

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/72/2021

8th July, 2021

ORDER

In the matter of Mr. Anupam Tiwari, Insolvency Professional under Section 220 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016.

This Order disposes of the Show Cause Notice (SCN) No. IP-13012/2/2020-IBBI/981 dated 13th January, 2021, issued to Mr. Anupam Tiwari, W-37, M.I.G., Keshav Nagar, Juhi Gaushala, Kanpur, Uttar Pradesh who is a Professional Member of the Insolvency Professional Agency of Institute of Cost Accountants of India and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-003/IP-N00018/2017-18/10131.

Background

1. The SCN has been issued to Mr. Anupam Tiwari in respect of his role as resolution professional (RP) while conducting the corporate insolvency resolution process (CIRP) in the matter of M/s Jain Manufacturing (India) Private Limited, the Corporate Debtor (CD). Mr. Vikas Tiwari, the operational creditor (OC) of CD, had filed an application under section 9 of the Code for initiation of CIRP against the CD before the Hon'ble National Company Law Tribunal, Bench at Allahabad Bench (AA). The AA *vide* its order dated 22.02.2019 admitted the aforesaid application and appointed Mr. Manoj Kumar Singh as an Interim Resolution Professional (IRP).
 - 1.1 Mr. Singh had received the claim submitted by one 'BVN Traders' (BVN), as Financial Creditor (FC), in Form C as specified in the Schedule to the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations). Mr. Singh after collation of claims admitted the claim of BVN as a FC. BVN was allotted a voting share of 30.6% as observed from item no.6 of minutes of 1st Committee of Creditors (CoC) meeting held on 23.03.2019. However, in the 1st CoC meeting, it was resolved to replace IRP by Mr. Anupam Tiwari as a RP and the AA confirmed the appointment Mr Tiwari *vide* its Order dated 14.05.2019.
2. The IBBI had issued the SCN to Mr. Anupam Tiwari based on 13th January, 2021, on the basis of material available on record including the order dated 18.12.2020 passed by the Hon'ble National Company Law Appellate Tribunal (NCLAT) in the matter of Mr. Rajnish Jain Vs. Manoj Kumar Singh & Ors., Company Appeal (AT) (Insolvency) No. 519 of 2020, wherein adverse findings were made against Mr. Tiwari with regard to his conduct while acting as a RP in respect of CIRP of CD and the clarification submitted by Mr. Tiwari *vide* emails dated 27.12.2020, 28.12.2020 and 29.12.2020. The SCN alleged contraventions of section 12A, 25, 28 and 208 (2)(a) of the Code read with regulation

30A of CIRP regulations, regulation 13(1) and regulation 14(2) of CIRP Regulations, regulation 7(2)(a) and 7(2)(h) of IP Regulations and clauses 1, 2, 3, 5, 9 and 14 of Code of Conduct as specified in first schedule of IP Regulations. Mr. Anupam Tiwari replied to the SCN vide letter dated 2nd February, 2021.

- 2.1 The IBBI referred the SCN, response of Mr. Anupam Tiwari to the SCN, order of Hon'ble NCLAT 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. Anupam Tiwari availed an opportunity of personal hearing (e-mode) before the DC on 24th March, 2021 wherein he reiterated the submissions made in his written reply.

Show Cause Notice

3. The DC notes from the SCN the contraventions alleged therein which are summarised as follows:

- 3.1 The Board, while issuing the SCN, had taken on record the Order dated 18.12.2020 of Hon'ble NCLAT where certain observations were made against the conduct of the IP. The Hon'ble NCLAT observed that:

“31. It is apparent that every action of Resolution Professional, either about the change of status of ‘BVN Traders’ from financial to Operational Creditor or regarding the elimination of name of ‘BVN Traders’ from the ‘Committee of Creditors’ was being done in collusion with erstwhile Member of suspended Board of Directors, Promoter and Managing Director Mr Rajnish Jain. It is pertinent to mention that, the Resolution Professional even in disregard of the orders of the Adjudicating Authority dated 23rd January 2020, subsequently proposed the Resolution before ‘Committee of Creditors’ for considering BVN Traders as Operational Creditor and further for the elimination of name of BVN Traders from ‘Committee of Creditors’.

.....

41. Thus, it appears that the Resolution Professional has failed to perform his obligation/duty to observe the Code, the Rules and Regulations as enumerated in the Code and CIRP Regulations while conducting CIRP for the reason of taking up such an Agenda of Meeting and leading to illegal Resolution of ousting the BVN Traders from the ‘Committee of Creditors’.”

- 3.2 **Modification in the category of creditor in connivance with suspended director of CD**

- 3.2.1 Section 25 of the Code, *inter alia*, provides duties of RP to preserve and protect the assets of the CD including its continued business operations. In furtherance of this duty section 25(2) further mandates the RP to maintain an updated list of claims. The Code does not permit the change of category of a creditor in a CoC once it is constituted. Regulation 13(1) of CIRP Regulations requires RP to verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along

with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it. Regulation 14(2) of CIRP Regulations allows RP to revise the amounts of claims admitted. None of these provisions allow the RP or CoC to change the category of FC to OC in the CoC.

- 3.2.2 Mr Rajnish Jain, the promoter, stakeholder and managing director of the suspended Board of Director of CD had on 28.05.2019, filed a Company Application No.142/ALD/2019 under section 60(5) of the Code before the AA seeking to declare BVN as an OC and not as a FC. Thereafter, Mr. Tiwari sought the advice from M/s Jain Ashwani & Co, Chartered Accountant *vide* its letter dated 17.07.2019 and and from D N Awasthi, Advocate *vide* its letter dated 19.07.201 on the issue whether the debt of BVN is 'Financial Debt' or 'Operational Debt'. This act of Mr. Tiwari's after filing of the application by the suspended director of CD seeking to declare BVN as OC and not as FC indicates concerted action on IP's part with an apparent nexus between him and the suspended director showing intention to modify the category of BVN as OC for some ulterior purpose in the garb of updation of claim. This observation further gets substantiated from the admitted facts and circumstances emerging after constitution of CoC in accordance with the provisions of the Code read with CIRP Regulations particularly that Mr. Tiwari's having supported the stand of the suspended director while submitting his response on 21.07.2019 to the AA.
- 3.2.3 Mr. Tiwari's conduct had also been recorded in the order of the AA dated 19.08.2019, wherein it observed that IRP had earlier recognised the claim of BVN as FC, but subsequently after filing of the application by the suspended director of CD, Mr. Tiwari had obtained the advice of two professionals on the claim and changed his views that BVN is an OC without informing the CoC.
- 3.2.4 In the 5th CoC meeting held on 9.10.2019, Mr. Tiwari had informed CoC about settlement of claims and withdrawal of members of the CoC, *i.e.*, Edelweiss, Magma FinCorp and Tata Capital, and thereby reconstitution of CoC and revision in voting share and proposed for withdrawal of CIRP of CD under the ambit of applicable provisions of the Code read with regulations made thereunder.
- 3.2.5 In the 6th CoC meeting held on 15.11.2019, Mr. Tiwari had informed the CoC about -
- (i) the settlement of claim and withdrawal of another member of the CoC (*i.e.*, Kotak Mahindra Bank) and thereby again reconstituting CoC and consequent revision in voting share.
 - (ii) the withdrawal of claim by members of CoC have their claims due to personal settlement of the claims by the suspended director of the CD.
 - (iii) the reduction of the liabilities of CD for which RP to seek extension of CIRP period to obtain expression of interest from prospective resolution applicants.
 - (iv) postponing the agenda pertaining to withdrawal of CIRP of CD (which was opposed by BVN) considering that it would not receive the requisite voting.

- 3.2.6 The AA vide its order dated 23.01.2020 declared BVN as FC. Thereafter, in the 7th CoC meeting held on 14.02.2020, Mr. Tiwari had apprised CoC about continuation of BVN as FC in view of the aforesaid order of the AA. Mr. Tiwari conducted a voting on additional agenda for withdrawal of CIRP which was defeated in CoC with 69.10% votes in favour and 30.90% votes (held by BVN) against it as the requisite majority (90% votes) was not obtained. However, Mr. Tiwari also conducted a voting on another additional agenda for not considering BVN as FC despite aforesaid order of AA. This was approved with 69.10% votes held by other members of CoC in favour and 30.90% votes held by BVN against it.
- 3.2.7 In the 8th CoC meeting held on 18.02.2020, Mr. Tiwari had proceeded with elimination of BVN from CoC despite the aforesaid order of the AA dated 23.01.2020 which clearly stated that the category of BVN cannot be changed for the purpose of changing the CoC as has been done during the 7th and 8th CoC meetings.
- 3.2.8 Section 28 of the Code specifically provides certain actions of RP, as listed in clauses (a) to (m) of its sub-section (1), during the CIRP for which approval of CoC is required. Section 28(3) mandates that unless the CoC approves by vote of 66% of voting shares, those specified actions cannot be approved. The Code contains complete provisions with regard to constitution of CoC, the matters where CoC's approval is required including for change of RP under section 22 and the management of operation of the CD as a going concern by the RP. The aforesaid two additional agenda items placed before the CoC in its 7th and 8th meeting were not covered in section 28(1)(a) to (m). Further, in terms of section 12A of the Code, such application can be withdrawn only if allowed by the AA on an application made by the applicant with the approval of 90% voting share of the CoC. In terms of regulation 30A, the applicant can file the withdrawal application through RP and such application has to be first considered by the CoC within 7 days of its receipt. Any such withdrawal application considered by the CoC and this procedure cannot be circumvented by moving an additional agenda item in the CoC by RP alone. Thus, the additional agenda items moved by Mr. Tiwari was not at all permitted under the Code.
- 3.2.9 Mr. Tiwari had no authority to *suo moto* review or change the category of BVN from FC to OC in the garb of updating the list of creditors in view of the order of Hon'ble NCLAT dated 18.12.2020. If at all, he had any objection to the formation of the CoC, he should have approached the AA for any of his grievance. Any move to remove a FC and making them an OC to achieve the 90% majority for withdrawal of CIRP is farce and nothing but an artifice or device employed for an ulterior purpose and objective.
- 3.2.10 Mr. Tiwari's conduct can be traced from the above facts and circumstances and it is clear that the proposition to change category of BVN from FC to OC in 4th CoC meeting, reconstitution of CoC as informed during 5th and 6th CoC meeting, additional agenda items in 7th CoC meeting and subsequent withdrawal of CIRP in 8th CoC meeting were with a design or motive as a device to oust BVN out of CoC by camouflaging such ouster by updation of claims so as to safely facilitate the withdrawal of the CIRP which

was otherwise not possible considering the mandated requirement of 90% votes of CoC. From the minutes of CoC meetings, it is further noted that all this was orchestrated to obviate and nullify the factual position about the category of BVN as held by the AA and to facilitate the withdrawal of the CIRP which was otherwise not possible to achieve. Mr. Tiwari's conduct indicated gross negligence on his part in addition to non-compliance of aforesaid order of AA and in contravention of the provisions of the Code and Regulations made thereunder.

3.3 **Preferential treatment of creditors**

3.3.1 Under the scheme of the Code, once an application is admitted, all creditors become eligible to join the CIRP and hence, one creditor cannot individually settle with the debtor. However, it is observed from the records that during the 5th and 6th CoC meetings Mr. Tiwari had *inter alia* informed CoC that certain members of CoC have withdrawn their claims due to personal settlement of the claims by the suspended director of the CD and that the liabilities of CD had been reduced. Taking note of the same, Mr. Tiwari had also reconstituted CoC and revised the voting share from time to time. This is clearly in violation of the provisions of section 12A read with regulation 30A of the CIRP Regulations as it violates the requirement of collective decision of the CoC for any individual settlement and defeats the objectives of the Code considering that it would put the creditors in unequal bargaining position giving upper hand to the erstwhile management to retain the control over CD. In this connection the observation of the Hon'ble Supreme Court were referred to in *Swiss Ribbons Pvt. Ltd, Special Leave Petition (Civil) No. 28623 of 2018* that-

“...52. It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the Adjudicating Authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim...”

3.3.2 In view of the above, it has been alleged that Mr. Tiwari has violated the provisions of the section 12A of the Code read with regulation 30A of CIRP regulations, section 25 of the Code read with regulation 13(1) and regulation 14(2) of CIRP Regulations, section 28 of the Code and section 208(2)(a) of the Code read with regulation 7(2)(a) and 7(2)(h) of IP Regulations and clause 1, 2, 3, 5, 9 and 14 of Code of Conduct as specified in first schedule of IP Regulations.

Submission by Mr. Anupam Tiwari

4. The submissions made by Mr. Anupam Tiwari in response to the said SCN are summarised as follows:

4.1 Regarding the first allegation as to modification in the category of creditor in connivance with suspended director of CD, it has been submitted by Mr. Tiwari as follows.

- (i) In the judgment passed by the Hon'ble Supreme Court in the matter of *Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors*, it has been held that the role of the RP is not adjudicatory but administrative. Further, with respect to the claim, it has been stated that in the CIRP, all claims must be submitted to and decided by the IRP/ RP so that a prospective resolution applicant knows exactly what has to be paid so that it may then take over and run the business of the CD. Hence there is no express power granted to an IRP/RP to adjudicate the claim during the CIRP like that power granted to a liquidator to verify and either admit or reject a claim made by a creditor. However, it may be noted that the IRP/RP has substantial power to decide which claim and how many claims of a creditor is to be admitted or rejected during the CIRP.
- (ii) In other jurisdictions such as the United Kingdom, the court in *the Matter of Lehman Brothers International (Europe) (in Administration)*, has affirmed that administrators (equivalent to the RP) have quasi-judicial powers which allows them to make judicial determinations with respect to the admissibility of the claims. Such an approach of giving quasi-judicial powers to RP is especially relevant in India due to instances where the determination of whether a creditor falls under the definition of an OC or a FC has to be decided by the AA even though the RP could also make such a determination which can be seen in *ICICI Bank Limited v. Anuj Jain*, in its order dated 09.05.2018 in the matter of Jaypee Infratech Limited. CA No. 81/2018 in CP No. (IB)-77/ALD/2017 where the AA bench at Allahabad upheld the determination made by the RP. Further, if the creditor is aggrieved by the determination made by the RP, he may challenge the decision by approaching the AA.
- (iii) He had exercised due professional care, skepticism and due diligence during whole CIRP having regard to sections 18, 20, 25 and 28 of the Code which outlines the duties and functions of the IRP/RP. Section 20(2)(a) of the Code confers power on the RP to appoint accountants, legal, or other professionals as may be necessary. Such professional may include specialists and management experts who may provide specialist advice to RP. The professional in section 20(2)(a) of the Code is on the same analogy as contemplated in section 45 of the Indian Evidence Act, 1872. Therefore, he having regard to section 20(2)(a) of the Code obtained the advice from M/s Jain Ashwani & Co Chartered Accountant (also appointed as Transaction Auditor) vide its letter dated 17.07.2019, and D N Awasthi, Advocate vide its letter dated 19.07.2019 to enable him to ascertain whether the debt of BVN is 'Financial Debt' or 'Operational Debt' from concurrence of opinion of two experts. This opinion was sought being a novice in insolvency profession and taking into consideration principles of due diligence to avoid scope of any mistake and/or misunderstanding. Therefore, seeking advice is within authority as contemplated in section 20(2)(a) of the Code.
- (iv) He submitted documents including the Claim Form-C as provided by BVN along with ledger copy of loan account of CD, copies of the title deed of plot, screenshot of WhatsApp Message of 16.08.2018, and copies of Yes Bank statement to substantiate his contention.
- (v) Based on the aforesaid documents submitted, he contended that Mr. Dilip Kapoor of BVN was acting as a mediator between CD and some financier for arranging finance for CD against title deeds of plot and because of that, CD has given requisite documents/

title deeds for needful formalities required for arranging finance from the financier. Mr. Dilip Kapoor in the conversation had never admitted that BVN is funding against the title deeds. Mr. Tiwari on meticulously scrutinizing the loan account of CD in the books of BVN as provided by them along with Form-C, observed that transfer of funds from Yes Bank by BVN of amount Rs. 80,00,000/- consisting of Rs 70,00,000 and Rs. 10,00,000/- on 16.08.2018 by BVN were firstly posted into normal Ledger account of CD. But later on by way of rectification entry, it was transferred to CD (loan account) in the books of M/s BVN Traders on 18.01.2019 having an inordinate delay of 5 months, 2 days excluding the end date. Further, BVN was having routine business transactions with the CD, similar to the other buyers and OCs of the CD, like M/s MR Productions Private Limited, M/s BVN Chemicals Private Limited, M/s Shivan Exports & Imports, etc. and they used to make advance payment to CD to buy the goods and services. In view of the above, the RP, Mr. Tiwari was compelled to obtain the advice in this issue.

(vi) Furthermore, as per section 77 of Companies Act, 2013, there is a requirement to register a charge on such property and neither CD nor BVN (who is a practicing Chartered Accountant) has complied with such compliance under section 77 of Companies Act, 2013 which mandates that no charge created by a company shall be taken into account by the liquidator appointed under Companies Act or the Code, unless it is duly registered under section 77 (1) of the Companies Act, 2013 and a certificate of registration of such charge is given by the Registrar under section 77 (2) of the Companies Act, 2013.

4.1.1 Mr. Tiwari submitted that the allegations of concerted action and an apparent nexus between RP and suspended director of CD does not appear to be justifiable and is not tenable with due respect. So far as Mr. Tiwari's action of supporting the stand of the suspended board member is concerned, it is submitted that it was based on the verification of documents/records/books of accounts of the CD, entries in the books of accounts of BVN as well as in absence of any evidence about the prevalence of time value of money/ interest terms in the referred transaction.

4.1.2 Mr. Tiwari further submitted that after the order of AA dated 19.08.2019, he had stated in his reply to AA that the RP had sought the opinion regarding the category of BVN as FC or OC, and received the opinion of the Advocate engaged on 19.07.2019 and the transaction auditor's opinion engaged on 17.07.2019, but it could not be placed before the CoC meeting which was delayed to 23.07.2019 on the request of a CoC member. Therefore, the conclusion drawn that Mr. Tiwari kept CoC in dark appears to be non-judicious as the advice of the both professionals was placed in the 3rd CoC meeting and the 4th CoC meeting and the CoC members after discussion considered the BVN as the FC with approval of 64.9% voting shares. Mr. Tiwari submitted that the agenda point for approving the claim of BVN was placed before the CoC as per the directions issued by AA in its order dated 19.08.2019.

4.1.3 Further, in 3rd meeting of the CoC, Mr. Tiwari had informed CoC regarding the application filed by promoter Mr. Rajnish Jain and the opinion of the two professionals, but did not seek for approval of CoC as per Section 28 of the Code, which does not

require prior approval of CoC for such cases. Further, AA, vide its order dated 23.01.2020 has also held RP was not required to obtain prior approval.

- 4.1.4 Mr. Tiwari stated that he had initiated the 7th CoC meeting taking note of the decision of the AA dated 23.01.2020 and thereafter declared that the category of BVN as FC and not an OC. In this connection he also mentioned very categorically that as per notice of the 7th CoC meeting circulated, there was no agenda about the withdrawal of the CIRP and for “not considering BVN as FC”. Both these agenda points were proposed on-demand by members of the CoC. In this regard, Mr. Tiwari submitted that the order of AA explicitly relies upon the commercial wisdom of CoC and declared BVN as FC based on the mandate of CoC meeting. Under these circumstances, the RP had no choice but to place the agenda before CoC as demanded by the other CoC members. In the CoC meeting, members having 66% of voting shares were of the view that they no longer wished to allow BVN as a FC in the CoC and thus wanted to review their decision. In the present circumstances, the AA decided the category of BVN as FC but the members of CoC were pressing for placing agenda of their choice to disallow category of FC to BVN, hence RP in the capacity of convener of the CoC was compelled and duty-bound to accept the request of CoC members to place their agenda before CoC for discussion/approval/rejection. Further, the Code is still evolving in India and IRP/RP does not have quasi-judicial powers, but only administrative powers. Because of this lacuna which is left unattended IRP/RP has become puppet of CoC.
- 4.1.5 Further, in compliance of section 90(2) of the Code, the RP had submitted the Progress Report seeking direction from the AA on 24.02.2020 after 4th day of circulation of minutes of meeting of 8th CoC held on 18.02.2020.
- 4.1.6 As regard to violation of section 28(1)(a) to (m) by Mr. Tiwari, he submitted that he did not change the category of BVN from FC to OC, it is the CoC who did this. Also, in 3rd meeting of the CoC, RP had informed the CoC regarding the application of the promoter, Mr. Rajnish Jain and the opinion of two professionals, but no approval was taken from CoC because there is no requirement for the same under section 28 the Code. Furthermore, AA, vide its order dated 23.01.2020 has also held that RP was not required to obtain prior approval in such case.
- 4.1.7 Mr. Tiwari submitted that it was the collective commercial wisdom of CoC who changed the category and decided for the withdrawal of CIRP and the RP could not go against the collective commercial wisdom of CoC. Mr. Tiwari contended that he had followed due procedural fairness while conducting CIRP, that records shows no ulterior purpose and objective, rather RP has become victim of CoC’s coxcombry. The Hon'ble Supreme Court in the case of *Committee of Creditors of Essar Steel v. Satish Kumar Gupta* has made it very clear that the commercial decision of the CoC cannot be challenged. The only exception to the doctrine is that the impugned decision of the CoC should not have the effect of violating the very objectives of the Code. Therefore, it would not be out of place to state that at the vital stage of CIRP, the bias of an RP towards the FC can have a

negligible scope of being checked or challenged. Thus, making an RP/IRP more of a marionette of the CoC than an independent umpire. Such preferential privileged treatment to the collective wisdom of CoC appears to be against equality before the law viz: Article 14 of Indian Constitution and Article 7 of the Universal Declaration of Human Rights since such privileged treatment of CoC makes an RP/IRP more of a marionette of the CoC than an independent umpire.

4.1.8 With regard to the allegation about moving agenda item for removing a FC to make him an OC to achieve 90% majority for withdrawal of CIRP, it is submitted that both the agenda items were placed before the CoC meeting on the advice of the majority of the CoC members, the supremacy of the wisdom of CoC over RP has already been upheld by the AA vide interim order dated 19.08.2019 and further final order 23.01.2020 in the instant case. Thus, the act of RP regarding placing the said two agenda papers before the CoC meetings was not an artifice used for ulterior purpose or objectives.

4.1.9 It is submitted that the instant case was his first CIRP conducted, he has up to his best knowledge and understanding followed the provisions of the Code as well as charter of responsibilities of IRP/RP and CoC as issued by the IBBI. After passing of the interim order dated 19.08.2019 by AA directing the RP for taking permission to put up the matter of verifying the action to be conducted as per the provisions of section 25(2)(e) of the Code and as per regulations 13 and 14 of CIRP regulations, i.e to maintain updated list of claim including verification and determination of the CoC members and further after order dated 23.01.2020 passed by AA, the RP was of the view that he has to consider the wisdom of the CoC while taking any action whether it is calling of the meeting of CoC, placing agenda in the said CoC meeting, in spite of the fact the capability of the CoC members to get it passed or not. Thus, whatever the agenda were put up by the RP was with the consent of the majority of the CoC members and with the clear motive of following the provisions of the Code, the regulations made thereof as well as in compliance of the Orders of AA passed from time to time.

4.2 With regard to allegation as to preferential treatment of creditors, Mr. Tiwari submitted as follows.

- (i) The settlement of four FC is with one Mr. Rajnish Jain, who is both the promoter of the CD as well as a personal guarantor of CD and who paid to Edelweiss Retail Finance Limited, Magma Fincorp Limited, Kotak Mahindra Bank and Tata Capital. After the constitution of the CoC, the said four FCs issued No Dues Certificate to CD, stating that their dues had been settled and no balance amount is pending. After coming to the notice of RP, he had no option but to reconstitute the CoC. The said FCs have been paid their dues by Mr. Rajnish Jain in his individual capacity, who was also a personal guarantor to the said financial debt and neither with the consent of the CoC or informing the RP.
- (ii) The judgement of Hon'ble Apex Court in Swiss Ribbon case mentioned in SCN is applicable where the decision for the settlement of the dues of individual FC was taken by CoC. Further, it has been submitted by Mr. Tiwari that on receiving communication from FCs about their settlement of dues and the letter of No Dues Certificate issued to

CD he had no choice but to inform the CoC about these settlement and reconstitution of the CoC became necessary. Thus, Mr. Tiwari never intended to defeat the objective of the Code. No settlement of dues was made by CD, rather it was paid by Mr. Rajnish Jain in the capacity of personal guarantor and further, no funds of the CD had been used for settlement of the related dues. Hence, there occurred no adverse effect on the maximization of value of the assets of the CD. Therefore, the RP could not have restrained the FCs from settling their dues with the guarantor of the CD. Thus, Mr. Tiwari has not violated the collective decisions of the CoC for any settlement and has not intended to defeat the objective of the Code.

- 4.2.1 Mr. Tiwari referred to the observations of the Hon'ble NCLAT in their order dated 18.12.2020 that the CoC had no role in deciding the category of a creditor either as FC or OC and such a decision of CoC can never be treated as an exercise under its commercial wisdom and such matter cannot be a matter of voting and choice. After categorization of a claim by the IRP/RP, they cannot change the category of a creditor. He submitted that such observation are in the nature of directions for running the CIRP by the RP. The said order was sent to Hon'ble IBBI for taking necessary action deemed fit. It does not mean the IBBI have to take corrosive against RP.
- 4.2.2 As regards the agenda for liquidation of the running CIRP under section 33 of the Code which was put up before the 7th CoC meeting held on 14.02.2020, he submitted that since no Expression of Interest was received by the RP and the extended CIRP period was expiring on 22.02.2020, there was no alternate but to put up the agenda accordingly before the CoC meeting.
- 4.2.3 Mr. Tiwari submitted that the resolution for change of category of BVN from FC to OC was put up before the CoC on the observation of AA made in interim order 19.08.2019 and another final order dated 23.01.2020. From this observation of AA, it is obvious that the RP has to put up the agenda item whether about the change of category of a FC to OC or agenda for withdrawal of the CIRP if required by the CoC members before the CoC meeting. It is not relevant whether the said agenda is passed by requisite majority or not. The agenda regarding the change of category of BVN from FC to OC was put up by Mr. Tiwari on the request of the CoC members because then CoC members referred the order of the AA dated 23.01.2020.
- 4.2.4 During the personal hearing dated 24.03.2021, Mr. Tiwari had reiterated the submissions made by him in his reply dated 02.02.2021.

Analysis and findings:

5. The DC after taking into consideration the SCN, the reply to SCN, the oral and written submission of Mr. Anupam Tiwari and also the provisions of the Code, rules and the regulations made thereunder notes and finds as follows:
- 5.1.1 The DC notes that under the Code, the RP plays a central role in resolution process of the

CD, he is appointed by the AA as an officer of the Court to conduct the process with integrity, transparency and accountability ensuring that interests of all the stakeholders are equally balanced. As per Section 23(2), the RP is to exercise powers and perform duties as are vested or conferred on the IRP under Chapter II of Part II of the Code. Section 18 of the Code provides as follows:

*“18. Duties of interim resolution professional. -
The interim resolution professional shall perform the following duties, namely: -
(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to -
(i) business operations for the previous two years;
(ii) financial and operational payments for the previous two years;
(iii) list of assets and liabilities as on the initiation date; and
(iv) such other matters as may be specified;
(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;
(c) constitute a committee of creditors;
(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;
(e) file information collected with the information utility, if necessary; and
(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of asset.”*

Therefore, it is the duty of the RP to receive and collate claims of all creditors without any prejudice in pursuant to the public announcement and maintain an updated list of the claims. Further, Regulation 13(1) of the CIRP Regulations provides that:

“13. Verification of claims.

(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.”

5.1.2 Further, section 25(2) of the Code also casts an obligation to maintain updated list of claims which reads as follows:

*“25. Duties of resolution professional. –
(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;
...
(e) maintain an updated list of claims;”*

Regulation 14(2) of the CIRP Regulations states about revision of amount of the claim by the IRP which reads as follows:

“14. Determination of amount of claim.

(2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision.”

5.1.3 The RP while verifying any claim will come to know the nature of claim (FC/ OC) and amount of the claim. Then only he can constitute the CoC. It is a settled position of the law that the RP only has the power to admit or reject a claim based on the records available and that this role of the RP is administrative and not adjudicatory in nature. The Hon'ble NCLAT in Mr. S. Rajendran, Resolution Professional of PRC International Hotels Private Limited Vs. Jonathan Muralidarane, CA (AT)(Ins)1018/2019 had succinctly summarised by observing *“we are of the opinion that the ‘Resolution Professional’ had no jurisdiction to “determine” the claim as pleaded in the Appeal. He could have only “collated” the claim, based on evidence and the record of the ‘Corporate Debtor’ or as filed by Jonathan Muralidarane (‘Financial Creditor’). If an aggrieved person thereof moves before the Adjudicating Authority and the Adjudicating Authority after going through all the records, comes to a definite conclusion that certain claimed amount is payable, the ‘Resolution Professional’ should not have moved in Appeal, as in any manner, he will not be affected.”*

5.1.4 The position has also been clarified by the Hon'ble NCLT, Mumbai Bench in the order dated 05.02.2019 in the matter of Dr. Ramakant Suryanath Pande v. CS Prakash K. Pandya and others wherein it was held that:

“it can be said that the RP is not an adjudicating authority and is not required to enquire into the factual scenario between parties and determine their rights and liabilities. The task of the RP is to limit itself to confirm that the claims received by him are true and correct.”

5.1.5 Further, provisions of section 28 of the Code does not provide for seeking approval of the CoC for updating claims. It provides for following actions to be undertaken by the IP with the approval of the CoC:-

“28. Approval of committee of creditors for certain actions. –

(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely: -

(a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;

(b) create any security interest over the assets of the corporate debtor;

(c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;

(d) record any change in the ownership interest of the corporate debtor;

(e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;

(f) undertake any related party transaction;

- (g) amend any constitutional documents of the corporate debtor;*
- (h) delegate its authority to any other person;*
- (i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;*
- (j) make any change in the management of the corporate debtor or its subsidiary;*
- (k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;*
- (l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or*
- (m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.”*

5.1.6 Section 12A of the Code provides for withdrawal of applications as follows:

*“12A. Withdrawal of application admitted under section 7, 9 or 10. –
The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified.”*

5.1.7 Further, regulation 30A of the CIRP Regulations provides in detail about withdrawal of the application. It reads as follows:

“30 A. Withdrawal of application.

(1) An application for withdrawal under section 12A may be made to the Adjudicating Authority –

(a) before the constitution of the committee, by the applicant through the interim resolution professional;

(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be: Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

(2) The application under sub-regulation (1) shall be made in Form FA of the Schedule accompanied by a bank guarantee-

(a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application under clause (a) of sub-regulation (1); or

(b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of regulation 31, till the date of filing of the application under clause (b) of sub-regulation (1).

(3) Where an application for withdrawal is under clause (a) of sub-regulation (1), the interim resolution professional shall submit the application to the Adjudicating Authority on behalf of the applicant, within three days of its receipt.

(4) Where an application for withdrawal is under clause (b) of sub-regulation (1), the committee shall consider the application, within seven days of its receipt.

(5) Where the application referred to in sub-regulation (4) is approved by the committee with ninety percent voting share, the resolution professional shall submit such application along with the approval of the committee, to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(6) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (3) or (5).

(7) Where the application is approved under sub-regulation (6), the applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, as determined by the interim resolution professional or resolution professional, as the case may be, within three days of such approval, in the bank account of the corporate debtor, failing which the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code.”

5.1.8 The Hon’ble Supreme Court in the matter of Swiss Ribbons Pvt. Ltd. v. UOI while, upholding the constitutional validity of the section 12A of the Code had also observed that:

“52. It is clear that once the Code gets triggered by admission of a creditor’s petition under sections 7 to 9, the proceeding that is before the Adjudicating Authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim.”

5.1.9 It is the duty of the IP to ensure that their conduct would not undermine the public’s trust. Therefore, it is 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;”*

5.1.10 Moreover, while granting certificate of registration to an IP they are subjected to follow the Code of Conduct specified in the First Schedule to the IP Regulations to ascertain that the IP is a fit and proper individual at all times. In this regard, clauses(a) and (h) of regulation 7 (2) of the IP Regulations provide as follows:

“7. Certificate of registration.

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

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

...

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

5.1.11 Th DC observes that BVN had submitted its claim in Form ‘C’ as specified in the Schedule to the CIRP Regulations to the IRP and the IRP after collation of claims admitted the claim of BVN as a Financial Debt and they were allotted a voting share of 30.6% as per minutes of 1st CoC meeting held on 23.03.2019. Thereafter, Mr. Tiwari was appointed as the RP *vide* Order dated 14.05.2019 of the AA.

5.1.12 The DC notes that Mr. Rajnish Jain, the ex-Director of the CD and the guarantor had filed an application on 28.05.2019 before the AA praying to declare BVN as OC. It is also noted that Mr. Tiwari had obtained advice, from M/s Jain Ashwani & Co, Chartered

Accountant vide its letter dated 17.07.2019, and D N Awasthi, Advocate vide its letter dated 19.07.2019 on the nature of debt of BVN. Based on this opinion of the two professionals, Mr. Tiwari relegated BVN to an OC. It is observed that neither under the Code nor the Regulations made thereof, confer power to the RP to review the category of a creditor after the categorization has already been made by the IRP. The power to adjudicate on the claims is strictly conferred on the AA.

5.1.13 The DC also takes note of the observations of the Hon'ble NCLAT in their order dated 18.12.2020 wherein it is held that the finding of the AA in its Order dated 23.01.2020 that BVN is a FC is not solely based on the decision of the CoC and the AA has determined the category as FC in view of provisions and the facts of the situation. Even though it would have been ideal if AA would have recorded reasons instead of taking support of resolution of CoC. The AA in its Order dated 23.01.2020 declared BVN as FC with observation that:

“the COC has voted in majority in favour of BVN Traders as "financial creditor" and thus Suspended Management as well as Resolution Professional has no locus to challenge the commercial wisdom and decision of Committee of creditors with regard to determination of respondent as financial creditor.”

5.1.14 The Hon'ble NCLAT held that observation of the AA in its Order dated 23.01.2020 is incorrect because it is a matter of applying the law of the Code, and if such a factor is left to CoC, there would be a serious conflict of interest. Hence, determination of a person or entity is FC or OC would be based on applying the law to facts as defined in Section 5(7) or Section 5(20). During the CIRP the IRP collates the Claims, and after that, the CoC is formed under Section 18 of the Code. After the formation of the CoC only the aggrieved person can agitate the same and that too, only before the AA. The Hon'ble NCLAT also held that This was perhaps the reason CoC appears to have got emboldened that it can take such decisions in favour or against its own constituents. The Hon'ble Appellate Authority went on to hold that, during CIRP, the IRP is authorized to collate the claims, and based on that he is empowered to constitute the CoC. The RP may add to existing claims of claimants already received, or admit or reject further claims and update list of creditors. But For example, if the RP has accepted a claim as a Financial Debt and Creditor as a FC, then he cannot review or change that position in the name of updation of claim. It is also clarified that while updating list of claims the RP, can accept or reject claims which are further received and update list. Based on the above discussion, Hon'ble Appellate Authority held that the decision of the AA to treat BVN Traders as FC needed no interference.

5.1.15 The DC also notes that in the 4th CoC Meeting held on 30.08.2019, the voting was held on whether the claim of BVN is to be considered as FC which was approved with 64.90% voting share. Then in the 5th CoC meeting held on 9.10.2019, Mr. Tiwari informed CoC about settlement of claims and withdrawal of three members of the CoC (i.e., Edelweiss, Magma FinCorp and Tata Capital) and consequently reconstituted the CoC as well as revised the voting shares. The CoC members also proposed for the withdrawal of CIRP of CD as follows:

“Mr. Manish Macker (Auth. Rep. of Mr. Manish Agarwal and Mr. Rakesh Kumar

Shukla) proposed that the CIRP proceedings should be withdrawn. His proposal was duly seconded by Mr. Pramod Kumar Tripathi (Auth. Rep. of Mr. Liaquat Ali Khan) and Mr. Tanveer Alam (Auth. Rep. of Ms. Zeenat Tanvir Alam, Mr. Tahir Alam and Ms. Ariba Ahmed) The RP elucidated to the CoC that the process of CIRP withdrawal is a detailed process and would be a collective proceeding by the CoC under the ambit of Section 12A, and regulations of the IBC Code, 2016.”

5.1.16 The DC further notes from the submission of Mr. Tiwari, during the 6th CoC meeting held on 15.11.2019, he had informed CoC about settlement of claim and withdrawal of Kotak Mahindra Bank due to personal settlement of the claims by the ex-director and guarantor of the CD and again CoC was reconstituted and voting share was revised. Since, the liabilities of CD had been reduced, Mr. Tiwari sought extension of CIRP period to obtain expression of interest from prospective resolution applicants. Further, the agenda for withdrawal of CIRP of CD was postponed as it would not receive the requisite voting, which is reflected in the minutes of meeting as follows:

“The CoC deliberated about the same. Mr. Dilip Kapoor, Rep. of M/s BVN Traders is against the proposed agenda item, hence all rest of present members CoC requested the Chairman to take this agenda item for next CoC since one of the member is against this agenda and requisite voting would not be viable in this meeting.”

5.1.17 The DC also notes that despite the Order of AA declaring BVN as FC, Mr. Tiwari conducted voting on additional agenda for not considering BVN as FC in the 7th CoC meeting dated 14.02.2020 which was approved with 69.10% votes and has been briefed in the minutes of meeting as follows:

“The Chairman was informed by the members especially Mr. Pramod Tripathi (Auth. Rep. of Mr. Liaquat Ali Khan) and Mr. Tanvir Alam (Auth. Rep. of Mr. Tahir Alam, Ms. Zeenat Tanvir Alam, and Ariba Ahmed) that despite the order passed by the Hon’ble NCLT, Allahabad the CoC is of the view that they no longer wish to continue M/s BVN Traders in the category of the “Financial Creditor” in the COC and want to review their decision in this regard. Although Mr. Dilip Kapoor M/s BVN Traders (Auth. Rep. of M/s BVN Traders) strongly disapproved of this proposition.”

Subsequently in the 7th CoC Meeting, the CoC had also voted on the issue of withdrawal of the CIRP as per section 12A of the Code read with regulation 30A of CIRP Regulation, however, the requisite 90% voting threshold for approval was unable to be reached as the BVN with 30.9% voting share had rejected the resolution.

5.1.18 The DC observes that in the 8th CoC meeting held on 18.02.2020, Mr. Tiwari had proceeded with exclusion of BVN from CoC despite the aforesaid order of the AA dated 23.01.2020 which declared the category of BVN as FC, which cannot be subsequently changed on the whims and fancy of the CoC in its 7th and 8th meetings. The CoC then moved to voting on withdrawal of CIRP as per section 12A of the Code read with regulation 30A of CIRP Regulation, which was finally passed with 100% voting share now that the dissenting member had been ousted from the CoC, they had the requisite voting share.

5.1.19 The DC notes that in the Order dated 18.12.2020 of the Hon’ble NCLAT had made the following observations:

“26. The above contention of the Resolution Professional is not acceptable. The IRP after collation of Claims and formation of Committee of Creditors' was not entitled to suo-moto review or change the status of a creditor from Financial to Operational Creditor. Updating list and review are different acts. If Resolution Professional was aggrieved, he should have moved the Adjudicating Authority. The aggrieved person can challenge either constitution of 'Committee of Creditors' or for any grievance against rejection, incorrect acceptance or categorisation of creditors before the Adjudicating Authority. But the Resolution Professional cannot arbitrarily on its own overturn earlier decision, to change the status of a creditor from Financial Creditor to Operational Creditor.

27. Under the duties of RP to maintain an updated list of Claim, he cannot change the status of an existing creditor on his own. But to maintain an updated list of claims the IRP/RP is authorised to add to existing claims or admit or reject further claims received collating them and thus update the list of creditors accordingly.”

The DC also notes that the Appellate Authority also made the observation that:

“31. It is apparent that every action of Resolution Professional, either about the change of status of 'BVN Traders' from financial to Operational Creditor or regarding the elimination of name of BVN Traders' from the Committee of Creditors' was being done in collusion with erstwhile Member of suspended Board of Directors, Promoter and Managing Director Mr Rajnish Jain. It is pertinent to mention that, the Resolution Professional even in disregard of the orders of the Adjudicating Authority dated 23rd January 2020, subsequently proposed the Resolution before 'Committee of Creditors' for considering BVN Traders as Operational Creditor and further for the elimination of name of BVN Traders from 'Committee of Creditors'. It is also evident that when Appellant and Resolution Professional could not succeed in getting permission from the Adjudicating Authority to change the status of BVN Traders from Financial Creditor to Operation Creditor. Resolution Professional adopted the route of 'Committee of Creditors' for the elimination of name of BVN Traders from 'Committee of Creditors'. In the last the Appellant and RP succeeded in getting Resolution passed with 100% of the voting share for withdrawal of Petition under Section 12A of I&B Code, in total disregard of the Orders of Adjudicating Authority dated 23rd January 2020, whereby the Adjudicating Authority had not permitted Resolution Professional to change the status of BVN Traders from Financial to Operational Creditor.

32. Thus it appears that the Resolution Professional obtained the expert opinion of an Advocate and CA for removing the name of BVN Traders from 'Financial Creditor' to 'Operational Creditor'. After that, the Appellant moved an application before the Adjudicating Authority for seeking permission for the same. But when permission was not granted, and explanation was called from 'Resolution Professional' then he adopted the route of Committee of Creditors. After that, the Resolution Professional moved a resolution before Committee of Creditors for the elimination of name of BVN Traders from the list of 'Financial Creditors' and when Resolution was passed, and BVN Traders was eliminated from the list of Committee of Creditors, the Resolution for withdrawal of Petition was proposed and passed with 100% vote share.”

5.1.20 The DC also notes adverse remarks made by the Hon'ble NCLAT categorically on the conduct of the RP for placing of additional agenda item leading to ousting of BVN Traders from the CoC. It also observed that the CoC was not empowered to adjudicate the issue that has cropped up in the present case, i.e. M/s BVN Traders' is a 'Financial' or 'Operational' Creditor. Such adjudication is beyond the scope of consideration of the

CoC. Further, the Resolution Professional erred to reclassifying the status of a creditor from 'Financial' to 'Operational Creditor', based on the alleged expert opinion despite that the Adjudicating Authority took a contrary view. The Hon'ble NCLAT further noted that '*the Resolution Professional has failed to perform his obligation/duty to observe the Code, the Rules and Regulations*'.

- 5.1.21 Therefore, the DC observes that as per Section 25(2)(e) of the Code and Regulation 13(1) of the CIRP Regulations it is the duty of the RP to verify the claims and thereupon maintain an updated list of claims. Regulation 14(2) of the CIRP Regulations further provides that RP shall revise the amounts of claims admitted, when he comes across additional information warranting such revision. The Code does not entitle the RP to review the category of a creditor at will when such categorization has already been made and the CoC which has been constituted after being certified by the IRP before the AA. The power to adjudicate on the claims thereupon is strictly conferred with the AA and any persons aggrieved by such determination of IRP/RP may approach the AA.
- 5.1.22 The DC takes note of the fact that the AA vide its Order dated 19.08.2019 had directed the RP to place the issue of BVN's category as FC before the CoC, which in the 4th CoC meeting was confirmed with 64.90% voting share. Thereafter, the AA in its Order dated 23.01.2020 had conclusively declared BVN as FC, which should have settled the issue in that instant. However, emboldened by the AA recognizing the commercial wisdom of CoC in confirming BVN's category as FC, the CoC '*no longer wished*' to allow BVN to continue as a FC despite the order passed by AA. Then in the next meeting the other CoC members ousted BVN from the CoC, as it was the only CoC member holding them back from successfully passing a withdrawal of CIRP resolution under section 12A of the Code read with regulation 30A of CIRP regulations. In all this Mr. Tiwari had enabled the CoC to pass a resolution by allowing additional agenda items of removing BVN as FC and for withdrawal of CIRP which was not even in the agenda items and had only been included at the insistence of the CoC members.
- 5.1.23 The DC observes that reviewing the position of BVN as FC and allowing the CoC to pass resolution on an agenda which was not even listed (and has been brought on insistence of CoC) regarding BVN as FC, Mr. Tiwari has disregarded the order of the AA dated 23.01.2020. This is in the backdrop of ex-Director and guarantor, Mr. Rajnish Jain having filed an application before AA to remove BVN as FC and subsequent appeal against order of AA when BVN was instead confirmed as FC. Also the ex-Director, Mr. Rajnish Jain's efforts to settle claims of four members of the CoC (i.e, Edelweiss, Magma FinCorp, Tata Capital and Kotak Mahindra Bank) so that the CoC members may be influenced to withdraw from the CIRP.
- 5.1.24 It is the sacrosanct duty of the RP to be unbiased, balance interest of all stakeholders and being an officer of the court to uphold the objectives of the Code. However, Mr. Tiwari allowed the CoC members to oust BVN despite being aware of the Order of the AA. It is obvious that Mr. Tiwari abdicated his authority in favour of the CoC. The CoC members deciding the category of their own constituents gives rise to very clear conflict of

interest, as the majority would then have the power to remove the dissenting members in minority, which has ensued in the present instance. Therefore, the conduct of Mr. Tiwari in allowing resolution in the additional agenda items at the request of CoC members may have been to remove BVN from CoC as it posed as the last hurdle to achieving the withdrawal of CIRP. Hence, the DC finds that this conduct of Mr. Tiwari, being a silent spectator abdicating his authority in favour of the CoC and enabling in ousting a *bona fide* CoC member to accomplish the withdrawal of CIRP while disregarding the order of the AA is in clear contravention of section 25 of the Code read with regulation 13(1) and regulation 14(2) of CIRP Regulations, section 28 of the Code and section 208(2)(a) of the Code read with regulation 7(2)(a) and 7(2)(h) of IP Regulations and clauses 2,3,5,6,10,11 and 12 of Code of Conduct as specified in first schedule of IP Regulations.

5.1.25 In addition, the DC notes the submission of Mr. Tiwari that: “the observations of the Hon’ble NCLAT in the Order dated 18.12.2021 is in the nature of directions for running the CIRP and the order was sent to IBBI for taking necessary action, which does not mean corrosive action should be taken” is erroneous. Such submissions of Mr Tiwari amounts to serious misconduct as such irrational and misleading statements are not expected from a professional. Even if Mr Tiwari considers observations of Hon’ble NCLAT as directions for running the CIRP, then he should have followed it. But he acted in contravention of the provisions of the Code while modifying the category of creditor BVN from FC to OC and even despite the order of the AA and clear guidance provided in the order of Hon’ble NCLAT as regards the provisions relating to his powers as to updation of claims. The matter was referred to the IBBI because the IBBI is a statutory regulator for insolvency professionals.

5.2 Preferential treatment of creditors

5.2.1 The DC notes the allegation that there is a violation of the provisions of section 12A read with regulation 30A of the CIRP Regulations as collective decision of the CoC (ninety percent of voting share) is required for any settlement under the Code. That in the present case four FCs have individually settled with the debtor. It is observed from the records that during the 5th CoC meeting held on 9.10.2019, it was informed that the three members of the CoC, namely, Edelweiss, Magma FinCorp and Tata Capital had personal settlements of their claims with the ex-director and guarantor of the CD, Mr. Rajnish Jain and had consequently withdrawn from the CoC. Also in the 6th CoC meeting held on 15.11.2019, it was informed that Kotak Mahindra Bank had also withdrawn their claim due to personal settlement of the claims by the ex-director and guarantor of the CD. Therefore, the CoC had to be reconstituted and voting shares had to be revised.

5.2.2 The DC notes the submission of Mr. Tiwari in this regard that the settlement of four FCs with Mr. Rajnish Jain, who is the promoter of the CD and personal guarantor of CD, was not within his notice and the dues were paid by Mr. Rajnish Jain in his individual capacity and no funds of the CD had been utilised. As he was not informed by FCs before 5th CoC meeting, these settlements were not in the knowledge of the RP. The said four FCs had issued ‘No Dues Certificate’ to CD, stating that their dues have been settled and no balance amount is pending and that on becoming aware of these circumstances,

Mr. Tiwari had no option but to reconstitute the CoC. The DC notes that Mr. Tiwari was not aware of such settlements, hence, DC takes a lenient view with regard to the said allegations.

ORDER

6. In view of the above, the DC, in exercise of the powers conferred under Section 220 of the Code read with sub-regulations (7), (8), (9) and (10) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, issues the following directions:
 - 6.1 Mr. Anupam Tiwari shall not seek or accept any process or assignment or render any services under the Code for a period of one year from the date of coming into force of this Order. He shall, however, continue to conduct and complete the assignments / processes he has in hand as on date of this order.
 - 6.2 This Order shall come into force on expiry of 30 days from the date of its issue.
 - 6.3 A copy of this order shall be forwarded to the Insolvency Professional Agency of Institute of Cost Accountants of India where Mr. Anupam Tiwari is enrolled as a member.
 - 6.4 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.
7. Accordingly, the show cause notice is disposed of.

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(Dr. Mukulita Vijayawargiya)
Whole Time Member, IBBI

Dated: 8th July 2021
Place: New Delhi