

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/77/2021

17th September 2021

ORDER

In the matter of Ms. Charu Sandeep Desai, Insolvency Professional (IP) under Section 220 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 and Regulation 13 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017.

Background

1. This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/(R)INSP/2019/15/292/1649 dated 17th March, 2021, issued to Ms. Charu Sandeep Desai, Sahabagan, Salua, 2602, Fairfield A Wing, Lodha Luxuria, Majiwada, Thane West, Thane, Maharashtra- 400601 who is a Professional Member of the Indian Institute of Insolvency Professional of ICAI and an Insolvency Professional registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P00434/2017-18/10757.
 - 1.1 Ms. Charu Sandeep Desai was appointed as an interim resolution professional (IRP) for the corporate insolvency resolution process (CIRP) in the matter of M/s Mandhana Industries Limited, Corporate Debtor (CD) vide Order of the Hon'ble National Company Law Tribunal, bench at Mumbai (AA) dated 29.09.2017 which admitted an application for CIRP under Section 7 of the Code. She was confirmed by Committee of Creditors (CoC) as resolution professional (RP) on 14.11.2017.
 - 1.2 In exercise of its power under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017, the IBBI vide Order dated 03.10.2019 appointed an Inspecting Authority (IA) to conduct an inspection of Ms. Charu Sandeep Desai, on having reasonable grounds to believe that the IP had contravened provisions of the Code, Regulations, and directions issued thereunder. IA submitted the Inspection Report to IBBI on 04.11.2020.
 - 1.3 The IBBI on 17.03.2021 had issued the SCN to Ms. Charu Sandeep Desai, based on findings in the inspection report in respect of her role as IRP/ RP in the CIRP of M/s Mandhana Industries Limited, CD. The IBBI was of the *prima facie* opinion that sufficient cause exists to take action against Ms. Desai in terms of section 220 of the Code read with regulations 11 and 12 of the IBBI (Inspection and Investigation) Regulations, 2017 (Inspection Regulations) and regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations). The SCN alleged the contravention of the provisions of sections 5(13)(e) and 208(2)(a) & (e) of the Code, regulation 31 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), regulation 7(2)(h) of the IP Regulations and clauses 3, 5 and 25 of the Code of Conduct specified in First Schedule of the IP Regulations read with Circular No. IBBI/IP/013/2018

dated 12.06.2018. Ms. Desai replied to the SCN vide letter which was received by IBBI on 06.04.2021.

1.4 The IBBI referred the SCN, reply of Ms. Desai 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. Ms. Desai availed an opportunity of personal virtual hearing before the DC on 07.09.2021 wherein she was represented by Advocate Pooja Mahajan. The Advocate reiterated the submissions made in the written reply and also made a few additional submissions. Further, Ms. Desai submitted the additional submissions vide e-mail dated 13.09.2021 and 14.09.2021.

2. The contraventions alleged in the SCN and the submissions by Ms. Desai in her reply are summarized as follows.

2.1 **Inclusion of legal fees of CoC in IRPC**

Contravention:

2.1.1 It was observed that legal fees of Cyril Amarchand Mangaldas (CAM) for an amount of Rs. 16,04,483/- was made a part of Insolvency Resolution Process Cost (IRPC). The said amount of Rs. 16,04,083/- was charged by CAM for rendering advocacy and legal services to Bank of Baroda for the period 28.07.2017 to 31.12.2017. A part of the fees charged by the legal counsel was prior to the CIRP commencement date i.e 29.09.2017. The agenda for ratifying the fees of the legal counsel was put for voting in the 7th Committee of Creditors (CoC) Meeting held on 10.04.2018 and the same was disapproved with 74.01% votes. The same agenda was put for voting in the 8th CoC Meeting held on 02.05.2018 and the same was approved with 98.14% votes.

2.1.2 Ms. Desai in her reply to the Draft Inspection Report (DIR) admitted that payment was made to CAM after being duly ratified by the members of CoC, *"On 3rd July 2018, payment of INR 14,54,483 (net of TDS @ 10% on total invoice of INR 16,04,483) was made to CAM as per the voting resolution approved by CoC and as per our then understanding that these expenses are CIRP costs"*. She further in her reply submitted that *"as per the common industry practice that all costs borne by the lenders in relation to a loan account and incurred in relation to CIRP of the Corporate Debtor are recovered from the borrower's account."*

2.1.3 Further, Ms. Desai mentioned that the sum of Rs. 16,04,483/- was remitted back to the CD's account on 29.08.2020. It was observed that CAM was engaged before the initiation of CIRP by Bank of Baroda for rendering advocacy and advisory services to them. The fees of the same should have been paid only by Bank of Baroda. However, the same was paid from the CD's account putting additional burden on the CD at critical juncture. Ms. Desai being the Chairman of the CoC allowed the voting on this agenda for making payment to CAM not once but twice. Section 5(13) clearly defines IRPC and Ms. Desai's conduct on allowing the voting on the agenda to ratify the legal fees of the counsels appointed by a member of the CoC and thereby making it a part of IRPC portrays Ms. Desai as being negligent while performing functions and duties envisaged under the Code.

2.1.4 It was Ms. Desai's duty to ensure reasonable care and diligence while performing her

duties including incurring expenses. The said amount was only refunded back by Bank of Baroda once IA pointed out the same. It can be inferred that only on the intervention of the IBBI, the sum of Rs. 16,04,483/- was remitted back to the CD's account on 29.08.2020 after the DIR was shared with her on 20.08.2020. This conduct on her part depicts an afterthought approach and shows her willful negligence and disobedience which is in gross violation of the Code and Regulation and Circulars issued by the IBBI.

Submissions

- 2.2.1 Ms. Desai submitted that in 2017-18 when the CD was undergoing CIRP, the Code was at its nascent stage and continuously evolving. It was also a common practice in the market at that time for the fees of the legal counsel, engaged by the CoC in respect of a CIRP, to be borne by the CD on the principle that all litigation costs in respect of a loan account was charged to the borrower.
- 2.2.2 Ms. Desai further submitted that the payment was made to CAM as per the voting resolution approved by CoC and as per the then prevalent understanding and general practice that lenders recover all such costs from the account of the borrower as per their loan agreements. As submitted earlier, e-voting on approval of CAM's fees was held pursuant to the request of Bank of Baroda during the 7th CoC meeting dated 10.04.2018. Ms. Desai understood that the voting matter was rejected at the first time because a few lenders were not part of the earlier Joint Lender's Forum (JLF) and hence, they were not aware of the understanding amongst the lenders regarding sharing of legal costs. Later, during the 8th CoC meeting, dated 02.05.2018, the representatives of Bank of Baroda brought to the notice of the CoC members that the JLF had agreed for payment of the legal fees in its meeting in August 2017 and accordingly, requested for re-voting on this issue. The voting matter was eventually approved with 98.14% votes of the CoC. As an RP, she only implemented a CoC approved decision.
- 2.2.3 Ms. Desai submitted that she was made aware of the clarification issued by IBBI on IRPC under the IBBI Circular, she started requesting Bank of Baroda for refunding the amount to the CD. In fact, on 09.07.2018, she had written to Bank of Baroda asking for the refund immediately. This was almost two years prior to the DIR being issued to Ms. Desai. This being so, the observation in the SCN that she followed up with Bank of Baroda as an afterthought, does not appear tenable.
- 2.2.4 Ms. Desai further submitted that in the lenders meeting held in December 2018, the lenders had agreed that all CoC legal costs shall be borne by the lenders and shall be recovered from the upfront amount to be invested by the resolution applicant. In the meantime, pursuant to approval of its resolution plan by the AA, the Resolution Applicant (RA) had taken over management and control of the CD. It was after almost one year of taking charge of the CD that Ms. Desai was reinstated as the RP pursuant to the CIRP restoration order.
- 2.2.5 When the non-remittance of Rs. 16,04,483 to the account of the CD came to light, Ms. Desai once again followed up with Bank of Baroda after which the amount of Rs. 16,04,483 was refunded to the CD. Ms. Desai has also added that she would have taken steps to recover this amount even if the inspection by IA had not happened. She further submitted that the non-compliance with the IBBI Circular was only due to evolution of the

Code and prevailing practices. Given the fact that the IBBI had itself issued a clarification by way of the Circular which shows that even as per the IBBI this issue needed clarity. She submitted as an IP, Ms. Desai respects the provisions of the Code, the underlying Rules and Regulations and the directions issued by IBBI and believe in fully complying with the law. It may also be noted that no costs were borne by the CD as, after constant follow ups, the amount in question was eventually refunded to the account of the CD. The DC is, therefore, requested to take a lenient view on this matter.

3. **Charging of Success fee**

3.1 **Contravention:**

3.1.1 It was observed that in the 6th CoC Meeting held on 05.03.2018, wherein it has been stated that success fee shall be charged by the SBI Caps who was engaged as M&A Advisor. It was further observed from minutes of the 6th CoC Meeting that *"Success based transaction fee shall be applicable in case of successful resolution."*

3.1.2 Ms. Desai stated in her reply to the DIR that the decision to appoint an external agency for the M&A process was made by her in consultation with the CoC and that M&A agencies are specialized agencies having technical expertise and capability to elicit interest in the resolution process from a diverse range of potential resolution applicants (PRAs"), to facilitate better negotiations and structuring of offers which in turn results in maximization of value of assets.

3.1.3 Ms. Desai further stated that *"Success fees, as opposed to fixed fees, is considered more economically desirable as it incentivises a professional to successfully perform the assigned task and helps in aligning interests of the client and the professional. It also lead to potential savings since no fee is required to be paid in case of an unsuccessful outcome. On the other hand, in case of a fixed fees model, the payment has to be made irrespective of the outcome."* She additionally submitted that *"it was clearly set out as part of the resolution process that fees payable to the M&A Advisors will be borne by the incoming Resolution Applicant and hence would not burden the finances of the Corporate Debtor."*

3.1.4 As per Ms. Desai's submission out of the total fees of Rs 2.76 crores (exclusive taxes) payable to SBI Caps as per the terms of engagement, only a sum of Rs. 0.3 crores (exclusive taxes, as monthly retainer fee of Rs. 5 Lacs for 6 months from January 2018 to June 2018) has been paid so far. The balance payment is still outstanding (owing to the failure of the erstwhile Resolution Applicant, Formation Textiles LLC, to infuse the necessary funds as per its Resolution Plan) and SBI Caps has repeatedly followed up with her for the balance payment to be cleared.

3.1.5 SBI Caps was appointed as M&A advisor with specific scope of work. They were appointed to facilitate better negotiations and restructuring of offers, smooth sale process for maximisation of assets, to shortlist RA's from a diverse range of potential resolution applicants. However, Ms. Desai's biased approach is also reflected in the proposition and appointment of the M&A Advisor SBI Caps on the basis of success fee which seems infeasible, unfair and wrong. The scope of work was already defined and enlisted by the M&A advisors, howsoever, their fees should be directly proportional to the work done by them and not on the fate of the CIRP.

3.1.6 The fees payable to M&A Advisor SBI Caps at a success fee is untenable. Professionals or advisors engaged by the IP should be paid on a reasonable basis and as per the nature and scope of the work and not on the outcome of the final result of CIRP. This enumerates a clear violation of the Code of Conduct. An IP is obliged to take reasonable care and diligence while performing his duties, including incurring expenses. Ms. Desai has, thus, failed to ensure that not only fee payable by her is reasonable but also other expenses incurred by her are reasonable.

3.2 Submissions

3.2.1 Ms. Desai submitted that under the provisions of the Code read with the underlying Regulations, an RP is entitled to engage professionals to assist in the CIRP and the fees of such professionals, to the extent ratified by the CoC, form part of IRPC. The Code or the underlying Regulations do not prescribe any fixed model for the fees to be charged by professionals engaged by the RP to assist during CIRP. Further, there is nothing in the Code or CIRP Regulations that would restrict or prohibit RP from engaging professionals/ advisors who do not charge on a fixed fee basis. On the contrary, regulation 4 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Liquidation Regulations), itself envisages the determination of fees of the Liquidator as a specified percentage of the amount realised and of the amount distributed. The mechanism of compensation recognised under regulation 4 of the Liquidation Regulations, which rewards the Liquidator based on the amount realised/ distributed and the time taken, is similar to the success fee model in CIRP cases, which rewards early and successful resolutions. Therefore, the IBBI itself has recognised a contingency or success or recovery-based model while determining the fee for liquidators.

3.2.2 Ms. Desai further submitted that, Annexure B of the IBBI Circular, which contains an illustrative list of factors to be considered by IPs in determination of what is reasonable “cost” and reasonable “fee” also mentions “*success or contingency fee, only to the extent that it is consistent with the requirements of integrity and independence of insolvency professionals*”. Given the fact that there is no prohibition in the Code or the Regulations on determination of professional/ advisors’ fee on basis of recovery made/ success of assignment, coupled with the provisions of Liquidation Regulations and the IBBI Circular which themselves recognise the possibility of success/ contingency fee, she submitted that was of the understanding that payment on success/ contingency fee basis is not against the Code or the Regulations.

3.2.3 Ms. Desai further submitted that the decision to appoint an external agency for the M&A process was made by her in consultation with the CoC, given the complex nature and scale of business operations of the CD and in the interest of effective resolution and value maximization of the CD. After various rounds of presentations and evaluation of technical and financial bids received from various reputed entities, SBI Caps, an independent entity, was shortlisted for appointment as M&A Advisor and its fees was also approved by 97.39% of voting shares of the CoC. Additionally, it was clearly set out as part of the resolution process that fees payable to the M&A Advisors will be borne by the incoming resolution applicant and hence, would not burden the finances of the CD. The M&A

agencies are specialized agencies having the technical expertise and capability to elicit interest in the resolution process from a diverse range of potential resolution applicants (PRAs). They facilitate better negotiations and structuring of offers and help run a more robust sale process which in turn results in maximization of value of assets. Further, the appointment of M&A Advisors is a common practice in case of highly technical industries such as the textile industry (to which the CD belongs) as has also been seen in several other large CIRP cases.

3.2.4 Ms. Desai submitted that she performed the duties expected of an RP while conducting the CIRP of the CD, including but not limited to, running the day to day affairs and continued business operations of the CD, verification of claims, convening and attending CoC meetings, preparing and issuing the information memorandum, floating the Expression of Interest (EOI), preparing and releasing the process memorandum and evaluation matrix, preparing a robust virtual data room to facilitate due diligence by PRAs, reviewing the resolution plans for compliance with the Code etc., the M&A Advisors (SBI Caps), carried out various specialized activities such as running an extensive investor outreach program where they approached more than 60 strategic and financial investors, helping showcase the business strengths and manufacturing capabilities of the CD and facilitating the submission of EOIs and resolution plans. Notably, their efforts resulted in receipt of 17 EOIs from PRAs and 3 resolution plans from resolution applicants.

3.2.5 Ms. Desai submitted that success fees, as opposed to fixed fees, is considered more economically desirable as it incentivizes a professional to successfully perform the assigned task and helps in aligning interests of the client and the professional. It also leads to potential savings since no fees is required to be paid in case of an unsuccessful outcome. On the other hand, in case of a fixed fees model, the payment must be made irrespective of the outcome. Thus, in a CIRP scenario, the CD would, in fact, be at a disadvantage under a fixed fee model for two reasons –

- (i) less chances of successful resolution as the M&A advisor would not be adequately incentivized towards bringing the best possible resolution plans on the table;
- (ii) the M&A advisor would have to be paid (adding to the IRPC) even though it was unsuccessful in getting any resolution plans. Success fees also acts as an incentivizing factor in process advisory especially in sectors like textile for which there is lower investor appetite as compared to the other more sought-after sectors such as steel or cement. Taking into consideration these factors, the appointment of SBI Caps on a success fees basis was made by Ms. Desai with the approval of the CoC, considering the best interests of the CD.

3.2.6 Ms. Desai submitted that SBI Caps is a highly reputed organisation, which is well-regulated by the Securities and Exchange Board of India and the Reserve Bank of India. It has acted as M&A advisors under success fees model in various assignments under the Code, including but not limited to Alok Industries, Dighi Port etc. The Corporate Debtor was, therefore, not a unique case in which SBI Caps rendered services in consideration of an agreed upon success fees. The success fees structure for M&A advisory services has also been followed in several other CIRP cases such as Monnet Ispat Energy Ltd, ABG Shipyard, Dighi Port Ltd, Alok Industries and Sevenhills Healthcare Pvt. Ltd too, M&A advisors had been appointed on a success fees structure.

- 3.2.7 Ms. Desai also submitted that out of the total fees of Rs. 2.76 crores (excluding taxes) payable to SBI Caps as per the terms of engagement, only a sum of Rs. 0.3 crores (excluding taxes, as monthly retainer fee of Rs. 5 Lacs for 6 months from Jan 2018 – Jun 2018) has been paid so far. The balance payment is still outstanding (owing to the failure of the erstwhile resolution applicant to infuse the necessary funds as per its resolution plan) and SBI Caps has repeatedly followed up with me for the balance payment to be cleared.
- 3.2.8 Ms. Desai further stated that the appointment of SBI Caps as M&A Advisors was made by her after following due process and the fees of SBI Caps was also approved by the CoC. In her humble opinion the engagement of SBI Caps on a success fees basis meets the test of reasonableness, care, diligence and independence as mandated under the Code read with the underlying Regulations and the IBBI Circular. SBI Caps was shortlisted for appointment as M&A Advisors after detailed commercial and technical evaluation of the quotations received and its fees was approved by 97.39% of the CoC voting shares. Further, a success fees payment model was consciously opted for considering various factors, as elaborated above, in the best interests of the CD.
- 3.2.9 Ms. Desai in her additional submission vide e-mail dated 13.09.2021 informed that, the Rs. 30 lacs were paid to SBI Caps during the CIRP, as a monthly retainer fee at Rs. 5 lacs per month from January 2018 to June 2018 but the balance fees of Rs. 2.46 crores was paid to SBI Caps on 07.06.2021 as CIRP Costs, out of the money infused by the Successful Resolution Applicant during the second round of CIRP of the CD. Since the payment was made on 07.06.2021 (after the passing of the Plan approval order by the AA on 19.05.2021) Ms. Desai's reply dated 06.04.2021 mentions only the balance amount of Rs 2.46 crores as being outstanding to SBI Caps, as on the said date.

4. **Expenses of the ex-management personnel**

4.1 **Contravention:**

- 4.1.1 It was observed that Mr. Priyavrat Mandhana who is a family member of the erstwhile promoters of the CD was involved in the functioning of the CD. The foreign trips taken by Mr. Priyavrat Mandhana were funded from the CD's fund and these trips were approved by Ms. Desai. In her reply to the DIR it has been submitted that *"Mr. Priyavrat Mandhana did not hold any leadership or decision-making position during the CIRP. Additionally, he was also not paid any salary or other remuneration during CIRP as the CoC had taken a decision to not release any payments to the promoter group."*
- 4.1.2 Additionally, Ms. Desai also submitted that Mr. Priyavrat Mandhana *"was the point of contact in the company for several customers and brands. These customers had given orders through him when the company was in good financial health and thus he continued to remain the main connect for them during CIRP. Also, these foreign customers were not aware of the Indian Insolvency framework and as such requested his presence in meetings from a business continuity perspective."*
- 4.1.3 Ms. Desai further stated that on foreign trips, Mr. Yogesh Thore (fabric marketing head) and Mr Gopal Shah (garment marketing head) were accompanied Mr. Priyavrat. These trips were taken to keep the CD as a going concern and keeping in touch with the existing customers, negotiating and for further business development. She has submitted a chart

disclosing the expenses for a sum of Rs. 13,26,517 incurred in these foreign trips. IA has accepted this submission.

4.1.4 Ms. Desai admitted that a total sum of Rs. 13,26,517 was spent during the period of November 2017 to October, 2018 for the foreign trips taken by the ex-Promoter. As an IP it was Ms. Desai's duty to approve only those expenses which were reasonable and justified. Ms. Desai had not given any justifiable reason with cogent evidence that such foreign travel was allowed in the interest of the CD. Thus, it was observed that foreign travel expenses of the Ex-promoter overburdened the IRPC. The expenses incurred during CIRP should have been rational and practical to the extent that the same did not overburden the CD and as an aftermath increased the CIRP cost. In light of the Section 66 application pending against the erstwhile promoters, Ms. Desai's approval for funding the foreign trips of a member related to the promoter group reflected dereliction of duties and carelessness in running the CIRP.

4.2 **Submission**

4.2.1 Ms. Desai submitted that, Mr. Priyavrat Mandhana was an employee of the CD and did not hold any leadership or decision-making position during the CIRP. He was also not paid any salary or other remuneration during CIRP as the CoC had taken a decision to not release any payments to the persons related of the promoter group. Mr. Priyavrat Mandhana was an employee of the CD and is not a respondent in the application filed by RP under Section 66 of the Code. Mr. Priyavrat Mandhana is the son of the erstwhile promoter, namely Mr. Purushottam Mandhana, who is one of the respondents in this application. She stated that the Code does not create any prohibition on continuing to avail services of an employee during CIRP merely because such employee is a relative of a respondent against whom an application under Section 66 of the Code has been filed. Further, the Section 66 application is pending before the AA and no final order has been passed yet.

4.2.2 Ms. Desai further submitted that, section 19 of the Code mandates the personnel of the CD, its promoters or any other person associated with the management of the CD to provide all assistance and cooperation to the IRP/ RP as may be required in managing the affairs of the CD. Thus, Section 19 of the Code itself envisages taking the assistance of personnel of the CD, including even the promoters, while managing the affairs of the CD. Hence, where required, the RP should take assistance from the employee/ ex-management for running the business of the CD.

4.2.3 Ms. Desai emphasised that all decisions regarding the travels of Mr. Priyavrat Mandhana had been undertaken by me after considering his experience in the textile field as well as his connections and relationships with customers and vitality of those customers towards business and health of the CD, keeping in mind the necessity of maintaining going concern. Trips to USA had been taken for business development with Target Corp and H&M (fabrics), while trips to Europe had been predominantly undertaken to ensure order continuation for garment business. While H&M and Target said they could not give new orders till CIRP was over, the impact of the garment orders can be seen in the EBITDA performance of the company during latter half of CIRP where company had started reporting positive EBITDA for the first time in 2-3 years. These business trips helped the

CD's export garment business, which is a higher margin business than fabric sale, with contribution margin ranging from 45-50%. Hence, Ms. Desai stated that, incurring of approx. Rs. 13 lakhs on foreign trip of team members on these travels was justified as it helped the CD make sales of Rs. 255 crores in Financial Year of 2018 and subsequent roll over business of Rs. 386 crore in Financial Year of 2019.

- 4.2.4 Mr. Priyavrat Mandhana did not travel to these countries alone but was always accompanied by fabric marketing head, Mr. Yogesh Thore or garment marketing head, Mr. Gopal Shah on all his trips, depending on the nature of the meeting with respective customers. These meetings were important to ensure orders for the company especially fabric orders from C&A (key customer), garment orders from Zara and from other brands in Europe like STR, Pull and Bear etc. These visits were also helpful for handing over the customer relations to the marketing team who accompanied Mr. Priyavrat Mandhana.
- 4.2.5 Ms. Desai added that she diligently checked all payments being made in relation to these trips and ensured that all these trips had sound business justification. This was also subject to all bills and invoices being processed and certified by an external agency i.e., Internal Auditors of the CD prior to being sent across for her approval.
- 4.2.6 In view of the above, Ms. Desai submitted that there has been no dereliction of duties or carelessness/ negligence on her part in approving the expenses of Rs. 13,26,517 incurred on foreign travels undertaken for business purposes as mentioned above. In her view, these expenses were reasonable and justified and were approved in the larger interest of enabling the continued business operations of the CD as a going concern.

5. **Analysis and findings**

5.1 The DC after taking into consideration the SCN, the reply to SCN, the oral and additional written submissions of Ms. Charu Sandeep Desai and also the provisions of the Code, rules and the regulations made thereunder finds as follows.

5.1.1 In regards to issue of inclusion of legal fees of CoC in IRPC, An IP is obliged under section 208(2)(a) and (e) of the Code to take reasonable care and diligence while performing her duties, including incurring expenses and to perform duties in a manner specified by the IBBI. She must, therefore, ensure that not only fee paid to professionals is reasonable, but also other expenses incurred by her are reasonable. Section 208(2)(a) and (e) are provided as under,

“ 208. Functions and obligations of insolvency professionals. -

(2) Every insolvency professional shall abide by the following code of conduct: –

(a) to take reasonable care and diligence while performing his duties;

(e) to perform his functions in such manner and subject to such conditions as may be specified.”

5.1.2 The DC notes that IP is expected to ensure that the expenses incurred during the CIRP is reasonable so that the CD, who is already entangled in a web of unsustainable liabilities is not further over-burdened with exorbitantly high IRPC. Therefore, an IP must maintain balance between discharging the duties and responsibilities as an IP and the cost incurred for doing the same. The Code and the Regulations made thereunder provide that an IP is

to take reasonable care and diligence while performing her duties, maintain transparency and integrity.

5.1.3 Further, regulation 31 of the CIRP Regulations defines the IRPC as under:

“31. Insolvency resolution process costs.

“Insolvency resolution process costs” under Section 5(13)(e) shall mean-

(a) amounts due to suppliers of essential goods and services under Regulation 32;

(aa) fee payable to authorised representative under sub-regulation (8) of regulation 16A;

(ab) out of pocket expenses of authorised representative for discharge of his functions under section 25A;

(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 resolution professional fixed under Regulation 34; and

(e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.”

5.1.4 Also the Circular No. IBBI/IP/013/2018 dated 12.06.2018 titled *“Fee and other Expenses incurred for Corporate Insolvency Resolution Process”* 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;

(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;

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

(j) any expense not related to CIRP.”

5.1.5 In the instant matter, the DC notes that CAM had raised an invoice dated 15.03.2018 for an amount of Rs. 16,04,483 which covered legal fee for the period from 28.07.2017 to 31.12.2017. The DC also notes from the minutes of the 7th CoC meeting dated 10.04.2018 that the resolution for payment of legal advisory charges raised in the aforesaid invoice by CAM was put for vote. The relevant extract is as follows:

“2. Approval for payment of legal advisory charges incurred by Bank of Baroda in connection with Application to NCLT under IBC:

- *Bank of Baroda had engaged Cyril Amarchand Mangaldas ("CAM") to conduct all procedures and formalities required to be performed in connection with application to NCLT for admitting CIRP against Mandhana Industries Limited.*
- *A total fees of INR 16,04,483 has been charged by CAM for the advocacy and advisory services rendered for the period July 28, 2017 to December 31, 2017 to the Applicant Bank- Bank of Baroda. The invoice for the same was circulated to all CoC members by Bank of Baroda on 3rd April, 2018.*
- *A total of 68.75 hours of time has been charged on account of various activities Drafting, finalising and executing the proof of claims, preparing and appearing for hearings, drafting EL between RP and Applicant Bank and advising BoB on the process to be followed in connection with filing Application under IBC”*

The said Agenda was, however, rejected with a voting share of 74.01%. Again it was put for vote in the 8th CoC meeting dated 02.05.2018 wherein the minutes recorded as follows.

“Summary of voting items from last CoC meeting

In the last COC held on April 10, 2018 there were three voting items:

1. *Ratification of appointment of TR Chadha as Forensic Auditors*
2. *Payment of INR 16,04,483 by company to CAM for Advocacy and Advisory services provided to Applicant Bank- Bank of Baroda, in connection with filing Application under IBC against Mandhana Industries Limited*
3. *Reduction of Notice Period for holding CoC meeting to 24 hours*

Voting items 1 and 3 were approved by the requisite majority. However voting item 2 was disapproved with only 74.01% votes in favour.

After a brief discussion on voting item 2 in the meeting i.e. payment of INR 16,04,483 to CAM for advocacy services provided to Bank of Baroda, in relation to the filing of IBC against the company, it was decided to put up the voting item for voting again. It was clarified by several members that the JLF had agreed for the same in meeting held in August 2017 as applicable by BoB was made after consultation with JLF. Consequently, the same shall be a voting item for this CoC meeting.”

- 5.1.6 The DC also notes from the minutes of the 9th CoC meeting dated 08.05.2018, the results of the voting in the 8th CoC meeting are recorded with the following observations:

“Summary of voting items from last CoC meeting

In the last COC meeting held on May 8, 2018 there was just 1 voting item-payment of INR 16,04,483 by Mandhana Industries Limited to Cyril Amarchand Mangaldas & Co for Advocacy and Advisory services provided to Applicant Bank- Bank of Baroda, in connection with filing Application under IBC against Mandhana Industries Limited.

The same was approved by the CoC members with 98.14% votes in favour.”

- 5.1.7 It has been submitted by Ms. Desai that on being made aware by the clarification issued by IBBI vide Circular No. IBBI/IP/013/2018 dated 12.06.2018 on “*Fee and other Expenses incurred for Corporate Insolvency Resolution Process*”, she wrote to Bank of

Baroda to refund the amount paid to CAM. The DC notes that an email dated 09.07.2018 was sent to Bank of Baroda for refunding the amount paid to CAM stating that the expenses cannot be classified as CIRP Cost as per the IBBI Circular. It is also observed that Ms. Desai demitted office on account of approval of the resolution plan on 30.11.2018 but was reinstated as RP again due to non-implementation of the resolution plan on 05.12.2019. When the IA made the observation in the DIR on 20.08.2020 that Bank of Baroda has not refunded the amount to CD, Ms. Desai constantly followed up and the same was refunded on 29.08.2020. The request to refund was also noted in the minutes of 32nd CoC meeting held on 27.08.2020. Further, the minutes also recorded apprising to CoC (forum) about IBBI inspection as follows:

“To apprise the forum regarding IBBI inspection:

The RP team updated the forum that in continuation of the inspection of the CIRP cases being handled by the RP carried out by the Insolvency and Bankruptcy Board of India (“IBBI”) in Dec 2019 as part of its routing procedures, IBBI had shared their draft inspection report with the RP on 20th Aug 2020. In the report, IBBI has made a few observations on the CIRP of the Corporate Debtor and has requested responses from the RP on the same:

...

▪ *Payment of legal fees of CoC and inclusion in IRPC – IBBI made an observation on the payment of legal fees of INR 16,04,483 which was paid by the Company to CAM as fees for drafting and filing the CIRP application for the Company in 2017. IBBI was of the view that such payment was in contravention to the circular issued by the IBBI on 12th June regarding what shall be excluded from Insolvency Resolution Process Cost (“IRPC”). RP team reminded the forum that it had been agreed in the lenders meeting held in December 2018 that all CoC legal costs shall be borne by the lenders and shall be recovered from the upfront amount to be invested by the resolution applicant. The RP has requested BOB to refund the amount in absence of which the IBBI might issue show-cause notice to the RP and/or BOB for further clarification and information on the matter. The representative from BoB stated that they are in the process of refunding the amount to the Corporate Debtor, from the Corpus created by the lenders for legal and other expenses, held with Bank of Baroda on behalf of CoC. Once the refund is received, the RP will respond to the IBBI informing that while the payment had been made based on then prevalent understanding that such expenses formed part of IRPC, the amount has been refunded to the Corporate Debtor by the bank and hence no loss has been caused to the Corporate Debtor.”*

- 5.1.8 In the present matter, the DC is cognizant of the fact that the CoC had ratified the payment of the professional fees of lender’s legal counsel prior to the issue of Circular no. IBBI/IP/013/2018 dated 12.06.2018 clarifying that the expense incurred before the commencement of CIRP and the expense incurred by a member of CoC or a professional engaged by the CoC cannot be included in the IRPC. The DC also notes that since, the insolvency regime in India was at its infancy and the common practice in the market was for the fees of the legal counsel engaged by the CoC to be charged to the borrower, due to

which IBBI was obligated to issue Circular dated 12.06.2018. In these prevailing circumstances, the DC notes that when Ms. Desai came to know of the contents of the Circular, she took immediate action by sending e-mail dated 09.07.2018 seeking refund of the amount from Bank of Baroda. However, due to demitting of office on 30.11.2018 she was unable to follow up the action. On being reinstated as RP and the observation by IA, Ms. Desai was able to get the refund from the Bank of Baroda on 29.08.2020. In view of the aforesaid, it cannot be said that Ms. Desai disregarded the Circular on being made aware of the same or that she had not taken any action prior to the observation made by IA. Therefore, the DC takes a lenient view in this regard as Ms. Desai had acted in good faith.

5.2.1 As to issue of charging success fee, the DC notes that, Circular no. IBBI/IP/013/2018 dated 12.06.2018 titled "*Fee and other Expenses incurred for Corporate Insolvency Resolution Process*" clarified that the RP is to ensure that the fees payable to the professionals engaged by her are reasonable. It has been clarified as follows:

"6. Keeping the above in view, the IP is directed to ensure that:-

(a) the fee payable to him, fee payable to an Insolvency Professional Entity, and fee payable to Registered Valuers and other Professionals, and other expenses incurred by him during the CIRP are reasonable;

(b) the fee or other expenses incurred by him are directly related to and necessary for the CIRP;

(c) the fee or other expenses are determined by him on an arms' length basis, in consonance with the requirements of integrity and independence;

(d) written contemporaneous records for incurring or agreeing to incur any fee or other expense are maintained;

(e) supporting records of fee and other expenses incurred are maintained at least for three years from the completion of the CIRP;

(f) approval of the Committee of Creditors (CoC) for the fee or other expense is obtained, wherever approval is required; and

(g) all CIRP related fee and other expenses are paid through banking channel."

5.2.2 The DC notes from the submission of Ms. Desai that SBI Caps was appointed as the M&A advisor in the 5th CoC meeting which was approved by the CoC with 97.39% voting share. The DC takes note of the minutes of the 6th CoC meeting dated 05.03.2018 wherein fee structure for SBI Caps, the M&A Advisor was discussed as follows:

"7. Taking on record SBI capital markets fee structure:

SBI Capital Markets requested that the following fee structure already approved by CoC be taken on record in minutes:

Monthly Retainer Fee

A Monthly Retainer Fee of INR 5,00,000. This retainer fees shall be adjustable against the last milestone Transaction Fees as detailed below.

Transaction Fee

Success-based Transaction Fee shall be applicable in case of successful resolution:

• Success fee for EV upto INR 500 crore - A Transaction fee of INR 2,00,00,000

- *Success fee for incremental EV between INR 500 to INR 550 crore : 0.50% of the EV in excess of INR 500 Crore unto INR 550 Crore;*
- *Success fee for incremental EV between INR 550 to INR 600 crore : 0.75% of the EV between INR 550 Crore and INR 600 Crore;*
- *Success fee for incremental value above INR 600 crore : 1% of the EV above INR 600 crore;*

Milestone based payment

Transaction Fee payable based on following milestones:

- *A milestone fee of 50% of the total Transaction Fee payable on approval of Resolution Plan by NCLT.*
 - *A milestone fee of 50% of the total Transaction Fee payable shall be payable on Signing of necessary documents (Letter of Intent/Definitive documents etc.)*
- Applicable taxes would be billed in addition to the fee mentioned above. The above structure was approved in the fourth COC meeting.”*

5.2.3 Ms. Desai submitted that the mechanism of compensation recognised under regulation 4 of the Liquidation Regulations rewards the liquidator based on the amount realised/ distributed and the time taken which is similar to the success fee model and also the Annexure B of the IBBI Circular no. IBBI/IP/013/2018 dated 12.06.2018 contains an illustrative list of factors to be considered by IPs in determination of what is reasonable cost and reasonable fee also mentions success or contingency fee. Therefore, the IBBI itself has recognized success or recovery-based fee.

5.2.4 The Annexure B of the said Circular illustrates various factor including success fee for determination of reasonable fee as follows:

“(ii) An insolvency professional may use one or a combination of bases to charge fee for carrying out different tasks or discharging different duties. The bases of charging fee include:

- (a) time based charging,*
- (b) prospective fee (up to a cap),*
- (c) fixed fee,*
- (d) percentage based charging,*
- (e) success or contingency fee, only to the extent that it is consistent with the requirements of integrity and independence of insolvency professionals.”*

5.2.5 In view of the above facts, the DC notes that the charging of success fee linked to the milestones has not been barred in the Code, Regulations or the Circular issued thereunder. In fact, the Circular no. IBBI/IP/013/2018 dated 12.06.2018, in para 3 provides for the obligation of the IP to ensure that not only the fee to be reasonable but the expenses incurred are also reasonable. Its para 3 reads as under:

“3. An IP is obliged under section 208(2)(a) of the Code to take reasonable care and diligence while performing his duties, including incurring expenses. He must, therefore, ensure that not only fee payable to him is reasonable, but also other expenses incurred by him are reasonable. What is reasonable is context specific and it is not amenable to a

precise definition. An illustrative list of factors considered in determination of what is reasonable is given in Annexure B.”

- 5.2.6 Since, the appointment of SBI Caps as M&A Advisor along with its fee structure was duly approved by the CoC with 97.39% voting share. Since, the CoC in exercise of its commercial wisdom approved the fees charged by SBI Caps and so long as the fee being charged are reasonable within the said Circular and are not an overwhelming burden on the CD, no contravention could be made out of the Code and the Regulations made thereunder. The DC therefore, finds the submission made by Ms. Desai to be satisfactory.
- 5.3.1 As to issue of the expenses of foreign trips of the ex-management personnel, it has been alleged that Mr. Priyavrat Mandhana was a family member of the erstwhile promoters of the CD and that the foreign trips taken by Mr. Priyavrat Mandhana were approved by Ms. Desai and were funded from the CD's account. It has also been alleged that Ms. Desai has admitted a total sum of Rs. 13,26,517 spent during the period of November 2017 to October, 2018 for the foreign trips taken by Mr. Priyavrat Mandhana and she has not been able to give any proper justification for the added cost to the IRPC.
- 5.3.2 The DC notes that the said allegations have been contested by Ms. Desai stating that Mr. Priyavrat Mandhana did not hold any leadership or decision-making position during the CIRP and he was also not paid any salary or other remuneration during CIRP as the CoC had taken a decision to not release any payments to the promoter group. Also Ms. Desai has submitted that Mr. Priyavrat Mandhana was the contact person of the CD for the customers and brands. The customers had given orders through him when the CD was in stable financial health and therefore, he continued to remain the main contact even during CIRP. Also, these foreign customers were not aware of the Indian insolvency framework and requested his presence in meetings from a business continuity perspective.
- 5.3.3 Ms. Desai further stated that during these foreign trips, Mr. Priyavrat Mandhana was always accompanied by the fabric marketing head or the garment marketing head. Also the section 19 of the Code mandates that the personnel of the CD, its promoters or any other person associated with the management of the CD are to provide all assistance and cooperation to the IRP/ RP as required for managing the affairs of the CD. Section 19 of the Code itself envisages taking the assistance of personnel of the CD. Hence, where required, the RP should take assistance from the employee/ ex-management for running the business of the CD.
- 5.3.4 Ms. Desai also emphasised that the necessity of the trips was for business development which is apparent from the EBITDA performance of the CD during latter half of CIRP where company had started reporting positive EBITDA for the first time in 2-3 years, as these business trips helped the CD's export garment business, with contribution margin ranging from 45-50%. Although expense of Rs. 13 lakhs was incurred but it helped the CD make sales of Rs. 255 crore in Financial Year of 2018 and subsequent roll over business of Rs. 386 crore in Financial Year of 2019.

5.3.5 In view of the above, the DC finds that Mr. Priyavrat Mandhana was a family member of the erstwhile promoter of the CD but at the same time, he was not a Director but an employee of the CD. Further, it is noted that as per provision of section 19 of the Code the personnel are required to assist the RP in managing the affairs of the CD as follows:

“19. Personnel to extend co-operation to interim resolution professional. -

(1) The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the corporate debtor.”

5.3.6 Therefore, the DC notes that it is as per the scheme of the Code, the employees of the CD are to provide continued cooperation to the RP even during the CIRP and in this matter no separate remuneration was paid to Mr. Priyavrat Mandhana. Moreover, due to the various trips taken for business development of the CD a sales of Rs. 255 crore in Financial Year of 2018 and subsequent roll over business of Rs. 386 crore in Financial Year of 2019 was achieved, therefore, it is observed that the activities were undertaken to maximise the value of the CD. Hence, the DC is of the view that the justifications provided by Ms. Desai are sufficient with regard to the allegation. Hence, there appears to be no contravention of the provisions of the Code or Regulations made thereunder.

ORDER

6. The DC, therefore, in exercise of the powers conferred under Section 220 (2) of the Code read with sub-regulations (7), (8) and (10) of regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017, hereby warns that Ms. Charu Sandeep Desai should take reasonable care and be extremely careful, diligent while performing her duties under the Code.
7. This Order shall come into force immediately from the date of its issue.
8. In view of the above Order, a copy of this order shall be forwarded to the Indian Institute of Insolvency Professional of ICAI where Ms. Charu Sandeep Desai is enrolled as a member for their further necessary action.
9. 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.
10. Accordingly, the show cause notice is disposed of.

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(Dr. Mukulita Vijayawargiya)

Whole Time Member, IBBI

Dated: 17th September 2021

Place: New Delhi