has been classified under the heading "IBC Advisory Work during CIRP Process" and hence, EY's involvement in IM was restricted only up to assisting and providing inputs to him.
- 3.2.3 Mr. Venkatesan further submitted that it was brought to the notice of the CoC in its meeting held on 13.09.2017 that Edelweiss (in its fiduciary capacity) had engaged EY

since 16.09.2015 to provide cash flow/ project monitoring services along with CRO services to Edelweiss with respect to its assigned lending exposure to CD. Considering that EY had understanding of operational affairs of the CD for past 2 years and professional expertise, EY was formally appointed by CoC to assist Mr. Venkatesan in the CIRP. It is normal practice, to engage experienced firms for preparation of IM but review and finally clear the IM was with the management and therefore, Mr. Venkatesan asked EY to prepare the first cut of IM for review and finalisation by him.

3.2.4 Mr. Venkatesan submitted that the charging of success fee based charges is a market practice and as per the Circular dated 12.06.2018 of IBBI and in no manner detrimental to the interest of CD. The Circular mentions that fee charged should be reasonable and ratified by CoC. Since success fee cannot be quantified, the same was not included in the estimate. However, the appointment of EY was put to voting in the 1st CoC (Agenda 3 in the first CoC meeting and E-voting question No. 3). Appointment of EY was approved by CoC with 97.68% voting rights. The success fee component ensured lower recurring costs during CIRP. The success fee shall become part of the CIRP cost only when successful resolution applicant implements the approved resolution plan, whereas the resolution plan has not been implemented till date. Therefore, the cost of success fee has not been included in the CIRP costs declared by IP while demitting office as IP in January 2020.

3.2.5 Mr. Venkatesan submitted that since a recovery to CoC can happen only after recovery to CD, the literal construction of the phrase “Recovery of Debt by CoC” as working only for CoC is not appropriate. The fee payable to EY was approved in the First meeting of CoC after taking cognisance of the fact that the admitted claims of FC were to the tune of INR 8,035 crore against asset base of INR 2,200 crore as on March 2017. All actions undertaken by Mr. Venkatesan and EY were undertaken to maintain the going concern status of the CD and to maximise the recovery.

3.2.6 Mr. Venkatesan submitted that the ‘use of name’ clause was allowed and included in the term of agreement, not to designate itself as an insolvency professional but purely for their credentials that they have rendered services to Mr. Venkatesan.

II Finding and Analysis

3.3.1 As per section 25 of the Code, it is the duty of RP to prepare the information memorandum under clause (2) sub-clause (g). The said information memorandum is to be prepared in accordance with section 29 of the Code. Section 29 of the Code provides the manner in which the information memorandum is to be prepared. Relevant portion of section 25 and section 29 of the Code are reproduced below:

“25. Duties of resolution professional. –

(1) ...

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

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

“29. Preparation of information memorandum. -
(1) The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.
....”

3.3.2 The Code read with Regulations made thereunder cast specific duties and responsibilities on an insolvency professional who is required to perform certain tasks under the Code while acting as an IRP, RP, Liquidator or a Bankruptcy Trustee for various processes. Section 25(2) of the Code makes it mandatory for the RP to undertake certain functions including the duty to prepare the information memorandum under its clause (g). Section 29 of the Code casts responsibility on the IRP/RP to prepare the information memorandum in the manner and, containing such information as specified by the Board in the regulations. The Circular No. IP/003/2018 dated 03.01.2018 regarding outsourcing of responsibilities of IRP and RP is merely clarificatory in nature. It is primary function of RP to prepare IM and therefore, by not doing so Mr. Venkatesan has not taken reasonable care and diligence and not performed his functions in the manner specified in the Code. Hence, the DC finds that Mr. Venkatesan has contravened section 25(2)(g) of the Code read with section 29 of the Code, section 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and (h) of IP Regulations and clause 5 of the Code of Conduct.

3.3.3 With regard to the fee, the DC notes that the Code of Conduct in Schedule I of the IP Regulations lays down the guidance with regard to the fee of the RP. The relevant paras of the Code of Conduct under the IP Regulations are as under:

- (i) Para 16 provides that an IP must ensure that he maintains written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions.
- (ii) Para 25 provides that an IP must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken and is not inconsistent with the applicable regulations.
- (iii) Para 25A provides that an IP shall disclose the fee payable to him, the fee payable to the insolvency professional entity, and the fee payable to professionals engaged by him to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.
- (iv) Para 26 provides that an insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.

(v) Para 27 provides that an insolvency professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that such costs are not unreasonable.

3.3.4 Thus, the Code of Conduct provides for charging of reasonable fee by the IP as well as keeping the total cost of CIRP reasonable. The Circular No. IBBI/IP/013/2018 dated 12.06.2018 provides that an RP is obliged under Section 208(2)(a) of the Code to take reasonable care and diligence while performing his duties, including incurring expenses. He must, therefore, ensure that not only fee payable to him is reasonable, but also other expenses incurred by him are reasonable. Para 6 of the Circular states that the RP is directed to ensure that the fee payable to him, fee payable to an Insolvency Professional Entity, and fee payable to Registered Valuers and other Professionals, and other expenses incurred by him during the CIRP are reasonable.

3.3.5 The DC notes that Mr. Venkatesan has allowed inclusion of a success fee clause in the engagement letter with EY for its professional services. It is observed that the same leads to escalation of CIRP costs leading to extra burden being imposed on already stressed CD. The DC further notes that the charging of success fee linked to the recovery of the debt has not been expressly barred. Moreover, the resolution process of CD was not successful and therefore, the inclusion of success fee in the professional fee of EY did not result in any financial stress on the CD. Hence, the DC finds that Mr. Venkatesan has not contravened the provisions of the Code or the Regulations as alleged.

3.3.6 With regard to the issue of using of name by EY, the DC notes that section 206 of the Code provides that no person shall render his services as insolvency professional under this Code without being enrolled as a member of an insolvency professional agency and registered with the Board. This implies that the IP's name cannot be used by anyone for any purpose whatsoever, except by an IP who is enrolled as a member of an insolvency professional agency and registered with the Board. The DC finds the submission of Mr. Venkatesan that the 'use of name' clause was allowed and included in the term of agreement, not to designate itself as an insolvency professional but purely for their credentials, is not tenable.

3.3.7 The important and primary duty of an IP under section 208(2)(a) is to take reasonable care and diligence, and an IP is also required to perform his functions in manner and subject to conditions specified under section 208(2)(e) of the Code. Mr. Venkatesan, by allowing use of his name by EY, has not exercised reasonable care and diligence and therefore contravened section 208(2)(a) and (e) of the Code. Mr. Venkatesan has also violated clause 5 of the Code of Conduct which states that an IP must maintain complete independence in his professional relationships and should conduct the insolvency process independent of external influence. By allowing the use of name of IP by the consulting firm EY in correspondences, Mr. Venkatesan has not only allowed the firm to misrepresent itself as an IP but has also become party to the misrepresentation. Thus, he

has not taken reasonable care and diligence and not maintained independence. Therefore, the DC finds Mr. Venkatesan has contravened Sections 206, 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and (h) of the IP Regulations and clause 5 of the Code of Conduct.

III Contravention

- 4.1.1 According to section 28(1)(h) of the Code, it is mandatory for the RP to take the prior approval of the CoC before delegating its authority to any other person. The Code provides that the RP shall convene a meeting of CoC and seek vote of the creditors prior to any action which “*delegates its authority to any other person*”. Mr. Venkatesan, in his capacity as IRP executed 11 Power of Attorneys (POA) in favour of Mr. D. Venkatasubramaniam (who is Director, EY and appointed by Mr. Venkatesan for providing advisory services) on 17.08.2017 with respect to M/s Andhra Pradesh Power Generation Corporation Ltd., M/s Bhartiya Rail Bijlee Company Ltd., M/s Chhattisgarh State Power Generation Com Ltd., M/s Gujarat State Electricity Corporation Ltd, M/s Kanti Bijlee Utpadan Nigam Ltd., M/s Karnataka Power Corporation Ltd., M/s MejaUrja Nigam Pvt. Ltd, M/s NDMC Ltd, M/s NTPC Ltd, M/s Rashtriya Ispat Nigam Ltd. and M/s Telangana State Power Generation Corporation Ltd.
- 4.1.2 Mr. Venkatesan, also executed 8 other POA with various other persons during CIRP namely, POA dated 04.11.2017 in favour of Mr. Ravi balan Devnathan with respect to M/s Kanti Bijlee Utpadan Nigam Ltd., POA dated 24.06.2019 in favour of Mr. Swapan Roy with respect to M/s Bhartiya Rail Bijlee Company Ltd., POA dated 08.01.2018 in favour of Mr. Puneet Awasthi with respect to M/s NTPC Ltd., POA dated 08.01.2018 in favour of Mr. Puneet Awasthi with respect to M/s Kanti Bijlee Utpadan Nigam Ltd., POA dated 08.01.2018 in favour of Mr. Puneet Awasthi with respect to M/s Bhartiya Rail Bijlee Company Ltd., POA dated 29.04.2019 in favour of Mr. M Devadasan with respect to M/s Mecon Ltd., POA dated 20.10.2017 in favour of Mr. Shyamal Krishna with respect to M/s Chhattisgarh State Power Generation Com Ltd., POA dated 09.05.2019 in favour of Mr. D. Venkata Subramaniam with respect to M/s Ultratech Ltd.
- 4.1.3 Mr. Venkatesan executed all the above POAs without taking any prior approval of the CoC which is mandatory as per section 28(1)(h) of the Code and therefore, violated Section 28(1)(h) of the Code. Therefore, the IBBI was of *prima facie* view that Mr. Venkatesan has violated Section 208(1)(h), 208(2)(a) and 208(2)(e) of the Code by not taking reasonable care and diligence, regulation 7(2)(a) & (h) of the IP Regulations read with Clauses 3, 5 and 14 of the Code of Conduct.

III. Submissions

- 4.2.1 Mr. Venkatesan in his reply submitted that during the CIRP of TSL, several ongoing projects were being executed and INR 250 Crore of live Bank guarantees were at risk. To ensure the ongoing status of the CD and timely delivery of project to customers, Mr. Venkatesan felt the need to have a technical person to liaison with the clients and protect

the interest of CD. It is in the above backdrop that Mr. Venkatesan executed the POA in favour of Mr. D. Venkatasubramaniam who had been working as CRO since 2015 and need was felt for some senior leadership team at the head office to avoid any disruption in operations at the project sites. Mr. Venkatesan submitted that only certain functions were delegated for operational convenience and he did not delegate the control on cashflows or on significant decisions taken on behalf of the CD.

4.2.2 Mr. Venkatesan has further submitted that the POAs issued subsequent to the 1st CoC pertain to the same projects and the same authority which was first given to CRO was branched out and subsequently, given to another person situated in the respective project site for ease of running day to day operations without any interruptions. According to Mr. Venkatesan, this has helped him to keep the on-going projects live, keep the bank guarantees safe from threat of invocation and secured the sources of recovery for stakeholders from CD.

4.2.3 As per Mr. Venkatesan, the delegation of authority from RP to Mr. D. Venkatasubramaniam has been approved by the CoC in its first CoC meeting, the substance of CoC's approval for delegation of authority to the CRO in the first CoC meeting covers all subsequent delegations pertaining to the same project and hence, the POAs issued subsequently for operational effectiveness by Mr. Venkatesan to the CRO were deemed to be with approval of CoC.

4.2.4 According to Mr. Venkatesan, all POAs except two POAs executed after constitution of CoC are covered in the previous points. The two POAs issued to CRO for M/s Ultratech Ltd. and Mr. Devadasan for M/s Mecon Ltd., were done post the submission of resolution plan to the adjudicating authority and after end of 270 days. The CoC members were kept informed that post submission of resolution plan to the adjudicating authority, going concern status of CD shall be maintained in the best interests of all stakeholders till NCLT disposes of the resolution plan application. Mr. Venkatesan refuted the findings.

III. Finding and Analysis

4.3.1 According to Section 28(1)(h) of the Code, the RP cannot delegate his authority to any other person without the prior approval of the CoC. The relevant portion of section 28 of the Code is reproduced below:

*“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: -
...
(h) delegate its authority to any other person;
...”*

4.3.2 It is necessary that approval of CoC is taken by RP prior to delegating his authority as per section 28(1)(h) of the Code. However, Mr. Venkatesan acted in haste while giving PoA in favour of Mr. D. Venkatasubramaniam on 17.08.2017, prior to approval of the same by the CoC. The DC notes from the Minutes of the First meeting of CoC that approval for appointment of Mr. D. Venkatasubramaniam as CRO was taken from CoC. Later, after constitution of CoC, Mr. Venkatesan delegated authority to Mr. Ravi Balan Devnathan, Mr. Swapan Roy, Mr. Puneet Awasthi, Mr. M Devadasan and Mr. Shyamal Krishna on various dates without taking approval of CoC. The DC also notes his submissions that POAs issued subsequent to the first CoC pertain to the same projects and the same authority which was first given to CRO, but now branched out and subsequently given to another person situated in the respective project site for ease of running day-to-day operations without any interruptions and the same is not tenable as it was subsequently given to another person at the project site without the approval of the CoC which goes against the basic tenets of the delegation of authority.

4.3.3 The DC finds that the aforesaid POAs issued by Mr. Venkatesan is in the nature of unauthorised delegation of his authority and beyond his powers which is in violation of section 28(1)(h) of the Code. This also shows that Mr. Venkatesan did not take reasonable care and exercise diligence while discharging his duties as an IP. This act of Mr. Venkatesan shows serious lapse on his part but also indicative of the process not being carried out with reasonable care and diligence. Therefore, the DC finds that Mr. Venkatesan has violated section 28(1)(h) of the Code, section 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and (h) of the IP Regulations read with clauses 3, 5 and 14 of the Code of Conduct.

IV Contravention

5.1.1 According to Section 18(1)(f) of the Code, one of the duties of an IRP is to take control and custody of any asset over which CD has ownership as recorded in balance sheet of CD or with information utility or the depository of securities or any other registry that records the ownership of assets including tangible assets whether moveable or immovable. Further, Section 25(2)(a) of the Code provides that duties of the RP which makes it mandatory for the RP to take immediate custody and control of all assets of CD, including the business records of the CD. Further, the IP is duty bound to determine the valuation of all the assets of CD in terms of Regulation 27 of CIRP Regulations.

5.1.2 Mr. Venkatesan was required to take custody and control of all assets of the CD. The CoC, in its 2nd meeting was informed that the CD has more than 34 high value vehicles registered in the name of the CD and the CoC agreed that the possession of said vehicles should be taken by Mr. Venkatesan and subsequently, the cars recovered be sold/auctioned. Mr. Venkatesan failed to take control and custody of the vehicles of the CD and failed to conduct valuation of these cars.

5.1.3 Mr. Venkatesan stated that the promoters did not cooperate and therefore, was unable to take control of the cars. In situation of non-cooperation by the promoters, Mr. Venkatesan could have made an application under section 19(2) of the Code to the Adjudicating Authority for necessary directions. However, he did not make any such application. Therefore, the IBBI is of *prima facie* view that Mr. Venkatesan has violated section 18(1)(f), 19(2), 25(2)(a), 208(2)(a) and 208(2)(e) of the Code, Regulation 7(2)(a) and (h) of the IP Regulations read with Clause 14 of the Code of Conduct.

IV Submissions

5.2.1 Mr. Venkatesan, in his reply submitted that he made efforts to recover the assets from promoters which has been tabulated in detail by him in his reply to IBBI's preliminary inspection report. Mr. Venkatesan submitted that the Kotak Mahindra bank with which the vehicles were hypothecated did not cooperate. He submitted that the bank neither filed a claim nor issued NOCs to remove hypothecation on the vehicles, which would have hampered the realisation process.

5.2.2 Mr. Venkatesan submitted that he undertook an approach wherein amount of time spent in maximising value to CD was commensurate to the value created. Mr. Venkatesan submitted that the depreciated vehicles which contributed to 1% of total value of the business of CD did not warrant compromising on the time to be spent for running the operations and in maximising the recovery from 99% assets of CD.

5.2.3 Mr. Venkatesan submitted that his approach was to correspond and not to confront with the promoters and their team, to extract maximum hidden information and this could not have been achieved by adopting a confrontational approach by filing application against them for non-cooperation. He stated that this approach helped him in understanding the nature of transactions between 2010 and 2014 when bank borrowings were extended to CD. In addition, he could seek information as to the non-core assets including land in Sri City of value about INR 2.63 crore, horizontal directional drilling machine in possession of custom department of about INR 5 crore, rejection of claims of ex-employees totalling INR 1.40 crores etc.

5.2.4 Mr. Venkatesan stated in his submissions that he worked to understand the modus operandi adopted by the CD for certain contracts or transactions, on basis of which the avoidance applications under Section 66 was filed for INR 1064 Crore. Mr. Venkatesan submitted that he focused on maximisation of recovery of assets to be able to garner maximum returns for the stakeholders and to ensure that the cooperation of the promoters who were not cooperating with respect to the vehicles which was merely 1% of the total value of business of CD. Therefore, Mr. Venkatesan submitted that he has not violated any provisions of the Code or the Regulations.

IV Finding and Analysis

5.3.1. Section 18 of the Code lays down the duties of IRP. Clause (f) to sub-section (1) to section 18 of the Code provides that the IRP shall take control and custody of any asset over which the CD has ownership rights as recorded in the balance sheet of the CD, or with information utility or the depository of securities or any other registry that records the ownership of assets. Section 18(1) (f) of the Code reads as follows:

“18. Duties of interim resolution professional. –

(1) The interim resolution professional shall perform the following duties, namely: -

...

(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;

... ”

5.3.2 Section 25 of the Code provides the duties of the RP. Clause (a) of sub-section (2) of section 25 of the Code makes it mandatory for the RP to take custody and control of assets of the CD, which reads as under:

“25. Duties of resolution professional. –

...

(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;

... ”

5.3.3 Regulation 27 of the CIRP regulations provides that IP is duty bound to get the valuation of all assets of the CD. The Regulation 27 is reproduced below:

“27. Appointment of registered valuers.

The resolution professional shall within seven days of his appointment, but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation:

Provided that the following persons shall not be appointed as registered valuers, namely:

(a) a relative of the resolution professional;

(b) a related party of the corporate debtor;

(c) an auditor of the corporate debtor at any time during the five years preceding the insolvency commencement date; or
(d) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director.”

- 5.3.4 From a combined reading of section 18(1)(f) and section 25(2)(a) of the Code alongwith Regulation 27 of CIRP Regulations, it is clear that an IRP/RP is duty bound to take custody and control of the assets of the CD. In case the promoters of the CD do not cooperate, the Code under section 19(2) provides that *“Where any personnel of the corporate debtor, its promoter or any other person required to assist or cooperate with the interim resolution professional does not assist or cooperate, the interim resolution professional may make an application to the Adjudicating Authority for necessary directions.”* Thus, the RP may make an application under Section 19(2) of the Code before the Adjudicating Authority in case the promoters of the CD are not cooperating with him.
- 5.3.5 The DC finds that Mr. Venkatesan did not perform his duty of taking control and custody of 34 high value vehicles nor he made an application under section 19(2) of the Code for seeking cooperation of the promoters of CD. In consequence, valuation of these vehicles could not be done under Regulation 27 of CIRP Regulations. The DC notes the submission of Mr. Venkatesan that he was able to reject claims of ex-employees/ promoters totalling to INR 1.40 crore who had not surrendered vehicle of the company and that about 9 vehicles were recovered from ex-employees before admitting their claims. It is noted that Mr. Venkatesan was able to recover a few vehicles as given in Annexure I to the reply to SCN, though not all. The DC also notes the submission of Mr. Venkatesan that Kotak Mahindra Bank did not cooperate in issuing NOC or raise claim, nor did the promoters cooperate who held custody of the cars. Hence, even though Mr. Venkatesan did not take custody or control of the vehicles, he was able to get the value of the vehicles adjusted against the claims by rejecting claims of ex-employees/ promoters amounting to INR 1.40 crore, thereby protecting the interest of the CD. In view of this, the DC takes a lenient view with this regard to the alleged contravention.

V Contravention

- 6.1.1 As per section 20 of the Code, it is the duty of the IRP to appoint accountants, legal or other professionals as may be necessary for management of operations of CD. The IP is duty-bound to undertake due diligence before appointing any professional in order to minimise CIRP cost and to appoint only those professionals as are necessary to run the CD, since the fee of professionals is part of CIRP cost which has priority in payment. As per Sections 18 and 25 of the Code, the appointment of professionals is to be done by the IRP/RP only. Further, a RP is to maintain complete independence in his professional relationships and should conduct the insolvency resolution process independent of external influences as per Clause 5 of the Code of Conduct.

6.1.2 It has been observed that Mr. Venkatesan appointed various professionals and engaged services of their entities including EY for providing restructuring/ IBC advisory services with respect to CD, various other services such as review of tax implications, restructuring services, services by CRO, tax advisory services and third-party due diligence (Project Ash). The total fee bill raised by EY is Rs. 4,92,31,216/-. During the course of enquiry, before the IA, Mr. Venkatesan admitted that he has not held any due diligence nor called any quotation before appointing EY as support team as well as business tax advisory services. It has been noted that the appointment of EY was made by Mr. Venkatesan on recommendations of Edelweiss, one of the FC. These instances reflect that Mr. Venkatesan did not act independently while appointing the professionals and were guided by the recommendations of Edelweiss, a FC and member of CoC. Therefore, the IBBI is of *prima facie* view that Mr. Venkatesan has contravened Section 208(2)(a) and 208(2)(e) of the Code, Regulation 7(2)(a) and (h) of IP Regulations read with Clause 3,5 and 14 of the Code of Conduct.

V Submissions

- 6.2.1 Mr. Venkatesan in his reply to the SCN submitted that EY was appointed after discussion with them to understand their role in the last 2 years and their approach to prospective investors during resolution process. On being satisfied with their understanding of CD's business and relationship with major PSU clients of ongoing projects of CD, they were considered vital for the resolution process. Mr. Venkatesan submitted that the appointment of EY was done after thoroughly understanding their credentials and not because of Edelweiss.
- 6.2.2 Mr. Venkatesan placed the proposal of engagement of EY and appointment of Mr. D. Venkatasubramaniam as CRO before the CoC in its first meeting held on 13.09.2017 and both the resolutions were voted in favour by 97.68% and no single member of CoC voting against the proposals. The costs to be incurred was also approved in the 1st meeting of CoC.
- 6.2.3. Mr. Venkatesan selected EY for tax advisory services since they had advised other client in same EPC space and had expertise for providing such service. Further, the credentials of EY were confirmed since the structure had been approved by the Court/ Tribunal. Mr. Venkatesan appointed EY after conducting necessary due diligence procedures. He submitted that other appointments of EY for generalised services were made after obtaining necessary quotes.
- 6.2.4. Mr. Venkatesan submitted that EY was not offering audit services and different teams are eligible to render different services as there is a Chinese wall policy that exists within such teams to maintain independence on work output. Mr. Venkatesan refuted all charges on basis of above submissions.

V. Finding and Analysis

- 6.3.1 The DC notes that as per sections 20 and 25 of the Code, the appointment of professionals is to be done by the IRP/RP only. The RP shall make endeavour to protect and preserve the value of the property of the CD under sections 20 and 25 of the Code.

and manage the operations of the CD. To fulfil this objective, the IRP shall have authority to appoint accountants, legal or other professionals.

6.3.2 The DC also notes that an IRP/ RP is to maintain complete independence in his professional relationships and should conduct the insolvency resolution, independent of external influences as provided under Clause 5 of the Code of Conduct.

6.3.3 From the combined reading of sections 20, 25 and 28 of the Code along with clause 5 of the Code of Conduct, it is essential for the RP to take an independent decision while appointing professionals and not to be influenced by any external influences. The sole objective of appointing the professionals is to protect and preserve the value of the CD. Section 28 of the Code provides for the matters where RP is required to obtain approval of CoC.

6.3.4 The DC notes that for appointing professionals, he is not required to seek approval of CoC. The involvement of a FC in decision making of appointment of professional makes the decision influenced by stakeholders who have vested interest. This is succinctly clear from the reply sent by Mr. Venkatesan by email dated 14.01.2020 to the IA, in respect of query 7, which is reproduced below:

“7. Quotes obtained for availing EY services –

a. For IRP / RP Support team – No quote, as EARC the financial creditor which initiated CIRP in the Corporate Debtor suggested EY to continue in an Interim Management role for continuity and includes support to RP. This was also approved by other CoC members.

b. Business Tax advisory services – No quote, as EARC being the lead financial creditor had directly engaged EY on behalf of all CoC members for understanding the implication of tax loss of Tecpro Systems Limited on the resolution plan. Considering EY's association from 2015 onwards, EY was engaged for operational convenience.”

6.3.5 The DC finds that Mr. Venkatesan was guided by one of the members of CoC Edelweiss while appointing professional services of EY and did not act independently nor did he discharge his duty of undertaking due diligence before appointing any professional. Therefore, DC finds that Mr. Venkatesan has contravened section 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and (h) of the IP Regulations read with clauses 3, 5 and 14 of the Code of Conduct.

VI Contravention

7.1.1 According to Regulation 34 of CIRP Regulations, the CoC shall fix the expenses to be incurred on or by the RP and the expenses shall constitute insolvency resolution process costs which includes the cost of each and every professional appointed by IP during the CIRP period. Further, the RP is required to mention the names of each professional along with the corresponding fees in the resolution approving the fee of the professional in order to maintain transparency of the whole process.

- 7.1.2 Mr. Venkatesan appointed EY on 16.09.2017 for restructuring service, on 16.03.2018 for tax advisory services, on 23.04.2018 for third party due diligence (Project Ash), N.M.Kannan on 15.02.2018 for verifying the accounting accuracy of payments made by Tecpro, N.M.Kannan on 07.03.2019 for performing internal audit, India Law on 08.04.2019 to represent CD before High Court and Agram Law as legal professional.
- 7.1.3 It has been observed that neither the appointments of these professionals nor their fees was ratified by the CoC. Mr. Venkatesan stated that the per month cost and budgeted costs for the next six months (180 days) in the process was placed before CoC for its approval in its first meeting. However, it has been observed from the voting results of 1st CoC meeting, that no such item was there for voting and hence, no approval was obtained.
- 7.1.4 Thus, the IBBI is of the *prima facie* view that Mr. Venkatesan has violated Section 208(2)(a) and 208(2)(e) of the Code, Regulation 34 of CIRP Regulation, Regulation 7(2)(a) & (h) of IP Regulations read with clauses 3 and 14 of the Code of Conduct.

VI Submissions

- 7.2.1 Mr. Venkatesan submitted that six-month budgeted costs were presented in 1st CoC meeting and no objections were raised by CoC for the same. The breakup of budgeted costs was presented to the CoC members in the first meeting and a comparison statement of actuals versus budget was presented to the CoC in its 4th meeting. Mr. Venkatesan submitted that as per Regulation 25 of CIRP Regulations, this is not a mandatory voting item in CoC meetings as specified in Section 28(1) of the Code.
- 7.2.2 Mr. Venkatesan submitted that Regulation 34 of CIRP Regulations provides for costs to be fixed by CoC, simply meaning that costs if presented before CoC and not objected to, the same are considered fixed/ ratified. Regulation 34 does not provide for approval through voting unlike other provisions in the Code which specifically provide for approval through voting. Mr. Venkatesan refuted all charges.

VI Finding and Analysis

- 7.3.1 Regulation 34 of the CIRP Regulations provides that the CoC shall fix the expenses incurred on or by the RP and the expenses shall constitute CIRP costs. Regulation 34 reads as under:

“34. Resolution professional costs.

The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.

Explanation. - For the purposes of this regulation, “expenses” include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and

fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional.”

7.3.2 The DC notes the provisions of section 28 of the Code which provides for approval of CoC approval for certain matters and RP cannot take action without approval of CoC. Section 28 of the Code reads as under:

“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.

(2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).

(3) No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of 1 [sixty-six] per cent. of the voting shares.

(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.

(5) The committee of creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this code.”

7.3.3 The DC notes from the minutes of the 1st meeting of CoC, the agenda items on which voting took place, which are as follows:

“Result of E-voting

Question 1

Reduce the standard notice period for calling a CoC meeting from 7 days to 2 days

Votes

Yes – EARC, Standard chartered, Vijaya bank
No – None
Agenda was passed by 97.68% of the voting rights

Question 2

Appoint Interim Resolution Professional Mr Venkatesan Sankaranarayanan as a Resolution Professional
Yes – EARC, Standard chartered, Vijaya bank
No – None
Agenda was passed by 97.68% of the voting rights

Question 3

Ratification of appointment of EY for preparing the resolution plan
Yes – EARC, Standard chartered, Vijaya bank
No – None
Agenda was passed by 97.68% of the voting rights

Question 4

Appointment of Mr Venkatasubramaniam as the CRO
Yes – EARC, Standard chartered, Vijaya bank
No – None
Agenda was passed by 97.68% of the voting rights”

7.3.4 The DC notes the submission of Mr. Venkatesan that as per regulation 25 of the CIRP Regulations, fixing the cost as provided under Regulation 34 is not mandatory voting item in the CoC meetings under section 28(1) of the Code. The DC notes from the appointment letter of EY/ engagement terms and conditions dated 16.09.2017 entered between Mr. Venkatesan and EY for rendering its professional services that it provides for fee being charged by EY for its professional services. Even though the minutes do not specifically mention the fee paid to EY, as its appointment has been approved by CoC, the terms of engagement letter including fee stand approved. Therefore, no contravention is made out as alleged.

VII Contravention

- 8.1.1 As per Regulation 24 of the CIRP Regulation, the IP alone acts as the Chairperson of the meeting of the CoC and is required to conduct the meeting of CoC in terms of Regulation 23 and 24 of the CIRP Regulation. The RP/IP shall make necessary arrangements to ensure uninterrupted and clear video or audio and video connection. Further, the IP is to ensure availability of proper video conferencing or other audio and visual equipment or facilities for providing transmission of the communications for effective participation of the participants at the meeting.
- 8.1.2 The IP is required to do certain tasks as per the Regulations and strictly comply with the aforesaid provisions and maintain transparency. Further, as per the Regulation, the IP is required to attend the meeting in person or through video conferencing as alternate means, as visual means is mandatory requirement for each participant. The provisions nowhere provides participating in the meeting through audio means only.

8.1.3 In total 15 meetings of CoC were held. It has been observed that physical record of only two meetings with physical attendance sheet signed by all participants has been produced by Mr. Venkatesan. It has been further observed that Mr. Venkatesan attended only two meetings physically and attended remaining CoC meetings only through audio means. Therefore, the IBBI is of the *prima facie* view that Mr. Venkatesan has violated Regulation 23 and 24 of the CIRP Regulation read with section 208(2)(a) and 208(2)(e) of the Code read with regulation 7(2)(a) &(h) of the Code read with clauses 3,5, 14 and 16 of the Code of Conduct.

VII Submissions

8.2.1 Mr. Venkatesan in his reply submitted that as per Regulation 23 of CIRP Regulations, meetings can be conducted either by video conferencing or other audio and visual means and therefore, the meetings have taken place in accordance with this Regulation, wherein any presentations or notes were shared before the meeting and the same were used to explain through auditory means in the meetings. He further elucidated that the meetings were conducted through audio conferencing since the registered office of the CD is at Delhi, Corporate Office at Chennai, all financial creditors except RIICO were based out of Mumbai and most meetings were conducted in Mumbai as the financial creditors predominantly were in Mumbai. The Financial creditors, as per the IP, preferred to attend through audio call to save on commuting time in Mumbai.

8.2.2 The option of audio conference was always made available to all outstation participants. Mr. Venkatesan and his team attended the first two CoC meetings in person. The period for calling a meeting of CoC was reduced to 48 hours in 1st meeting of CoC and later, in the 5th CoC meeting, it was reduced from 48 hours to 24 hours. Since meetings were called at 24 hour notice and flight tickets were expensive considering CD's less than adequate cash flow, the CoC members did not have any objection to Mr. Venkatesan attending meetings over audio call instead of attending in person. Mr. Venkatesan submits that since CoC consisted of only 6 financial creditors, there was no discomfort in conducting meeting of CoC over audio conference without Mr. Venkatesan's physical presence. This according to Mr. Venkatesan, did not stop him from complying with Regulation 24 of the CIRP Regulation.

8.2.3 Mr. Venkatesan stated in his reply that he was the chairperson of the meetings, he took roll call as per Regulation 24(2) of CIRP Regulations, informed the names of all participants who were present and confirmed the quorum and ensured access of meeting to only participants who were invited to the CoC meeting. Mr. Venkatesan submitted that no objection was raised by the CoC in this regard. Mr. Venkatesan submitted that only 8 meetings of the CoC were held prior to the filing of resolution plan with adjudicating authority and the others were convened only for update ad to request to keep the CD as going concern. Mr. Venkatesan refutes the finding of the IA on this issue.

VII Finding and Analysis

8.3.1 The DC notes that as per regulation 23 of the CIRP Regulations, the RP shall make necessary arrangements to ensure uninterrupted and clear video or audio and visual connection. Sub-Clause (b) to Clause (3) of Regulation 23 of the CIRP Regulations provides that the RP shall take due and reasonable care to ensure availability of proper video conferencing or other audio and visual equipment or facilities for providing transmission of the communications for effective participation of the participants at the meeting. Further, under sub-clause (f), the RP has to take due and reasonable care to ensure that participants attending the meeting through audio and visual means are able to hear and see the other participants clearly during the course of the meeting. Clause (4) to Regulation 23 of the CIRP Regulations provides that the scheduled venue of the meeting as set forth in the notice convening the meeting (which shall be in India), shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place. Regulation 23 of the CIRP Regulations reads as under:

“23. Participation through video conferencing.

(1) The notice convening the meetings of the committee shall provide the participants an option to attend the meeting through video conferencing or other audio and visual means in accordance with this Regulation.

(2) The resolution professional shall make necessary arrangements to ensure uninterrupted and clear video or audio and visual connection.

(3) The resolution professional shall take due and reasonable care-

(a) to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;

(b) to ensure availability of proper video conferencing or other audio and visual equipment or facilities for providing transmission of the communications for effective participation of the participants at the meeting;

(c) to record proceedings and prepare the minutes of the meeting;

(d) to store for safekeeping and marking the physical recording(s) or other electronic recording mechanism as part of the records of the corporate debtor;

(e) to ensure that no person other than the intended participants attends or has access to the proceedings of the meeting through video conferencing or other audio and visual means; and

(f) to ensure that participants attending the meeting through audio and visual means are able to hear and see, if applicable, the other participants clearly during the course of the meeting;

Provided that the persons, who are differently abled, may make request to the resolution professional to allow a person to accompany him at the meeting.

(4) Where a meeting is conducted through video conferencing or other audio and visual means, the scheduled venue of the meeting as set forth in the notice convening the meeting, which shall be in India, shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place.”

8.3.2 Thus, it is clear from regulation 23(1) provides that the meeting notice shall provide an option of attending meetings through video conferencing or *other audio and visual*

means, thereby emphasising on alternate audio and visual means not audio means alone. Regulation 23(2) further provides that necessary arrangements for holding uninterrupted and clear *audio and video connection* shall be made by RP. Therefore, again audio and visual connection has been mentioned. The importance of both audio and visual means is also clear from Regulation 23(3)(f) which provides that the RP shall take due and reasonable care and ensure that in meetings attended through audio and visual means, the participants are able to hear and see during the course of meeting. For effective participation, video conferencing or such methods including visual methods is required which is expected from a professional entrusted with duty of conducting CoC meeting. The IP Regulations, in the First Schedule, in para 10 provides that *an insolvency professional must maintain and upgrade his professional knowledge and skills to render competent professional services*. In this era of technology, adequate means are available for effective participation other than physical presence to expedite the time bound process. The resolution professional needs to engage such technical services to conduct the process with proficiency.

8.3.3 The intent and language of the said regulation 23 is amply clear that the meetings of CoC are to be held either in physical mode or through video conferencing or other audio and video means but not by audio means. This gets further crystalised in regulation 24 which provides for conduct of meeting. Regulation 24 reads as under:

“24. Conduct of meeting.

(1) The resolution professional shall act as the chairperson of the meeting of the committee.

(2) At the commencement of a meeting, the resolution professional shall take a roll call when every participant attending through video conferencing or other audio and visual means shall state, for the record, the following, -

(a) his name;

(b) whether he is attending in the capacity of a member of the committee or any other participant;

(c) whether he is representing a member or group of members;

(d) the location from where he is participating;

(e) that he has received the agenda and all the relevant material for the meeting; and

(f) that no one other than him is attending or has access to the proceedings of the meeting at the location of that person.

(3) After the roll call, the resolution professional shall inform the participants of the names of all persons who are present for the meeting and confirm if the required quorum is complete.

(4) The resolution professional shall ensure that the required quorum is present throughout the meeting.

(5) From the commencement of the meeting till its conclusion, no person other than the participants and any other person whose presence is required by the resolution professional shall be allowed access to the place where meeting is held or to the video

conferencing or other audio and visual facility, without the permission of the resolution professional.

(6) The resolution professional shall ensure that minutes are made in relation to each meeting of the committee and such minutes shall disclose the particulars of the participants who attended the meeting in person, through video conferencing, or other audio and visual means.

(7) The resolution professional shall circulate the minutes of the meeting to all participants by electronic means within forty eight hours of the said meeting.”

8.3.4 The DC notes that regulation 24(6) states that RP shall ensure the minutes of meeting which shall disclose the particulars of the participants who attended the meeting in person, through video conferencing, or *other audio and video means*. The words ‘audio and video’ have been used conjunctively and not as in the alternative. Therefore, the Regulations are clear on the modes to be used for holding CoC meetings, i.e., physical mode or video conferencing or other audio and video means.

8.3.5 It is mandatory for the RP to hold and convene meetings of CoC and IRP/RP being the Chairperson of the CoC shall keep a record of every participant attending meeting through video conferencing or other audio and visual means. While holding meetings, the RP is required to note the names of all participants and the mode in which they attended the meeting i.e. physical, video conferencing or other audio and video means and the RP is to ensure that all participants can hear and see the meeting proceedings throughout the duration of the meeting.

8.3.6 Mr. Venkatesan by conducting CoC meetings by audio mode only on 6 occasions during the CIRP and 7 occasions after the completion of CIRP out of total 15 meetings has not provided facility to CoC members for effective participation. Therefore, the DC finds that Mr. Venkatesan has contravened section 208(2)(a) and (e) of the Code, regulation 23 and 24 of the CIRP Regulations, Regulation 7(2)(a) and (h) of the IP Regulations read with clauses 10, 14 and 16 of the Code of Conduct.

VIII Contravention

9.1.1 The Circular No. IP/004/2018 dated 16.01.2018 titled “*Fees payable to an insolvency professional and to other professionals appointed by an insolvency professional*” provides that any other professional appointed by an insolvency professional shall raise bills/ invoices in his/ its name towards such fees, and such fees shall be paid to his/ its bank account. It has been observed that Mr. Venkatesan appointed Mr. Venkat D as Chief Restructuring Officer (CRO) in his individual capacity for day to day operation of the CD. In the 1st meeting of CoC, two resolutions were placed for approval of CoC for appointment of EY and appointment of CRO. His appointment was separate from appointment of EY (in the capacity of a firm) for providing restructuring/ IBC advisory services. In the 1st CoC meeting, two separate resolutions were placed for approval of CoC for appointment of EY and appointment of CRO.

9.1.2 It has been specifically mentioned in agreement dated 16.09.2017 between Mr. Venkatesan and EY that the fee of EY does not include the fees of CRO. It has been observed that the invoices for fee of CRO has been raised by EY Restructuring LLP is violative of the IBBI Circular dated 16.01.2018.

9.1.3 The IBBI is of the *prima facie* view that Mr. Venkatesan has contravened the Board Circular no. IP/004/2018 dated 16.01.2012, sections 208(2)(a) and 208(2)(e) of the Code, Regulation 7(2)(a) & (h) of IP Regulations read with Clauses 2,5,10 and 14 of the Code of Conduct.

VIII Submissions

9.2.1 Mr. Venkatesan in his reply has submitted that the CRO has been part of EY since September 2015. He stated that their appointments were made separately as the appointment of CRO included certain specific approvals from Mr. Venkatesan to liaison with project customers on behalf of TSL. That if their appointments were clubbed together, then Mr. Venkatesan's specific approval could not be implemented as intended. He referred to the Side fee letter provided to IBBI during inspection, wherein it has been clearly mentioned that E&Y LLP would raise fees for the services rendered by CRO as CRO services are provided by an individual who is part of EY.

VIII Finding and Analysis

9.3.1 The DC notes that the fee Circular No. IP/004/2018 titled *Fees payable to an insolvency professional and to other professionals appointed by an insolvency professional* was issued on 16.01.2018. The Circular provides the fee payable to an IP and to other professionals appointed by an IP. The relevant portion of the Circular is reproduced below:

“Section 206 of the Insolvency and Bankruptcy Code, 2016 (Code) provides that only a person registered as an insolvency professional with the Insolvency and Bankruptcy Board of India (IBBI) can render services as an insolvency professional under the Code. Section 23 read with section 5(27) of the Code requires that an insolvency professional, who is appointed as an interim resolution professional or a resolution professional, shall conduct the entire corporate insolvency resolution process, including fast track process. In terms of section 5(13) of the Code, ‘the fees payable to any person acting as a resolution professional’ is included in ‘insolvency resolution process cost’, which needs to be paid in priority.

2. The Code of Conduct for Insolvency Professionals under the IBBI (Insolvency Professionals) Regulations, 2016 require that an insolvency professional must provide services for remuneration which is charged in a transparent manner, and is a reasonable reflection of the work necessarily and properly undertaken. He shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.

3. In view of the above, it is clarified that an insolvency professional shall render services for a fee which is a reasonable reflection of his work, raise bills / invoices in his

name towards such fees, and such fees shall be paid to his bank account. Any payment of fees for the services of an insolvency professional to any person other than the insolvency professional shall not form part of the insolvency resolution process cost.

4. Similarly, any other professional appointed by an insolvency professional shall raise bills / invoices in his / its (such as registered valuer) name towards such fees, and such fees shall be paid to his / its bank account.

...”

9.3.2 The DC notes from the minutes of the 1st meeting of CoC wherein agenda in respect of each issue was placed before the CoC and result of e-voting including the appointment of Mr. Venkatasubramaniam as the CRO was approved by the CoC vide 97.8% of voting rights.

9.3.3 The minutes of the 1st meeting of the CoC show that the appointment of the CRO was approved and ratified by the CoC and the appointment of EY was approved as a separate agenda. The engagement letter of EY clearly states that the fee of EY does not include the fees of CRO. However, the invoices for the fee of CRO was raised by EY Restructuring LLP. The DC notes that the Circular No. IP/004/2018 dated 16.01.2018 came much after the resolution process was undertaken for the CD in the present matter and therefore, the DC takes a lenient view with regard to the allegation in this regard.

IX Contravention

10.1.1 As per Section 5(13) of the Code, the expression “*Insolvency Resolution Process Costs*” has been defined and Clause (b) of Section 5(13) of Code provides for the fees payable to any person acting as resolution professional. Further, as per Regulation 33 and 34 of the CIRP Regulations only IRP/IP is entitled to directly receive the fee payable alongwith out of pocket expenses in relation to a resolution process for which he has been appointed as IRP/IP.

10.1.2 It has been observed that the invoice for services rendered Mr. Venkatesan as IRP was not raised in his name but was raised in the name of his firm, *i.e.*, Enrich Enterprises Consulting LLP. Therefore, the IBBI is of the *prima facie* view that Mr. Venkatesan has contravened Section 208(2)(a) and 208(2)(e) of the Code, Regulation 33 of CIRP Regulations, Regulation 7(2)(a) & (h) of IP Regulations read with Clause 2, 5, 10 and 14 of the Code of Conduct.

IX Submissions

10.2.1 Mr. Venkatesan has submitted that IRP fees was raised in the name of Enrich Enterprises Consulting LLP for services rendered during IRP period. The invoice has been raised in the name of Edelweiss, which had fixed the expenses for the services as per Regulation 33 of CIRP Regulations. He submitted that the cost was borne by Edelweiss and the same has not been charged back to the CD and therefore, the same has not been considered as part of CIRP costs.

IX Finding and Analysis

10.3.1 The DC notes that section 5(13) of the Code, the cost of the insolvency resolution process includes the fees payable to any person acting as a resolution professional (apart from other items provided under the provision). The section 5(13) of the Code states as under:

“(13) “insolvency resolution process costs” means –
(a) the amount of any interim finance and the costs incurred in raising such finance;
(b) the fees payable to any person acting as a resolution professional;
(c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;
(d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
(e) any other costs as may be specified by the Board;”

10.3.2 According to Regulation 33 of the CIRP Regulations, the applicant shall bear the expenses incurred on or by the IRP which shall be reimbursed by the CoC to the extent ratified. Regulation 33 reads as follows:

“33. Costs of the interim resolution professional.
(1) The applicant shall fix the expenses to be incurred on or by the interim resolution professional.
(2) The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses under sub-regulation (1).
(3) The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies.
(4) The amount of expenses ratified by the committee shall be treated as insolvency resolution process costs.
Explanation. - For the purposes of this regulation, “expenses” include the fee to be paid to the interim resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the interim resolution professional.”

10.3.3 It is also relevant to refer to Regulation 34 of the CIRP Regulations which reads as follows:

“34. Resolution professional costs.
The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.
Explanation. - For the purposes of this regulation, “expenses” include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional.”

10.3.4 The combined reading of section 5(13) of the Code alongwith Regulations 33 and 34 of the CIRP Regulations, clearly stipulates that only IRP/RP is entitled to directly receive

the fee payable alongwith the out-of-pocket expenses in relation to a resolution process for which he has been appointed as the IRP/RP.

- 10.3.5 In the present case, Mr. Venkatesan, while acting as an IRP, has instead of raising fee bills in his name, raised the bills in the name of his firm Enrich Enterprises Consulting LLP whereas only the IRP/RP can receive the fee directly in relation to the CIRP. This fact has been admitted by Mr. Venkatesan that his fees as IRP was billed through the name of said firm. He also accepted that the said was paid directly by Edelweiss (resolution applicant and one of the FC and member of CoC) and has not been considered as part of CIRP cost in Form III.
- 10.3.6 The DC notes that after the clarification issued vide circular dated 16.01.2018, Mr. Venkatesan could have raised bills in his own name. However, he did not produce any evidence to show his *bona fide* that he has raised bills in his own name after the said circular. Therefore, the DC finds that Mr. Venkatesan has violated Regulation 33 and 34 of CIRP Regulations and in consequence, Section 208(2)(a) and 208(2)(e) of the Code, Regulation 7(2)(a) & (h) of IP Regulation read with Clauses 5 and 14 of the Code of Conduct by raising the invoices in the name of his firm Enrich Enterprises Consulting LLP while he was the IRP.
- 11.1 The objective of the Code is, *inter alia*, to promote entrepreneurship, maximisation of value of assets, make available credit and balance the interests of all stakeholders, in a time bound manner. In its endeavour to maximize the value of assets of the CD, uniform valuation standards have been adopted to get a fair estimate of the value of the assets of the CD, which enables the CoC and the prospective resolution applicants to make an informed decision regarding the CD.
- 11.2 The Bankruptcy Law Reforms Committee in its report has laid emphasis on the role of an IP in Chapter 4 titled Institutional Infrastructure, at point 4.4 titled Insolvency Professional, which are as follows:

“Insolvency professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process. ... In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. The latter include the identification of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings if it is an enterprise, preparation of the resolution proposal, implementation of the solution for individual resolution, the construction, negotiation and mediation of deals as well as distribution of the realisation proceeds under bankruptcy resolution. In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IPs to carry out

these tasks in an efficient and professional manner. The role of the IPs is thus vital to the efficient operation of the insolvency and bankruptcy resolution process. ...”

11.3 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.

11.4 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 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.

11.5 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.

11.6 In the present matter, the DC, in view of the foregoing analysis, finds as follows:

- (i) Mr. Venkatesan, by not performing his duty of preparing IM and outsourcing the same to EY, has contravened sections 25(2)(g), 29, 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and (h) of IP Regulations and clause 5 of the Code of Conduct.
- (ii) Mr. Venkatesan, by allowing the use of his name by the consulting firm EY in correspondences, has not only allowed the firm to misrepresent itself as an IP but has also become party to the misrepresentation. Therefore, Mr. Venkatesan has contravened sections 206, 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and (h) of the IP Regulations and clause 5 of the Code of Conduct.
- (iii) Mr. Venkatesan did not take reasonable care and exercise diligence while issuing POAs without the approval of CoC under section 28(1)(h) of the Code. This act of Mr. Venkatesan shows serious lapse on his part. Therefore, Mr. Venkatesan has contravened sections 28(1)(h), 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and (h) of the IP Regulations read with clauses 3, 5 and 14 of the Code of Conduct.

- (iv) Mr. Venkatesan was guided by one of the members of CoC Edelweiss while appointing professional services of EY and did not act independently nor did he discharge his duty of undertaking due diligence before appointing any professional, therefore, has contravened section 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and (h) of the IP Regulations read with clauses 3, 5 and 14 of the Code of Conduct.
- (v) Mr. Venkatesan by conducting CoC meetings only by audio mode on 13 occasions, out of total 15 meetings has not provided facility to CoC members for effective participation, therefore, he has contravened section 208(2)(a) and (e) of the Code, Regulation 23 and 24 of the CIRP Regulations, Regulation 7(2)(a) and (h) of the IP Regulations read with clauses 10, 14 and 16 of the Code of Conduct.
- (vi) Mr. Venkatesan, by raising the invoices in the name of his firm Enrich Enterprises Consulting LLP while acting as the IRP/RP, has violated Regulation 33 and 34 of CIRP Regulations and in consequence, section 208(2)(a) and (e) of the Code, Regulation 7(2)(a) & (h) of IP Regulation read with clauses 5 and 14 of the Code of Conduct.

Order

- 12.1 In view of the above, the DC finds that Mr. Venkatesan has violated sections 25(2)(g), 29, 28(1)(h), 206, 208(2)(a) and (e) of the Code, regulations 23, 24, 33 and 34 of CIRP Regulations, regulation 7(2)(a) and (h) of the IP Regulations read with clauses 3, 5, 10, 14 and 16 of the Code of Conduct.
- 12.2 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. Venkatesan shall not seek or accept any process or assignment or render any services under the Code for a period of three 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.
- 12.3 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Venkatesan is enrolled as a member.
- 12.4 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.
13. Accordingly, the show cause notice is disposed of.

Dated: 5th March 2021
Place: New Delhi

Sd-
(Dr. Mukulita Vijayawargiya)
Whole Time Member, IBBI