

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/67/2021

02nd February, 2021

Order

In the matter of Mr. Vijaykumar V Iyer, Insolvency Professional (IP) under Regulation 11 read with Regulation 13 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 read with section 220 of the Insolvency and Bankruptcy Code, 2016.

Background

- 1 This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/R(INSP)/2019/11 dated 24th July, 2020 issued to Mr. Vijaykumar V Iyer, Deloitte Touche Tohmatsu India LLP, Indiabulls Finance Centre, Tower 3, 27th floor, Senapati Bapat Marg, Elphinstone Road (West), Maharashtra-400013, who is a Professional Member of the Indian Institute of Insolvency Professionals of ICAI (IPA) and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P00261/2017-18/10490.
 - 1.1 Mr. Iyer was appointed as an interim resolution professional (IRP) and/ or resolution professional (RP) in corporate insolvency resolution process (CIRP) of Murli Industries Ltd. (CD 1) vide order dated 04.04.2017 passed by Hon'ble NCLT, Mumbai Bench; in the CIRP of Binani Cements Ltd. (CD 2) vide order dated 25.07.2017 passed by Hon'ble NCLT, Kolkata Bench and in the CIRP of Bhushan Steels Ltd. (CD 3) vide order dated 26.07.2017 passed by Hon'ble NCLT, New Delhi, Principal Bench. He was confirmed by the respective CoCs of CD 1, CD 2 and CD 3 as RP.
 - 1.2 In exercise of its powers under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017 (Inspection Regulations), the IBBI vide Order dated 3rd October, 2019 appointed an Inspecting Authority (IA) to conduct an inspection of Mr. Vijaykumar V Iyer for his role as IRP/ RP in the CIRPs of CD 1, CD 2 and CD 3.
 - 1.3 The IA, in its report dated 25th February, 2020 observed that Mr. Iyer has violated section 5, 25(2)(d), 30(4) and 208(2)(a) of the Insolvency and Bankruptcy Code, 2016 (Code) and Regulations 31 and 34 of IBBI (Insolvency Resolution Process for Corporate Persons) regulations, 2016 (CIRP Regulations), Regulation 7(2)(h) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clause 25 of the First schedule to the IP Regulations read with Circular No. IBBI/IP/013/2018 dated 12.06.2018 issued by IBBI.
 - 1.4 The IBBI had issued the SCN on 24th July, 2020 to Mr. Iyer, on the basis of material available on record in respect of his role as an IRP and/ or RP in the CIRPs of the aforesaid

CDs. The SCN alleged contraventions of Section 5(13) and Section 208(2)(a) & (c) of the Code, Regulation 31 and 34 of the CIRP Regulations, Regulation 7(2)(a) and (h) of the IP Regulations and the Code of Conduct under regulation 7(2) thereof with respect to inclusion of expenses incurred by CoC in Insolvency Resolution Process Cost as also the raising of fee of IP. Mr. Iyer replied to the SCN vide letter dated 11.09.2020.

- 1.5 The IBBI referred the SCN, his reply 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. Iyer availed an opportunity of personal virtual hearing before the DC on 26th October, 2020 wherein he was represented by Mr. Abhinav Vasisht, who appeared along with Mr. Manmeet Singh and Mr. Anugrah Robin Frey. He also submitted additional written submission vide email dated 31.10.2020.

Alleged Contraventions and Submissions

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

Contravention

- 2 The SCN alleged contraventions of Section 5(13) and Section 208(2)(a) & (c) of the Code, Regulation 31 and 34 of the CIRP Regulations, Regulation 7(2)(a) and (h) of the IP Regulations and the Code of Conduct under regulation 7(2) thereof with respect to inclusion of expenses incurred by CoC in Insolvency Resolution Process Cost (IRPC) as also the raising of fee of IP.

Preliminary submissions made by Mr. Iyer

- 2.1 Mr. Iyer submitted that he had acted with *bona fide* intent, transparently and in good faith throughout his professional engagements and in the discharge of his obligations under the Code and regulations thereunder. The SCN also does not include any finding or observation regarding any *mala fide* intent or finding or observation on the part of Mr. Iyer having made any undue, illegal or personal gain.
- 2.2 Given the complexity and magnitude of the duties and responsibilities required to be discharged by the RP, the Code expressly protects *bona fide* actions of such person under section 233 of the Code. Section 233 of the Code reads as under:

“233. No suit, prosecution or other legal proceeding shall lie against the Government or any officer of the Government, or the Chairperson, Member, officer or other employee of the Board or an insolvency professional or liquidator for anything which is in done or intended to be done in good faith under this Code or the rules or regulations made thereunder.”

- 2.3 Mr. Iyer had also referred to the letter dated 11.02.2019 of IBBI issued to the IP which has expressly recognized that the IP is an officer of the Court. Thus, Mr. Iyer submitted that from a perusal of Section 233 of the Code, it is clear that there is a common standard set for

an officer of the Government, members of the IBBI and IPs that any action taken by any of them in good faith shall be excluded from the purview of a proceeding. Therefore, the SCN, being in the nature of legal proceeding, ought not to have been initiated and is liable to be disposed of in favour of Mr. Iyer, in view of Section 233 of the Code.

- 2.4 Further, the current DC proceedings do not satisfy the requirements of Section 218 of the Code and the SCN ought not to have been issued under Section 219 for the purposes of proceedings under Section 220. Further, the provisions of the Inspection Regulations giving power to IBBI to commence an inspection against an IP without compliance of the provisions and scheme of the Code including Section 218, are bad in law being *ultra vires* the Code.
- 2.5 It is trite law that any subordinate legislation to the extent inconsistent with the main statute cannot be given effect to. The present proceedings against Mr. Iyer without compliance of the provisions and scheme of the Code including Section 218, are bad in law being *ultra vires* the Code.
- 2.6 Further, Mr. Iyer submitted that the SCN has been issued in violation of the principles of natural justice due to non-furnishing of the inspection report as envisaged under Regulation 6(4) of the Inspection Regulations. The report is a relevant document under Regulation 6 (4) of the Inspection Regulations and is the basis of issuance of the SCN. Accordingly, Mr. Iyer *vide* letter dated 05.08.2020 and in accordance with his right under law, requested IBBI for a copy of such report in order to be able to respond to the SCN. However, the same has not been provided to him till date of submission of his response in a time bound proceeding. This amounts to a clear violation of the principles of natural justice and contravenes the fundamental rights of Mr. Iyer.
- 2.7 He further submitted that the SCN cited infractions of provisions of the Code and regulations which were not alleged in the Draft Report. Further, there were other discrepancies in the SCN and the Draft Report which have the effect of expanding the observations and findings beyond what was stated in the Draft Report. Thus, Mr. Iyer sought kind indulgence and reserved all his rights to impugn/ take objections to/ provide additional responses arising out of the foregoing.
- 2.8 Mr. Iyer submitted that the SCN has been issued in violation of principles of natural justice, in breach of the express provisions of the Code and is without jurisdiction. Such defects go to the root of the matter. Any action taken in furtherance of the SCN shall also suffer the same vice of complete lack of jurisdiction. In such circumstances, the erroneous issuance of the invalid SCN causes immense unfair prejudice to the IP. Accordingly, it is most respectfully submitted that the SCN issued to Mr. Iyer is liable to be kindly set aside/ disposed of in his favour.

3. **In the matter of Murli Industries Ltd.**

Contravention

- 3.1 As per section 5(13) of the Code, Insolvency Resolution Process Cost (IRPC) includes under its clause (b), “the fees payable to any person acting as a resolution professional.” Therefore, a constructive interpretation of section 5(13) of the Code and Regulation 34 of

CIRP Regulations implies that only IRP/RP is entitled to receive the fee payable along with out-of-pocket expenses in relation to a resolution process for which he has been appointed as the IRP/ RP. However, in the present matter, the invoice for the services rendered by Mr. Iyer was raised in the name of his firm i.e., Deloitte Touche Tohmatsu India LLP (DTTILLP). Therefore, Mr. Iyer has violated Section 5(13), section 208(2)(a) & (e) of the Code and regulation 34 of the CIRP Regulations and 7(2)(a) and (h) of the IP Regulations, read with clauses 2, 5 and 14 of the Code of Conduct as given in the First Schedule of the IP Regulations.

Submissions

- 3.2 Mr. Iyer submitted that the observation in the SCN regarding alleged wrongful invoicing of the fees for the IP by DTTILLP is untenable in both law and fact. Further, in the CIRP of Murli Industries Ltd., the operations were at a standstill at the time of taking control of assets and over the management. As a result, there was minimal cash flow generated from the operations of Murli Industries Ltd. Their bank accounts were frozen and no funds were available with Mr. Iyer at the start of the CIRP. Further, Mr. Iyer had, as on date of submission of his response, not been paid an amount of Rs. 1,37,50,000 towards professional fee for the period of December 2018 till July 2019, despite the same was approved by the CoC. Notwithstanding unpaid fee, Mr. Iyer continued to discharge his duties under the Code and ultimately achieved a successful CIRP.
- 3.3 The provisions of the Code or the CIRP regulations does not restrict either the invoices of the IP being raised in the name of the firm in which he is a partner or to receive money in the name of such firm. The amounts set forth in the invoice raised by DTTILLP represented a cost item, being the professional fee for services rendered by the IP, which in any event was nothing but CIRP Cost. Therefore, Mr. Iyer submitted that there was no breach of Section 5(13) of the Code, merely on account of such amounts having been invoiced by DTTILLP, the firm in which he was a partner. Also, there was neither duplicate billing nor any unfair or undue advantage taken by Mr. Iyer at any time or in any manner whatsoever.
- 3.4 Mr. Iyer understood that this observation was limited to a single invoice for his fee for services rendered by him in December 2017 during the CIRP of Murli Industries Limited, which was raised in the name of DTTILLP, instead of in his name. The SCN does not refer to the Circular No. IP/004/2018 dated 16 January 2018 (January Circular), however it is presumed to be based on the same since the draft inspection report referred to and relied upon the said Circular. In the event that this observation is based on the January Circular, then the SCN is itself rendered bad in law because it does not even refer to such circular upon which it is based.
- 3.5 All invoices in relation to the services rendered as RP post the January Circular were duly raised in the name of Mr. Iyer. The invoice in question related to services rendered from 1 to 30 December 2017, i.e., a period prior to the issuance of the January Circular. Mr. Iyer also submitted that there was no double payment ever for any services rendered, much less on account of one invoice dated 13.02.2018 being raised in the name of DTTILLP. Mr. Iyer did not raise any invoice in his name for the period covered by such invoice of DTTILLP. Therefore, the raising of the invoice dated 13.02.2018 by DTTILLP for the month of December 2017 did not result in any increase in the overall CIRP Cost in any manner. Further, no prejudice or loss was caused to the corporate debtor or any stakeholder in the

CIRP.

- 3.6 The CIRP of Murli Industries has been successfully completed and the Resolution Applicant is in the process of implementing its Resolution Plan.
- 3.7 The January Circular, for the first time, set out its interpretation of the Code and the Regulations that the IP was required to raise invoices for services rendered as such in his own name. Prior to the said January Circular, there was no guidance or circular from the IBBI setting out such interpretation in respect of invoicing in respect of such services. The IBBI deemed it appropriate to issue the January Circular to set out its position on the provisions thereto shows that the interpretation of the law and practice on this issue in the field on practical basis was different, prior to the issuance of such circular. Further, retrospective application cannot be given to the January Circular since it set out a new interpretation of the relevant provisions and any retrospective application in respect of expenses already incurred prior to the date of such circular shall be contrary to settled principles of law. Therefore, he submitted that the observation in the SCN in this regard is incorrect in both fact and law and hence denied. Accordingly, the same may be decided in favour of Mr. Iyer.

4. **In the matter of Binani Cements Ltd.**

Contravention

- 4.1 It has been observed that in the 6th CoC meeting held on 5.12.2017, it was decided to appoint Argus Law Partners as legal counsel for CoC. As per Form III filed by Mr. Iyer with IPA, an amount of Rs. 10,49,30,202 was shown towards the fee paid to legal professionals. It has been submitted by Mr. Iyer in his response to draft inspection report, that out of the above-mentioned amount, an amount of Rs. 2,73,97,485 was paid towards the expenses of Argus Law Partners in the capacity of legal counsel of CoC. However, CIRP cost does not include the cost incurred by the CoC members directly. The inclusion of expenses incurred towards legal counsel of CoC in CIRP cost for the Corporate Debtor is in violation of section 5(13) of the Code and regulation 31 of the CIRP Regulations. Therefore, Mr. Iyer has violated Section 5(13), section 208(2)(a) & (e) of the Code and regulation 31 of the CIRP Regulations and 7(2)(a) and (h) of the IP Regulations, read with clause 14 of the Code of Conduct as given in the First Schedule of the IP Regulations.

Submissions

- 4.2 Mr. Iyer submitted with respect to the observations in the SCN regarding alleged wrongful inclusion of legal cost in the IRPC that it is untenable in both law and fact. He further submitted that that the SCN does not provide the basis of the observation given in the SCN. He submitted that it is unclear as to which provision of the Code, CIRP Regulations and / or IP Regulations restricts inclusion of legal costs for services which are directly related to the CIRP and also approved by the committee. Such legal costs are squarely covered as CIRP Cost and none of provisions, as mentioned in the SCN, of the Code or its regulations exclude legal costs of the CoC from CIRP Costs. The CoC had in accordance with Regulation 31(e) of the CIRP Regulations duly approved the professional fees of Argus Partners since it was other costs directly related to the CIRP Process, and required to be incurred in order to facilitate such process.

- 4.3 My. Iyer submitted that Section 5(13) of the Code read with Regulation 31(e) of the CIRP Regulations is not exhaustive in its definition and provides that CIRP Costs include “*other costs directly relating to the corporate insolvency resolution process and approved by the committee*”. The committee had in accordance with Regulation 31(e) of the CIRP Regulations duly approved the professional fee of Argus Partners since it was other costs directly relating to the CIR process, and required to be incurred in order to facilitate such process.
- 4.4 The CoC is a committee constituted in accordance with the provisions of the Code for the specific purpose of the CIRP. Under the scheme of the Code, such committee has an integral role in the facilitation of any CIRP by discharging its statutory duties. No CIRP can be facilitated without the CoC performing its duties and exercising its powers envisaged under the Code. The roles and responsibilities of the CoC has been affirmed by the Hon’ble Supreme Court in the case of *Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta* [Civil Appeal No. 8766-67/2019]. In connection with the discharge of its role and responsibilities under the Code, if the CoC is required to engage the services of legal counsel, then such costs directly relate to facilitating the CIRP and are, thus, CIRP Costs as defined under the Code. He referred to various articles authored by Chairperson of IBBI, Dr. M. S. Sahoo wherein he specifically mentions that the CoC has a statutory role and discharges a public function. Further, Dr. Sahoo has also noted that all stakeholders including the CoC take numerous decisions in a CIRP, it is the CoC’s key decisions that ultimately ensure value maximization.
- 4.5 Mr. Iyer also submitted that the duties and functions of the CoC as per the Code are to be exercised independently of the IP and vice versa. In many CIRPs, it is often the case that the CoC and the IP have varying views on issues concerning such process. Thus, the RP and the CoC engages separate legal counsel and other experts to advise them in their respective decision-making process and for discharging statutory obligations. Thus, the costs incurred on CoC’s counsel were directly relating to the CIRP. Further, such expenses were discussed and approved by the CoC in the 8th CoC meeting held on 16.01.2018 and thus, they were eligible to be paid as CIRP Costs.
- 4.6 Mr. Iyer also submitted that the Draft Inspection Report referred to and relied upon the Circular No. IBBI/IP/-013/2018 dated 12 June 2018 relating to ‘*Fee and other Expenses incurred for Corporate Insolvency Resolution Process*’ (June Circular), while the SCN does not refer to the June Circular. In the event that the instant observation is based on the June Circular, then the SCN is itself rendered bad in law because it does not even refer to such circular upon which it is based.
- 4.7 Prior to the June Circular, there was no guidance or circular from IBBI setting out its contrary interpretation of such provisions. Also, retrospective application cannot be given to the June Circular since it set out an altogether new interpretation of the relevant provisions and any retrospective application in respect of expenses already incurred prior to the date of such circular shall be contrary to settled principles of law. Further, no invoices of Argus Partners which related to the period post the June Circular were paid after the issuance of such circular.
- 4.8 He submitted that the June Circular does not take into account the following:
- a) the fact that the IP and the CoC need to obtain independent legal advice to execute their

- separate roles and responsibilities in any CIRP so as to ensure that the CoC does not encroach upon the IP's role and vice versa;
- b) engaging the same legal counsel for the RP as well as the CoC may give rise to allegations of the RP not discharging his role in an independent manner, risking the entire CIRP itself;
 - c) result in conflict-of-interest issues for legal counsel; and
 - d) even assuming (without admitting) it would be possible for the legal counsel of the RP to also provide opinions to the CoC as required by the CoC, the same would not result in any cost optimization as the counsel of the RP would have charged for such additional work.
- 4.9 Further, the June Circular has been issued under Regulation 34A of the CIRP Regulations and Section 196(1)(h) of the Code and such provision *ex facie* does not grant IBBI the power to determine *inter alia* what constitutes CIRP Costs. Therefore, the IBBI did not have jurisdiction under such provisions to issue the June Circular and even if the jurisdiction was correctly exercised under the above-mentioned provisions, the IBBI could not have exercised the power to set out an interpretation which derogated from and was contrary to a specific provision of the CIRP Regulations i.e., Regulation 31(e). For these reasons, the June Circular does not have the force of law. In any event, retrospective application cannot be given to the June Circular since it sets out an altogether new interpretation of the relevant provisions and any retrospective application in respect of expenses already incurred prior to the date of such circular shall be contrary to settled principles of law. Invoices of Argus Partners which related to the period post the June Circular were not paid after the issue of June Circular. Thus, he had complied with the June Circular which demonstrates his *bona fide* conduct.
- 4.10 The RP also submitted that in the underlying CIRP of Binani Cements, financial creditors had 100% recovery of admitted claims plus interest. The CIRP Cost remaining to be paid at the time of implementation of the Resolution Plan was not deducted from the amounts payable to such creditors and was to the account of the Resolution Applicant. Therefore, no prejudice or loss was caused at all to any creditor of Binani Cements on account of payment of invoices of Argus Partners as CIRP Costs, being costs specifically approved by the CoC and incurred to facilitate the CIRP.
- 4.11 When the payment of the total amount to Argus Partners is viewed against the Rs. 7,950.34 crore resolution plan of Ultratech Cement Limited, it is a miniscule 0.034%. Thus, IBBI must have regard to the lack of any materiality of the instant observation.
- 4.12 In view of the above submissions, the observations in the SCN against him are incorrect in both fact and law and hence denied. He submitted that he has not committed any violation of the provisions of the Code and regulations thereto including Sections 5(13) and 208 of the Code, Regulation 31 of the CIRP Regulations, Regulation 7(2) of the IP Regulations read with clause 14 of the Code of Conduct. Accordingly, the same may be decided in favour of Mr. Iyer.

5. In the matter of Bhushan Steels Ltd.

Contravention

- 5.1 In the 2nd CoC meeting held on 25.09.2017, M/s Shardul Amarchand Mangaldas (SAM)

was appointed as legal counsel for CoC. In the 4th CoC meeting held on 27.11.2017, M/s KPMG was appointed as advisor of CoC. As per Form III filed by Mr. Iyer with his IPA, a total amount of Rs. 2,81,53,236 was paid to SAM and an amount of Rs. 2,40,40,046 was paid to KPMG. Both these payments were included in CIRP cost. However, CIRP cost does not include the cost incurred by the CoC members directly. The inclusion of both these expenses incurred by the CoC in CIRP cost for the Corporate Debtor is in violation of section 5(13) of the Code and regulation 31 of the CIRP Regulations. Therefore, Mr. Iyer has violated Section 5(13), section 208(2)(a) & (e) of the Code and regulation 31 of the CIRP Regulations and 7(2)(a) and (h) of the IP Regulations, read with clause 14 of the Code of Conduct as given in the First Schedule of the IP Regulations.

Submissions

- 5.2 Mr. Iyer submitted that the observation in the SCN regarding the wrongful inclusion of legal costs incurred by the CoC engaging SAM and fee charged by KPMG for services rendered as an expert advisor to the CoC, in the overall CIRP Costs, is unclear as to which provision of the Code, CIRP Regulations and / or IP Regulations restricts inclusion of legal costs for services which are directly related to the CIRP and also approved by the committee as how the SCN referred to contravention of Section 5(13) of the Code and regulation 31 of CIRP Regulations.
- 5.3 The CoC had also deemed it appropriate to engage KPMG as its expert advisor to discharge its role especially to evaluate resolution plans received, and thus assisted the CoC in facilitation of the CIRP. Such advice was found necessary by the committee in order to discharge its duties and functions under the Code and therefore, the same was also towards facilitation of the CIRP and integral thereto. Further, none of the said provisions of the Code and regulations thereunder exclude or restrict costs of expert professionals engaged by the CoC from CIRP Costs. In a CIRP, an IP does not evaluate resolution plans (beyond checking the same for compliance with applicable law including the Code and the RFRP). Further, the structure provided under the June Circular of the IP procuring a legal opinion from its counsel for the CoC, in any event, does not work for a financial expert since the RP does not appoint such an expert for his own needs and therefore, there arises no question of him being able to offer such assistance to the CoC.
- 5.4 Mr. Iyer submitted that the SCN does not set forth the basis of the observation and merely referred to Section 5(13) of the Code read with regulation 31 of the CIRP Regulations to conclude without grounds that *prima facie* the IP has violated the said two provisions, and also Section 208(2)(a) and (e) of the Code, Regulations 7(2)(a) and (h) of the IP Regulations read with Clause 14 of the Code of Conduct thereto. Therefore, it is unclear as to which provision of the Code, CIRP Regulations and/ or IP Regulations restricts inclusion of legal costs for services which are directly related to CIRP and also approved by the committee.
- 5.5 The CoC is a committee constituted in accordance with the provisions of the Code for the specific purpose of the CIRP. Under the scheme of the Code, such committee has an integral role in the facilitation of any CIRP by discharging its statutory duties. Such position is recognized by Hon'ble Supreme Court as well as in the articles of Chairperson of IBBI, Dr. M.S. Sahoo. The submissions to Contravention – I regarding costs relating to CoC's legal advisors, as well as the submissions in relation to the June Circular, have been relied upon and shall be deemed to be incorporated as if set out in full herein in response

to the cost of KPMG and SAM being included in the CIRP Cost by Mr. Iyer in the CIRP of Bhushan Steel Limited.

- 5.6 Mr. Iyer submitted that the CoC under the design of the Code has an important role to play, which is independent of the IP and no CIRP and least of all a process which was as complex as that of Bhushan Steel Limited can be concluded without the CoC performing its duties and exercising the powers given to it under the Code, including by way of engaging experts for assistance. This was at a time when there were no precedents on the process or protocols to be followed under the then nascent Code; hence the need for expert guidance and counsel was necessitated all the more. Thus, if the CoC was required to engage the services of legal counsel or an expert advisor to facilitate such process, then such costs also directly relate to the CIRP and are CIRP Costs.
- 5.7 The CoC had duly approved the appointment of SAM as recorded in the CoC minutes of the meeting held on 25.09.2017. Similarly, the appointment of KPMG and its professional fee charged on account of being the CoC advisor was approved by the CoC on 27.11.2017. Thus, it was in the considered opinion of the CoC that SAM and KPMG were to be engaged to advise the CoC in the CIRP of Bhushan Steel Limited.
- 5.8 Mr. Iyer also submitted that the SCN does not refer to the June Circular which was referred to and relied upon in the Draft Inspection Report. In the event that the instant observation is based on the June Circular, then the SCN is itself rendered bad in law because it does not even refer to such circular upon which it is based.
- 5.9 Mr. Iyer demitted office in the CIRP of Bhushan Steel Limited on 15.05.2018 viz. the date of the order of the Hon'ble Adjudicating Authority *vide* which the resolution plan of Tata Steel Limited was approved in accordance with Sections 30 and 31 of the Code. As of 15.05.2018, the June Circular had not been issued and therefore, the alleged violation that is entirely based on the June Circular (without referring to the same in the SCN), cannot be applied retrospectively for the previously concluded CIRP. Further, the submissions made regarding the legal invalidity of the June Circular are also relied upon for the purposes of the present observation.
- 5.10 The CIRP of Bhushan Steel Limited continues to be one of the largest insolvency resolutions under the framework of the Code. The CIRP Cost remaining to be paid at the time of implementation of the Resolution Plan was not deducted from the amounts payable to such creditors and was to be paid from the cash flows of the CD which were to the account of the Resolution Applicant. Therefore, no prejudice or loss was caused at all to any creditor of the CD on account of payment of such invoices of SAM and KPMG as CIRP Costs, both being costs incurred to facilitate the CIRP and specifically approved by the CoC.
- 5.11 The payment of fees to SAM and KPMG when viewed against the Resolution Plan of Tata Steel Limited providing Rs. 36,400 crore, is merely 0.0143% of such amount which is a miniscule fraction and must be viewed in the context of the successful resolution of insolvency achieved in the present matter.
- 5.12 The observations in the SCN against Mr. Iyer, therefore, are incorrect in both fact and law and hence denied. Hence, he has not committed any violation of the provisions of the Code and regulations thereto including Sections 5(13) and 208 of the Code, Regulation 31 of the

CIRP Regulations, Regulation 7(2) of the IP Regulations read with clause 14 of the Code of Conduct. Accordingly, the same may be decided in favour of Mr. Iyer.

Analysis and finding

6. The DC, after considering the SCN, oral and written submissions of Mr. Iyer and also the provisions of the Code and the regulations made thereunder, proceeds to dispose of the SCN.

6.1 At the outset, with regard to the preliminary submissions, the DC notes that Regulation 6(1) of the Inspection Regulations provides that the IBBI needs to share a copy of the draft inspection report with the service provider which in the present case was duly shared with Mr. Iyer. Regulation 6 of the Inspection Regulations reads as under:

“6. Inspection Report.

(1) The Inspecting Authority shall send a copy of the draft inspection report to the service provider requiring comments of the service provider within 15 days from receipt of the draft inspection report.

(2) The Inspecting Authority shall submit a copy of the draft inspection report to the Board.

(3) The Board shall examine the draft inspection report as to whether inspection is complete and satisfactory or requires further inspection and advise the Inspecting Authority accordingly within 15 days of receipt of draft inspection report.

(4) After considering the comments of the service provider and taking into account advice of the Board, the Inspecting Authority shall prepare the inspection report and submit it to the Board.”

6.2 The final inspection report, as per Regulation 6(4), has to be submitted to the IBBI. Though there is no provision for sharing the final inspection report in the Inspection Regulations with the service provider but this DC notes that if the final inspection report was requisitioned by Mr. Iyer, it should have been provided to him.

6.3 The DC also notes that SCN is issued by the IBBI on the basis of material available on record. Further, adequate opportunity was provided to Mr. Iyer to make his submissions during the personal e-hearing and also thereafter. Further, under the provisions of the Code, once a SCN is referred to the DC, the DC disposes it of by passing a reasoned order, after providing a reasonable opportunity of being heard to the noticee and in accordance with the provisions of the Code and the regulations.

6.4 During CIRP, an IP is vested with various powers including management of affairs of the CD as a going concern. He is required to comply with applicable laws on behalf of the CD and to conduct the entire CIRP. Such responsibilities of an IP require the highest level of professional excellence, dexterity and integrity and therefore, he needs to be compensated for his professional services commensurate to his ability, duties and responsibilities. He also needs to pay fee or incur other expenses for various goods and services required for conducting the CIRP and for managing the operations of the CD.

6.5 The UNCITRAL Legislative Guide on Insolvency Law spells out the role of an ‘insolvency

representative' in the following words:

“[T]he insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially. Accordingly, it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime.”

6.6 The BLRC, the recommendations of which has led to the enactment of the Code, in its Final Report, has also laid emphasis on the role of an IP as follows:

“The Insolvency Professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process....In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. The latter include the identification of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings if it is an enterprise, preparation of the resolution proposal, implementation of the solution for individual resolution, the construction, negotiation and mediation of deals as well as distribution of the realisation proceeds under bankruptcy resolution. In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IPs to carry out these tasks in an efficient and professional manner...This creates Role of Resolution Professionals in CIRP the positive externality of better utilisation of judicial time.”

6.7 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 the expenses incurred by him during CIRP are reasonable. Section 208(2)(e) further obliges the IP to perform his functions in such manner and subject to such conditions as may be specified. Section 208(2) reads 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.”

6.8 It is very crucial for IRP/ RP to monitor the expenses incurred by the RP to ensure that a CD, who is already entangled in a web of unsustainable liabilities is not further overburdened with exorbitantly high IRPC.

Section 5 (13) of the Code defines the term IRPC in the following words –

“(13) insolvency resolution process costs” means-

(a) the amount of any interim finance and the costs incurred in raising such finance;

- (b) the fees payable to any person acting as a resolution professional;
- (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;
- (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
- (e) any other costs as may be specified by the Board.”

Regulation 31 of CIRP Regulations further elaborates upon the definition of IRPC as provided under section 5(13) of the Code and provides 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 interim resolution professional fixed under Regulation 34; and
- (e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.”

6.9 Regulation 34 of the CIRP Regulations also contains provision regarding resolution professional costs and provides as under:

“34. *Resolution professional costs.*

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. - For the purposes of this regulation, “expenses” include **the fee to be paid to the resolution professional**, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional.”*

6.10 The IBBI has notified regulations in exercise of powers conferred under section 196 of the Code consistent with the objectives of the Code and the provisions thereof. As the regulator of the service providers, it has endeavoured to facilitate service providers in performing their duties and issued Circulars consistent with the provisions of the Code and the regulations. Under the provisions of the Code, the RP is vested with the power to engage professionals during conduct of CIRP process whose fee is ratified by the CoC which usually comprises of financial creditors. The Circulars issued by IBBI are clarificatory in nature and aim to clarify the IRPC and to achieve the objectives of the Code.

6.11 The DC notes that IBBI also issued a January Circular clarifying in Paragraph 3 as under:

“3. In view of the above, it is clarified that an insolvency professional shall render services for a fee which is a reasonable reflection of his work, raise bills / invoices in his name towards such fees, and such fees shall be paid to his bank account. Any payment of fees for the services of an insolvency professional to any person other than the insolvency professional shall not form part of the insolvency resolution process cost.”

6.12 Further, the DC also notes that the June Circular issued by clearly and unequivocally stated under para 8 as under:

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

- (a) any fee or other expense not directly related to CIRP;*
- (b) any fee or other expense beyond the amount approved by CoC, where such approval is required;*
- (c) any fee or other expense incurred before the commencement of CIRP or to be incurred after the completion of the CIRP;*
- (d) any expense incurred by a creditor, claimant, resolution applicant, promoter or member of the Board of Directors of the corporate debtor in relation to the CIRP;*
- (e) any penalty imposed on the corporate debtor for non-compliance with applicable laws during the CIRP;*
[Reference: Section 17 (2) (e) of the Code read with circular No. IP/002/2018 dated 3rd January, 2018.]
- (f) any expense incurred by a member of CoC or a professional engaged by the CoC;*
- (g) any expense incurred on travel and stay of a member of CoC; and*
- (h) any expense incurred by the CoC directly;*
[Explanation: Legal opinion is required on a matter. If that matter is relevant for the CIRP, the IP shall obtain it. If the CoC requires a legal opinion in addition to or in lieu of the opinion obtained or being obtained by the IP, the expense of such opinion shall not be included in IRPC.]
- (i) any expense beyond the amount approved by the CoC, wherever such approval is required; and*
- (j) any expense not related to CIRP.”*

6.13 The Code envisages for engagement of only Insolvency Professional, who is enrolled with the IPA and registered by the IBBI as an IP to undertake and conduct assignments under the Code. He is the key person to conduct the whole process of CIRP and acts as the Chief Executive Officer of the CD and exercises powers of the suspended board of directors of the CD. He brings to the notice of CoC and AA, developments and progress of the process. He has to place before CoC certain matters for approval or ratification of CoC. In this regard, the Apex Court has made the following observations in the matter of *Committee of Creditors of Essar steel India Limited through Authorised Signatory v. Satish Kumar Gupta* [Civil Appeal No. 8766-67/ 2019]:

“36. Even though it is the resolution professional who is to run the business of the corporate debtor as a going concern during the intermediate period, yet, such resolution professional cannot take certain decisions relating to management of the corporate debtor without the prior approval of at least 66% of the votes of the Committee of Creditors.

...

Thus, it is clear that since corporate resolution is ultimately in the hands of the majority vote of the Committee of Creditors, nothing can be done qua the management of the corporate debtor by the resolution professional which impacts major decisions to be made in the interregnum between the taking over of management of the corporate debtor and corporate resolution by the acceptance of a resolution plan by the requisite majority of the Committee of Creditors.”

- 6.14 The role of IP is vital to the efficient operation of the insolvency and bankruptcy resolution process. A well-functioning system of resolution driven by a competent IP plays a significant role in cementing together the interests of the creditors with those of the other stakeholders. It is for this reason that the need of specialized professionals to complete the resolution processes has been unequivocally provided.
- 6.15 Professionals are persons having domain knowledge and experience. They lay down the benchmark for their quality, efficiency and good governance. Under the provisions of the Code, an IP is recognized as an important component of the ecosystem who has been entrusted with a wide range of functions for the conduct of CIRP. The credibility of the whole process under the Code hinges upon the conduct and professional competence of IP who is required to observe the code of conduct. The IP Regulations provides in the First Schedule the Code of Conduct to be followed by the IPs during the processes. Code of Conduct is a charter of professional norms which establishes the credibility of the process. During the course of CIRP, an IP is expected to act independently and perform his duties and functions with utmost care and caution.
- 6.16 In the matter of **CIRP of Murli Industries Limited**, the DC notes that the invoices for the services rendered by Mr. Iyer were raised in the name of his firm, i.e., DTTILLP. Section 206 of the Code clearly provides that **only individual (person) can render services as an IP**. Section 5 (13) defines the term ‘Insolvency Resolution Process Costs’ and includes in clause (b) *‘the fees payable to any person acting as a resolution professional’*. The DC notes that agenda no. 6 was placed in its 1st CoC meeting held on 04.05.2017 for the appointment of Mr. Iyer as RP. Thus, the appointment of Mr. Iyer as RP was made in his individual capacity and not in his capacity as the partner of DTTILLP. Consequently, invoices should also have been raised in the name of Mr. Iyer. The DC also notes that all invoices in relation to the services rendered as RP post the January Circular were raised in the name of Mr. Iyer. The invoice in question of number 2068003285 dated 13.02.2018 was issued in the name of DTTILLP after the issue of January Circular but the same related to services rendered by Mr. Iyer from 1.12.2017 to 30.12.2017 i.e., period prior to issuance of January Circular. Thus, the matter pertains to a period before issue of clarification vide January Circular. The DC further notes that the CIRP of Murli Industries has been successfully completed. It is also relevant to note that after the issue of clarification, there was compliance by him in accordance with January Circular and there was no repeat of such conduct. Hence, the DC takes a lenient view.
- 6.17 In the matter of **Binani Cements Limited**, the DC notes that in its 6th CoC meeting held on 05.12.2017, agenda was placed before the CoC for appointment of Argus Law Partners as the legal counsel for CoC. As per the submission of Mr. Iyer, cost disclosure in Form III submitted by him to his IPA, for an amount of Rs. 10,49,30,202/- is shown to have been incurred on Legal Professionals, out of which, an amount of Rs. 2,73,97,485/- had been

paid to Argus Law Partners in the capacity of legal counsel of CoC.

- 6.18 The DC also notes from the submission of Mr. Iyer that in this matter, financial creditors had 100% recovery of admitted claims plus interest. The CIRP Cost remaining to be paid at the time of implementation of the Resolution Plan was not deducted from the amounts payable to such creditors and was to the account of the Resolution Applicant. The June Circular was issued after approval of fee of Argus Partners by the CoC. Further, in this matter, no invoices of Argus Partners which related to the period post the June Circular were paid after the issuance of such circular and Mr. Iyer complied in accordance with the June Circular after its issuance. Hence, DC is of the view that his conduct reflects his *bonafide* intent and good faith, and therefore, DC takes a lenient view.
- 6.19 In the matter of **Bhushan Steels Limited**, the DC notes from the SCN that in the 2nd CoC meeting held on 25.09.2017, agenda was placed before the CoC for ratification of appointment of SAM and their fee as legal advisor of CoC. In its 4th CoC meeting held on 27.11.2017, agenda was placed before the CoC to “*approve the appointment of KPMG as the CoC Advisor and approve the [professional fees of the CoC Advisor, which shall form a part of Insolvency Resolution Process Costs and be debited from the accounts of Corporate Debtor and to authorise State Bank of India to sign and issue the engagement letter to the CoC Advisor]*”. As per the cost disclosure in Form III submitted by Mr. Iyer to his IPA, an amount of Rs. 2,81,53,236/- was paid to SAM in the capacity of legal counsel of CoC, and an amount of Rs. 2,40,40,046/- was paid to KPMG in the capacity of Advisor of CoC. In this matter also, CoC approval for ratification of the fee of SAM and KPMG as advisor was given prior to the clarification issued vide June Circular. Further, Mr. Iyer demitted office on 15.05.2018 and on that date the resolution plan of Tata Steel Limited was approved, which is certainly before the issue of June Circular. The DC also notes from the submissions of Mr. Iyer that the CIRP Cost remaining to be paid at the time of implementation of the Resolution Plan was not deducted from the amounts payable to such creditors and was to be paid from the cash flows of the CD which were to the account of the Resolution Applicant. Hence, in this case also, issues alleged in the SCN pertains prior to the issue of clarification by the IBBI vide June Circular. Hence, DC takes a lenient view.
- 7 The DC notes that in the CIRP of CD 1, CD 2 and CD 3, the alleged contraventions in the SCN pertained to the period before the issue of clarifications by IBBI vide January and June Circulars of 2018. Further, after issuance of the Circulars, Mr. Iyer acted in compliance of the Circulars in all the aforesaid CIRPs in which there have been resolutions. The DC further notes that in 2017, implementation of the Code was in the nascent stage and the legal jurisprudence of this new insolvency regime was evolving. Every matter for the IRPs/ RPs was a learning curve for them. In this backdrop, DC is of the view that Mr. Iyer shall not be held liable for the alleged contraventions in the matter of CIRP of CD 1, CD 2 and CD 3.

Order

- 8 In view of the above, the Disciplinary Committee, in exercise of the powers conferred under Section 220 of the Code read with Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and Regulation 13 of IBBI (Inspection and Investigation) Regulations, 2017, disposes of the SCN without any directions to Mr. Vijaykumar V Iyer.

- 8.1 The Order shall come into force with immediate effect as the SCN has been disposed of without any directions.
- 8.2 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI is enrolled as a member.
- 8.3 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, for information.
- 9 Accordingly, the show cause notice is disposed of.

-sd-

(Dr. Mukulita Vijayawargiya)
Whole Time Member, IBBI

Dated: 02nd February, 2021
Place: New Delhi