

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/90/2022

8th April, 2022

Order

In the matter of Mr. Manish 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.

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/MON/2021/137/298/1686 dated 26.03.2021 issued to Mr. Manish Gupta, R/o – MPR & Co., E-62, LGF, Lajpat Nagar-II, New Delhi-110024 who is a Professional Member of Indian Institute of Insolvency Professionals of ICAI (IIP-ICAI) and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P01131/2018-19/11826.

Background

- 1.1 The Hon'ble NCLT, New Delhi (AA) *vide* order dated 06.09.2019 admitted the application under section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) bearing no. (IB) 1771/(ND)/20180 for initiating Corporate Insolvency Resolution Process (CIRP) of M/s. Dream Procon Private Limited (CD). The AA appointed Mr. Manish Gupta as an Insolvency Resolution Professional (IRP) and since the appointment of Resolution Professional (RP) was delayed, the IRP as per Regulation 17(3) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2017 (CIRP Regulations) performed the functions of RP from 40th day of Insolvency commencement date (ICD) till RP was appointed. Thus, in this case, at relevant time, Mr. Manish Gupta was acting as RP in the said assignment after 40th day from the ICD till January 23, 2020. Thus, he was responsible for all activities as IRP/RP with regard to the CIRP during his tenure.
- 1.2 The IBBI issued the SCN to Mr. Manish Gupta on 26.03.2021 based on the material available on record. The SCN alleged contraventions of Section 25(2)(d), 208(2)(a) & (e) of the Code, Regulation 7(2)(a) and (h) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and Clause 13 and 14 of the Code of Conduct under First Schedule of regulation 7(2) thereof. Mr. Manish Gupta replied to the SCN *vide* email dated 13.05.2021.
- 1.3 The IBBI referred to the SCN, response of Mr. Manish 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. Manish Gupta availed an opportunity of virtual personal hearing before the DC on 22.06.2021 wherein he was represented by his counsel, Mr. Aashish Makhija.

2. Alleged Contraventions and Submissions

Contraventions alleged in the SCN and Mr. Gupta's submissions thereof are summarized as follows.

2.1 Contravention – I

- 2.1.1 CIRP of Dream Procon Private Limited commenced on 06.09.2019. As per Section 25(2)(d) of the Code, the authority to appoint professionals in the manner specified by the Board by regulations vests with RP only. However, from the minutes of the 2nd meeting of Committee of Creditors (CoC) held on 23.012.2019, it was observed that Mr. Gupta had placed agenda for appointment of registered valuers before the CoC though its role is limited to ratifying the fees payable to professionals. Thus, Mr. Gupta abdicated his duty in favor of CoC.
- 2.1.2 Mr. Gupta stated that he could not appoint registered valuers, as CoC did not approve the cost of registered valuer and wanted incoming RP to make the the appointment. However, Mr. Gupta failed to substantiate his claim with support of any document showing disapproval of CoC to costs payable to registered valuers as claimed by him.
- 2.1.3 Regulation 27 read with Regulation 40A of the CIRP Regulations requires the Registered Valuers to be appointed within 47th day of the ICD. However, from the above, it is gathered that Mr. Gupta failed to appoint the Registered Valuers to determine the fair value and liquidation value of the CD in terms of the aforesaid Regulations.

2.2 Contravention – II

- 2.2.1 Regulation 36 read with Regulation 40A of the CIRP Regulations requires Information memorandum (IM) to be prepared by the RP within 54th day of ICD. However, Mr. Gupta failed to prepare the IM on the said assignment as required under these regulations.
- 2.2.2 It is also noted from the voting results of 1st and 2nd meeting of the CoC that Mr. Gupta's monthly fees of INR 3,54,000/- (Three lacs fifty-four thousand only) of CIRP had been ratified by the CoC. Even though Mr. Gupta have charged hefty fees for his tenure of 101 days, he had failed to perform the basic duty of an Insolvency Professional, *i.e.*, preparation of IM and appoint registered valuers).
- 2.2.3 Mr. Gupta's above acts and omissions are observed to be in contraventions of provisions of Section 25(2)(d) of the Code and Regulations 27, 36 and 40A of CIRP Regulations. When seen in context of role, functions, and powers conferred upon an IP, the aforesaid acts and omissions committed by Mr. Gupta during the CIRP of the

CD suggest negligence and dereliction of duties on his part.

In view of the above, it is alleged that by Mr. Gupta's aforesaid acts, omissions and conduct, he had contravened Section 25(2)(d), 208(2)(a) & 208(2)(e) of Code, Regulation 7(2)(a) & 7(2)(h) of IP Regulations and Clause 13 & 14 of Code of Conduct as provided under First Schedule of IP Regulations.

Submissions

2.3 With regard to the aforesaid contraventions, Mr. Gupta made the following submissions:

- (a) Mr. Gupta stated that in the present case, it wasn't mentioned in the SCN that the Board had made a *prima facie* opinion regarding existence of sufficient cause. That no such copy of the *prima facie* opinion has been attached with SCN dated 26.03.2021. He stated that the authority to issue SCN is conditional upon the making of *prima facie* opinion by the Board. In other words, since there is neither any mention of *prima facie* opinion in SCN nor a copy of such *prima facie* opinion has been attached, the SCN issued is misconceived and unlawful.
- (b) Mr. Gupta stated that the clarification as sought by the complaints and grievances handling procedure team was duly replied by him on 5.8.2020. Mr. Gupta stated that he had clearly brought about the facts and circumstances which led to delay in the Model timeline as laid down in CIRP Regulations and it was clear from said reply that minor delay in following the timeline was due to *extraneous factors beyond his control*. After submitting the clarification as above on 5.8.2020, Mr. Gupta did not hear from the Board and had suddenly been served with the instant SCN. Mr. Gupta submitted that the basis of the present SCN remained unexplained. He stated that he was not supplied a copy of any grievance or complaint.
- (c) Mr. Gupta stated that assuming it to be a grievance, in terms of Regulation 6 of IBBI (Grievance and Complaint Handling Procedure) Regulations, 2017 (GCHP Regulations), the Board was under an obligation to give directions to the Respondent to redress the grievance and if it was a complaint, then the Board was required to form an opinion whether there exists a *prima facie* case within 45 days receipt of complaint. The Respondent was unaware about the basis of SCN, *i.e.*, whether the genesis of SCN lies in any grievance or complaint filed against the Respondent. It was also unclear whether the Board formed its opinion about existence of *prima facie* case within time limit mentioned in Regulation 7(3) of GCHP Regulations.
- (d) Mr. Gupta stated that the timeline as stated in the Regulation 40A of the CIRP Regulations is directory and not mandatory in nature. The aforesaid interpretation is based upon the fact that Regulation 40A which was inserted with effect from 04.07.2018 clearly uses the expression, 'Model Time-line in CIRP' which indicates that the time-line stated in the Regulations are not to be construed strictly and hence they are not mandatory. He further stated that the dictionary meaning of the word 'model' is "a representative form, style or pattern". In other words, the

model time-line' is *illustrative, advisory and demonstrative* in nature and under no circumstances can be considered mandatory. Hence, any explained delay in following the 'model time-line' cannot be considered as non-compliance of any of the Regulations containing time-line. Mr. Gupta stated that the minor delay, which did not impact the overall time-line of CIRP, was beyond his control and was primarily due to extraneous reasons.

- (e) Mr. Gupta stated that the Board has a duty, as a Regulator, to look into the facts and circumstances of each case and also to understand the difficulties faced by the Insolvency Professionals while conducting the CIRP. He stated that the assignment of the CIRP undertaken by him was not easy to handle and it required a sympathetic consideration from the Board. Mr. Gupta further explained the difficult circumstances under which he conducted CIRP, which led to slight delay in following the Model time-lines. He enumerated the challenges faced by him while handling the instant CIRP assignment which are provided herein below:
- (i) The order admitting the application for commencement of CIRP was passed by the AA on 6.9.2019. However, the said order was uploaded on the portal of AA only on 15.10.2019 and Mr. Gupta gained knowledge of the same from the email of the lawyer of the Applicant. The said delay of 39 days was beyond the control of Mr. Gupta and deserves to be excluded.
 - (ii) That immediately Mr. Gupta issued the public announcement and commenced the activities under the CIRP. He also brought this to the knowledge of the Committee of Creditors (CoC) and has also informed them that an application for exclusion of 39 days has to be filed with the AA.
 - (iii) That the slight delay that occurred is to be understood contextually. Mr. Gupta handled the case which comprised of allottees of Real Estate project, *i.e.*, class of creditors. Because of infighting amongst the allottees and there being two homebuyers' association/groups engaging in conflict drained precious time of Mr. Gupta in hearing their opinions and grievances. Both the groups continuously approached Mr. Gupta and maximum time was lost in discussing the matter with the homebuyers' and Mr. Gupta was inundated with large number of emails from the allottees.
 - (iv) That it is not out of place to mention that during this period, Mr. Gupta was faced with personal medical problems as his father-in-law fell critically ill. Crucial time was lost in tending to ailing father-in-law, who unfortunately lost his battle with life on 02.12.2019. The time that was lost due to medical emergency needs to be excluded as it was beyond his control.
 - (v) That lot of time of Mr. Gupta was also consumed in verifying the claims filed by allottees. This was a case where promoter had sold some of the flats more than once and hence, the process of reconciliation took lot of time. It needs to be appreciated that the time in hand of the Interim Resolution Professional is always limited and he has to complete the process of claim verification despite the fact that no proper documents are available. It is pertinent to state that despite all these bottlenecks and

hurdles, all the claims were verified in time and after constituting the Committee of Creditors (CoC), the first committee of creditors meeting was held on 15.11.2019. Mr. Gupta did not get the requisite records, documents, information and books of account of the CD and he had to struggle to get hold of the relevant documents, records and information relating to the CD.

- (vi) That it is pertinent to state that main suspended director of the CD was in judicial custody at the relevant time and that there was no one in the CD to handover the documents to Mr. Gupta. The registered office of the CD was found to be closed and after spending a lot of time and effort, he was able to get the office opened but did not find any documents or data related to the financial position of the CD.
 - (vii) That during the CIRP, Mr. Gupta had to incur expenses relating to CIRP amounting to Rs. 14,78,228.00. Out of the aforesaid expenses, the CoC has approved the expenses to the extent of Rs. 9,02,700.00 and the balance amount of Rs. 5,75,528.00, is yet to be approved by CoC.
 - (viii) It may not be out of place to mention that sum of Rs. 1,44,700.00 has been incurred by Mr. Gupta from his personal resources and the amount is yet to be reimbursed and paid to him. The fee of Mr. Gupta as IRP amounting to Rs.12,15,400.00 (Rs.3,54,000.00 p.m. for a period of 3 months and 13 days), though approved by the COC, is yet to be paid to him.
- (f) With regard to the issue of non-appointment of registered valuers, Mr. Gupta submitted that section 25(2)(d) of the Code is contextual and has to be read with the practical considerations. He submitted that no professional accepts appointment unless and until his fee is settled, *i.e.*, all professionals require signing of engagement letter. Mr. Gupta stated that he was in no position to fix the fee of the valuers on his own it was to be approved by the committee of creditors. Unless and until there was clarity as to the fee of the valuers, any engagement letter issued by Mr. Gupta would have been of no value or it would have resulted in personal liability of Mr. Gupta. Mr. Gupta vehemently denied that he abdicated his duty in favour of committee of creditors. He submitted that the appointment of any professional is intricately linked with the professional fee and Mr. Gupta was in no position to commit the fee of the valuer. Mr. Gupta stated that the CoC did not approve the cost of registered valuer and wanted incoming resolution professional to make the appointment. In support of this contention, Mr. Gupta placed reliance on minutes of the meeting of the CoC held on 23.12.2019. Mr. Gupta reiterated and submitted that crucial time was lost due to extraneous factors, namely, delay in intimation of his appointment as IRP, time lost due to continuous engagement by rival groups of allottees and non-approval of fee of the valuers by committee of creditors.
- (g) With regard to the issue of non-preparation of IM, Mr. Gupta stated that while the model time-line relating to preparation of IM is not denied, it is submitted that practical considerations must be taken into account. The IM contains information about the CD and Mr. Gupta, despite his best efforts, did not get any information, documents, records or books of account of the CD. Therefore, he could not

complete the IM.

- (h) Mr. Gupta further submitted that the fee payable to the IRP was neither hefty nor on higher side considering the work involved in verifying the claims of allottees and other work relating to CIRP despite of non-availability of information or non-cooperation of the personnel of the CD. Mr. Gupta stated that the Code relies on negotiated fee and his fee was approved by the committee of creditors (CoC) using their commercial wisdom. He submitted that the fee payable to Mr. Gupta was duly approved by the CoC in their first meeting held on 15.11.2019 and that the same was reasonable and commensurate the work done by him during the CIRP. Mr. Gupta also submitted details of the activities carried out by him during CIRP.
- (i) Mr. Gupta submitted that the slight delays should be seen in the context of circumstances under which he as an IRP operated. He submitted that all the delays were justifiable and have been fully explained by him in preceding paragraphs and that there was no negligence or dereliction of duties on his part. Mr. Gupta submitted that negligence indicates deliberate, intentional and willful act of omission or commission. In the present case, none of the elements of negligence were present as Mr. Gupta has been able to explain the delays due to factors beyond his control. Contextual interpretation with the facts and circumstances would lead to the conclusion that neither any time line was breached intentionally by Mr. Gupta nor he was careless in performing his duties. Mr. Gupta stated that he undertook the assignment with utmost care and professionalism.

Analysis and Findings

- 3. After considering the allegations in the SCN and submissions made by Mr. Gupta in light of the provisions of the Code and regulations, the DC finds as follows.

Under the Code, RP plays a central role in resolution process of the CD, he is appointed by the AA as an officer of the Court to conduct the resolution process and it is the duty of RP to conduct CIRP with integrity and accountability in the process and to take reasonable care and diligence while performing his duties. Therefore, it becomes imperative for an IP to perform his duties with utmost care and diligence. Section 208(2) of the Code provides that every insolvency professional shall abide by the Code of conduct.

- 3.1 The IP is to maintain integrity, by being honest, straight forward and forthright in all his professional relationships while conducting business during CIRP. His conduct has a substantial bearing on performance and outcome of the processes under the Code. He, therefore, is expected to function with reasonable care and diligence to ensure credibility of the process.

Regulation 7(2)(a) and 7(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Professional), Regulations, 2016 provides as under:

“7. Certificate of Registration:

(1)

(2) The registration shall be subject to the conditions that the insolvency

professional shall -

(a) at all times abide by the Code, rules, regulations, and guidelines thereunder and the bye-laws of the insolvency professional agency with which he is enrolled".

(h) abide by the Code of Conduct specified in the First Schedule to these Regulations;

and..."

Clauses 13 and 14 of First Schedule of Code of Conduct for Insolvency Professionals under Regulation 7(2)(h) of IBBI (Insolvency Professionals) Regulations, 2016 states as follows:

Clause 13: An insolvency professional must adhere to the time limits prescribed in the Code and the rules, regulations and guidelines thereunder for insolvency resolution, liquidation or bankruptcy process, as the case may be, and must carefully plan his actions, and promptly communicate with all stakeholders involved for the timely discharge of his duties.

Clause 14: An insolvency professional must not act with mala fide or be negligent while performing his functions and duties under the Code".

3.1.1 The DC notes that regulation 27 of the CIRP Regulations provides for appointment of professionals. The regulation is reproduced below:

"27. Appointment of Professionals. (1) The resolution professional shall, within seven days of his appointment but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35.

3.1.2 With regard to the issue of non-appointment of the registered valuers to determine the fair value and liquidation value of the CD by Mr. Gupta, the DC notes that it is duty of RP to appoint two registered valuers within forty-seventh day of the ICD. In the instant case, Mr. Gupta served as an IRP in the said assignment from 15.10.2019 to 23.01.2020, *i.e.*, 101 days. As per Regulation 17(3) of the CIRP Regulations, if the appointment of RP is delayed, the IRP shall perform the functions of RP from 40th day of ICD till RP is appointed. Mr. Gupta, thus, at the relevant time was acting as RP in the said assignment after 40th day from ICD till 23.01.2020. In view of the same, Mr. Gupta was under an obligation to appoint two registered valuers within the timeline prescribed under regulation 40A of the CIRP regulations. In this regard, the DC notes the submission of Mr. Gupta that no professional accepts appointment unless and until his fee is settled, *i.e.*, all professionals require signing of engagement letter. The DC notes the submission of Mr. Gupta that he was not in a position to fix the fee of the valuers on his own as it was to be approved by the committee of creditors. Unless and until there was clarity as to the fee of the valuers, any engagement letter issued by Mr. Gupta would have been of no value or it would

have resulted in personal liability of Mr. Gupta. The DC further notes that Mr. Gupta did make an effort to put forward an agenda for appointment of registered valuers in the 2nd CoC meeting dated 23.12.2019. However, the CoC did not approve the cost of registered valuer and wanted incoming RP to make the appointment/ however, the CoC was of the opinion that more proposal should be sought and placed for appointment of registered valuers in next CoC meeting. Hence, there appears to be no contravention in view of the efforts made by Mr. Gupta to appoint registered valuers.

- 3.1.3 With regard to the issue of non-preparation of the IM, the DC notes that Mr. Gupta failed to prepare the IM as required under regulation 36 read with regulation 40A of the CIRP regulations. The DC notes that regulation 36 of the CIRP regulations provides that:

“36. Information memorandum.

(1) Subject to sub-regulation (4), the resolution professional shall submit the information memorandum in electronic form to each member of the committee within two weeks of his appointment, but not later than fifty-fourth day from the insolvency commencement date, whichever is earlier.”

- 3.1.4 The DC notes the submission of Mr. Gupta, that despite his best efforts, he did not get any information, documents, records or books of account of the CD and he had to struggle to get hold of the relevant documents, records and information relating to the CD. The DC also notes the submission of Mr. Gupta that main suspended director of the CD was in judicial custody at the relevant time and that there was no one in the CD to handover the documents to Mr. Gupta. The DC further notes that registered office of the CD was found to be closed and after spending a lot of time and effort, he was able to get the office opened but did not find any documents or data related to financial position of the CD. As per his submission, he could not complete IM despite his best efforts in the context of given facts and circumstances. The DC accepts the submission of Mr. Gupta.
- 3.1.5 The DC further notes the submission of Mr. Gupta that the fee payable to him was duly approved by the CoC in their first meeting held on 15.11.2019 and that the fee payable to him was reasonable and commensurate the work done by Mr. Gupta during the CIRP.
- 3.1.6 Thus, the DC finds that the alleged non-appointment of registered valuers and non-preparation of IM was due to circumstances beyond the control of Mr. Gupta. Hence, no contravention can be attributed on part of Mr. Gupta.

Order

4. In view of the above, the DC, in exercise of the powers conferred under section 220 (2) of the Code read with sub-regulations (7) and (8) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, disposes of the SCN without any directions.

5. The Order shall come into force with immediate effect in view of para 4.
6. A copy of this order shall be forwarded to the Indian Institute of Insolvency Professional of ICAI where Mr. Manish Gupta is enrolled as a member.
7. 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.
8. Accordingly, the show cause notice is disposed of.

-sd-

(Dr. MukulitaVijayawargiya)

Whole Time Member, IBBI

Dated: 8th April, 2022

Place: New Delhi