

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/23/2020
27th April 2020

Order

In the matter of Mr. Ashwini Mehra, 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).

Appearance at hearing:

For Noticee	Mr. Ashwini Mehra, IP Mr. Piyush Mishra, Advocate Mr. Archit Grover, Duff & Phelps
For Board	Ms. Tuhina Mardi, Assistant Manager Mr. Vinay Pandey, Assistant Manager

1. Background

- 1.1 This Order disposes of the Show Cause Notice (SCN) dated 18th November 2019 issued to Mr. Ashwini Mehra, A-1601, Salarpuria Magnificia, 15th Floor, Old Madras Road, Bengaluru, Karnataka, 560016, who is a Professional Member of the Indian Institute of Insolvency Professional of ICAI and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board/IBBI) with Registration No. IBBI/IPA-001/IP-P00388/2017-18/10706.
- 1.2 In exercise of its powers under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017, the Board vide Order dated 6th June 2019 appointed an Inspecting Authority (IA) to conduct an inspection of Mr. Ashwini Mehra, 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 18th November 2019 had issued the SCN to Mr. Ashwini Mehra, based on findings of an inspection in respect of his role as interim resolution professional (IRP)/ resolution professional (RP) in corporate insolvency resolution process (CIRP) of Educomp Infrastructure & School Limited (CD). The SCN alleged contraventions of several provisions of the Insolvency and Bankruptcy Code, 2016 (Code), the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and the Code of Conduct under regulation 7(2) thereof, IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) and IBBI Circular dated 12th June 2018 on 'Fees and other Expenses incurred for Corporate Insolvency Resolution Process'. Mr. Ashwini Mehra replied to the SCN vide letter dated 9th December 2019.
- 1.4 The Board referred the SCN, response of Mr. Ashwini Mehra 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. Ashwini Mehra availed an

opportunity of personal hearing before the DC on 2nd March 2020 when he reiterated the submissions made in his written reply and also made a few additional submissions. Thereafter, the IP submitted some additional documents vide email dated 6th and 7th March 2020 in support of his submissions made during the course of personal hearing.

2. Consideration of SCN

The DC has considered the SCN, the reply to SCN, written and oral submissions of Mr. Ashwini Mehra, 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. Ashwini Mehra's written and oral submissions thereon and their analysis with findings of the DC are as under:

- 3.1 **Contravention:** In 2nd Committee of Creditors (CoC) meeting dated 24th May, 2018, Shardul Amarchand Mangaldas (SAM) was appointed by CoC members as their legal counsel. Fee of SAM was also decided in the said CoC meeting by the CoC members. CIRP fees does not include such costs, which are incurred by the members of the CoC directly. However, it has been observed that fee of SAM was included in CIRP costs in violation to section 5(13) of the Code and regulation 31 CIRP Regulations. Further, even though it was reiterated in the IBBI Circular dated 12.06.2018 on 'Fees and other Expenses incurred for Corporate Insolvency Resolution Process' that the CIRP cost would not include costs which are not incurred by the IRP/RP, it has been observed that post this circular also, IP still continued to accept the invoices of SAM.

Submission: The IP submitted that the CoC members had approved the appointment of SAM as the CoC legal counsel on 01.06.2018 in the 2nd CoC meeting and the Circular in relation to CIRP costs and payment of fees of CoC legal counsel was issued by IBBI on 12.06.2018 after the appointment of SAM by CoC. The IP adds that only interim payments were made by the RP on a provisional basis towards SAM fees. This was because multiple litigations had been initiated against both RP and CoC in various forums, and involvement of CoC's legal counsel (i.e. SAM) was critical from the perspective of CoC.

The IP further submitted that in light of directions of the Board, he has already asked the lenders to refund the amounts paid by CD towards SAM fees and the lenders thereafter held a meeting in this regard and communication of their decision to comply with the directions issued by the Board is awaited.

During the personal hearing on 02.03.2020, it was further submitted by the IP that the fees of the legal advisor of the CoC should be a part of the CIRP since they evaluate the resolution plan, protect the interests of the CD, strive for value maximization of the CD etc. Hence, the legal counsel of the CoC becomes an integral part of the CIRP and their fee should be included in the CIRP Cost. Further, the IP informed that after the issue of instructions by the Board, the RP discontinued making payment of the fees to SAM and the part that has already been paid is being reimbursed by the CoC members. The RP also

claimed that a CoC member has already advanced part payment towards the reimbursement.

Analysis:

It has been observed from the minutes of 2nd CoC meeting held on 01.06.2018 that a proposal was made to appoint SAM as lender's legal counsel at a fee of Rs. 9 lakh for 75 hours per month whereas additional hours were to be billed at Rs. 12,000 per hour. Further, invoices dated 26.02.2019 and 04.04.2019 have been raised by SAM for an amount of Rs. 9,04,244.07 and Rs. 12,02,043.91 respectively. The IP has also disclosed that the total amount paid to SAM including TDS is Rs. 73,87,642.

It has further been observed that the RP wrote an email dated 05.12.2019 to the members of CoC directing them to reimburse the legal fees that has been paid to SAM as CIRP costs. The IP has also informed, during the personal hearing, that one of the CoC members namely Punjab National bank has already reimbursed their respective share paid to SAM.

Section 5(13) of the Code defines the term 'Insolvency Resolution Process Costs' (IRPC) as follows -

5 (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.

Further, Regulation 31 of CIRP Regulations, 2016 provides that:

31. "Insolvency Resolution Process Costs" under Section 5(13)(e) shall mean –

- (a) amounts due to suppliers of essential goods and services under Regulation 32;
- (b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);
- (c) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;
- (d) expenses incurred on or by the interim resolution professional fixed under Regulation 34; and
- (e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.

The term IRPC, as defined in Section 5(13) of the Code read with Regulation 31 of the CIRP Regulations, 2016, does not include fee paid to CoC's legal counsel as it is incurred by members of CoC and has no direct nexus to the CIRP. However, in the present case, RP included the fee payable to CoC's legal counsel i.e. SAM while calculating IRPC.

In this regard, the words “*directly relating to the corporate insolvency resolution process*” used in Regulation 31(e) of CIRP Regulations, 2016 are significant. It is observed that the use of the word ‘*directly*’ unequivocally means that any indirect costs shall not be considered as CIRP costs since the provisions of the Code as well as CIRP Regulations, 2016 nowhere provides for inclusion of fee paid to the CoC’s legal counsel in the IRPC.

Further, Circular dated 12.06.2018 issued by IBBI in relation to CIRP costs and payment of fees of CoC legal counsel clearly states that,

“8. It is clarified that the IRPC shall not include:

(a) any fee or other expense not directly related to CIRP;

(b) any fee or other expense beyond the amount approved by CoC, where such approval is required;

(c) any fee or other expense incurred before the commencement of CIRP or to be incurred after the completion of the CIRP;

(d) any expense incurred by a creditor, claimant, resolution applicant, promoter or member of the Board of Directors of the corporate debtor in relation to the CIRP;

(e) any penalty imposed on the corporate debtor for non-compliance with applicable laws during the CIRP;

[Reference: Section 17 (2) (e) of the Code read with circular No. IP/002/2018 dated 3rd January, 2018.]

(f) any expense incurred by a member of CoC or a professional engaged by the CoC;

(g) any expense incurred on travel and stay of a member of CoC; and

(h) any expense incurred by the CoC directly;

[Explanation: Legal opinion is required on a matter. If that matter is relevant for the CIRP, the IP shall obtain it. If the CoC requires a legal opinion in addition to or in lieu of the opinion obtained or being obtained by the IP, the expense of such opinion shall not be included in IRPC.]

(i) any expense beyond the amount approved by the CoC, wherever such approval is required; and

(j) any expense not related to CIRP.”

Thus, in effect, the Circular issued by IBBI further clarifies the position of law that has already been mentioned in the Code and the CIRP Regulations, 2016.

It is important to mention that IRPC is an added financial stress on an already ailing CD (who is unable to pay his debt), and is paid in priority before all other dues and claims. By including the lender’s legal counsel fees as IRPC, the expenses of CoC will be paid in priority to the legitimate dues and claims of workmen, employees or operational creditors who will have to compromise on their dues by taking additional haircuts in order to accommodate these costs.

It is the duty of an IP 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 an ailing CD is not overburdened with exorbitantly high IRPC and only those

expenses are included in IRPC which are directly incurred by the CD.

The RP, in spite of the issue of IBBI Circular dated 12.06.2018 clearly stating under para 8 clause (f) that the IRPC shall not include any expense incurred by a member of CoC or a professional engaged by the CoC continued to make payment of the fee of lender's legal counsel from the IRPC, thereby failing to adhere to the directions issued by the Board.

The IP was well aware of the contravention made by him of the provisions of the Code and hence, he admittedly requested the CoC members to reimburse the payment already made towards the lender's legal counsel. However, a request for reimbursement cannot cure a violation that has been made. If the Board had not conducted an inspection and pointed out the contravention, the IP would have gone scot free without any repercussions. Thus, by writing an email to the CoC members, the RP cannot cover up the contravention.

Findings:

It is observed that the RP, despite the directions issued vide 6 IBBI Circular dated 12.06.2018, has made a payment of Rs. 73,87,642/- to SAM as on 05.12.2019 which is clearly in contravention of the provisions of the Code. Further, the invoices dated 26.02.2019 and 04.04.2019 raised by SAM for an amount of Rs. 9,04,244.07 and Rs. 12,02,043.91 respectively shows that payments were being made to SAM even after the issue of IBBI Circular dated 12.06.2018.

The conduct of RP by making payment of the fee of lender's legal counsel from the IRPC is in violation of Sections 5(13), 208(2)(a) & (e) of the Code and Regulation 7(2)(a), 7(2)(h) & 7(2)(i) of the IP Regulations read with clause(s) 10 and 14 of the Code of Conduct as given in the First Schedule of the IP Regulations, Regulation 31 of the CIRP Regulations and IBBI Circular dated 12th June 2018.

- 3.2 **Contravention:** IP appointed Kroll as Forensic Auditor on 10th August 2018 in this matter. Kroll submitted the Forensic Audit report on 22nd November, 2018. Thereafter, Kroll was again appointed on 11th January 2019 to conduct Forensic Audit for period between 01st April 2014 - 31st May 2018 on directions of the CoC members (minutes of the 10th CoC meeting dated 7th January, 2019). IP is required to take an independent decision on whether there was a need to get forensic audit of the CD again rather than abdicating the authority in favour of CoC and allowing them to usurp RP's authority. Also, since it is the CoC and not RP who decided to conduct the forensic audit again, the cost of the second audit should not have been made a part of CIRP cost in accordance to IBBI Circular dated 12th June 2018.

Submission: The IP submitted that based on the findings of serious and significant nature in the transaction audit conducted by Kroll, the CoC sought a larger audit on an enhanced scope of forensic audit to be conducted in relation to the affairs of the CD and the RP agreed with the same. Accordingly, the engagement letter for Kroll was executed by the RP in relation to this additional scope with an understanding that it is part of the CIRP

cost. The IP further submitted that after the clarification by IA regarding the inclusion of the cost of second forensic audit in IRPC, he has discussed with the members of CoC and has asked them to refund the amount of Rs. 50,74,000/- (including TDS) paid towards Kroll fees for such enhanced work vide email dt.08.12.2019.

During the personal hearing, it was submitted by the IP that taking a principle direction from CoC is not a contravention and it was an act of taking additional approval along with RP's own satisfaction. He added that reporting to the CoC does not amounts to abdicating his authority in favour of the CoC.

Analysis:

It has been observed from the minutes of the 10th CoC meeting dated 07.01.2019 that: *“25. The CoC communicated that they had decided to appoint Kroll to conduct a forensic audit of the Corporate Debtor at a fee of INR 41 lacs plus out-of-pocket expenses, which will be capped at INR 2 lacs. The CoC authorized the RP to finalize the appointment.”*

Further, the RP also submitted in his written reply that CoC sought for a larger audit based on the findings of serious and significant nature in the transaction audit conducted by Kroll, and had enhanced the scope of forensic audit to be conducted in relation to the affairs of the CD to which the RP had agreed.

The minutes of the 10th CoC meeting are amply clear which states that *“The CoC communicated that they had decided to appoint Kroll to conduct a forensic audit of the Corporate Debtor”*. The CoC also authorised the RP to finalise the appointment. Hence, it is evident that the appointment of Kroll was made on the decision taken and communicated by the CoC members and in such a scenario, the cost incurred by Kroll should not have formed part of IRPC.

Under the provisions of the Code, the responsibilities of CoC and IP are clearly demarcated. 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.

Further, as per the 2nd CoC presentation submitted by IP vide email dated 06.03.2020 and 07.03.2020 as an addendum to reply to SCN, the initial bid of Kroll was for a fee of Rs.17,00,000 with taxes for a review period of 2 years or Rs.28,50,000 with taxes for a review period of 5 years. However, it has been observed that the fee for forensic audit conducted for the period of 01.04.2014 - 31.05.2018, even after the forensic audit had already been conducted for financial year 2017 and 2018, was Rs. 50,74,000/-. Even though the scope of the audit had been enhanced, it cannot be ignored that a large amount has been cumulatively paid for conduct of two forensic audits (i.e. Rs. 17,00,000 + Rs. 50,74,000 = Rs. 67,74,000/-) despite the fact that the initial bid made by Kroll was Rs.28,50,000 with taxes for a review period of 5 years.

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

“25. (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;”

In the present case, the IP also submitted that when IA pointed out the inclusion of cost incurred on the conduct of second forensic audit in IRPC, the RP discussed the same with the members of CoC and consequently asked the lenders to refund the amount of Rs. 50,74,000/- (including TDS) paid towards Kroll fees for such enhanced work vide email dated 08.12.2019.

Thus, it can be observed that the IP had based the appointment of Kroll solely upon the decision of CoC and only when the IA pointed out the contravention to the RP, he rushed to mitigate the violation by requesting the CoC members to refund the amount so paid.

Findings:

Since the RP has made the appointment of Kroll to conduct a forensic Audit of the Corporate Debtor on the basis of a decision of the COC, he has contravened provisions of Sections 5(13), 208(2)(a) and (e) of the Code and Regulation 7(2)(a) and 7(2)(h) of the IP Regulations, read with clause(s) 10, 14 and 25 of the Code of Conduct as given in the First Schedule of the IP Regulations and Regulation 31 of the CIRP Regulations and IBBI Circular dated 12th June 2018.

- 3.3 **Contravention:** IP had appointed Duff & Phelps, wherein IP is a Partner, vide engagement letter 16th June 2018 for providing infrastructure and back office support for monthly fees of Rs. 18 lakhs (excluding out of pocket expense and applicable taxes). Further, Kroll a division of Duff & Phelps was appointed as a Forensic Auditor for this matter not just once but twice on 10th August 2018 and 11th January 2019, respectively. The position as an IP is clearly in conflict with the IP's position as a partner of Duff & Phelps. This is a clear conflict of interest as IP has used his position to unduly derive some benefits to the firm in which he is a partner.

Submission: IP submitted that neither the IRP Mr. Manoj Maheshwari nor the RP were Partners in Duff & Phelps India Private Limited, RP was partner in 'D&P India Restructuring LLP' which was proposed to be set up as an Insolvency Professional Entity but due to changes in IBBI guidelines and regulations governing IPEs the entity was never operationalized and the RP resigned from the position as partner in D&P India Restructuring LLP. The IP also submitted that the appointment of Duff & Phelps and IRP was finalized by lenders through a competitive bidding process in joint lender's forum dated February 28, 2018 and fees was duly ratified by CoC members in the CoC meeting dated June 01, 2018. Quotes were invited from reputed resolution professionals and after detailed deliberations, Mr. Manoj Maheshwari as IRP along with proposal of Duff &

Phelps were selected. This was the standard appointment process followed in most of the insolvency cases around that time, and the CoC members looked at both, the credentials of the IRP, together with the quality of support that the IRP has.

Further, the IP states that in the appointment of Kroll, proper process was followed in terms of inviting bids from major firms. Post discussions among the CoC members, it was agreed that Kroll seemed to be most suitable on the basis of credentials and fees quoted by them. Also Duff & Phelps India Private Limited had acquired Kroll recently and the same was discussed in the CoC meeting and it was concluded that since the firms are separate entities and have separate teams, the CoC does not perceive any conflict of interest arising due to the same, based on the discussions with the legal counsel.

At the time of personal hearing, it was submitted by the IP that during the presentation of 2nd CoC meeting it was also disclosed to the CoC members that the RP was in the founding team of Restructuring practice at Duff & Phelps India. Hence, there is no conflict of interest.

Analysis:

Section 208(2) of the Code provides that:

“208. (2) Every insolvency professional shall abide by the following code of conduct: —
(a) to take reasonable care and diligence while performing his duties;
(b) to comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member;
(c) to allow the insolvency professional agency to inspect his records;
(d) to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and
(e) to perform his functions in such manner and subject to such conditions as may be specified.”

Further, Regulation 7(2) (h) of IP Regulations, 2016 provides:

“7. (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;”

Moreover, the Code of Conduct (as per the Regulation 7(2) (h) of IP Regulations, 2016) clearly states that:

“3. An insolvency professional must act with objectivity in his professional dealings by ensuring that his decisions are made without the presence of any bias, conflict of interest, coercion, or undue influence of any party, whether directly connected to the insolvency proceedings or not.

5. An insolvency professional must maintain complete independence in his professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences.

14. An insolvency professional must not act with malafide or be negligent while

performing his functions and duties under the Code.”

It is observed that during the bidding process, 4 proposals were received and EY quoted a lower bid of Rs.16,00,000 with taxes as their fee for a review period of 2 years or Rs.28,00,000 with taxes as their fees for a review period of 5 years whereas Kroll had made a bid of Rs.17,00,000 with taxes as their fees for a review period of 2 years or Rs.28,50,000 with taxes as their fees for a review period of 5 years. However, the CoC during the 2nd CoC meeting dated 01.06.2018 had agreed to make the appointment of Kroll. The relevant excerpt from the minutes of 2nd CoC meeting is as under:

“The proposals received were discussed and most of the COC members agreed that Kroll seemed to be the most suitable on basis of credentials and fees quoted. Axis Bank proposed EY but agreed to go with the consensus and approve Kroll’s appointment.

It was stated that Duff & Phelps had recently acquired Kroll’s business globally. But since the firms are separate entities and have separate teams, the COC didn’t see a conflict arising due to the same. Moreover, conducting Forensic Audit comes under the domain of IRP/RP and therefore even if the firm is same there will be no conflict of interest if Chinese wall is maintained which was agreed by COC.”

Hence, it is observed that the CoC members had taken note of the conflict of interest that may arise from the appointment of Kroll for conduct of first forensic audit, however remarked that there will not be any conflict of interest if a Chinese wall is maintained between the RP’s team and the Kroll auditing team.

Since, the appointment of Kroll was made after discussion by CoC (considering the fact that Kroll has been acquired recently by Duff & Phelps India, however, both the firms are separate entity), no conflict of interest could be established.

Further, the Code of Conduct under Regulation 7(2)(h) of the IP Regulations provides that:

“3A. An insolvency professional must disclose the details of any conflict of interests to the stakeholders, whenever he comes across such conflict of interest during an assignment.”

It has also been observed that the IP had already informed the members of CoC that he was a member of the founding team of Restructuring Practice at Duff & Phelps India Private Limited in his 2nd CoC Presentation and the CoC had taken note of the Kroll’s acquisition by Duff & Phelps India Private Limited prior to his appointment in the 2nd CoC meeting, therefore, no instance of conflict of interest could be made out.

Findings:

Since, the appointment of Kroll was discussed in the 2nd CoC meeting in which RP was confirmed by CoC but yet to be appointed by the Adjudicating Authority, it cannot be said that there was conflict of interest in the appointment by RP as CoC had already addressed

the issue of conflict of interest and had suggested measures to keep the RP's team and Kroll's team separate. Further, the second appointment of Kroll on 11.01.2019 for an enlarged scope of forensic audit was made upon the decision of the CoC and not the IP. Hence, the DC cannot hold the IP liable for conflict of interest in the appointment of Kroll.

- 3.4 **Contravention:** Valuation is a vital part of the CIRP, and a proper understanding of liquidation value is crucial to protect the interest of stakeholders and to formulate a compliant resolution plan. Any error in determining the liquidation value in the CIRP can have far-reaching consequences including the effect of undermining or reversing any resolution plan that may be approved based on an incorrect liquidation value. Hence, valuation needs to be conducted independently by the valuers without the influence of any stakeholders.

In the aforementioned matter it has been observed from the valuation report that both the valuers revised the fair value and liquidation value on the instructions of CoC. Post this revision, CBRE South Asia Pvt Ltd. decreased the liquidation value by Rs. 176.79 Cr and E&Y decreased the liquidation value by Rs. 248 Cr in contravention to Regulation 35 (2) of the CIRP regulations which states that valuers should provide valuation report(s) directly to the RP only and thereafter, the information in valuation report may be shared with the CoC members only after receiving an undertaking from all the members. IP's actions indicate misunderstanding of the law and an attempt to mislead the stakeholders on such a crucial aspect.

Submission:

The IP submitted that the valuations (i.e. relating to fair value and liquidation value) were only disclosed by the RP to the CoC members after resolution plans had been opened and tabled before the CoC members, and confidentiality undertaking had been obtained from each of the CoC members. The IP accepted that valuation is a key exercise and the valuers are supposed to follow appropriate methodology and assumptions. If the assumptions or methodology are incorrect, it might have a significant impact on the process. Hence, clarifications on methodology and assumptions are important to arrive at correct valuations.

The IP also submitted that the RP/CoC have not interfered with the valuation exercise or the value, the CoC had queried about the methodology and assumptions, which the valuers agree with and then accordingly revised the report. This was an objective and transparent process. At no point of time have the RP or the CoC members asked the valuers to revise the values that they had arrived at and that no stakeholders were misled based on the actions of the RP.

During the personal hearing and also vide his email dated 06.03.2020 and 07.03.2020 as an addendum to his SCN reply, it was submitted by the IP that as per the International Valuation Standards it has been provided that:

“100. Business Information

100.1. The valuation of a business entity or interest frequently requires reliance upon information received from management, representatives of the management or other experts. As required by IVS 105 Valuation Approaches and Methods, para 10.7, a valuer must assess the reasonableness of information received from management, representatives of management or other experts and evaluate whether it is appropriate to rely on that information for the valuation purpose.”

Analysis:

Regulation 35 (2) of the CIRP Regulations, 2016 provides that:

“35. (2). After the receipt of resolution plans in accordance with the Code and these regulations, the resolution professional shall provide the fair value and the liquidation value to every member of the committee in electronic form, on receiving an undertaking from the member to the effect that such member shall maintain confidentiality of the fair value and the liquidation value and shall not use such values to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29.”

Section 29 (2) of the Code provides that:

“29. (2). The resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes-

(a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;

(b) to protect any intellectual property of the corporate debtor it may have access to; and

(c) not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.

Explanation. – For the purposes of this section, “relevant information” means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified.”

The valuation exercise plays a very critical role in protecting the interests of all stakeholders as it forms the basis of decisions taken to arrive at the proportion of the claim or dues that each stakeholder may recover from the CD and also to formulate a compliant resolution plan. Any unwarranted influence or modification in determining the liquidation value during CIRP may affect the decision of prospective resolution applicants while evaluating their bid in potential resolution plan. Hence, valuation needs to be conducted independently by the valuers without influence of any stakeholders.

It has been observed from the valuation reports that both the valuers revised the liquidation value. Post the instruction from CoC members, CBRE South Asia Pvt. Ltd.

had originally estimated liquidation value at Rs. 614.259 Cr, however, decreased the same liquidation value to Rs. 437.47 Cr i.e. by Rs. 176.79 Cr. On the other hand, E&Y had originally estimated liquidation value at Rs. 734.69 Cr, however, decreased the same to Rs. 487.3 Cr i.e. by Rs. 247.39 Cr.

However, it has been observed that no evidence has been placed on record to prove that the RP or the CoC have interfered with the valuation exercise or the liquidation values. The IP submitted that CoC had only enquired about the methodology and assumptions and made certain suggestions to which the valuers agreed with and revised the report accordingly which is acceptable.

Further, the RP has placed reliance on the International Valuation Standards and has submitted that a valuer frequently places reliance upon information received from management, representatives of the management or other experts but a valuer must assess the reasonableness of such information and evaluate the appropriateness of the same for valuation purposes.

Moreover, it can be observed from the minutes of the 10th CoC meeting that, *“The RP apprised the CoC that both appointed valuers, EY and CBRE, have prepared the draft analysis on the basis of the available information. Further, the valuation analysis can be presented to the CoC post-submission of the resolution plans.”*

Thus, from the above it can be observed that the draft analysis of the valuation report was not shared with the CoC, however, it was decided that the same can be presented to the CoC post the submission of the resolution plans as per Regulation 35 (2) of the CIRP Regulations, 2016. Therefore, no contravention could be made out on the basis of the information placed on record.

Findings:

Since no evidence has been found corroborating the fact that either RP or CoC has interfered with valuation exercise or the liquidation values could be determined, the IP cannot be held liable for contravening the provisions of Regulation 35 of CIRP Regulations.

3.5 **Contravention:** It has been observed that unreasonable CIRP costs has been incurred by the IP in appointment of following law firms and advocates when AZB & Associates were already appointed for legal assistance during CIRP at exorbitant costs (Rs. 11 Lakh for upto 100 hours and after that Rs.12,000 per hour).

- Appointment of ASA Law firm for updating title report of 62 properties for a fee of 21 Lakh
- Appointment of Sumant Batra for providing legal opinion for a fee of Rs. 2.5 Lakh
- Appointment of Mr. Arun Kathpalia and Mr. Sanjay Bhan for appearing before Hon’ble NCLT at a fee of Rs. 11 and 7 Lakh per hearing respectively.

With respect to appointment of Mr. Sumant Batra, it was submitted by IP that his

appointment took place after discussions in the CoC meetings and he was appointed specifically for handling the consolidation (of Videocon companies) petition. However, from the minutes of 10th CoC meeting dated 7th January, 2019, it has been observed that no such discussion took place with CoC members before appointing him.

Also, it is noted that Protocol Insurance Surveyors & Loss Assessors were appointed for measurement of Built-Up areas at 12 schools for a fee of 7.5 Lakh plus OPE plus GST. However, this exercise should have been a part of valuation exercise. These actions reflect that the professionals were appointed by the IP arbitrarily and in a non-transparent manner.

Submission:

a) Appointment of ASA Law Firm

IP submitted that the appointment of ASA law firm was conducted through a competitive bidding process and their fees was duly ratified by the CoC members in 11th CoC meeting dated 21st February, 2019. Quotes were invited from legal firms for conducting title search and after detailed deliberations, ASA law firm was selected.

Also, the appointment of ASA law firm resulted in significant cost saving for CD as the quote provided by ASA law firm was very reasonable compared to the agreed rates at which AZB & Partners was appointed as RP's legal counsel. The IP also stated that engagement of ASA law firm was for a specific mandate and there was no overlap of work between ASA law firm and AZB & Partners, in their capacity as RP's legal counsel. The scope of work for ASA law firm was clearly demarcated and restricted to updation of title reports of 62 properties as requested by resolution applicants. Also, ASA law firm was previously appointed by lenders of CD to conduct title search of the assets of CD few years back, and that this mandate was only an update on the previous engagement.

b) Appointment of Mr. Sumant Batra

As submitted in previous response dated 25th July, 2019, there was a difference of view between RP's legal counsel and CoC's legal counsel in relation to filing of consolidation application in relation to the ongoing CIRP of CD. Accordingly, based on discussions with CoC members, it was decided that a third party opinion is required to assess the situation and provide the best way forward.

Mr. Sumant Batra being a well-known name in insolvency space in India and is also a member of the "Working Group in Group Insolvency", which was chaired by Mr U.K. Sinha. He was also involved in Videocon consolidation matter before adjudicating authorities, hence it was decided to approach Mr. Batra to obtain an opinion to ensure maximization of CD. Since most of these parties in relation to whom consolidation was being contemplated, were already a part of the avoidance application which was filed by the RP, it was discussed between the CoC members and RP to seek a third opinion to understand a best way forward in relation to consolidation petition. Further, the fees for Mr. Sumant Batra was only undertaken post receipt of approval of CoC members in 10th CoC meeting dated 7th January,

2019.

c) Appointment of Senior Advocates

The appointment of both Mr. Kathpalia (in 8th CoC meeting dated 28th November, 2018) and Mr. Bhan (in the 11th CoC meeting dated 21st February, 2019) was approved by CoC members, after consultation with both RP's and CoC's legal counsels, at a fees which was transparently discussed and disclosed.

It is a common practice to hire senior advocate in sensitive matters and matters which involve questions of law. Further, it was submitted by IP that it is a usual practice for law firms and solicitors to brief senior counsels or outside counsels, who frequently appear in NCLT/NCLAT in IBC cases.

Also, the IP clarified that though appointment of Mr. Arun Kathpalia was approved by CoC, he has not appeared on behalf of RP before NCLT in any matter, but only appeared before NCLAT.

Mr. Akshay Bhan, senior advocate, was engaged by the RP and has appeared only in few select hearings before NCLT where the matter was deemed sensitive.

d) Appointment of Protocol Insurance Surveyors:

IP highlighted that 'measurement' is not a part of scope of work of valuers or the valuation exercise. In case, measurement is included in the scope, the same would lead to much higher costs for appointment of valuers.

The appointment of a separate entity for undertaking measurements was critical due to the nature of operation of CD, i.e. the CD derives its rental income from various parcel of lands, for which it was required to know the exact measurement area of each land parcel. As there was material discrepancy between the measurement areas of various sites as was provided in the registered lease deeds and the details which were provided by the ex-management of CD. This was discussed in 7th CoC meeting and it was agreed to appoint an external entity to conduct measurement of certain critical land parcels based on the discrepancy. Accordingly, Protocol Insurance Surveyors was appointed through a competitive bidding process, and appointment and fees were duly ratified by the CoC members in 8th CoC meeting dated 28th November, 2018. The appointment of Protocol Insurance Surveyors was conducted in a fair and transparent manner.

During the personal hearing and in his email dated 06.03.2020 and 07.03.2020 as an addendum to his SCN reply, it was submitted by the IP that, ASA law had conducted Title Search Reports (TSR) updation in 2013, the TSR exercise for properties of the CD (which were 72 properties at that point) was conducted by ASA Legal for a fee of Rs. 22.5 lacs, implying a fee of Rs. 31,250/- per property. For the updation of the same in year 2019, fee of Rs. 21 lacs has been paid to ASA Legal for 62 properties of the CD implying a fee of

Rs. 33,870 per property. This exercise was carried out in order to ensure that there are no additional title issues as keenly requested by resolution applicants during CIRP.

Further, the IP had submitted that in relation to measurement of 12 operational schools by Protocol Insurance Surveyors & Loss Assessors, the International Valuation Standards does not clearly mention about the measurement. As per page 56- 100.1 on Business Information-

“The valuation of a business entity or interest frequently requires reliance upon information received from management, representatives of the management or other experts. As required by IVS 105 Valuation Approaches and Methods, para 10.7, a valuer must assess the reasonableness of information received from management, representatives of management or other experts and evaluate whether it is appropriate to rely on that information for the valuation purpose.”

Indian Valuation Standards as prescribed by ICAI for its members, ICAI Valuation Standards,

“36. A valuer may obtain written representations from the management/client regarding information for performing the valuation assignment. The decision to obtain a representation letter is a matter of judgment by the valuer. A written representation obtained from the management or those charged with governance becomes part of the evidence obtained by the valuer which forms a basis for his valuation report.

37. Wherever a valuer obtains written representations from the management/client regarding information which is the base for the valuation assignment, the valuer shall mention the fact of such representation and the reliance placed on the same.

38. The existence of a management representation letter shall not preclude the valuer from exercising reasonable skill and care with respect to the information obtained regarding the valuation. The valuer shall carry required procedures in the performance of his valuation assignment in respect of the information included in the management representation letter.”

Based on standard practice being followed in relation to similar valuations; valuers (EY and CBRE) have relied on the information on buildings shared by management/ RP. Further, IP asked valuers to carry out physical verification which they mentioned that same is not part of their standard scope and accordingly, a third party specialist/ surveyors (Protocol Insurance and Surveyors) was hired to carry out physical verification and their professional fee was approved by CoC. The IP further submitted that physical verification of real estate assets is a specialized exercise, and normally carried out by the surveyors who also provide CAD layout plans along with floor wise structures.

Analysis:

The primary focus of the Code is revival and continuation of a failing, but a viable CD. To ensure the continuation of the CD as a going concern, the Code mandates that the cost of continuation of essential services and the cost incurred by the RP in running the business of the CD is required to be paid in priority over other payments made to any creditor or stakeholders. The IRPC by its nature, is an added financial burden although a necessary

one, for the already distressed CD, who is unable to pay its debts. Section 30(2) of the Code requires that resolution plan shall provide for payment of IRPC in priority to payment of other debts of the CD. Hence, it is crucial that the IRPC is to be kept at a minimum to ensure that there is no erosion of the value of the CD and no unnecessary cost is added which may take away from the already diminished shares of the creditors and other stakeholders.

Thus, it is the duty of an IP, under the Code, to take reasonable care and diligence while performing his duties, including incurring expenses. The IP is required to balance the interests of CD as well as the creditors and to ensure that the fees payable to the professionals are not exorbitant which may further cripple the CD.

a) Appointment of ASA Law Firm

It has been observed from the minutes of 11th CoC meeting dated 21.02.2019 that a technical due diligence of properties of CD was sought by the resolution applicants, hereby noting that:

“The RP further informed that basis the request of RAs to get a technical due diligence of the properties of the Corporate Debtor conducted, proposals had been sought from two firms to undertake the mandate. The quotes received were discussed and it was deliberated that same can be initiated at a later stage based on the feedback from the Resolution Applicants.

Further, the RP informed that two quotes (from Acuity and ASA legal) had also been invited for getting the Title Search Reports updated. The quotes received were deliberated and the lenders were of the view that ASA legal can be appointed post negotiation provided that the total quote is not more than INR 23 lacs.”

It has been observed that for the updation of title reports, conduct of due diligence of 62 properties in 10 states of India, which were mortgaged by the CD was based upon the request of the resolution applicants. Further, as per appointment letter dated 26.02.2019 to ASA Law Firm, a professional fee of Rs. 21 lacs was approved as per the lender’s requirement which stated that the total quote should not be more than Rs. 23 lacs.

Also, it has been submitted by the IP that, ASA law had already conducted TSR updation in 2013 for a fee of Rs. 22.5 lacs, implying a fee of Rs. 31,250/- per property. For updation of the same in year 2019, fee of Rs. 21.0 lacs has been paid to ASA Legal for 62 properties of the CD implying a fee of Rs. 33,870 per property. This exercise was carried out in order to ensure that there are no additional title issues as was keenly requested by resolution applicants during CIRP. Hence, it was for the confidence of the resolution applicants that the RP undertook the exercise and the fee was also reasonably negotiated.

The scope of the valuation exercise is limited only to ascertain the Fair Value and Liquidation Value of Educomp Infrastructure and School Management Limited.

E&Y in its report in the section “Sources of Information” has stated that the following

information as provided by RP have been inter-alia used for estimation of liquidation and fair value of EISML-

-Title Search Report (TSR) for 12 properties vide e mail dated 23rd April, 2019 and 27th April, 2019.

Further E&Y in its statement of limiting conditions has mentioned that “we have relied solely on the title documents received for such documents for such assets or properties. For the purpose of this report we have not verified such representations against any title documents”.

The CBRE in their critical assumptions noted that “This appraisal exercise is based on the premise that the subject properties have a clear title and are free from any encumbrances, disputes, claims etc. CBRE has not made any inquiries in this regard with the relevant legal/statutory authorities.”

Taking clue from the E & Y report which states that the TSR and site measurement report has been provided by RP it appears that TSR was not a part of valuation exercise. Moreover, it was got done on the request of resolution applicants. Hence it cannot be said that IP has appointed the firm arbitrarily.

b) Appointment of Mr. Sumant Batra

It has been alleged that no discussion took place with the CoC members prior to the appointment of Mr. Sumant Batra for providing legal opinion specifically for handling consolidation petition. However, the IP has submitted that since there was a difference of opinion between the RP and CoC’s legal counsel in relation to filing of consolidation application, it was decided that Mr. Batra, who had previously been involved in Videocon consolidation matter, should be approached to obtain an opinion to ensure maximization of value of CD. Since most of the parties on whom consolidation petition was being considered were part of avoidance application, it was discussed amongst the CoC members and RP to seek a third opinion and the fee for the same was approved in 10th CoC meeting.

The relevant excerpts from the 10th CoC minutes are,

“The RP informed the CoC that he had reached out to Mr. Sumant Batra to seek legal opinion on certain queries under the Insolvency and Bankruptcy Code, 2016, and related matters. Mr. Sumant Batra had agreed to undertake the engagement at a lumpsum fee of INR 2.50 lacs and the engagement letter has been executed to initiate the engagement. ... The resolution was unanimously approved by all the CoC members. Since members representing 100.00% assented to the matter, the resolution was adopted.”

It has been observed that CoC, in its 10th CoC meeting, had given its 100% assent for the appointment of Mr. Sumant Batra. Further, if the RP is of the opinion that to ensure maximization of value of CD an opinion is required on filing a consolidation petition so that parties covered under the consolidation petition could be made part of avoidance application, then as per Section 25 (2)(d) of the Code it is within the responsibilities of the RP to appoint such professionals.

c) Appointment of Senior Advocates

It has been alleged that the appointment of Mr. Arun Kathpalia and Mr. Sanjay Bhan for appearing before Hon'ble NCLT at fees of Rs. 11 and 7 lacs per hearing respectively is excessive. However, the IP has submitted that Mr. Kathpalia has only appeared before NCLAT and Mr. Bhan appeared only in selective hearings before NCLT when the matter was deemed sensitive. Further, it was submitted that it is a common practice to hire senior advocates to make representations in sensitive matters and matters which involves question of law. Also, it is a usual practice for law firms and solicitors to brief senior counsels or outside counsels, who frequently appear in NCLT/NCLAT in IBC cases.

It is observed from the minutes of the 8th CoC meeting held on 28.11.2018 that,
“Given the criteria of the avoidance application, it was proposed that a senior counsel needs to represent the RP in the proceedings at NCLT, Chandigarh. After considering various options, the RP shortlisted Mr. Arun Kathpalia, who has agreed to reduce his fees from Rs. 12.5 lac / hearing to a fee of INR 11 lacs/hearing (being an outstation tribunal Chandigarh). The CoC decided that the voting will be conducted through e-voting, and accordingly it was agreed that the following resolution shall be put to vote:

Resolution:

“RESOLVED THAT, pursuant to the applicable provisions of Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulations made thereunder, approval of the Committee of Creditors is hereby accorded for appointment of senior counsel, Mr. Arun Kathpalia to represent the RP before the NCLT, Chandigarh in relation to the application filed under Section 25 (J), 26, 43 to 51, 65 and 66 of IBC, 2016 and related matters thereto.”

Further, in the 11th CoC meeting dated 21.02.2019, the CoC unanimously adopted the below resolution,

“The RP informed the CoC that even though the CoC members had approved the appointment of Mr. Arun Kathpalia at a fee of INR 11 lacs for representing the RP in the avoidance application, Mr. Kathpalia was not available for the hearing on February 19, 2019. Hence, the RP had engaged Mr. Akshay Bhan at a fee of INR 7 lacs and this was informed to the lenders vide email dated February 12, 2019. Ratification was sought for the appointment of Mr. Bhan to represent the RP in the avoidance application and confirmation was also sought for his continuing to represent the RP in the avoidance application.”

It has been observed that the senior lawyers were appointed in select hearings in the sensitive matters such as for dealing with avoidance application. Hence, it cannot be said that the fee paid to senior advocates was exorbitant as it is a usual practice to engage senior advocate in critical and crucial matters and the fee is charged based on the quantum and scope of operation of the CD as per market practice.

d) Appointment of Protocol Insurance Surveyors & Loss Assessors Pvt. Ltd.

Protocol Insurance Surveyors & Loss Assessors Pvt. Ltd were appointed by the RP for a professional fee of Rs. 7.5 lacs for the measurement of built up areas at 12 schools, an exercise that could have been a part of the valuation. However, the IP submitted that measurement was not covered in the scope of work of valuation exercise and if the same would have been included it would have led to a higher fee for valuers. The IP also submitted that, crucial part of the CD's income is derived from renting of properties thus it was vital to know the exact measurements especially when there was material discrepancy in measured areas of various sites and details provided by ex-management of CD.

The minutes of the 7th CoC meeting dated 25.10.2018 notes that,

“The RP informed the CoC that both the valuers are facing issue in relation to discrepancy in the school building area as per agreements and as per information shared with Corporate Debtor. The discrepancies present in all the 25 operating schools were presented to the CoC.

RP's team has reached out to colliers for measurement of the school buildings. To start the process, 12 locations have been identified based on materiality / impact in the first phase. The valuers have been asked to submit draft analysis based on current information available and revise the same post the measurement.

Cost of measurement by Colliers has been quoted at approx. INR 15.5 lacs for the 12 shortlisted locations. The following resolution was therefore placed before the members of the Committee of Creditors for consideration:

“RESOLVED THAT, pursuant to the applicable provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulations made thereafter, approval of the Committee of Creditors is hereby accorded for appointment of Colliers for measurement of school buildings.”

The resolution was adopted by unanimous vote.”

Minutes of 8th CoC meeting dated 28.11.2018 notes that:

“In the last CoC meeting approval was provided by the CoC for appointment of Colliers International to measure built-up area at various schools. But since then Colliers had made changes to their proposals, including increase in fees, which led to the RP to reconsider and retract the appointment. RP team then approached other consultants and has finalized Protocol Insurance Surveyors & Loss Assessors Pvt. Ltd to undertake the measurement work at total fees of INR 7.5 lacs for 12 properties.

The same was discussed in the meeting and the CoC members took note of the appointment of Protocol Insurance Surveyors & Loss Assessors Pvt. Ltd.”

Further, the minutes of the 11th CoC meeting dated 21.02.2019 notes that,

“Protocol has prepared a draft analysis for 9 schools and the same was presented to the CoC members. Based on the survey, they have found that the built up area for 9 schools

was cumulatively about 30% greater than the area specified in the lease deeds.”

Furthermore, the IP submitted that neither the International Valuation Standards nor ICAI Valuation Standards clearly mentions that measurement shall be done as part of the valuation exercise. However, it permits the valuer to rely on the information received from management but he must assess the reasonableness of the information so obtained. In cases, where a written representation has been obtained from the management or those charged with governance, it becomes part of the evidence obtained by the valuer which then forms a basis for his valuation report.

It has been further observed that there was material discrepancy to the extent of 30% in the original records provided as per the minutes of 11th CoC meeting. Hence, it was necessary to verify the records to ascertain the exact value of the parcel of land as it was a major source of income of the CD. Therefore, to create the records anew, a land surveyor was required to be appointed. It is noted that the appointment of Colliers International was rejected and they had quoted a fee of 15.5 lacs. Protocol Insurance Surveyors & Loss Assessors Pvt. Ltd was instead appointed for a fee of Rs 7.5 lacs for 12 properties. In the present case the measurement was not within the scope of the work assigned to the valuers, which if included would have led to higher fees.

E&Y in its report in the section “Sources of Information” has stated that the following information as provided by RP have been inter-alia used for estimation of liquidation and fair value of EISML-

-Site Measurement Report for the built-up area of 12 Operational Schools vide e mail dated 25 February, 2019,

The CBRE in their critical assumptions noted that “This appraisal exercise is based on the premise that the subject properties have a clear title and are free from any encumbrances, disputes, claims etc. CBRE has not made any inquiries in this regard with the relevant legal/statutory authorities.”

Since, site measurement report has been provided by RP it appears that this was not a part of valuation exercise. Hence it cannot be said that IP has appointed the firm arbitrarily.

Findings:

The RP has been able to provide satisfactory justification for the IRPC incurred by the CD for the appointment of various professionals. Hence, the DC cannot hold the IP liable for payment of exorbitant fee to the professionals during the conduct of CIRP.

- 3.6 **Contravention:** Post commencement of CIRP, an IP must actively manage the corporate debtor. He should be directly involved in all types of communication(s) with the stakeholders including prospective resolution applicants. SBI Caps was appointed as a Process Advisor in the present matter to select the prospective resolution applicants, evaluation of bids, preparing the VDR etc. However, it was observed from minutes of various CoC meetings that there was excessive involvement of SBI Caps, especially with respect to communications with resolution applicants. Moreover, SBI Capital was also

made a part of the process of opening of resolution plans in 12th CoC meeting dated 5th March 2019. IP had submitted that the Hon'ble NCLT had directed that Process Advisors would be part of the process of opening of resolution plans, however, no such order has been furnished by IP where such direction was provided to him by Hon'ble NCLT. Thus, the actions of the IP attempt to mislead the stakeholders including the Board.

Submission: IP submitted that the appointment of SBI Capital Markets (the 'Process Advisor') was conducted through a fair and competitive bidding process and their appointment and fees was duly ratified by the CoC members in 4th CoC meeting dated 09.08.2019. Quotes were invited from various entities undertaking process advisory and after detailed deliberations, SBI Capital Markets was selected as the Process Advisor. The Process Advisor is an independent entity, which advises the RP in relation to the process to be followed in relation to CIRP of CD. SBI Capital Markets has also been appointed in several other IBC matters for similar scope of work. Further, it is customary for the process advisors to be part of CoC meetings and to make presentations before CoC in relation to progress and updates on ongoing CIRP.

The IP clarifies that the NCLT did not direct that the Process Advisors would be part of opening of the resolution plans. The IP regretted any confusion in this regard. He stated that he only noted that both RP and CoC legal counsels agreed to the methodology that the Process Advisor should be part of opening of the resolution plans. The process for opening of resolution plans was devised by the RP and CoC members, in consultation with both legal counsels based on extensive discussions in the 12th CoC meeting. This was due to multiple litigations in this regard, in which both RP and CoC were party.

The IP further stated that the involvement of the Process Advisor as an independent third party in opening of resolution plan added credibility to the whole process, rather than compromise the process in any manner. This is especially true in this case because of various unfounded allegations and litigations were initiated against RP and CoC members by ex-directors of CD.

During the personal hearing the IP reiterated the same submissions made in the reply to the SCN.

Analysis:

A specific duty and responsibility is cast on the IP under the Code read with regulations made thereunder, mandating him to perform certain tasks under the Code while acting as an IRP, a RP, a Liquidator or a Bankruptcy Trustee and he shall not outsource his responsibilities to another individual. The IP may appoint various professionals such accountants, legal or other professionals, as may be necessary in accordance with the provisions of the Code to assist him in conducting the business and management of the CD, however, the IP cannot outsource the core functions that are entrusted to him by virtue of the provisions of the Code and the Regulations made thereunder. IP holds a legal position and cannot outsource his duties to other individuals, and evade accountability and

responsibility. For example, an IP cannot accept any certificate from another person certifying eligibility of a resolution applicant.

In the present matter, it has been alleged that the Hon'ble NCLT had directed that Process Advisors would be a part of the process of opening of resolution plans, however, the RP has clarified that no such direction has been issued by Hon'ble NCLT and further regretted any confusion in this regard.

Further, in the 12th CoC meeting dated 05.03.2019 it was observed that,
“It was discussed that the resolution plans will be submitted in the presence of the CoC members, representative of SBI Capital Markets Limited (the “Process Advisor”), RP and the RA. Post submission of all resolution plans, each of the resolution plans will be opened in the presence of Resolution Professional, Process Advisor, the relevant RA and the CoC members. The key pages (viz. resolution plan and financial bid) would be counter-signed by the RP, a few authorized representatives of CoC, representative of Process Advisor and the authorized representative of RA.”

It has been submitted by the IP that it is customary for the Process Advisor to be part of the CoC meetings and to make presentations before CoC in relation to progress and updates on ongoing CIRP. A process advisor is meant to be an independent body which assists and advises the RP in relation to CIRP of CD such as selection of prospective resolution applicants, evaluation of resolution plan, preparation of VDR etc. However, there is a blurring of line between the responsibilities of the RP and scope of work of the process advisor, and the involvement of the process advisor affects the independence and neutrality of the RP. However, as there is no explicit and unambiguously stated provision in the Code or the Regulation or a circular issued to that effect which clearly and strictly demarcates the roles and responsibilities of the RP and the Process Advisor, no contravention could be made out.

Findings:

In the present case, the RP admitted that the Hon'ble NCLT did not issue any direction with regard to Process Advisors being a part of opening of the resolution plans and also regretted any confusion in this regard in his written submissions. He further clarified that both RP and CoC legal counsels agreed to the methodology that the Process Advisor should be part of opening of the resolution plans. In the absence of any specific circular or provision under the Code or Regulations made thereunder which clearly elaborates the role of Process Advisors, no specific contravention could be made out.

Hence, the DC cannot hold the IP liable for involvement of the Process Advisor in the opening of resolution plans and also for communication with the Resolution Applicants.

- 3.7 **Contravention:** Information Memorandum (IM) contains all confidential information related to CD. It is therefore required that a fair and transparent process must be followed by the RP to maintain this confidentiality. It has been observed that the IP shared a copy of

IM discreetly with one of the resolution applicants (DPS, Ghaziabad) vide an email on 10.07.2018 in priority to all other resolution applicants with whom it was shared from 10.09.2018 onwards (as discussed in 6th CoC meeting). IP submitted that he signed an NDA with DPS Ghaziabad. However, signing an NDA with one party does not justify IP's action as IM was shared in violation of regulation 36B of CIRP Regulations which specifically provides a procedure as to how an IM amongst other things needs to be shared with the resolution applicants.

Submission: IP submitted that NDA was signed with Mr. Om Pathak before sharing the IM with him. The purpose of sharing the IM was to get an understanding of Education sector to attain value maximisation from an industry expert. The industry expert helped in providing clarity on highly technical issue, such as how Trust structure work, how CBSE would allow transfer to new applicant etc.

The IP also submitted that DPS, Ghaziabad Society was not a resolution applicant as they only submitted an EoI but never paid the VDR fees and did not go ahead with due diligence and also did not participate in the process. The list of prospective resolution applicants who paid VDR fee and conducted due diligence was provided by the IP.

The IP also highlighted the minutes of 6th CoC meeting in which it was disclosed to the CoC that DPS Ghaziabad Society has not shown any interest to take VDR access.

Analysis:

An IM is a very crucial document and the information provided under the IM provides a complete picture of the financial position of the CD which is confidential in nature. This information is vital as the prospective resolution applicant, based on the information furnished, would decide to make a bid for the CD by submitting a resolution plan. Further, the IM may also contain forecasts and projected financial information based on the data available with the RP and his financial advisors. Hence, the sensitive nature of the data contained in IM could lead to insider trading, breach of intellectual property, breach of trust and compromising of confidentiality resulting in loss to the CD and violation of the solemn objective of the Code i.e. maximization of value of CD.

Section 29(2) of the Code provides that,

“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.

(2) The resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes-

(a) to comply with provisions of law for the time being in force relating to confidentiality

and insider trading;

(b) to protect any intellectual property of the corporate debtor it may have access to; and
(c) not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.

Explanation. – For the purposes of this section, “relevant information” means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified.”

Further Regulation 36B of the CIRP Regulations provides that,

“36B. Request for resolution plans.

(1) The resolution professional shall issue the information memorandum, evaluation matrix and a request for resolution plans, within five days of the date of issue of the provisional list under sub-regulation (10) of regulation 36A to -

(a) every prospective resolution applicant in the provisional list; and

(b) every prospective resolution applicant who has contested the decision of the resolution professional against its non-inclusion in the provisional list.”

It has been observed that the RP shared the IM with one Mr. Om Pathak of DPS Ghaziabad society vide email dated 10.07.2018 which was in priority to all other resolution applicants even before the information was made public. The IP submitted that a non-disclosure agreement was signed with the Mr. Pathak and the IM was only shared to attain an understanding of the education sector and clarity on technical issues. The IP also admitted that DPS Ghaziabad was not a resolution applicant and did not pay the VDR fee but had only submitted an Expression of Interest.

However, it has been observed that Form G for Invitation of Expression of Interest was issued on 18.07.2018 while the RP shared the IM with Mr. Pathak of DPS Ghaziabad society on 10.7.2018 i.e. before they submitted their Expression of Interest and before the RP conducted due diligence to ensure if they would qualify as eligible prospective resolution applicants. Section 29 (2) (c) prohibits the RP from sharing *relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with*. Thus, this is clearly in contravention of Section 29. However, the DC cannot take the contravention *suo moto* as the same has not been indicated in the SCN and consequently, the RP has not got any chance to respond. Further, it has been observed that Regulation 36B of the CIRP Regulations was inserted w.e.f. 3.7.2018 and is made applicable to CIRP commencing on or after 3.7.2018. The CIRP in the present matter commenced on 25.04.2018 i.e. before the above amendment was introduced. In such circumstances, Regulation 36B of the CIRP Regulations shall not be applicable to the facts of the present case.

An IP, under the provisions of the Code, must maintain integrity and act with objectivity in

his professional dealings. He must act with due diligence while performing his functions, exercise reasonable care and take all necessary steps to ensure that the CIRP is conducted without any negligence.

However, since in the present matter, the RP shared the IM with Mr. Pathak prior to submission of Expression of Interest by DPS Ghaziabad society which manifests that the RP acted with biasness and failed to take reasonable care while performing his duties. It is also pertinent to mention that the Code empowers the RP to hire professionals and experts to assist him in the technical fields and in understanding the education sector yet the RP shared a highly confidential IM with a third party in the guise of seeking their individual expertise and failed to seek the assistance of any independent industry expert.

Findings:

It is observed that the IP shared the confidential IM with the DPS, Ghaziabad on 10.07.2018 i.e. prior to the publication of the Form G on 18.07.2018 and before ensuring that they would qualify as eligible prospective resolution applicants. Since Regulation 36B of the CIRP Regulations was inserted w.e.f. 3.7.2018 and is made applicable to CIRP commencing on or after 3.7.2018, it will not apply to the facts of the present case.

However, indisputably the RP shared the confidential IM with Mr. Pathak of DPS Ghaziabad society on 10.7.2018 i.e. before invitation of Expression of Interest and before the RP conducted due diligence to ensure if they would qualify as eligible prospective resolution applicants. This is in violation of Section 208(2)(a) of the Code and Regulation 7(2)(h) of the IP Regulations, read with clause 1, 2, 3, 14 and 17 of the Code of Conduct as given in the First Schedule of the IP Regulations.

4. Conclusion

4.1 As per the Code, the RP acts as a negotiator between the debtor and the creditor. He is an officer of the Court who oversees the entire resolution process and manages information thereby ensuring that the stakeholders are appropriately informed. The RP is appointed by the Adjudication Authority and by virtue of the Code, is given the responsibility to effectively manage the CD as a going concern and is entrusted with the fate of the ailing CD during the process of CIRP. This puts the RP in a central position possessing immense powers however, the RP also has the corresponding responsibility to abide by the Code, rules, regulations and guidelines at all times. During the CIRP, IP has to face many hurdles. He holds the information of the CD in trust which should be shared with third parties as permitted by the Code. There may be many outsiders interested in knowing the sensitive information, but RP must refrain from sharing the same unless permitted by the Code.

4.2 The BLRC also noted that:

“The Committee recommends that an industry of regulated professionals be enabled under

the Code (Burman and Roy, 2015). These Insolvency Professionals will be delegated the task of monitoring and managing matters of business by the Adjudicator, so that both creditors and the debtor can take comfort that economic value is not eroded by actions taken by the other. The role of the professional is also critical to ensure a robust separation of the Adjudicator's role in to ensuring adherence to the process of the law rather than on matters of business, while strengthening the efficiency of the process.

The Committee recognizes that it is not possible, at present, to fully design every last procedural detail about the working of the bankruptcy process. Further, the changing institutional environment in India will imply that many procedural details will need to rapidly evolve in the future.”

4.3 In this matter, the DC observes that Mr. Ashwini Mehra displayed a negligent approach during the conduct of CIRP which can be elaborated as below:

- i. Despite the IBBI Circular dated 12.06.2018 clearly stating that IRPC shall not include any expense incurred by a member of CoC or a professional engaged by them, the RP charged the fee of lender's legal counsel to the tune of Rs. 73.87 lakh as on 05.12.2019 from the IRPC.
- ii. RP on the direction of COC, finalized the appointment of Kroll for the second forensic audit. Hence, the fees of Rs. 50,74,000/- charged by Kroll should be borne by the CoC members themselves and should not be included as IRPC.
- iii. RP had shared a confidential document i.e. IM discreetly with Mr. Om Pathak of DPS Ghaziabad society prior to the issue of Form G for Invitation of Expression of Interest and even before the conduct of due diligence (by the RP) to ensure that they would qualify as eligible prospective resolution applicants. This is too glaring to be ignored.

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

- i. Sections 5(13), 208(2)(a) and (e) of the Code,
- ii. Regulation 31 of the CIRP Regulations; and
- iii. Regulations 7(2)(a), 7(2)(h) and 7(2)(i) of the IP Regulations, 2016 read with clauses 1, 2, 3, 10, 14, 17 and 25 of the Code of Conduct under the said Regulations.
- iv. IBBI Circular dated 12th June 2018.

5. Order

5.1 During the personal hearing, the counsel on behalf of Mr. Ashwini Mehra submitted that the errors committed by him during CIRP were unintentional and were not *malafide*.

5.2 In view of the above, the DC, in exercise of the powers conferred under Section 220 of the Code read with Regulation 13 (3) of the IBBI (Inspection and Investigation) Regulations,

2017 and sub-regulations (7) and (8) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, issues the following directions:

- 5.2.1 The registration of Mr. Ashwini Mehra as an Insolvency Professional, having Registration No. IBBI/IPA-001/IP-P00388/2017-18/10706, shall be suspended for six months.
- 5.2.2 The DC hereby directs Mr. Ashwini Mehra to secure reimbursement of an amount of Rs. 73,87,642/- (Rs. Seventy-Three Lakh Eighty-Seven Thousand Six Hundred Forty-Two only) which was paid to lender's legal counsel (SAM) and charged to IRPC. The RP shall produce evidence to the Board of deposit of amount of Rs. 73,87,642/- in the account of CD.
- 5.2.3 The DC also directs Mr. Ashwini Mehra to secure reimbursement of an amount of Rs. 50,74,000/- (Rs. Fifty Lakh Seventy-Four Thousand only) which was paid to Kroll for conducting second forensic audit on the directions of the members of CoC and was charged to IRPC. The RP shall produce evidence to the Board of deposit of amount of Rs. 50,74,000/- in the account of CD.
- 5.3 This Order shall come into force on expiry of 30 days from the date of its issue.
- 5.4 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professional of ICAI where Mr. Ashwini Mehra is enrolled as a member.
- 5.5 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.
- 5.6 Accordingly, the show cause notice is disposed of.

Sd/-
(Dr. Navrang Saini)
Whole Time Member, IBBI

Dated: 27th April 2020
Place: New Delhi