

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/63/2021

5th January, 2021

Order

In the matter of Mr. A. Arumugam, 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 Professional) Regulations, 2016 and regulation 13 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017.

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/INSP/2019/24/211/399 dated 10th July, 2020 issued to Mr. A. Arumugam, R/o – 1/56, Market Road, Kelambakkam, Chennai, Tamil Nadu - 603103 who is a Professional Member of Insolvency Professional Agency of Institute of Cost Accountants of India (IPA) and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-003/IP-N00094/2017-18/10936.

Background

1. The Hon'ble NCLT, Chennai Bench (AA) *vide* order dated 29th December, 2017 admitted the application u/s 7 of the Insolvency and Bankruptcy Code, 2016 (Code) for initiating Corporate Insolvency Resolution Process (CIRP) of M/s RRP Housing Private Limited (CD). M/s Sri Adinath Enterprises was the financial creditor (FC) of the CD. The AA appointed Mr. Tharuvai Ramachandran Ravichandran as IRP. Later, on the recommendation of Committee of Creditors (CoC), AA *vide* order dated 19th April, 2018 appointed IP, Mr. A. Arumugam as the Resolution professional (RP).
- 1.1 The CIRP of CD could not be completed within the extended period of 270 days which expired on 26th September, 2018 as the RP could not get full information and cooperation from the Ex-directors. During CIRP, Mr. Arumugam filed various applications before the AA seeking direction to the Ex-directors of the CD to provide cooperation in discharging his duties. On his application filed on 25th September, 2018 seeking extension of CIRP period, the AA did not grant extension for being not a fit case for extension as the CD was not doing business since 2013. The AA *vide* order dated 4th April, 2019 passed an order for liquidation of the CD and observed that the instant case was not feasible for any positive progress for reconstruction of the CD.
- 1.2 An Inspection Authority was constituted *vide* order dated 26th August, 2019 to conduct inspection of IP, Mr. A. Arumugam for his role as RP in the CIRP of RRP

Housing Pvt. Ltd. & the inspection was conducted on 23rd September, 2019. The Inspection Authority submitted the Inspection Report on 21st November, 2019 to the IBBI.

- 1.3 The IBBI issued the SCN to Mr. A. Arumugam on 10th July, 2020 based on material available on record including Inspection Report dated 21st November, 2019 in respect of his role as Resolution Professional (RP) in CIRP of M/s RRP Housing Private Limited. The SCN alleged contraventions of section 25(g), 29(1), 208(2)(a) and (e) of the Code, Regulation 16(A)(1), 16A (2), 36, 39A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2017 (CIRP Regulations) and Regulation 7(2)(a) and (h) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and clause 10, 13, 14, 16, 19, 20 and 25A of the Code of Conduct under regulation 7(2) thereof. Mr. Arumugam Arumugam replied to the SCN vide letter dated 31st July, 2020.
- 1.4 The IBBI referred the SCN, response of Mr. Arumugam Arumugam 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. Arumugam Arumugam availed an opportunity of virtual personal hearing before the DC on 12th October, 2020 wherein he was represented by his counsel, Mr. Shantanu Lakhota and Mr. Vikram Hegde, Advocate. Mr. Arumugam reiterated the submissions made in his written reply and also submitted written submissions via email dated 2nd November, 2020 in the matter.

Alleged Contraventions and Submissions

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

I Contravention

- 2.1 According to section 25(2)(g) of the Code read with Regulation 36 of the CIRP Regulations, IP is under an obligation to prepare Information Memorandum in accordance with section 29 of the Code. In the present case, the office premises of the CD was sealed and was under the control of Chennai Metropolitan Development Authority (CMDA). On an application filed by Mr. Arumugam, AA *vide* order dated 11th July, 2020 directed the ex-directors to make an application to CMDA to enable Mr. Arumugam to take possession of all the documents and records. It requested CMDA to cooperate with the RP to retrieve the records from office of the CD which was sealed by CMDA.
 - 2.1.1 In compliance with the said order dated 11th July 2018, CMDA *vide* its letter dated 14th August, 2018 informed Mr. Arumugam that CMDA proposed to de-seal the building for one day to allow him to take the required documents, books of accounts and records on 17th August, 2018 at 11.00 am. It was observed that Mr. Arumugam failed to avail the opportunity given by CMDA for the said purpose. Thereafter, in the letter dated 4th October, 2018 issued by CMDA, it was mentioned that Mr. Arumugam was again informed *vide* letter dated 21st August, 2018, that the building would be de-sealed on 24th August 2018 at 11.00 am. However, neither

he, nor his authorized representative was present during de-sealing of the building.

- 2.1.2 Thus, Mr. Arumugam has failed to perform his duties and also failed to obtain the requisite documents for preparation of Information Memorandum as stated under Section 25(2)(g) and Section 29(1) of the Code read along with Regulation 36 of CIRP Regulations, 2016 which ultimately led to the liquidation of the CD. Therefore, the IBBI was of *prima facie* view that Mr. Arumugam has violated section 25(2)(g), Section 29(1), Section 208(2)(a) and Section 208(2)(e) of the Code, Regulation 36 of CIRP regulations, regulation 7(2)(h) of IP regulations read with clause 13 and 14 of the Code of Conduct under regulation 7(2) thereof.

Submission

- 2.2 With regard to the aforesaid contravention, Mr. Arumugam submitted that the AA had exculpated him of any blame for the failure of the CIRP. The AA in paragraph 19 of the order dated 4th April, 2019 has stated –
“On the top of it, custody of records has not yet come to the Resolution Professional. It is not that the RP has not made efforts to avail access to the records of the Corporate Debtor, he has made, in spite of it, he could not lay his hands on the records of the debtor because – 1) the promoter directors not cooperated 2) it appears the registered office has been kept locked by third party.”

Thus, the AA has particularly observed that Mr. Arumugam has made efforts to access the records of the CD, however, the same could not be done due to non-cooperation of promoter directors of CD as well as because the registered office of the CD was locked by third party, *i.e.*, CMDA. The same conclusion has been reached by National Company Law Appellate Tribunal (NCLAT) in its order dated 28th May 2019.

- 2.2.1 With respect to the issue of non-cooperation by Ex-directors of the CD faced by him, Mr. Arumugam submitted during the personal virtual hearing that he took recourse under Section 19 of the Code and the same is evident from the orders passed by the AA dated 4th May, 2018, 23rd May, 2018, 13th June, 2018, 2nd July, 2018, 24th July, 2018, 21st August, 2018, 12th September, 2018 and 26th September, 2018 and that the AA repeatedly directed the promoter director of the CD to cooperate with Mr. Arumugam. However, even after passing of such orders by the AA as well as after an undertaking by the promoter directors that they will cooperate with the IP, the directors continuously flouted the orders of the AA.
- 2.2.2 Mr. Arumugam stated in his reply that non-cooperation by promoter director of the CD has been repeatedly noted by the Committee of Creditors (‘CoC’) and the same was evident from the minutes of meetings of CoC dated 12th February, 2018, 28th April, 2018, 19th May, 2018 and 6th June, 2018. Mr. Arumugam relied on the case of *M/s Prem Industries v. M/s S.R. Breweries Private Limited & Ors.*, titled as TP No. 107/CTB/2019 in CP (IB) No. 776/KB/2018 by NCLT, Cuttack dated 16th July, 2019, wherein AA found that because of non-cooperation of the personnel of CD there would be times where Corporate Insolvency Resolution Process including Information Memorandum cannot be prepared/completed despite of the best efforts of the IP.
- 2.2.3 In respect of the issue of de-sealing of office premises of the CD by CMDA, Mr. Arumugam submitted that the IBBI has erroneously noted that the CMDA de-sealed

the property of the CD twice, *i.e.*, on 17th August, 2018 and on 24th August, 2018. He submitted that the property was not de-sealed on 17th August, 2018 and that the officials of CMDA told Mr. Arumugam about the de-sealing when he approached them in their office. He submitted that it was de-sealed only once, *i.e.*, on 24th August, 2018 and that CMDA's letter dated 21st August, 2018 conveying de-sealing of property of the CD on 24th August, 2018 was received by Mr. Arumugam on 25th August, 2018, and this is the reason as to why he could not be present for the de-sealing of the property. He further submitted that the CMDA should not have allowed Mr. Thiru K. Jenakiraman, the authorized representative of the CD, to take documents from the office during de-sealing, in the absence of Mr. Arumagam or his authorized representative, and that such an act was in direct breach of the direction issued by the AA vide its order dated 11th July, 2018.

- 2.2.4 Mr. Arumugam submitted that he cannot be faulted for non-preparation of the Information Memorandum. He stated that assuming for the sake of arguments, but not admitting, that he received the letter dated 21st August, 2018 of CMDA concerning the de-sealing of property on 24th August, 2018, and that the property of CD was de-sealed on 17th August, 2018, even then, in such a scenario no fault could be attributed to him for not preparing the Information Memorandum. Mr. Arumugam reiterated his earlier stand that post 24th August 2018, he had filed applications u/s 19 of the Code before the AA on 12th September 2018 and 26th September 2018 and the AA, in the pursuance of these applications, had issued directions to personnel of the CD to provide documents to him. However, personnel of the CD have flouted these orders of the AA, resulting in no documents being provided to Mr. Arumugam and hence, Information Memorandum could not be prepared.

II Contravention

- 2.3 As per regulation 39A of CIRP Regulations, the resolution professional shall preserve a physical as well as an electronic copy of the records relating to corporate insolvency resolution process of the corporate debtor as per the record retention schedule as communicated by the IBBI in consultation with Insolvency Professional Agencies ('IPA'). It has been observed from Mr. Arumugam's reply to Draft Inspection Report ('DIR') that the documents required as part of inspection were not available with him and had been handed over to the Liquidator appointed. Thus, the IBBI was of the *prima facie* view that Mr. Arumugam has violated section 208(2)(a) and Section 208(2)(e) of the Code, Regulation 39A of the CIRP Regulations, Regulation 7(2)(h) of the IP Regulations and clause 16, 19 and 20 of the Code of Conduct under regulation 7(2) thereof.

Submission

- 2.4 Mr. Shantanu Lakhota, Counsel for Mr. Arumugam submitted that Regulation 39A of CIRP Regulations was inserted by Notification No. IBBI/2018-19/GN/REG032 dated 5th October, 2018 whereas the CIRP proceeding of the CD concluded on 26th September, 2018, *i.e.*, before section 39A was inserted, thus, the requirement under section 39A does not apply to this case and no obligation can be imposed on him under the said provision.

- 2.4.1 He further submitted that it is trite law that any statute will be prospective in nature unless it has been made retrospective. Thus, the requirement as provided under Regulation 39A to “*preserve a physical as well as electronic copy of the records relating to corporate insolvency resolution process of the Corporate Debtor*” shall be applicable to all CIRP proceedings of the CD post 5th October 2018. He submitted that Mr. Arumugam has not violated any legal requirement to maintain records of CIRP proceedings.
- 2.4.2 Mr. Arumugam submitted that, for CIRP proceedings before 5th October, 2018, he has maintained an electronic copy of all the CIRP proceedings in compliance with Clause 16, 19 and 20 of the Code of Conduct. He also submitted that clause 16, 19 and 20 of the Code of Conduct does not specify the mode in which information needs to be preserved or provided.
- 2.4.3 He further submitted with regard to the statements made by him in his reply to the DIR wherein he had stated that, “*All the documents were available and handed over to liquidator*” and “*All the records were handed over to Liquidator. However, all the documents asked were handed over to the IA*”. He submitted that the IBBI has incorrectly inferred the above-mentioned statement to mean that “the documents required as part of inspection are not available with him and have been handed over to the Liquidator appointed”. He submitted that even though it was categorically stated that all documents as requested by the Inspecting Authority (‘IA’) have been provided, the IBBI interpreted the same in an opposite manner to infer that Mr. Arumugam did not have the documents required as part of the inspection. He said that the true interpretation of the above-mentioned statements is that he did not have a physical copy of all the documents, and the documents for which he did not have a physical copy have been preserved as an electronic copy and the same was submitted to the IA. Thus, he concluded that he has not violated any legal requirement to maintain a copy of the CIRP Proceeding.

III Contravention

- 2.5 As per Clause 19 and 20 of the Code of conduct of IP Regulations, an IP must provide all information and records as may be required by the IBBI or the insolvency professional agency with which he enrolled and IP must be available and provide information for any periodic study, research and audit to be conducted by the IBBI. It has also been observed that Mr. Arumugam did not provide any documents based on which the claims of Operational Creditors were verified by him. Thus, the IBBI was of the *prima facie* view that Mr. Arumugam has violated section 208(2)(a) and (e) of the Code, Regulation 7(2)(h) of the IP Regulations and clause 16, 19 and 20 of the Code of Conduct under regulation 7(2) thereof.

Submissions

- 2.6 Mr. Arumugam has submitted in his reply that he had cooperated with the IA throughout the inspection which is evidenced by the fact that the IA in its DIR has stated the same. He further submitted that the IA should have requested him to produce the same before preparing the DIR. The IA did not make any effort to procure the same under the assumption that since Mr. Arumugam did not have a physical copy of the documents, he may as well not have the electronic copy of the same. He referred to his reply to the DIR wherein he had stated that, “*The operational creditors claims were*

verified based on the copy of invoices, bank records, contract and other documents.” He stated that even after receiving the said reply to DIR from him, the IA made no efforts to procure the copy of the documents. Finally, Mr. Arumugam submitted that he would produce the same if directed by the IBBI.

IV Contravention

2.7 The claim of homebuyers was rejected in the 3rd CoC meeting dated 19th May, 2018. After the Insolvency and Bankruptcy Code (Second amendment) Act, 2018 came into force, homebuyers were to be included in the list of creditors. Therefore, after the Amendment Act came into existence (w.e.f 6th June, 2018), Mr. Arumugam was obliged to invite, verify, and accept/reject their claims under the new Amendment Act. However, Mr. Arumugam failed to provide the details of action taken by him with respect to the claim of homebuyers after the Amendment Act came into force. As per the records, the last CoC meeting was held on 6th June, 2018. After that, AA in its order dated 24th July, 2018 in MA/256/IB/2018 ordered Mr. Arumugam to reconstitute CoC and to conduct a meeting with the reconstituted CoC. It is observed that, Mr. Arumugam had reconstituted CoC after including home buyers as members, however, he failed to conduct a CoC meeting till the order of liquidation was passed by AA on 4th April, 2019. Thus, the IBBI was of the *prima facie* view that Mr. Arumugam have violated section 208(2)(a) and (e) of the Code, Regulation 7(2)(h) of the IP Regulations and clause 10 of the Code of Conduct under regulation 7(2) thereof.

Submission

- 2.8 At the outset, Mr. Arumugam submitted that he never had the complete list of homebuyers with him due to non-cooperation of the Ex-directors of the CD. He further submitted that homebuyers were made Financial Creditors by way of Insolvency and Bankruptcy (Amendment) Ordinance, 2018 promulgated on 6th June, 2018.
- 2.8.1 He submitted that the 4th CoC meeting was conducted on 6th June, 2018, i.e., the day aforementioned Ordinance was promulgated and thus, he came to know that homebuyers have been made Financial Creditors post the conclusion of the 4th CoC meeting.
- 2.8.2 Mr. Arumugam stated that, thereafter, he took all the necessary steps to ensure that the homebuyers of the CD submit their claim and the same is evident from the fact that he made phone calls to several home buyers and Mr. Arumugam also sent a letter to the homebuyers on 26th June, 2018 to file the claim before him. He submitted that he reconstituted the CoC on 10th July, 2018 to include LIC Housing Finance Ltd. (LICHFC) for being a financier of 30 homebuyers of the CD. Thus, even before the order was passed by the NCLT on 24th July 2018, Mr. Arumugam was at the helm of the matters to reconstitute CoC by including home buyers.
- 2.8.3 Mr. Arumugam stated in his reply that he wanted to conduct a CoC meeting of the homebuyers on 17th July, 2018, however, the same had to be postponed to 20th July 2018. Later, the AA *vide* its order dated 20th July 2018 postponed the same to 24th July, 2020.

- 2.8.4 In this regard, it was submitted by Mr. Shantanu Lakhotia, Counsel of Mr. Arumugam that, as per Section 21 (6A) (b) of the Code, the homebuyers of the CD as a class were to be represented by an Authorised Representative ('AR') who was to be appointed before the first CoC. He submitted that *vide* Mr. Arumugam's letter dated 24th July, 2018, all the homebuyers were requested to nominate Authorised Representative among the list of three RP's before 7th August, 2018. It was pointed out by him that homebuyers submitted their claim way beyond the time limit of 7th August, 2018, which resulted in the delay of sending every home buyer the name of 3 RPs. However, even after sending the name of the 3 RP's, most of the Homebuyers took their time till early September to convey their claims as well as their decision as to who should be appointed as the AR. Mr. Arumugam reemphasized that the ex-directors of the CD, even post the order of the AA dated 24th July, 2018, did not furnish all records of the homebuyers to him.
- 2.8.5 He submitted that the CIRP came to an end on 26th September, 2018 by virtue of expiry of 270 days and therefore, no CoC could take place post 26th September, 2018. Mr. Arumugam emphasized that he filed an application before the AA in August 2018 to exclude certain period from CIRP Process, however the AA *vide* its order dated 21st August, 2018 gave him the liberty to withdraw the application and file it again. Thus, Mr. Arumugam submitted that, in view of the above stated facts, he had diligently complied with the requirements of the provisions of the Code as well as order of the AA to include home buyers in the CoC.

V Contravention

- 2.9 According to Regulation 16A (1) of CIRP Regulation, Insolvency Resolution Professional should select the insolvency professional ('IP'), who is the choice of the highest number of financial creditors in the class in Form CA received under sub-regulation (1) of regulation 12, to act as the authorized representative of the creditors of the respective class. In addition, under Regulation 16A (2), Insolvency Resolution Professional should apply to the Adjudicating Authority for appointment of the authorized representative selected under Regulation 16A(1) referred above. It has been observed that Mr. Arumugam has not provided any documentary evidence to prove that he has filed a petition with AA for the appointment of authorized representative for home buyers nor he has provided any documents relating to a petition filed before AA for approval for appointment of Authorised Representative. Thus, the IBBI was of the *prima facie* view that Mr. Arumugam has violated section 208(2)(a) and 208(2)(c) of the Code, Regulation 16(A)(1) and 16(A)(2) of the CIRP Regulations, Regulation 7(2)(h) of the IP Regulations and clause 16 of the Code of Conduct under regulation 7(2) thereof.

Submission

- 2.10 Mr. Arumugam submitted that the IBBI has erroneously recorded that Mr. Arumugam has not applied to the AA for appointment of authorized representative of homebuyers. Mr. Shantanu Lakhotia, Counsel for Mr. Arumugam referred to the emails sent by the RP and submitted that Mr. Arumugam had sent many e-mails to the homebuyers. He stated further that the majority of the homebuyers had voted for Mr. Kannan to be appointed as their Authorized Representative among the lists of three RP's proposed by Mr. Arumugam.

- 2.10.1 On the issue of providing documentary evidence to prove that he has filed a petition with AA for the appointment of authorized representative for homebuyers, Mr. Arumugam submitted that the AA in para 10 of its order dated 4th April, 2019 in the matter captioned *Arumugam Arumugam, RP for RRP Housing Private Ltd v. M/s Sri Adinath Enterprises & Anr.* (MA/364, 446, 447 & 448/2018 in TCP/70/IB/CB/2017) had observed that, “..... *this RP filed another MA/448/2018 on 25.09.2018 seeking approval of this Bench for reconstitution of the CoC and also to approve Mr. S. Kannan as an authorized representative of the home buyers among the list of three Authorized Representatives proposed by the RP...*”

Hence, he submitted in his reply as to the allegation in SCN that he had not applied to the AA for appointment of authorized representative of homebuyers is incorrect.

VI Contravention

- 2.11 According to the IBBI circular dated 16th January, 2018 (‘said Circular’), the resolution professional is under an obligation to file relationship disclosure with his respective IPA whenever he appoints a professional for CIRP purpose. In this case, it has been observed that Mr. Arumugam has not filed any relationship disclosure in relation to appointment of his advocates, viz., Adv. Arun, Adv. Anita and Adv. Viswanath. Thus, the IBBI was of the *prima facie* view that Mr. Arumugam has violated section 208(2)(a) and (e) of the Code, Regulation 7(2)(h) of the IP Regulations and clause 25A of the Code of Conduct under regulation 7(2) thereof alongwith Circular dated 16th January, 2018.

Submission

- 2.12 Mr. Arumugam referred to para 3, 4 and 5 of the said Circular issued by IBBI and submitted that by using the term ‘if any’ in Para 3 and Para 4 thereof, the RP is required to disclose his relationship with professional appointed by him only if they share a relationship as provided in row A-D of Para 5 of the same. Mr. Arumugam submitted that in the present case, he did not share any form of relationship as defined in row A-D of Para 5 of the said Circular with Adv. Arun, Anita and Viswanath. Thus, the requirement to disclose relationship does not arise in his case. Further, it is submitted by Mr. Arumugam that no fee was paid by him to Adv. Arun and Adv. Anita, hence a disclosure under Clause 25A of the Code of Conduct is not required. Furthermore, Adv Viswanath was hired by Mr. Arumugam in September only.

Analysis and Findings

3. After considering the allegations in the SCN and submissions made by Mr. Arumugam in light of the provisions of the Code, regulations and the relevant circulars, the DC finds as follows.
- 3.1 Under the Code, RP plays a key role in resolution process of the CD, he is appointed by the Adjudicating Authority 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

which includes preparation of Information Memorandum in a timely manner. 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. It reads as follows:

“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.”

Section 25 of the Code enumerates duties of RP. It reads as follows:

“25. Duties of resolution professional. –

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;

(c) raise interim finances subject to the approval of the committee of creditors under section 28;

(d) appoint accountants, legal or other professionals in the manner as specified by Board;

(e) maintain an updated list of claims;

(f) convene and attend all meetings of the committee of creditors;

(g) prepare the information memorandum in accordance with section 29;.....”

- 3.2 With respect to the first issue relating to information memorandum, the DC notes the submission of Mr. Arumugam that the Ex-directors of the CD did not cooperate with the IRP/RP from the very inception of the CIRP. The DC also notes that the non-cooperative attitude of the Ex-directors led Mr. Arumugam to file 9 applications before the AA under section 19 of the Code during the CIRP wherein it was directed by the AA that the ex-directors would cooperate with Mr. Arumugam and an undertaking to that effect was also given by the ex-directors to the AA. It is also noted by the DC that at the time of passing liquidation order on 4th April, 2019, an observation was made by the AA that although the RP had made efforts to get access to the records of the CD, however, he could not lay his hands on the same due to non-cooperation of the ex-directors of the CD and sealing of the registered office of the CD by the third party (CMDA).
- 3.3 The DC notes the submission made by Mr. Arumugam during the personal hearing that the specific direction of the AA to CMDA for de-sealing of registered office of the CD to enable Mr. Arumugam to retrieve documents, was not complied with and in utter disregard of the said direction, Mr. Thiru K. Jenkiran, Authorized Representative of the CD wrongly took away the documents from the office of the

CD on the date of de-sealing on 24th August, 2018. The DC notes that submission made by Mr. Arumugam that the registered office of the CD was not de-sealed on 17th August, 2018 and when he approached the office of CMDA, he was informed that the de-sealing had been deferred. His submission that the letter dated 21st August, 2018 intimating the date of de-sealing was received by Mr. Arumugam on 25th August, 2018 and was not able to be present for the de-sealing on 24th August, 2018, is satisfactory justification.

- 3.4 DC further notes that after the de-sealing, the AA vide order dated 26th September, 2018 directed the ex-directors of the CD to file all the books of accounts and other documents before the AA. However, it is noted that the Ex-directors flouted the same and did not cooperate with the RP. The fact of non-cooperation was also taken cognizance by AA which is clear from the observations of AA in its order dated 4th April, 2019, the para 2 of the same reads as follows:

“...2. By looking at the progress of the CIRP, this RP cannot be fully blamed for not taking CIRP to its logical end because the RP could not get full information from the debtor side as to the details of the creditors of the debtor, details of the assets and title alleged to be lying in the name of the debtor. He is not even aware which home buyer paid how much, finally homebuyers on their own have come before this Bench placing their version saying that their money has been stuck in the Debtor Company and they are unable to get either the Villas/Flats or their money back even after lapse of several years.”

The DC also notes from the afore-stated order that the debtor company had not filed Annual Returns since 2013 and was struck off from the records of RoC in the year 2018.

- 3.5 Mr. Arumugam is a professional and he is expected to undertake all actions which are required to take control of the assets of CD. This is the most important and primary duty and without collection of information of assets and control and custody of assets, RP cannot determine the financial position of the CD and cannot determine the avoidance transactions too. It was observed by the DC that Mr. Arumugam made consistent and material efforts to identify and to take control of the assets of the CD in consonance of the statutory duties under sections 18(1) and 25(1)(a) of the Code. It is not a case where he did not avail the opportunity given by the CMDA or that he did not pursue with the ex-directors/CMDA to obtain the documents. The DC has noted that despite the steps taken by Mr. Arumugam, Information Memorandum could not be prepared due to non-cooperative attitude of the Ex-directors. In view of the same, the DC opines that the contravention as alleged in the SCN is not made out.
- 3.6 In respect of the second and third issue regarding failure to preserve the records relating to CIRP as per Regulation 39A of the CIRP regulations and non-submission of the documents to the IA, the DC finds from the material available on record that the documents which formed the basis of constitution of CoC, e.g., claims receipt and verification records were handed over to the liquidator and copies of the same were not retained by Mr. Arumugam for maintenance of written contemporaneous records under clause 16 of the Code of Conduct of IP Regulation. Also, the RP has not provided the documents on the basis of which the debts of the Operational Creditors (OC) were verified. It was observed in the report of IA that the response submitted by Mr. Arumugam to the DIR was not clear. In this regard, the DC notes that

Regulation 39A of the CIRP Regulations, clauses 16 and 19 of the Code of Conduct cast obligation on the IP in clear language. Regulation 39A of the CIRP Regulations w.e.f. 5th October, 2018, reads as under:

“39A. Preservation of records.

The interim resolution professional or the resolution professional, as the case may be, shall preserve a physical as well as an electronic copy of the records relating to corporate insolvency resolution process of the corporate debtor as per the record retention schedule as may be communicated by the Board in consultation with Insolvency Professional Agencies.”

Further, clauses 16 and 19 of the Code of Conduct read as under:

“16. An insolvency professional must ensure that he maintains written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions.”

19. An insolvency professional must provide all information and records as may be required by the Board or the insolvency professional agency with which he is enrolled.”

3.7 With respect to the issue of preservation of the records pertaining to CIRP in electronic and physical mode as per the Regulation 39A of the CIRP regulations, the DC notes the submission made by Mr. Arumugam that Regulation 39A came into effect after the culmination of the instant CIRP of the CD, i.e., after 26th September, 2018 and thus was not applicable in his case at the relevant time. In this context, the DC notes that in the instant matter, the liquidation order was passed on 4th April, 2019 and *vide* same order, he was directed to act as the acting liquidator till the new liquidator was appointed. Thus, Mr. Arumugam acted as the RP till 4th April, 2019 and Regulation 39A of the CIRP Regulations, which came into force on 5th October, 2018 was applicable in the matter. Hence, his submission based on Regulation 39A is not tenable. However, the DC takes on record his submission that he was maintaining the records in physical as well as electronic mode, therefore, there appears to be no contravention of clause 16 of the Code of Conduct.

3.8 The DC also notes the clarification made by Mr. Arumugam in his reply to the SCN, wherein it was elucidated by the RP that he had handed over physical copy of the documents to the liquidator whereas a copy of the same had been stored by him in electronic mode as well. Mr. Arumugam submitted that all the documents as requested by the Inspecting Authority were provided by him. However, he could not produce any documentary evidence to substantiate his submissions to show that he has given copies of such records to the IA. Therefore, the DC finds that despite the clear provisions in clause 19 of the Code of Conduct, Mr. Arumugam failed to provide the copies of the records which formed the basis of constitution of CoC, claims receipt & verification to the IA. Thus, clause 19 of the Code of Conduct of IP Regulations provided in the first Schedule of IP Regulations has not been complied with by Mr. Arumugam in this case.

3.9 Regarding the fourth and fifth issue with respect to failure to conduct Meeting of

reconstituted CoC after including homebuyers and failure to apply to the AA for appointment of Authorised Representative representing the homebuyers in CoC, the DC notes that 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 so as to effectively strive to maximise the value of assets of debtor during the resolution process. 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. Mr. Arumugam is a professional and he is expected to undertake all actions which are required to conduct the insolvency resolution process smoothly and efficiently.

- 3.10 The DC notes that the homebuyers were made financial creditors by way of an Insolvency and Bankruptcy (Amendment) Ordinance, 2018 on 6th June, 2018 ('Ordinance') and on the same day, the 4th CoC meeting was also concluded. The DC notes the submission of Mr. Arumugam that he came to know about the passing of the ordinance post the 4th CoC meeting.

The DC also notes the submission of Mr. Arumugam that consistent efforts were made by him post the said ordinance, to ensure that the homebuyers submit their claim so that the CoC may be reconstituted. The DC further notes that even before the order of the AA on 24th July, 2018, Mr. Arumugam was at the helm of the matters to constitute a CoC of homebuyers and to conduct a CoC meeting of the homebuyers on 17th July, 2018 which is evident from his email dated 10th July, 2018 to various stakeholders and to the IBBI.

- 3.11 The DC also observed that Mr. Arumugam wanted to conduct a CoC meeting of the homebuyers on 17th July, 2018, however, the same had to be postponed to 20th July, 2018 and later, the AA vide its order dated 20th July, 2018 postponed the same to 24th July, 2018. In this regard, section 21(6A)(b) of the Code is relevant and provides that the homebuyers as a class must be represented by an Authorised Representative, who needs to be appointed before the first meeting of the CoC as per Clause (6A)(b) of Section 21 of the Code which reads as follows:

“(6A) Where a financial debt—

(a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

(b) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (a) or sub-section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

(c) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors, and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.”

3.12 It is seen from the records that Mr. Arumugam vide letter dated 24th July, 2018 requested all homebuyers to choose an Authorised Representative from the list of three RPs and intimate him about the same by 7th August, 2018. The homebuyers conveyed the decision with respect to the appointment of the Authorised Representative only in early September, 2018 and this shows that the homebuyers failed to take the decision with respect to appointment of the Authorised Representative expeditiously and in a timely manner.

3.13 The DC notes that Mr. Arumugam did file an application before the AA for appointment of authorised representative of homebuyers as evident from para 10 of the order dated 4th April, 2019 of the AA wherein it was observed as follows:

“...this RP filed another MA/448/2018 on 25.09.2018 seeking approval of this Bench for reconstitution of the CoC and also to approve Mr. S. Kannan as an authorised representative of the homebuyers among the list of three Authorised Representatives proposed by the RP.....”.

3.14 The DC also notes that the CIRP ended on 26th September, 2018 and no meeting could take place post 26th September, 2018. It is noted that eventually, the liquidation order was passed on 4th April, 2019 wherein the AA observed as follows:

“... For having already 270 days of CIRP period been over, it is clear that this debtor has authorisedly not been doing any business since 2013, therefore it cannot be brought back in the name of preparation of Information Memorandum and inviting Expression of Interest from the Resolution Applicant. Therefore, we are of the considered view that it is not a fit case for exclusion of the CIRP period and it is not feasible for any positive progress for the reconstruction of this company.”

In the above backdrop, the DC notes that Mr. Arumugam had complied with the requirements to involve homebuyers in the CoC and also to apply to the AA for appointment of AR of the homebuyers.

3.15 With respect to the issue of non-filing of the relationship disclosure in relation to appointment of the advocates by Mr. Arumugam, the DC notes that as per IBBI Circular dated 16th January, 2018, an IP is under obligation to file relationship disclosure whenever he appoints a professional for CIRP purpose.

Regulation 7(2)(h) of the IP Regulations require an IP to abide by the code of conduct specified in the First Schedule to these regulations. It provides as follows:

“7. Certificate of registration.

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

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

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. Clause 14 of the Code of Conduct as given in the First Schedule provides as under:

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

- 3.16 Further, Regulation 40B of the CIRP Regulations requires that every insolvency professional, interim resolution professional or resolution professional shall file the Forms, along with the enclosures thereto, on an electronic platform of the Board, as per the timelines stipulated against each Form, in the table therein. For disclosure purposes, RP is, *inter-alia*, required to file form CIRP-5 within seven days of the approval or rejection of the resolution plan under section 31 or issue of liquidation order under section 33, as the case may be, by the AA. This form requires under column 2, the following information to be filed with IBBI.

*“ This includes updated list of claimants; updated CoC; details of the resolution applicants; details of resolution plans received; details of approval or rejection of resolution plans by CoC; application filed with AA for approval of resolution plan; details of resolution plan approved by the AA; initiation of liquidation, if applicable; expenses incurred on or by RP; appointment of professionals and the terms of appointment; **relationship of the RP with the CD, Financial Creditors, and Professionals**; support services taken from IPE; non-compliances with the provisions of 45 the Code and other laws applicable to the CD”*

- 3.17 The DC notes the submission made by Mr. Shantanu Lakhotia, Counsel for Mr. Arumugam that the disclosure as per the IBBI Circular dated 16th January, 2018 was not required in his case. The DC further notes the submission of Mr. Arumugam referring to para 3, 4 and 5 of the said Circular issued by IBBI and submitted that by using the term ‘if any’ in Para 3 and Para 4 thereof, the RP is required to disclose his relationship with professional appointed by him only if they share a relationship as provided in row A-D of Para 5 of the same. Mr. Arumugam submitted that in the present case, he did not share any form of relationship as defined in row A-D of Para 5 of the said Circular with Adv. Arun, Anita and Viswanath. Thus, the requirement to disclose relationship does not arise in his case. However, the DC has taken on record the CIRP-5 Form filed by Mr. Arumugam wherein he has mentioned that such relationship disclosure does not apply. Hence his submission is tenable as his relationship with the advocates engaged by him does not fall within the purview of the kinds of relationship mentioned and defined in para 5 of the said circular. Thus, the DC is of considered view that the present case does not make out any contravention of the requirements of the said circular or clause 25A of the Code of Conduct.

Order

4. In view of above, the DC finds that Mr. Arumugam, as an RP, has contravened, the provisions of section 208(2)(a), clause 19 of the Code of Conduct under regulation 7(2)(h) of the IP Regulations for not providing the copies of certain records to the IA.
5. The DC, therefore, 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 and Regulation 13 of the IBBI (Inspection and

Investigation) Regulations, 2017 hereby directs that-

- (i) Mr. A. Arumugam shall not accept any new assignment under the Code for a period of two months from the date of coming into force of this order. However, he may continue to conduct and complete the assignments/processes he has in hand, if any, as on the date of this order; and
- (ii) Mr. A. Arumugam should take reasonable care and due diligence in discharging his duties under the Code and Regulations made thereunder.

5.1 This order shall come into force on expiry of 30 days from the date of its issue.

5.2 A copy of this order shall be forwarded to the Insolvency Professional Agency of Institute of Cost Accountants of India where Mr. A. Arumugam is enrolled as a member.

5.3 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.

6. Accordingly, the show cause notice is disposed of.

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(Dr. Mukulita Vijayawargiya)

Whole Time Member, IBBI

Dated: 5th January, 2021

Place: New Delhi