

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/109/2022
1st July, 2022

Order

In the matter of Mr. Yogesh Kumar Gupta, Insolvency Professional (IP) under section 220 of the Insolvency and Bankruptcy Code, 2016 read with regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 and Regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017.

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/INSP/2021/102/521/3520 dated 09.05.2022 issued to Mr. Yogesh Kumar Gupta who is a Professional Member of Insolvency Professional Agency of Institute of Cost Accountants of India (IPA-ICAI) and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-003/IP-N00078/2017-18/10701.

1. Background

- 1.1. The Hon'ble NCLT, Principal Bench, New Delhi (AA) *vide* order dated 13.02.2019 admitted the application under section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) for initiating Corporate Insolvency Resolution Process (CIRP) of Kamrup Housing Projects Private Limited (CD). Mr. Yogesh Kumar Gupta was appointed as RP replacing Mr. Surendra Khinvasra *vide* AA's order dated 13.06.2019.
- 1.2. The IBBI, in exercise of its powers under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017 appointed an Inspecting Authority (IA) to conduct the inspection of Mr. Yogesh Kumar Gupta. In compliance with regulation 6(1) of Inspection Regulations, IA shared the Draft Inspection Report (DIR) with Mr. Gupta on 22.02.2022 to which response was received on 11.03.2022. Thereafter, IA submitted the Inspection Report (IR) in accordance with regulation 6(4) of the Inspection on 14.03.2022.
- 1.3. The IBBI issued the SCN to Mr. Yogesh Kumar Gupta on 09.05.2022, based on the findings in the inspection report in respect of his role as an RP in the CIRP of CD and material available on record. Mr. Yogesh Kumar Gupta sought extension of 15 days for submission of his reply to the SCN *vide* email dated 29.05.2022. He finally replied to the SCN *vide* email dated 08.06.2022.
- 1.4. The IBBI referred the SCN, response of Mr. Yogesh Kumar Gupta 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. Gupta availed opportunity of e-hearing before the DC on 08.06.2022 where he requested for adjournment. The DC granted adjournment and fixed date of personal hearing on 20.06.2022 where Mr. Gupta again sought time on behest of unavailability of his Advocate Mr. Ashish Makhija. The DC granted another opportunity of personal hearing on 22.06.2022. Mr. Gupta was represented by Mr. Ashish Makhija, Advocate who made submissions during the e-hearing.

1.5. The DC has considered the SCN, the reply to SCN, oral and written submissions of Mr. Yogesh Kumar Gupta, other material available on record and proceeds to dispose of the SCN.

2. Alleged Contraventions, Submissions, Analysis and Findings:

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

3. Contravention-I:

3.1 As per item No. 5 of the minutes of 10th meeting of committee of creditors (CoC), Mr. Gupta updated the list of creditors by removing those Financial Creditors (homebuyers) who have not paid their dues towards insolvency resolution process costs (IRPC). According to section 21(2) of Code, the CoC shall comprise all FCs of CD. Neither the Code nor any regulations made under the Code provide for any provision for exclusion of FCs from CoC for non-payment of IRPC. The said minutes also record that an application shall be moved before AA for removal of name of creditors who have not paid their share towards CIRP cost and construction cost. Rather than seeking directions from AA, Mr. Gupta excluded FCs from CoC and deprived them from their rights given by the Code. In view of the above, the Board is of prima facie view that he had inter-alia violated section 21(2) of the Code.

Submissions

3.2 Mr. Gupta submitted that the insolvency resolution process costs plays a very significant role in the whole process of CIRP to keep the CD as a going concern and the members of CoC are required to contribute towards the IRPC for the effective implementation of the CIRP of the CD. The RP also requires to make a balance between all stakeholders and to treat them equally in order to run the CIRP process successfully and in the best interest of all stakeholders by maximising the value of the CD. Consequently, the matter relating to the non-payment of the CIRP cost was discussed in the meeting of CoC held on 10.01.2020 and upon the suggestion given by the CoC, it was decided that an application shall be moved to the AA seeking removal of the names of such creditors who were not contributing towards the CIRP cost. Accordingly, Mr. Gupta moved an application bearing IA No. 1348/2020 on 16.02.2020 for the recovery of CIRP cost before the AA and the same is still pending for adjudication.

3.3 Mr. Gupta submitted that he has sent various e-mails and reminders to the members of the CoC requesting them to contribute towards the CIRP cost but no response was received from them. Consequently, on 09.12.2019, he sent 17th reminder via e-mail to the members of the CoC stating that in case, the members of the CoC fail to make payment towards the CIRP cost, Mr. Gupta will be compelled to take appropriate action against the creditors. However, again the members of the CoC did not pay any heed to the requests and reminders sent by the Respondent. Consequently, Mr. Gupta mentioned about the removal of the names of the defaulting creditors from the list of creditors updated in the minutes of 10th meeting held on 18.01.2020. In fact, the said removal of names was done so that the homebuyers make payment of the CIRP cost.

- 3.4 Mr. Gupta placed reliance on the order passed by the Hon'ble NCLT, New Delhi, in the matter of "M/S Reliance Commercial Finance Vs Noble Resourcing Business and Solutions (P) Ltd." wherein it was explained by the Hon'ble NCLT that for the effective implementation of the CIRP, the FC constituting the CoC has to contribute to the expenses, fee and other costs of the process. The Hon'ble Court observed that "if the financial creditors are not inclined to contribute to the cost of the process, then we are doubtful as to how their claim would be considered in the whole Process. If the financial creditors fail to contribute towards the CIRP cost then their claim in the CIRP Process would not be considered."
- 3.5 Mr. Gupta submitted that he has taken an action in compliance of the direction/order passed by the Hon'ble Court in the above stated matter. It is significant to mention here that he had mentioned about the removal of the names of defaulting creditors only after approval of the resolution plan and all such creditors have been treated as the part of the CoC till date as decision relating to removal of the defaulting creditors was only mentioned in the minutes but the said decision was never given effect to at any point of time. In fact, after 10th CoC meeting, no meeting has taken place and consequently, no matter has been considered which requires the approval of CoC members. Therefore, any rights of any financial creditor have not been infringed upon and all the creditors continued to be in the list of creditors.
- 3.6 Mr. Gupta further submitted that the last updated list of creditors was filed as on 07.10.2019 on the website of IBBI and the names of all financial creditors in class are included. He has also sent all the informative mails to those FCs either in relation to current status of the CIRP or proceedings pending before the AA. Mr. Gupta submitted that he has not removed the name of any of the FC in class from the list of creditors and has treated all the creditors equally. Furthermore, for the purpose of protecting the interest of all FC, including the creditors whose names were alleged to be removed from the CoC members for non- payment of the CIRP cost which is very much essential for running the operations of a going concern, he has sent all the informative mails to those FCs either in relation to current status of the CIRP or proceedings pending before the AA. Any of the FC in class has not been deprived from its rights.

Analysis & Findings

- 3.7 The DC observes that in the minutes of 10th CoC meeting it was recorded as follows:
"The Final list of COC members who have paid their dues of CIRP cost is annexed herewith as Annexure A and the names of the creditors who have not paid their dues have been removed from the final updated list of COC. List of the COC member who have not paid and removed is also annexed as Annexure A. And it is pertinent to mention that the notice of the ensuing meeting is not being sent to these creditors. And the updated list is being sent to creditors with their revised voting share.

It was also discussed and decided that an application shall be moved to the Hon'ble court for filing an application to remove the names of such creditors who have not paid the amount towards the CIRP cost and the construction cost."

From the above-referred minutes, it is apparent that RP had decided to remove the names of the CoC members who have not paid their dues towards CIRP cost from the list of CoC and

their voting share was also revised. The DC further notes that Mr. Gupta had decided not to send notices to the CoC members who have been removed from the list of CoC. The Code/Regulations do not envisage removal of any CoC member on non-payment of CIRP cost. This is blatant violation of the provisions of the Code and Regulations made therein. If such kind of action is permitted, then RPs would abuse their powers by removing CoC members. Hence, DC finds that Mr. Gupta has violated section 21(2) of the Code.

4. Contravention-II:

4.1 The minutes of 3rd CoC meeting (during the tenure of erstwhile RP Mr. Surendra Khinvasra) noted that construction material worth Rs.1.58 crore was lying at the project site. However, after appointment of Mr. Gupta as RP, he didn't create record of the quantum of construction materials available at site / handed over to Mr. Gupta by the erstwhile RP. It is observed from the CA certificate provided by erstwhile RP that most of the assets of CD could have been made good use of in construction and out of assets worth Rs. 1.49 crores, only Rs. 0.015 crores of assets (cement) belong to perishable category. It is also recorded in the minutes of 6th CoC meeting held on 22.06.2019 that assets such as bricks & cement can be utilised in construction. This not only establishes poor inventory management on part of Mr. Gupta but also led to deficiency of information with the CoC about the availability of actual inventory while having discussion on commencing the construction work at Greater Noida site in 6th CoC meeting. In view of the above, the Board is of prima facie view that Mr. Gupta has inter-alia violated section 25(1) and 25(2)(a) of Code.

Submissions

4.2 Mr. Gupta submitted that he was appointed as RP after 4 months from the date of commencement of CIRP against the CD. The erstwhile RP, Mr. Surendra Khinvasra neither provided any physical handover of the inventory nor provided any record with respect to the exact quantity and value of the inventory lying at the site of the CD. Furthermore, the erstwhile RP provided a physical inspection report submitted by Kanha & Associates, Chartered Accountants appointed by him, wherein, the notes of the report provides that:

- i. All values are approximate and subject to detailed verification and calculation.*
- ii. Rates of all individual items have been taken as provided by the management of the company, we have not verified the rates from open markets.*
- iii. Physical count of each and every items were not practically possible hence, we have taken physical count on best estimated basis.*

4.3 Mr. Gupta submitted that he also visited the site of the CD for the purpose of physical verification of the inventory and it was observed that all the construction material was spread over a very large area and it was not practically possible to take measures of the quantity of the said material. However, in order to ensure the security the assets/inventory of the CD, security guards were appointed by the erstwhile RP, who were continued to provide their services during the whole CIRP process. He has never come across about any theft activity taking place at the site. The CA certificate was based upon the information provided by the suspended management of the CD. The said certificate wasn't based upon the physical verification of the inventory as mentioned in the said certificate itself. In fact, no physical

verification of the inventory of the CD could be done by the erstwhile RP as well as by Kanha & Associates. Out of inventory worth Rs. 1.49 crores, 0.799 crores worth of goods consisting of raw material like cement, sand, steel, bricks etc could not be verified at all. The rest of the other material was consisting of more than 200 items of very small values and even these items could not physically be verified by the erstwhile RP as well as by the Kanha & Associates. In fact, it was very difficult for the Respondent to physically verify them. The said facts were also corroborated and recorded in the physical count verification report submitted by Kanha & associates dated 12.06.2019. Relevant extract of the said report is reproduced hereunder:

"Notes:

- i. Exact quantity of steel lying at the site could not be verified without weighing and weighing is not possible.
- ii. Exact quantity of cement bags could not be verified because stacking of the cement bags was not proper & certain loose cement bags was also found lying on floor.
- iii. Coarse sand, aggregate and fine sand lying on the site but exact quantity of the same could not be verified because it was spread over a large area.
- iv. Bricks are lying at the site at various places hence, could not be counted. "

Analysis & Findings

4.4 The DC notes from the report of Kanha & Associates, CA dated 12.06.2019 that material was lying loose and its quantification was not feasible. The DC notes the submission of Mr. Gupta that he also visited the site of the CD for the purpose of physical verification of the inventory and it was observed that all the construction material was spread over a very large area and it was not practically possible to take measures of the quantity of the said material and he continued the security guards were appointed by the erstwhile RP during the whole CIRP process That out of inventory worth Rs. 1.49 crores, 0.799 crores worth of goods consisting of raw material like cement, sand, steel, bricks etc could not be verified at all. The rest of the other material was consisting of more than 200 items of very small values and even these items could not be physically verified by the erstwhile resolution professional as well as by the Kanha & Associates. Mr. Gupta who was appointed as RP in the CD on 13.06.2019 conducted his first CoC meeting on 22.06.2019. The DC observes that Mr. Gupta proposed to utilize the steel lying at the site. Hence DC accepts the submission of Mr. Gupta.

5. Contravention-III:

5.1 IBBI circular No. IP/005/2018 dated 16th January 2018 requires disclosure of appointment of a professional to be made within three days of appointment of that professional. However, it is observed that Mr. Gupta has delayed the filing of disclosure on the website of the insolvency professional agency of the following professionals:

Professional	Name	Date of appointment	Disclosure date	Delay (in days)
Advocate	Mr. Vinod Khanna	05-07-2019	30-07-2019	22
Forensic Auditor	M/s VMRS & Associates	03-08-2019	16-08-2019	10

5.2 In reply to DIR, Mr. Gupta accepted the delay while attributing it to technical issues and receiving of requisite details of professionals for submission of disclosure. He has also sought condonation from the Board for the delays by stating that it has not caused any loss to any person. In view of the above, the Board is of prima facie view that Mr. Gupta has *inter alia* violated regulation 7(2)(h) of IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clauses 13 and 14 of Code of Conduct and IBBI circular No. IP/005/2018 dated 16th January 2018.

Submissions

5.3 Mr. Gupta submitted that he appointed Mr. Vinod Khanna as legal counsel on 05.07.2019 and VMRS & Associates as forensic auditor on 16.08.2019. After appointment of these professionals, he immediately sought the requisite details of the professionals in order to file disclosures in accordance with the IBBI circular no. IP/005/2018. However, there were minor delays happened on the part of the appointed professionals in providing the relevant details sought by him. Consequently, he couldn't file the disclosures within the prescribed period and minor delays were caused in such compliances. However, any of such delays were neither intentional nor caused any prejudice or loss to any of the stakeholder of the CD. He has not derived any personal benefit out of it and there was never any active intent by him to violate the law or cause any undue gain to himself or any undue loss to any other party.

Analysis & Findings

5.4 The DC notes the submissions of Mr. Gupta that delay by him in filing disclosure with insolvency professional agency were neither intentional nor caused any prejudice or loss to any of the stakeholder of the CD. He has not derived any personal benefit out of it. Though Mr. Gupta has delayed in filing disclosure and he is admitting the delay on his part but same has not affected any of the stakeholder, hence DC accepts the submission of Mr. Gupta and takes a lenient view.

6. Contravention -IV:

6.1 From financial statement for FY 2016-17, it was observed that the CD had advanced long term loans and advances of Rs. 2.13 crores and short term loans and advances of Rs. 5.21 crores. However, Mr. Gupta failed to take concrete action to recover the advances. In reply to DIR, Mr. Gupta inter-alia, stated that the majority loans and advances are fictitious entries and details of these entries are not available in records of CD. He has also stated that any legal efforts to recover this money would have cost the CD a lot without any material gain and hence he did not take help of professionals to recover the money. Mr. Gupta has also failed to provide any documentary proof in support of low value of assets. His stand that said loans and advances are fictitious entries is neither recorded in CoC minutes nor communicated to CoC members or while taking over charge from erstwhile resolution professional. Thus, Mr. Gupta has failed to preserve and protect the assets of corporate debtor. In view of the above, the Board is of prima facie view that Mr. Gupta has *inter alia* violated section 25(1) of Code.

Submissions

- 6.2 Mr. Gupta submitted that as per the financial statements for the year 2016-17, the CD had long-term loans and advances of Rs. 2.13 crore and short-term loans and advances 5.21 crores. However, as on the date of commencement of CIRP i.e. 13.02.2019, the CD loans and advances of Rs. 0.04 crore and short-term loans and advances 3.87 crores only. In the valuation report submitted by the registered valuer Mr. Pradeep Kumar comments were mentioned at page 57 as under: *"The information regarding the short term loans and advances was sought from the CD as stated in Section 6 of the report on page 18. However, no details of the same have been made available to us ... In absence of any data, it is assumed that the loans and advances made are not recoverable and hence, its value is taken as ZERO."* Further, the other registered valuer, Mr. Ankush Garg has also provided his comments in his report at page 19 mentioned hereunder: *"No agreement, balance confirmation and account statement were provided for the above, accounts (list of all such loans were provided). As informed, most of the balances are either more than 2 years old or are not recoverable from the respective authorities/ vendors. Hence, conservatively and due to lack of information the fair value and liquidation value have been considered as NIL"*
- 6.3 Mr. Gupta submitted that as per the list of such advances, most of the amount pertains to individuals whose whereabouts were not known and as respondent was not in a position to even communicate to such persons. Mr. Gupta submitted that he has also appointed the forensic auditor to conduct forensic audit of the financials of the CD. During the forensic audit, it was observed that the entries relating to such loans and advances were fictitious in nature or bogus in majority. Even, any details relating to these entries were not available in the records of the CD. The forensic auditor vide its addendum dated 14.12.2019 provided some comments over the queries raised him which are reproduced hereunder: *" The Loans and Advances -Assets Side as on 13.02.2019 shown under financial statement of corporate debtor includes balances majorly from individual persons, some corporates and rest from Directors and Relatives which seems to be suspicious on the basis of books of accounts and other details provided ...On further analysis of the book of accounts of the CD, most of the balances belongs to a very long period and appears to be time barred...."*

Analysis & Findings

- 6.4 Based on valuation reports and report of forensic auditor, the DC accepts the submission of Mr. Gupta.

7. Contravention-V:

- 7.1 The minutes of 9th CoC meeting in its Item No. 5 record that Mr. Gupta has incurred some expenses on construction work at Greater Noida site without approval of CoC. The said minutes further note that on being questioned about the increased expenditure on construction, Mr. Gupta stated that he is not required to obtain approval of CoC as it is a going concern, which is factually incorrect. Regulation 34 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) requires that the committee shall fix the expenses to be incurred on or by the resolution professional and the

expenses shall constitute insolvency resolution process costs. In view of the above, the Board is of prima facie view that Mr. Gupta has inter-alia violated regulation 34 of CIRP Regulations.

Submissions

- 7.2 Mr. Gupta submitted that in the 3rd CoC meeting, the concern about the construction and utilization of the material lying in the construction site was raised by the Authorized Representative of the FCs in class which is already on record. Thereafter, some discussions were done between the members of the CoC relating to appropriate utilization the material such as cement and steel which were likely to deteriorate in quality and utility with the passage of time. After such discussion on this issue, Shri Shridev Sharma, Board Member of Company (Suspended) was requested to give the plan where the perishable material can be utilized and also the estimate of expenditure to be incurred for carrying the activity. It was also discussed that once the plan with likely expenditure is received, CoC members shall be requested to approve the same and arrange funds for carrying out the activity. That in the 4th meeting of CoC held on 18.05.2019, the matter relating to the construction was discussed in the detail between the members present in the meeting, including the invitation of tenders from the Civil Engineers, formation of a committee for the said purpose and other actions to be taken with this respect. The said discussion is also recorded in the minutes of fourth meeting of Committee of Creditors.
- 7.3 In the 6th CoC meeting held on 22.06.2019, the agenda relating to approval for construction at the project site was placed before CoC in agenda item 12 of the 6th meeting along with the agenda of seeking approval of constitution of project. The said agenda was approved by the members of CoC with the 74.75% majority. Later, he kept apprising the CoC members about the status of the Construction work from time to time in every subsequent COC meeting.
- 7.4 Mr. Gupta submitted that IRP/RP is duty bound to make all possible efforts to run the CD as going concern as per section 20 of the Code. All the expenses were incurred in ordinary course of business and any such expenses do not require any approval of the members of the CoC. However, the said information was placed before the CoC members during the meeting on several occasions and the same was in the knowledge of the members of CoC. Moreover, no objections were ever raised by any of the creditor or other stake holders during the CIRP process or even after the completion of the same.

Analysis & Findings

- 7.5 The DC notes the following from the minutes of the 9th CoC meeting held on 24.10.2019:
“On being asked for the approval of CoC for the increased expenditure on the construction by the AR, RP informed that it is not required to obtain the approval of CoC as it is going concern and RP is authorized to look into the operation of the company.”

Regulation 34 of the CIRP Regulations states that *“The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.”* Explanation provided under Regulation 34 of the CIRP Regulations clarifies that “expenses” includes “other expenses to be incurred by the

resolution professional.” Thus, it is clear that RP has to take approval of the CoC for the expenditure incurred to run the CD as a going concern. The contention of the Mr. Gupta in the 9th CoC meeting that he as RP is not required to take approval of the CoC for going concern expenses cannot be sustained. If Mr. Gupta’s stand is to be accepted, it would lead to RP’s spending arbitrary amounts in the name of going concern expenses. The stand taken by Mr. Gupta that he as RP does not need the approval of the CoC, is not only against the provision of Regulation 34 of the CIRP Regulations but also against the spirit of the Code. Hence, the DC finds that Mr. Gupta has violated Regulation 34 of the CIRP Regulations.

8. Order

- 8.1 It is clear that Mr. Yogesh Kumar Gupta had violated the provisions of the Code and regulations by deciding to remove the CoC members from the list of CoC and revise their voting share on the basis that some CoC members have not contributed to the CIRP cost, and stating before the CoC that no approval is required from the CoC for the going concern expenses. Hence, the DC, in exercise of the powers conferred under section 220 (2) of the Code read Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and Regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017 hereby suspends the registration of Mr. Yogesh Kumar Gupta having Registration No. IBBI/IPA-003/IP-N00078/2017-18/10701 for a period of three years.
- 8.2 This Order shall come into force on expiry of 30 days from the date of its issue.
- 8.3 A copy of this order shall be sent to the CoC of Kamrup Housing Projects Private Limited (CD). The CoC of the CD may consider getting an audit of the increased construction cost.
- 8.4 A copy of this order shall be sent to the CoC of all the Corporate Debtors in which Mr. Yogesh Kumar Gupta is providing his services, if any. The CoC may decide whether to continue his services or not. In case, CoC decide to discontinue his services, CoC may file an appropriate application before AA.
- 8.5 A copy of this order shall be forwarded to the Insolvency Professional Agency of Institute of Cost Accountants of India where he is enrolled as a member.
- 8.6 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, for information.
- 8.7 Accordingly, the show cause notice is disposed of.

-sd-

(Ravi Mital)
Chairperson, IBBI

Dated: 1st July, 2022
Place: New Delhi