INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/18/2020
27th February 2020

Order

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

Appearances before Disciplinary Committee on 18th December 2019

For Noticee	Mr. Dushyant C. Dave, In Person, Mr. Sumant Batra, M/s Kesar Dass B & Associates, and Mr. Sumant Prashant, M/s Shardul Amarchand Mangaldas & Co.
For Board	Mr. Umesh Kumar Sharma, Chief General Manager, and Ms. Rashi Gupta, Research Associate.

1. Background

1.1 This Order disposes of the Show Cause Notice (SCN) dated 31st October 2019 issued to Mr. Dushyant C. Dave, 1101, Dalamal Tower, B Wing, Free Press Journal Marg, Nariman Point, Mumbai (Maharashtra) - 400021, who is a Professional Member of the Insolvency Professional Agency of Institute of Cost Accountants of India and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board) with Registration No. IBBI/IPA-003/IP-N00061/2017-18/10502.

1.2 In exercise of its power under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017, the Board vide Order dated 5th March 2019 appointed an Inspecting Authority (IA) to conduct an inspection of Mr. Dushyant C. Dave, on having reasonable grounds to believe that the IP had contravened provisions of the Code, Regulations, and directions issued thereunder.

1.3 The Board on 31st October 2019 had issued the SCN to Mr. Dushyant C. Dave, based on findings of an inspection in respect of his role as an interim resolution professional (IRP) and / or resolution professional (RP) in corporate insolvency resolution process (CIRP) of Siddhi Vinayak Logistics Limited. The SCN alleged contraventions of several provisions of the Insolvency and Bankruptcy Code, 2016 (Code), the IBBI (Insolvency Professionals) Regulations, 2016 and the Code of Conduct under regulation 7(2) thereof, the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016, Circular No. IP/003/2018 on 'Insolvency professional not to outsource his responsibilities' dated 3rd January 2018 Circular No. IP/001/2018 on 'Insolvency professional to use Registration Number and Registered Address in all his communications' dated 3rd January

2018. Mr. Dushyant C. Dave submitted an executive summary of responses to SCN vide letter dated 11th November 2019 and then submitted detailed reply to the SCN vide letter dated 19th November 2019. He also submitted additional written responses vide letter dated 20th December 2019 received on 24th December 2019 subsequent to personal hearing on 18th December 2019.

1.4 The Board referred the SCN, response of Mr. Dushyant C. Dave 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. Dushyant C. Dave availed an opportunity of personal hearing before the DC on 18th December 2019 along with his counsel Mr. Sumant Batra and Mr. Sumant Prashant when he reiterated the submissions made in his written reply and made a few additional submissions. He also undertook to submit certain additional documents. The additional documents were received by the DC on 24th December 2019 vide letter dated 20th December 2019.

2. Consideration of SCN

The DC has considered the SCN, the reply to SCN, oral submissions of Mr. Dushyant C. Dave, his counsel Mr. Sumant Batra and Mr. Sumant Prashant during the course of personal hearing, additional documents submitted by the RP, other material available on record and proceeds to dispose of the SCN.

3. Alleged Contraventions, Submissions, Analysis and Findings

A summary of contraventions alleged in the SCN, Mr. Dushyant C. Dave's written and oral submissions thereon and their analysis with findings of the DC are as under:

3.1 **Contravention:**

a) It has been observed from the minutes of 1st meeting of Committee of Creditors ('CoC') dated 12th October 2017 that the RP has informed CoC members that around 300 trucks of Corporate Debtor ('CD') were being illegally used by Sunrise Polyfilms Pvt. Ltd. ('SPPL') and the entire revenue was credited to SPPL's bank account. Further, it was also informed that the promoters of CD have a stake in SPPL and have transferred the staff of CD to SPPL. However, the RP failed to file an application under section 66(1) of the Code when it was found that the business of the CD is carried on with the intent of defrauding creditors. The RP was aware of this fraudulent practice since 1st CoC meeting on 12th October 2017 but the application under section 66 was filed on 29th October 2018 after a delay of more than a year.

b) Further, as per minutes of 3rd CoC meeting held on 16th November 2017, the RP apprised the CoC members that there is an urgent need to take steps to preserve the assets of CD and accordingly approval of CoC was obtained for appointment of one security agency. In 1st CoC meeting, the RP apprised the CoC about illegal use of assets of CD by another company which is sister

concern of CD. The RP should have deployed security at the time when he was appointed as IRP. Thus, the RP failed to protect and preserve the assets of CD which may have led to erosion in value of assets of CD.

c) It is observed from minutes of 3rd CoC meeting, that despite knowing that there was an urgent need to take steps to preserve the assets of company the RP failed to appoint security agency (for which CoC had given approval) due to the following reasons:
   i. Lack of adequate funds.
   ii. Security was already provided by the yard owners where truck owned by CD were parked.

   However, these facts were not brought to notice of CoC during 3rd CoC meeting.

Submission:

a) It was submitted by the RP that the decision to take action for fraudulent activity was immediately taken. At the time of 1st CoC meeting RP only had information about purported 'illegal' use of trucks without any documentary evidence. The hiring agreement dated 1.06.2015 was produced by SPPL and a preliminary review of the same does not disclose any fraudulent transaction. The RP held SPPL responsible for the custody of the trucks since 2015 and for the bad condition of the vehicles. Subsequently it emerged that the directors of SPPL were former employees of the CD and SPPL appeared to be under the direct control of the erstwhile promoters of CD. Thus, the RP followed up with SPPL to provide statement of accounts of SPPL and to furnish details of the revenues earned by SPPL out of use of CD's assets. However, SPPL failed to provide the said information for a prolonged period of time. Thus, an application under section 66 of the Code was filed due to non-cooperation and non-deposit of the revenue by SPPL on account of running the trucks of the CD. This application was filed after non-cooperation from SPPL was demonstrated and thus there was no laxity in filing the same. The same is also recorded in minutes of 7th and 8th CoC meeting.

b) It has been submitted that the assets of CD consisted of moveable and immovable assets. The moveable assets consisted of thousands of trucks and vehicles located all over India which were parked in yards belonging to third parties. All these yards were visited by the RP and notice was also pasted on each yard. Further, all yards had their individual security agency and hence new security agency to replace old was not required considering limited funds available with CD. The immovable assets consisted of fixed assets spread across India. The RP also took immediate possession of these assets by taking control of keys and locks. Thus, the RP took every reasonable step to protect the assets of CD.

c) The question to be decided was if there was any requirement to replace the security which was already provided by existing yard managers. The yard managers were on contractual terms with SPPL to provide security and custody to the vehicles and SPPL has debited the costs of security etc. to the CD's account. The RP took charge of the CD and continued with the security arrangement and the yard services as provided by SPPL. The approval for security costs was taken by RP for future if there is need to replace the entire security. In the very 1st CoC meeting, the RP informed CoC about lack of funds and had asked for interim finance which was not approved by CoC.

During the personal hearing on 18th December 2019, it was submitted by the counsel for the RP that the RP became aware of the hiring agreement after the 1st CoC meeting took place. However, the application under section 66 of the Code cannot be filed on mere suspicion of fraud. It was contended that the RP took reasonable time to find onerous agreements and thereupon immediately filed the application before Hon'ble National Company Law Tribunal. Further, it was also stated that timelines prescribed in the Code are only directory in nature and it lies in the discretion of the IP to file an application under section 66 of the Code when he deems fit.

Analysis:

Under the Code, an IP plays a central role in resolution, liquidation and bankruptcy processes. He takes important business and financial decisions that may have substantial bearing on the interests of all stakeholders. In such a scenario, it becomes imperative for an IP to perform his duties with utmost care and diligence.

Section 66 of the Code provides:

"*66. (1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit."*

Thus, it is the duty of a RP to manage, preserve and protect the assets of the CD and is also required to ensure continuance of the business operations of the CD. In the 3rd CoC meeting dated 16th November 2017, it was decided that forensic audit should be conducted to find out the money trail of the Corporate Debtor. The forensic auditor was appointed on 5.4.2018 and the forensic audit report was submitted on 6.07.2018. Thereafter the application under section 66 was filed on 29.10.2018 i.e. after 115 days from receiving the forensic audit report. Thus, the application under section 66 of the Code was filed after 412 days from the date of

commencement of CIRP i.e. 12.09.2017.

The IP assumes a pivotal role in CIRP under the Code. He shall befittingly perform a wide array of responsibilities and duties which are bestowed upon him in the process. He is responsible for managing the affairs of the company as a going concern and preserving its value. Thus, there is no doubt that the RP has to make every endeavor to protect and preserve the value of the property and assets of the CD. However, simultaneously RP has to be rational in expenditure which should be incurred where essential. All the available resources should be utilized up to full extent.

Findings:
Conduct and performance of a RP have a substantial bearing on the survival of an ailing entity. He, therefore, is expected to function with a strong sense of urgency and with utmost care and diligence.

In the present case, the RP has taken extra-ordinary time to file an application under section 66 of the Code after the forensic audit report was submitted to him. An IRP/RP has the highest professional responsibility during CIRP. However, in the absence of any statutory mandate prescribing definite timelines for filing application under section 66 of the Code, the RP cannot be held liable for filing the application belatedly. However, it cannot be disputed that he acted negligently and failed to acknowledge the importance of timelines during CIRP.

As regards to appointment of security agency, submission made by RP seems to be reasonable because of the fact that all yards had their own security agency. Keeping the above in view, there seems to be no violation as mere taking approval for appointing security agency and then not appointing the same should not be a reason/ ground for violation.

3.2 **Contravention**:
In the 2nd CoC meeting held on 2nd November 2017, CoC resolved to liquidate the CD. However, this decision was based upon an interim valuation report. It is the responsibility of an RP to advise CoC members against the liquidation since final valuation report was awaited. Even the AA in its order dated 4.05.2018 made the following observations, "*...The very object/ intention of the Code is to revive a company under the CIRP and not to liquidate it. In the instant case, it is clear that the resolution professional has omitted to perform his statutory duties and responsibilities…"*
"...It is amply clear that the Resolution Professional has not invited prospective resolution applicants as per Section 25 of the Code…"

It is in the domain of the members of CoC to take commercial decisions but at the

same time, it is the duty of RP to provide CoC all necessary documents/ information like valuation report to enable them to take an informed decision. However, IP failed to take any steps to invite prospective lenders, investors and any other person to put forward resolution plans in accordance with section 25(2)(h) of the Code.

Submission:
The RP has submitted that the CoC has put on record its intention to liquidate the CD in the 1st CoC meeting itself where the RP informed the CoC members that in absence of sufficient data, such decision cannot be taken. He also asked CoC to wait for valuation report which was expected by 25.11.2017. It is further submitted that in 2nd CoC meeting, the RP extensively appraised the CoC members of the importance of encouraging resolution of CD over liquidation. The RP has submitted video recordings of the discussion between RP and CoC evidencing that RP was against liquidation and also urged CoC to vote for resolution of CD. The CoC informed RP that they had conducted a joint lenders meeting where they concluded that they must go for liquidation and not for resolution since they do not wish to waste further time. Accordingly, the RP filed an application for liquidation under section 33(2) of the code.

During the personal hearing, it was submitted by the counsel of RP that he has fulfilled his duty by apprising CoC of the importance of resolution, however if the CoC disregards the same, the RP cannot do anything. Further, it was pointed out that the RP could not perform his duty as stipulated under section 25(1)(h) of the Code in the absence of approval of CoC for inviting prospective resolution applicants.

Analysis:
The Code read with regulations made thereunder cast specific duties and responsibilities on an IP. An IP is required to perform certain tasks under the Code while acting as an IRP or RP. One of the responsibilities of IP include inviting resolution plans, examining them and presenting them to the CoC for approval.

In the present case, in the 1st CoC meeting, the IRP pointed out to the members of CoC that the Code requires that a full process of resolution must be run before any decision is taken on liquidation of the company. Expression of interest has to be invited once the final Information Memorandum (IM) is prepared by the RP after receipt of the valuation report and once the audit of the accounts is completed.

The RP also explained the provisions relating to resolution plan and liquidation to the members of CoC in the 2nd CoC meeting dated 2.11.2017. He also made presentations highlighting the spirit of the Code and laid emphasis on completion of resolution process as it costs nothing to the members of the committee of creditors. It is also noted in the 2nd CoC meeting, "*The RP also made the*

presentation through slides in which he cited case laws in which the NCLT had not accepted the liquidation proposal of the committee without going for the resolution process. The relevant section 33(2) of the Code was read out by the RP in the committee which clearly provides for liquidation at any stage before the confirmation of the resolution plans and not before receipt of resolution plans."

The CoC members, in general, were of the opinion that resolution should be attempted, however, it was decided to put this item to vote. Accordingly, this item i.e. '*The CoC hereby decides to liquidate the CD without completing the Resolution Process prescribed under the provisions of the Code*' was added by the RP in the e-voting concluded on 7.11.2017 which was approved by 79.91% of the CoC members.

In this regard, the Hon'ble NCLT vide order dated 04.05.2018 also made the following observations:

"*...The very object/ intention of the Code is to revive a company under the CIRP and not to liquidate it. In the instant case, it is clear that the resolution professional has omitted to perform his statutory duties and responsibilities nor the CoC seems to have shown much interest and made efforts to achieve the object of the Code for exploring the possibilities for revival of the company ..."*

"...It is amply clear that the Resolution Professional has not invited prospective resolution applicants as per Section 25 of the Code. Therefore, the Resolution Professional is hereby directed to act as per Section 25 of the Code and give an opportunity to the prospective resolution applicant, if any, received by him and submit the same before CoC as per mandate of the Code..."

During the personal hearing, it was pointed out by the counsel for RP that the RP could not perform his duty as stipulated under section 25(1)(h) of the Code in the absence of approval of CoC for inviting prospective resolution applicants. The duties of RP are defined in Section 25 of the Code. Clause (h) of sub-section (2) of Section 25 specifically provides:
"For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:-
(h) invite prospective lenders, investors, and any other persons to put forward resolution plans;..."

The above-mentioned clause (h) was substituted by the Insolvency and Bankruptcy Code (Amendment) Act, 2018 w.r.e.f. 23.11.2017 which reads as under:

"invite prospective resolution applicants, who fulfil such criteria as may be laid down by him ***with the approval of committee of creditors****, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or*

plans…"

It should be remembered that the responsibilities of CoC and IP are clearly demarcated by the Code. The CoC must not encroach upon the role of IP and must not allow the IP to encroach upon its role. Similarly, the IP must not compromise his independence in favour of the CoC. In the present case, the decision to liquidate the CD was taken before Clause (h) was amended. According to the provisions of erstwhile Section 25(2)(h), it was the duty of the RP to invite prospective resolution lenders, investors, and any other persons to put forward resolution plans. For this purpose, Section 25(2)(h) does not contemplate any role of CoC.

Section 33(2) of the Code provides, "*Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).*"

Thus section 33(2) of the Code permits the resolution professional to intimate Adjudicating Authority of the decision of CoC to liquidate CD at any time during the corporate insolvency resolution process but before confirmation of resolution plan.

Findings:
In the present case, it can be observed from the minutes of the 2nd CoC meeting that the RP made efforts to explain the legal position to CoC, however, CoC decided to go for liquidation. In such a peculiar circumstance, the RP cannot be strictly held liable even though he acceded to the request of CoC and filed an application for liquidation of the CD without inviting resolution plans.

3.3 **Contravention:**
Pursuant to Regulation 29 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, RP may sell unencumbered assets of the CD, other than in the ordinary course of business, if he is of the opinion that such sale is necessary for a better realization of value under the facts and circumstances of the case. However, in 3rd CoC meeting, sale of encumbered assets was proposed and as per summary report of e-voting for 3rd CoC meeting concluded on 21.11.2017, CoC also allowed sale of encumbered assets not exceeding 10% of the total value.

Submission:
It is submitted that the RP has clarified in reply to inspection report dated 30.04.2019 that the minutes inadvertently mentioned the word 'encumbered', whereas the word should be only 'unencumbered'. Further, 2nd CoC meeting also provides for sale of unencumbered assets for the same resolution as referred to

above. In 7th CoC meeting also, the RP rejected CoC's demand to sell unencumbered assets. It is also submitted that RP has not sold any unencumbered assets whatsoever.

During the personal hearing, the counsel for the RP reiterated the stand taken by the RP in his written submissions to the Board.

Analysis:
Regulation 29 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 on Sale of assets outside the ordinary course of business provides:
"*(1) The resolution professional may sell unencumbered asset(s) of the corporate debtor, other than in the ordinary course of business, if he is of the opinion that such a sale is necessary for a better realisation of value under the facts and circumstances of the case…*"

Thus, Regulation 29 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 empowers a RP to sell only unencumbered assets of the CD after seeking approval of the CoC.

It is observed from the e-voting of 2nd CoC meeting that Approval Item No. 6 which was put to vote states, *"The Committee of Creditors approves that the Resolution Professional be allowed to sell those assets of the company which are free from any encumbrances in order to have a better realization of the assets of the company and keep the CoC informed about any such transaction. This will prevent further deterioration in the value of these assets."*

Thus, in the e-voting of 2nd CoC meeting, the approval of the members of CoC was sought for sale of unencumbered assets. However, the agenda for the 3rd CoC meeting held on 16.11.2017 in Item no. B [6] provided: '*To take approval of the Committee to sell the* ***encumbered or unencumbered*** *assets of the Corporate Debtor not exceeding 10% of the total asset value outside the ordinary course of business under Regulation 29 of the CIRP of the IBC Code 2016.*'

Further, in the Summary Report of e-voting (for 3rd CoC meeting) concluded on 21.11.2017 the Agenda item No. 3 '*CoC allows the RP to sell* ***encumbered or encumbered*** *assets not exceeding 10% of the total value'* was put to vote and the same was approved by 92.82% members.

It is important to mention that during CIRP, an IP shall apply the highest standards of duty of care. It must not only follow the due process, but also be fair towards all stakeholders and transparent in discharge of its responsibilities for maximising the value of the assets of the company.

It is submitted by RP that demand to sell encumbered assets was rejected by RP in the 7th CoC meeting. It is observed from the minutes of 7th CoC meeting that, *"the*

RP explained to the CoC that only unencumbered assets could be sold to generate revenues. For the encumbered vehicle, the respective financial creditors will have to give a No Objection Certificate and no sale can be effected without the same."

It is also submitted by the RP that no encumbered assets have been sold during CIRP and the word 'encumbered' has been mentioned inadvertently instead of 'unencumbered' in the agenda and e-voting for the 3rd CoC meeting. In the given circumstances, it is a little difficult to assume that such mistake was committed twice i.e. in the agenda as well as in the summary report of e-voting of 3rd CoC meting as mentioned above. Further, it cannot even be considered to be a typographical error since both the words i.e. encumbered and unencumbered are used in both the documents.

Findings:
Section 208(2)(a) of the Code obliges an IP to take reasonable care and diligence while performing his duties, however in the present matter, the RP failed to act with reasonable care and diligence since agenda has been put for sale of 'encumbered or unencumbered' assets in the 3rd CoC meeting and the same was also put up for approval of the CoC members in e-voting for 3rd CoC meeting.

It was also admitted by the RP in his written submissions and by his counsel during the personal hearing that the mistake was 'inadvertent' which also indicates the casual approach adopted by RP while preparing the agenda and e-voting items for 3rd CoC meeting.

However, since no encumbered assets have actually been sold by the RP, a lenient view can be taken in this regard and he may not be held responsible even though he should have been more careful while performing his duties.

3.4 **Contravention:**
During 1st CoC meeting, the following agenda was placed for resolution:

a) Insolvency resolution process costs at 0.25% of amount of financial debt owed to all the creditors as admitted in the Information Memorandum (IM)
b) Success fee (of 1.5% on the amount of total debt included in the final resolution plan) payable to Puneet Advisory Services P. Ltd. (PAS), which is a party related to you.

The fees as stated above is unreasonable as required under clause 25 of Code of Conduct. Further, IA requested the RP to submit agreement for appointment of all professionals during CIRP vide emails dated 13.03.2019, 1.04.2019 and 4.04.2019, however the RP failed to provide the same.

Submission:
It is submitted by the RP that the proposed fee of 0.25% consists of all the costs of valuers, security, CIR process costs, RP fees and the supporting entity fees. The

break-up of the same is given in detail in minutes of 1st CoC meeting and hence, the fee was reasonable. It is submitted that the success fee of 1.5% was based on the industry standards of investment banking when the fundraising exercise is undertaken for any company which ranges from 1% to 5% depending upon the complexity of the case. Hence, success fee was also reasonable. However, since neither the composite fee of 0.25% nor the success fee of 1.5% was approved by the CoC, this fee was also never charged and hence there was no agreement entered into for this fee which could be provided to the Board. It is also submitted that the appointment letters provided to valuers were also provided to IBBI on 5.3.2019 and 30.4.2019. The question of fee is always a subjective one and all the fees are to be decided by CoC (reasonable or unreasonable).

Analysis:

When a CD undergoes CIRP, an IP is vested with the management of its affairs and he manages its operations as a going concern. He complies with the applicable laws on behalf of the CD and conducts the entire CIRP. Such responsibilities of an IP require the highest level of professional excellence, dexterity and integrity. Since the highest degree of professionalism is expected from him by the stakeholders, the IP is also not expected to break the confidence reposed on him. Untrustworthiness of the IP would lead to collapse of the institution of IPs and every authority needs to be vigilant to conserve and preserve the reputation of the profession. Undisputedly, an IP needs to be compensated for his professional services commensurate to his ability, duties and responsibilities.

In the present case, it has been observed from the voting results of 1st CoC meeting that the following resolutions were rejected by the members of CoC:

i) Resolved that the expenses, costs and the fees of the Insolvency Resolution Process be and is hereby fixed at 0.25% [Zero point twenty five percent] of the amount of the financial debt owed to all the creditors as admitted in the Information Memorandum and submitted to the Committee of Creditors in the first meeting.

ii) Resolved that the Success Fee of 1.5% shall be payable to Puneet Advisory Services P Ltd computed on the amount of total debt included in the final duly accepted Resolution Plan which gets approved by the Hon'ble NCLT.

Clause 25 of the Code of Conduct for the IBBI (Insolvency Professionals) Regulations, 2016 provide as under –

"*An insolvency professional must provide for the 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.*"

An IP is also obliged under section 208(2)(a) of the Code to take reasonable care and diligence while performing his duties, including incurring expenses. Since

professional fee cannot be regulated, it is believed that the fee, remuneration and CIRP cost should be tested through the crucible of reasonableness. Therefore, while performing his duties, an IP must ensure that not only fee payable to him is reasonable, but also other expenses incurred by him are reasonable. The Code does not fix the fee payable to an IP but only provides that the CIRP cost would include, inter alia, the cost incurred by the RP and also any other cost as may be specified by the Board as per section 5(13) of the Code.

In the present case, it has also been observed from the Summary report of E-Voting for 5th Meeting concluded on 6.06.2018 that the resolution to approve '*Professional Fee, payable to PAS, an investment banking firm, for assisting in the managing the process of invitation of EOI (Expression of Interest) till the selection of the bid for final submission to Hon'ble NCLT is Rs. 30 Lakhs plus success fee of 2% of the value of the resolution plan. The success fee shall become only on the approval of the resolution plan by the Hon'ble NCLT'* was passed by 52.34% of the CoC members.

In effect, the two resolutions which were put to e-voting in the 5th meeting of CoC included payment of Rs 10 lakhs per month to the RP for his services and a sum of Rs 30 lakhs to PAS plus success fee of 2% of the value of the resolution plan. However, it has been submitted by the counsel for the RP during the personal hearing that success fee of 2% was never paid to PAS and accordingly never charged as insolvency resolution process costs since success fee was to be made payable only upon approval of resolution plan by Hon'ble NCLT. Since no resolution plan was received, in the present case, the question of payment of success fee did not arise.

Findings:

It is found that the provisions of the Code and the rules made therein obligates an IP to incur reasonable expenses commensurate with the work properly done. In the present case, it has been submitted by the counsel for the RP during the personal hearing that success fee of 2% was never paid to PAS and accordingly never charged as an insolvency resolution process cost. In such circumstances, the RP cannot be held liable specifically when all these costs were also approved by the members of CoC, however never charged.

3.5 **Contravention:**

It has been observed from the voting results of 1st CoC meeting that CoC did not approve appointment of Puneet Advisory Services P. Ltd. (PAS). From the minutes of 3rd CoC meeting, it is inferred that PAS was a related party and this fact was not mentioned in 1st CoC meeting when agenda for appointment of PAS was placed. In 5th CoC meeting, fee payable to PAS was approved, however, no prior approval for appointment of PAS was obtained from CoC in the manner

provided under Section 28(1)(f) of the Code.

Submission:
It was submitted that RP has given a detailed introduction of PAS in the 1st CoC meeting and in many subsequent CoC meetings and also showed its credentials and experience in corporate advisory services from over 20 years. Adequate disclosure was also made in 5th CoC meeting. The approval required under Section 28(1)(f) of the Code is for the related parties of the CD as interpreted by RP and his legal team. Nevertheless, the RP repeated the related party factor to CoC in several meetings.

During the personal hearing, it was argued by the counsel for RP that PAS was appointed during the time when RP was acting as IRP for which no prior approval of CoC can be sought since CoC does not exist at that time. The counsel for the RP contended that adequate disclosure of the fact that RP was a related party to PAS was made, however, the same was not noted in any minutes.

Analysis:
It has been observed that PAS continued to provide services to the RP during CIRP. During the personal hearing, it was contended by the counsel for RP that the appointment of PAS was made when RP was acting as an IRP. At that time, the question of approval of CoC did not arise as CoC did not exist. However, the counsel for the RP also admitted that no ratification of the appointment of PAS to provide services during CIRP has been made by the RP.

It has been further observed that no documentary evidence has been produced by the RP to substantiate the official appointment of PAS during IRP's tenure. Further, post commencement of CIRP, in the very 1st CoC meeting, the resolution for appointment of PAS was put to vote. The resolution provided as below:

'*Resolved that the Resolution Professional be and is hereby authorized to appoint PAS as the Process consulting firm to undertake the functions mentioned in the Resolution No 1 above under a separate contract and make the payment to PAS accordingly*'.

However, it is interesting to note that this resolution was rejected by the members of CoC. Further, no ratification was sought by the RP after commencement of CIRP for appointment or for payment of fee to PAS from the members of CoC.

Undoubtedly, the RP gave a detailed introduction of PAS before the members of CoC, however it is important to note that discussions may be conducted at length during the CoC meeting, however, the fact remains that no definite decision was taken regarding appointment of PAS.

From the summary report of e-voting for 5th CoC meeting concluded on 06.06.2018,

it has been observed that the fee payable to PAS was approved by CoC by passing the following resolution, "*It is hereby approved that Professional Fee, payable to Puneet Advisory Services Pvt Ltd (PAS), an investment banking firm, for assisting in managing the process of invitation of EOI till the selection of the bid for final submission to Hon'ble NCLT is Rs. 30 Lakhs plus success fee of 2% of the value of the resolution plan. The success fee shall become payable only on the approval of the resolution plan by the Hon'ble NCLT"*

It has been observed that the fee payable to PAS was approved, however, it is questionable if adequate disclosure to CoC was made by the RP about the fact that PAS is a related party to the RP before approval for appointment of PAS was sought (by the RP) in the 5th CoC meeting. In this regard, it has been submitted by the RP, in his written submissions, that such disclosure was not made by the RP since the approval required under Section 28(1)(f) of the Code is for the related parties of the CD as interpreted by RP and his legal team.

The term related party is defined in Section 5(24) of the Code which begins with the words, "*'related party', in relation to a corporate debtor, means-…*" and thus, it can be said that related party disclosure has to be made in respect of CD. Section 5(24A) of the Code has been inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act 2018 w.e.f. 6.06.2018 and begins with the words, "*related party', in relation to an individual, means - …*". Since, the provision for disclosure of related party in relation to an individual [section 5 (24A)]was inserted after the CIRP commenced in the present matter and even the e voting of 5th CoC (opened on 5th June, 20218) concluded on 06 June, 2018 (wherein the decision to pay fee to PAS was taken), the same cannot be made applicable upon the RP. Hence, there is no contravention of Section 28(1) (f) of the Code.

Findings:
It is found that the RP failed to disclose his relationship with PAS to the CoC before the proposal for appointment of PAS was put to vote in the 5th CoC meeting. However, since the definition of "*'related party', in relation to an individual"* under Section 5(24A) of the Code was inserted after commencement of CIRP in the present case, RP cannot be held liable.

3.6 **Contravention:**
As per Section 25(2)(g) of the Code, it is the duty of the RP to prepare the Information Memorandum ('IM') in accordance with section 29 of the Code. As per IBBI circular dated 3.01.2018, an IP shall not outsource any of his duties and responsibilities under the Code. It has been observed from the minutes of 6th CoC meeting dated 30.06.2018 that '*The CoC authorised appointment of an external agency for the preparation of information memorandum…*'. Hence, the RP outsourced his responsibility in favour of an external agency and also failed to submit an explanation regarding the same.

Submission:
It is submitted that the preparation of IM was never outsourced to any outside third party and was prepared by the RP himself. It is submitted that the IA has **erroneously classified the Investor IM** meant for the investors as the IM as described in the Code. The task of preparing **Investor IM** was outsourced to a professional investment banking firm to effectively showcase the investment opportunity in the CD by making use of professional skills of the said investment banking firms. This demonstrates that the RP was proactively trying to find a suitable investor to resolve the CD.

During the personal hearing, it was submitted by the counsel appearing for RP that since after the preparation of IM at the time of 1st CoC meeting, **the data significantly changed**, there was a need of preparing **a pitch document** to invite prospective Resolution Applicants. In the written submissions dated 20.12.2019 also, the RP submitted that the document outsourced was the **pitch document and not the IM**. Further, the RP requested the DC to see the **substance and not the form** of the document.

Analysis:
The Code has clearly outlined the duties which must be performed by the RP during the insolvency resolution process. One of the key functions of the RP with respect to conduct of CIRP include preparation of IM. An IM is a very crucial document and provides a holistic view about the operations of the CD. It is due to this reason that preparation of IM has been categorically listed as one of the duties which must be performed by the RP himself. It is trite to mention that the role of RP in conducting the CIRP is most important for its successful completion.

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

"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;"

Further, circular dated 03.01.2018 was also issued by the Board directing that "*an insolvency professional shall not outsource any of his duties and responsibilities under the Code...*"

With regard to the allegation about outsourcing responsibility for preparation of IM in favour of an external agency, it has been submitted by the RP that the IM was prepared by him at the time of 1st CoC meeting itself and was submitted to members of CoC vide email dated 11.10.2017. In the 1st CoC meeting, a summary of IM was also given by the RP to CoC. It was further submitted that approval in the 6th CoC meeting was taken for the preparation of 'Investor Memorandum' and not 'Information Memorandum'.

Findings:

There is no doubt that, as per provisions of Section 25(2)(g) of the Code, it is the duty of the RP to prepare the IM in accordance with Section 29. However, since numerous activities are to be taken up by the RP during CIRP, he can engage people to help him in carrying out his duties. It appears that the task of preparing IM was outsourced to a professional investment banking firm to effectively showcase the investment opportunity in the CD by making use of professional skills.

It has been observed that name of Shri D. C. Dave, Resolution Professional is appearing at the bottom of every page of the IM (total 104 pages). Thus, he outsourced the preparation of the IM, however by mentioning his name on each page, he owed responsibility for the same. Therefore, it is found that ultimately, he (RP) presented the IM to the CoC and thus, an inference can be drawn that it is his (RP's) IM. Ideally, the law expects that it is exclusive responsibility of an IP to prepare the IM. Although it is not the best practice, but it is difficult to consider it an explicit contravention of law given the fact that this is a new law. However, it is beyond the powers of CoC to decide that the preparation of IM should be outsourced to an external agency.

3.7 **Contravention:** It has been observed that the RP has not been using the registered email address in his communication to stakeholders in the notices and agendas for the following CoC meetings:

i. Notice dated 5th October 2017 for 1st CoC meeting
ii. Notice dated 25th October 2017 for 2nd CoC meeting
iii. Notice dated 9th November 2017 for 3rd CoC meeting
iv. Notice dated 10th May 2018 for 4th CoC meeting
v. Notice dated 25th May 2018 for 5th CoC meeting
vi. Notice dated 23rd June 2018 for 6th CoC meeting
vii. Notice dated 27th July 2018 for 7th CoC meeting
viii. Notice dated 25th August 2018 for 8th CoC meeting

As per IBBI circular dated 3rd January 2018, an IP has to prominently state his email address registered with IBBI in all communications to a stakeholder or to an authority. Even after the issue of the circular, the RP failed to adhere to the same.

Submission:

It is submitted that the RP has always used the registered email address in all communications subsequent to previous correspondence from the Board dated 13.04.2019. The RP team created a separate email address to run CIR process so that there is efficiency in collection, storage, assimilation and distribution of the data. However, all emails contained details of registered office address of IP and

official email address of IP. Further IBBI Circular dated 3.01.2018 (which was issued after CIRP commencement date) stated as follows:
"…3. Additionally, an insolvency professional may use a process (Example: CIRP, Liquidation, etc.) specific address and email in its communications, if he considers it necessary subject to the conditions that: (i) the process specific address and email are in addition to the details required in Para 2 above, and (ii) the insolvency professional continues to service the process specific address and email for at least six months from conclusion of his role in the process." It is submitted that the RP has done exactly what has been stated in the Circular.

Analysis:
The Board issued directions to IPs vide Circular dated 3.01.2018 with subject 'Insolvency professional to use registration number and registered address in all their communications'. The Circular provides, "*It is hereby directed that in all his communications, whether by way of public announcement or otherwise to a stakeholder or to an authority, an insolvency professional shall prominently state: (i) his name, address and email, as registered with the IBBI, (ii) his Registration Number as an insolvency professional granted by the IBBI, and (iii) the capacity in which he is communicating (Example: As Interim Resolution Professional of XYZ Limited, As Resolution Professional of ABC Limited, etc.).*
3. Additionally, an insolvency professional may use a process (Example: CIRP, Liquidation, etc.) specific address and email in its communications, if he considers it necessary subject to the conditions that: (i) the process specific address and email are in addition to the details required in Para 2 above, and (ii) the insolvency professional continues to service the process specific address and email for at least six months from conclusion of his role in the process."

After issue of Circular dated 3.01.2018, RP sent notices of 4th CoC meeting to 8th CoC meeting by email enclosing copy of notice and agenda. (DC is not aware whether the notices and agenda has been also sent by post).

In the emails sent (along with copy of notice and agenda for the 4th CoC meeting to 8th CoC meeting), the email address of the RP that is registered with the Board i.e. dushyant.dave@dcdave.in has been mentioned below the name and address of the RP. Though the notice of the meetings of CoC (attached with email) do not contain the email address registered with the Board (and only the process email address is mentioned), he cannot be strictly held liable as the communication sent (email) which is a sort of covering communication contains the email address registered with the Board.

However, a casual approach has been adopted by the RP by not mentioning his registered email address with the Board in the notices which have been sent with the emails to CoC members.

Findings:

Since the email sent to CoC members along with notice and agenda contains both the email addresses i.e. process email address as well as the email address registered with the Board, there is no contravention of Section 208(2)(e) of the Code and Regulation 7(2)(i) of the IBBI (Insolvency Professionals) Regulations, 2016.

3.8 **Contravention:**

a) As per minutes of 3rd CoC meeting, the RP proposed for valuers' fees of 1.20 crores before CoC and the same was ratified by CoC. However, it was noted from the cost disclosure to IPA that the actual valuers' fees were Rs 27.48 lakhs. Hence, there exists a significant difference in the amount of valuers' fees ratified by CoC and the amount of expense incurred on valuers' fees. Further, the RP failed to provide any explanation as to why CoC's approval was obtained for a much higher amount than the actual amount incurred on valuers' fees.

b) As per Form III (Cost Disclosure) submitted by RP to IPA, the amount ratified by the CoC is mentioned at Rs. 1.20 crores separately for each valuer. Accordingly, total cost for valuers approved by CoC is disclosed at Rs 2.40 crores instead of Rs. 1.20 crores.

However, as per minutes of 3rd CoC meeting dated 16.11.2017, CoC approved that *"…total cost of valuations exercise and valuation shall not exceed Rs 120 lacs (1.20 crores) for both the valuers for all the assets of the company spread over all the country…"* Thus, the cost disclosed to IPA on appointment of valuers was much higher than what was approved by the CoC.

Submission:

a) It is submitted that the RP took approval of the valuer's cost on the basis of the quotations received from the valuers. The RP incurred the valuation costs on the basis of the lowest quotations selected whereas the approval was taken on the basis of the highest quotation received so that the upper limit of the costs can be capped.

Further, the valuation of the trucks was a complex assignment. The number of trucks in ERP was 6170 whereas the valuers could find only 2500 trucks hence the actual costs also went down due to these factors.

Regulation 34 does not prohibit the RP from incurring the expenses less than those sanctioned by the CoC. It is submitted that the RP has, in fact, saved the costs of the valuation by selecting the correct valuers after examining in detail about the higher quotations quoted by other valuers.

b) It is submitted that there is a format error in the prescribed forms of IPA. The format asks for the cost to be mentioned separately for valuer 1 and valuer 2 whereas the CoC had approved the total cost for both the valuers.
The RP could not divide the approved cost equally in two and write on his own some numbers as the same has to tally with numbers approved by CoC. Hence the figures appear twice in IPA report which is actually not reflecting the correct position. This is not misconduct but an error in design of the format.

Analysis:
The CoC approved the appointment of two valuers by RP and also approved that the total cost of valuation shall not exceed Rs. 120 lacs for both the valuers for all the assets of the company spread across the country in the 3rd CoC meeting dated 16.11.2017. From the cost disclosure to IPA in Form III: Insolvency Resolution Process Cost of Corporate Debtor for the period under RP, it is found that the RP has mentioned the fee payable to Valuer 1 as Rs 12,73,699 and to Valuer 2 as Rs. 14,75,000. In the same form, in the column 'Amount ratified by CoC', the RP has mentioned Rs 1,20,00,000 for Valuer 1 and Rs Rs 1,20,00,000 for Valuer 2. Thus, according to the disclosure made by the RP in the form, the total fee amount ratified by CoC for valuers stands at Rs 240 lacs.

It is submitted by the RP in his written submissions that there is a format error in the Form and there was no column wherein total cost approved by the CoC could be stated. However, at the end of the form there was a column for 'Remarks' and the RP could have mentioned the total fee approved by CoC for Valuers as Rs 120 lacs there. However, the RP failed to do so.

Findings:
(a) The Code does not prohibit for incurring expenditure less than those sanctioned by CoC hence there is no contravention of Regulation 34 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016**.**
(b) Though the RP adopted a casual approach while making cost disclosures to his IPA, however, in view of an inherent format error in the Form itself, RP cannot be held liable.

3.9 **Contravention:**
As per the minutes of 3rd CoC meeting dated 16.11.2017, CoC discussed and approved the appointment of E&Y as Forensic Auditor. However, the appointment was made on 5.4.2018 i.e. after a delay of 4 months from the date when approval of CoC for appointment of forensic auditor was sought. As per section 20(2)(a) and 25(2)(d) of the Code, in order to preserve and protect the assets of CD, IRP/RP shall appoint accountants, legal or other professionals. The Code does not envisage any role of CoC in this matter. Thus, the RP abdicated his authority in favour of CoC and allowed CoC usurp his authority. Further, E&Y submitted its report on

6.7.2018 in response to which the RP filed an application under section 66 of the Code before NCLT on 29.10.2018 i.e. after a delay of 4 months from receipt of forensic audit report. This indicates the casual attitude of RP in a time bound CIR process.

Submission:

The appointment of forensic auditor was put up before CoC for approval of costs and not for appointment. The appointment was approved on 16.11.2017 and the Forensic auditor was appointed on 2.1.2018 i.e. within 45 days and not after 4 months. The IA ignored the appointment letter dated 2.1.2018 which was only modified as to the name of appointee from the professional services provider to the name of IP. For submission of data to forensic auditor, IP had to collect adequate data. Further, the IP also tried to find out if any forensic audit has already been conducted by any other agency. In fact, the RP found that Bank of Maharashtra had conducted forensic audit and also wrote to the bank to share the report. When the bank did not share the report, the RP got the audit conducted independently. It is submitted that this was done to save the costs of CIR Process as CD had minimal funds and no interim finance was sanctioned by CoC. The request of RP to Bank of Maharashtra is also contained in minutes of 1st CoC meeting. After the report was submitted by E&Y, it was given to study to legal firm appointed by CoC which took time. Before an application under section 66 (which implicated 20 parties) is filed, a thorough checking is required. The RP demonstrated tremendous courage and spent serious efforts in filing proper application u/s 66 of the Code.

During the personal hearing, it was contended by the counsel for the RP that if the fee of forensic auditor is not approved by CoC then the appointment made by the RP will not have any meaning. Even though RP has no intention to seek approval for appointment of forensic auditor, the appointment cannot be done unless fee is approved by CoC.

Analysis:

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

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

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

Thus, section 25(2)(d) casts a duty upon the RP himself. He is neither permitted to delegate his duties to others nor can he abdicate his authority in favor of CoC. If the law provides for a certain manner of doing something, it must be done in that manner only. The RP could appoint professionals himself and there was no need for him to seek approval of CoC before appointing forensic auditor.

From the agenda of the 3rd meeting of CoC, it has been observed that Item No. B[4] provides:
"*To take approval of the committee for appointment of the forensic auditor and fixing the fees for the assignment.*"

This manifests that the RP sought approval of the CoC for 'appointment of forensic auditor' and compromised his authority in favour of the CoC.

The list of matters requiring approval of CoC in the 3rd e-voting scheduled on 20.11.2017 also states as follows:
"*Approval Item No. 10: The Committee of Creditors* ***hereby approves the conduct of the forensic audit by the Resolution Professional*** *with the assistance of a Forensic Auditor to trail the end-use of the assets of the corporate debtor including the funds of the company and approve the limit of Rs 12.60 Lacs as the total costs of the Forensic Audit plus out of pocket expenses and applicable taxes.*"

Thus, it is very clear that CoC has approved the conduct of Forensic Audit. However, even after approval of CoC was received for appointment of forensic auditor, the RP belatedly appointed Ernst & Young to conduct forensic audit on 5.04.2018 i.e. after 4 months from receiving approval of CoC. This indicates RP's casualness in performing his duty as an RP and misunderstanding of the law.

The argument of the counsel that if the fee of forensic auditor is not approved by CoC then the appointment made by RP will not have any meaning is not tenable as the Code contains separate provisions empowering the IRP/RP to appoint accountants, legal or other professionals as may be necessary (Section 25(2)(d) of the Code) and for CoC to approve the 'Insolvency Resolution Process Costs' (Regulation 34 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.)

Findings:

(a) Since RP has abdicated his authority in favor of CoC and allowed them to approve conduct of Forensic Audit, he has contravened the provisions contained in Section 25(2)(d) of the Code and Regulation 7(2) (a) and (h) of the IBBI (Insolvency Professionals) Regulations, 2016 read with clause 14 of the Code of Conduct read with section 208(2)(a) and (e) of the Code.

(b) Further, it is beyond the powers of CoC to decide the appointment of Forensic Auditor.

3.10 Contravention:

a) As per the Code of Conduct, IP is duty bound to provide all information and records as may be required by the Board and the IA. The Board vide email

dated 17.05.2018 had sought clarifications from the RP along with necessary documents. The same were provided by RP vide email dated 24.05.2018. The Board thereafter sought certain additional documents vide email dated 8.10.2018 but the RP failed to provide the documents to the Board within the stipulated time. A reminder was also sent to the RP on 18.10.2018 for submission of the said documents. However, instead of providing documents, the RP vide email dated 20.10.2018 advised the Board to close the case treating it as too old.

b) The IA also sought certain documents from IP for inspection vide email dated 6.03.2019 and the same were provided on 25.03.2019 i.e. after 19 days. The IA vide email dated 29.03.2019, requested the RP to submit enclosures to Form 2 filed by RP before NCLT. To this the RP replied vide email dated 4.04.2019 that "The attachments with Form 2 are not available". The RP failed to explain why the attachments are not available. Hence, there was a delay in submission of certain documents and non-submission of enclosures to Form 2 to IA.

Submission:

a) The RP has given full reply to the original query on the same subject made by IBBI in May 2018. When the same query was made by the Board again in October 2018, that is after over six months, it has not referred to the response of RP submitted in May 2018.

b) The RP took time of 19 days to respond to the query dated 6.03.2019 as a huge volume of documents were collected during CIRP. The list of documents required were 21 in number and the RP was also working rigorously under Liquidation Regulations. The time taken by RP was not to avoid the response but to prepare a proper and complete response with all documents. There was lack of intention to delay the report since the RP was not informed about the inspection and he was acting under the belief that it is a routine collection of information. The RP provided only Form 2 and no optional certification at the time of providing consent. Hence, RP provided Form 2 to IA and informed that other attachments are not available since there were none.

During the personal hearing, the counsel for RP admitted that the language used by RP, in his communication with the Board was inappropriate, however, the RP never had the intention of not supplying the information desired by the Board.

Analysis:

The Board vide email dated 8th October 2018 directed the RP to furnish certain additional documents followed by a reminder dated 18th October 2018. As per the contents of the email dated 8th October 2018, the following documents were sought:

a) Fee agreement (signed) entered with the Applicant;

b) Date-wise list of CoC meetings (including adjourned meetings, if any)

conducted by you in your capacity as IRP and RP;

c) Copy of Notices sent to CoC members and others, if any, before conducting the CoC meetings and Agenda for each of the aforesaid CoC meetings;
d) Signed copy of Minutes of each of the CoC meetings;
e) Voting results (including of e-voting) pertaining to each of the CoC meetings;
f) Date-wise list of Progress Reports filed by you before the Hon'ble NCLT;
g) Copy of each of the aforesaid progress reports filed by you before Hon'ble NCLT; and
h) Applications filed before the Hon'ble NCLT in the said matter.

However, despite reminder being sent vide email dated 18th October 2018, the RP failed to provide the above documents and evasively stated in his email dated 20th October 2018 that "*the case is too old and may be treated as closed without wasting your time and IPs time in creating correspondences.*" He also advised the Board to refer to his reply dated 24th May 2018 in answer to queries in the matter.

The Board vide email dated 17th May 2018 only requested the RP to furnish minutes of all CoC meetings and progress reports submitted by him to Hon'ble NCLT to which a reply was sent by the RP vide email dated 24th May 2018.

Thus, the RP failed to provide additional documents in his email dated 20th October 2018 as required by the Board vide email dated 8th October 2018. The counsel for the RP also admitted during the personal hearing that such a reply (vide email dated 20th October 2018) was inappropriate though unintentional.

Regulation 7 (2) (h) of the IBBI (Insolvency Professional) Regulations, 2016 provides:
"(2) The registration shall be subject to the conditions that the insolvency professional shall –
(h) abide by the Code of Conduct specified in the First Schedule to these Regulations."

Clause 18 of the Code of Conduct to IBBI (Insolvency Professional) Regulations, 2016 provides:
"*An insolvency professional must appear, co-operate and be available for inspections and investigations carried out by the Board, any person authorised by the Board or the insolvency professional agency with which he is enrolled."*

Clause 19 of the Code of Conduct to IBBI (Insolvency Professional) Regulations, 2016 also provides:
"*An insolvency professional must provide all information and records as may be required*
by the Board or the insolvency professional agency with which he is enrolled."

Regulation 4(4) of the IBBI (Inspection and Investigation) Regulations, 2017 obligates an IP to furnish all documents to the IA and provides:
"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."

Thus, an IP is bound to provide necessary information and furnish all documents required by the Board. In the present case, the RP failed to provide additional documents with his email dated 20th October 2018 (as requested by the Board vide email dated 8th October 2018) and thus, acted in contravention of the above provisions. He only provided the documents (as requested by the Inspection Authority vide email dated 6th March 2019) to the IA vide email dated 25th March 2019 i.e. after a delay of 19 days despite knowing that inspection is a time bound exercise.

With reference to not submitting enclosures to Form 2 by RP as required by the IA vide email dated 29th March 2019, the RP replied vide email dated 4th April 2019 that "The attachments with Form 2 are not available". However, it is submitted by the counsel for the RP during personal hearing, that there were no enclosures to Form 2 and hence they could not have been provided by the RP. A perusal of Form 2 submitted by the RP also shows that no enclosures have been stated to be a part of Form 2. Thus, the RP cannot be held liable for non-submission of a document which does not exist.

Findings:

(a) Since RP has provided documents to the IA vide email dated 25th March 2019 although after a delay of 19 days, he cannot be strictly held liable for contravention of Regulation 4(4) of Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations 2017.

(b) During the CIRP when Board sought certain information/ documents from the RP, he replied by saying that these are too old and may be treated as closed without wasting Board's time and IP's time in creating correspondence, thereby, frustrating the statutory duties of the Board and, therefore, of the Code. Thus, he has acted in violation of the provisions of Regulation 7(2)(h) of IBBI (Insolvency Professionals) Regulations, 2016 read with Clause 19 of the Code of Conduct given in the First Schedule of the IBBI (Insolvency Professionals) Regulations, 2016.

4. **Conclusion**:

4.1 The role of IP is vital to the efficient operation of the insolvency and bankruptcy resolution process. A well-functioning system of resolution driven by a competent IP plays a significant role in cementing together the interests of the CD with those of the creditors. It is for this reason that the need of specialized professionals to complete the resolution processes has been unequivocally emphasized. The UNCITRAL Legislative Guide on Insolvency Law recognizes the role of an IP in the following words: "*However appointed, the insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially. Accordingly, it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime.*"

The BLRC, the recommendations of which has led to the enactment of the Code, in its Final Report, has also laid emphasis on the role of an IP as follows: "*'The 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... This creates Role of Resolution Professionals in CIRP the positive externality of better utilisation of judicial time."*

4.2 The Code also requires an IP to play a catalytic role in CIRP which requires a right combination of experts acting under the overall supervision of the IP. He is the backbone of the resolution process under the Code and success thereof hinges on the conduct and competence demonstrated by him. Also, a CD undergoing CIRP is a representation of interests of several stakeholders who pin their hopes on the outcome of CIRP. During CIRP, it is the utmost responsibility of an IP to run the company of CD as a going concern and conduct the entire CIRP in a transparent manner without creating additional insolvency resolution process costs.

4.3 In this matter, the DC observes that Mr. Dushyant C. Dave displayed a casual approach during the conduct of CIRP which can be elaborated as below:

a) An IP is the driving force and the nerve-center in an insolvency proceeding. A whole array of statutory and legal duties is vested in him and he is expected to perform them with due care and caution.
The Code shifts the control of a CD, when it is admitted into CIRP on its failure to service a debt, to creditors represented by a CoC for resolving its insolvency. The CoC holds the key to the fate of the CD and its stakeholders. Thus, several actions under the Code require approval of the CoC. On the other hand, the IP must maintain absolute independence in discharge of his statutory duties under the Code. In the present matter, the IP compromised his independence and sought approval of CoC for appointment of forensic auditor thereby abdicating his authority in favor of the CoC.

b) The Code casts an obligation upon the IP to co-operate with the Board and provide all information and records as may be required by the Board. However, in the present matter the RP, despite reminder email dated 18th October 2018, failed to provide documents as sought by the Board vide e mail dated 8th October 2018.

4.4 Thus, Mr. Dushyant C. Dave has displayed utter misunderstanding of the provisions of the Code and Regulations made thereunder. He has, therefore, contravened provisions of:

(a) Sections 25(2)(d), and 208(2)(a) and (e) of the Code,
(b) Regulation 7(2)(a) and 7(2)(h) of the IBBI (Insolvency Professionals) Regulations, 2016 read with clauses 14 and 19 of the Code of Conduct under the said Regulations.

5. Order

5.1 The DC is conscious of the fact that the insolvency regime in India is at its infancy. Also, the insolvency profession is new and emerging. Further, it is also recognised that the role of an IP in India is significantly different as compared to other matured jurisdictions. These facts may call for some leniency as long as these are not *mala fide*.

5.2 In view of the above, the DC, in exercise of the powers conferred under Regulation 13 (3) (b) of the IBBI (Inspection and Investigation) Regulations, 2017 and Section 220 (2) of the Code read with sub-regulations (7) and (8) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, disposes of the SCN

with the following directions:

5.2.1 Keeping in view the circumstances of the CIRP of Corporate Debtor, the RP is hereby warned to be extremely careful, diligent, strictly act as per law and similar action should not be repeated.

5.3 A copy of this order shall be forwarded to the Insolvency Professional Agency of Institute of Cost Accountants of India where Mr. Dushyant C. Dave is enrolled as a member.

5.4 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, New Delhi, for information

5.5 Accordingly, the show cause notice is disposed of.

-sd-

(Dr. Navrang Saini)
Whole Time Member, IBBI

Dated: 27th February 2020
Place: New Delhi