

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/26/2020
8th June 2020

Order

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

Appearance before Disciplinary Committee on 26th May 2020:

For Noticee	Mr. Vijay Kumar Garg, In Person Mr. Siddharth Srivastava, Advocate for IP
For Board	Mr. Umesh Kumar Sharma, CGM Mr. Amit Sahu, DGM Ms. Tuhina Mardi, AM Mr. Vinay Pandey, AM Mr. Animesh Khandelwal, RA (Law)

1. Background

- 1.1 This Order disposes of the Show Cause Notice (SCN) dated 11th December 2019 issued to Mr. Vijay Kumar Garg, Flat No. 1402, Tower A, GPL Eden Heights, Sector 70, Darbaripur Road, Gurugram (Haryana)- 122101, who is a Professional Member of the ICSI Institute of Insolvency Professionals and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board) with Registration No. IBBI/IPA-002/IP-N00359/2017-18/11060.
- 1.2 In exercise of its power under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017, the Board vide Order dated 5th September 2019 appointed an Inspecting Authority (IA) to conduct an inspection of Mr. Vijay Kumar Garg, on having reasonable grounds to believe that the IP had contravened provisions of the Code, Regulations, and directions issued thereunder.
- 1.3 The Board on 11th December 2019 had issued the SCN to Mr. Vijay Kumar Garg, based on findings of an inspection in respect of his role as an interim resolution professional (IRP) and / or resolution professional (RP) in corporate insolvency resolution process (CIRP) of M/s Gitanjali Gems Limited (GGL), Nakshatra World Limited (NWL) and Nakshatra Brands Limited (NBL). The SCN alleged contraventions of several provisions of the Insolvency and Bankruptcy Code, 2016 (Code), the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and the Code of Conduct under regulation 7(2) thereof, the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (CIRP Regulations) and IBBI Circular No. IBBI/IP/013/2018 dated 12th June 2018. Mr. Vijay Kumar Garg replied to the SCN vide letter dated 6th January 2020.
- 1.4 The Board referred the SCN, response of Mr. Vijay Kumar Garg 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. Vijay Kumar Garg availed an opportunity of e-hearing before the DC on 26th May 2020 when he reiterated the submissions made in his written reply and made a few additional submissions. Thereafter, the IP submitted some additional documents vide email dated 31st May 2020 in support of his submissions made during the course of e-hearing.

2. **Consideration of SCN**

The DC has considered the SCN, the reply to SCN, written and oral submissions of Mr. Vijay Kumar Garg, additional documents, other material available on record and proceeds to dispose of the SCN.

3. **Alleged Contraventions, Submissions, Analysis and Findings**

A summary of contraventions alleged in the SCN, Mr. Vijay Kumar Garg's written and oral submissions thereon and their analysis with findings of the DC are as under:

- 3.1 **Contravention:** RP appointed Duff & Phelps India Private Limited (D&P) to provide support services during the CIRP of GGL, NWL and NBL. Section 20 (2) (a) of the Code states that the interim resolution professional shall have the authority to appoint accountants, legal or other professionals as may be necessary. However, appointment of D&P by the RP was finalized in violation of the provisions since D&P cannot be considered a professional. Further, as per IBBI Circular dated 12th June 2019, IP has been directed to ensure that expenses incurred by him during CIRP are reasonable and are directly related to and necessary for the CIRP. However, it is noted that with respect to the CIRPs of GGL, NWL and NBL, D&Ps scope of work included preparation of Information Memorandum, receiving/collating claims, monitoring & managing the operations of the Corporate Debtor, assisting the IP to take control & custody of any asset. It was a fact that prior to the commencement of CIRPs, the assets of each of the Corporate Debtors (GGL, NWL and NBL) were already attached by various investigation agencies and control of the assets could not be taken by the RP. Despite this, the RP did not renegotiate the terms (including fees) of agreement with D&P and continued to pay full fees to D&P in all the three matters despite the fact that D&P could only provide limited support services to RP in violation of Section 25(1) of the Code which provides that it is the duty of the resolution professional to preserve and protect the assets of the corporate debtor. Therefore, the Board is of the prima facie view that RP has violated Sections 20 (2) (a), 25 (1), 208 (2) (a) and (e) of the Code, Regulation 7 (2) (a), 7 (2) (h) and 7 (2) (i) of the IP Regulations read with clause 27 of the Code of Conduct of the said IP Regulations and IBBI Circular dated 12th June, 2019.

Submission: RP submits that there is no rationale to assume that the intent of the lawmakers was to ensure that only individual accountants, valuers, asset advisors, restructuring advisors, transaction auditors etc. can be appointed to aid the RP while excluding the group/ firms/ company of accountants, valuers, asset advisors, restructuring advisors, transaction auditors etc. since in such a situation the RP will have to appoint multiple individual professionals without any integration of services within them, thereby increasing the financial burden on the Corporate Debtors/ financial creditors. Since the Code provides for appointment of IPE which can only be a company, partnership firm or LLP, it clearly provides support to the approach adopted by the RP in the present matter.

Further, at the time of filing the application under section 7 of the Code, ICICI Bank (one of the financial creditors) conducted a combined bidding process for appointment of RP. There were rounds of negotiations between ICICI Bank, RP and D&P and accordingly RP was appointed to conduct CIRP. As submitted, the appointment of the

RP and D&P was also envisaged collectively and was duly approved by the CoC(s) of all the Gitanjali Group Companies on the collective strength and credentials of the RP and D&P.

The RP further submits that given the peculiarities, complexities, and the work to be undertaken for meeting the objectives of the CIRP of the Corporate Debtor, the professional fee charged by D&P was commensurate and reasonable. The RP submits that no amounts have been withdrawn from the corpus created by the Committee of Creditors (CoC) and no payments have been made to any service providers till date. Since no cash flows of GGL were available, in order to support the continuation of the process, D&P made payment of CIRP costs and expenses amounting to Rs. 85.18 lakhs for GGL, Rs. 4.4 lakhs for NBL and Rs. 4.10 lakhs for NWL from out of its own pocket. The RP has also stated that D&P has extended its services for a period of more than 15 months in case of GGL and 11 months in cases of NWL & NBL, whereas fee claimed by them is only for 6 months (for GGL) and 4 months (for NWL & NBL each), despite the fact that D&P continues to provide full support and assistance to RP till date.

During the e-hearing on 26th May 2020, it was reiterated by the RP that there being no cash flows in the account of GGL, NBL, NWL, all members of the CoC agreed to bear the CIRP expenses in proportion to their voting share. D&P extended full support to the RP both in managing GGL, NBL, NWL as a going concern and in performance of other duties.

The RP submitted that since a fraud of a huge proportion had been perpetrated by the Corporate Debtor and its Group Companies by diverting bank funds to its foreign subsidiaries/ associates etc., and no business was presently going on, management of the affairs of the Corporate Debtor meant making an effort to trace and recover the fraudulent money, to explore whether the investments made in these subsidiaries could be monetized, to try and recover from importer clients as well as from domestic debtors the amount they owed to the Corporate Debtor. As the domestic assets of the group were already in control of the agencies, RP and D&P also focused on the international assets. With the offices/records sealed and no access having been provided to the RP, the required information/data had to be searched, collected, and compiled from all available sources which involved a humungous effort.

Analysis:

CIRP under the Code is a non-adversarial resolution process where the defaulting corporate debtor cedes control to an IP, who is responsible for managing the affairs of the company as a going concern and preserving its value. One of the duties of the RP under the Code is to act with objectivity in his professional dealings by ensuring that his decisions are made without the presence of any bias and also to ensure that all costs incurred during CIRP are reasonable.

The allegation in para 3(i) of SCN against the IP involves examination of two issues which shall be dealt with separately. The first issue to be examined is whether D&P is a professional or not while the second issue is whether the fee paid to D&P was reasonable or not.

The DC proceeds to examine the first issue as under:

Section 20 of the Code provides as under:

“20. Management of operations of corporate debtor as going concern. –

(1) The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

(2) For the purposes of sub-section (1), the interim resolution professional shall have the authority-

(a) to appoint accountants, legal or other professionals as may be necessary;”

The Explanation to Regulation 33 of the CIRP Regulations provides as under:

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

Further, Explanation to Regulation 34 of the CIRP Regulations provides as under:

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

The RP has submitted that there is no rationale to assume that the intent of the lawmakers was to ensure that only individuals can be appointed to aid the RP while excluding the group/ firms/ companies, however, the intention of the law makers is neither known to the RP nor anyone else. The language used in Section 20(2) of the Code in itself is clear and unambiguous and there is no possibility of more than one interpretation. The rationale being that only a qualified and regulated individual renders services for which he can be held accountable professionally, for example, for display of professional misconduct, his license to practice may be cancelled. This ensures that professionals continue to render services in a responsible manner. Further, it is true that the firms and companies are also not excluded if they are registered with the regulator of the profession, for example, only a company or LLP registered as a registered valuer or a firm of Company Secretaries registered with the regulator can provide professional services and not any company or firm engaged in production of any goods and services.

As regards the RP’s contention with respect to integration of services between multiple individual professionals, the DC observes that primarily, it is the RP who has the responsibility to integrate all the professional services required by him during CIRP and he is not permitted to outsource the job of integration to a third party.

The Code bestows upon an IP the authority to appoint accountants, legal or other professionals as may be necessary and provides that the expenses incurred for engaging such professionals by the IP shall be included in the Insolvency Resolution Process Costs (IRPC) in accordance with the Explanation to Regulation 33 and 34 as

abovementioned. However, the term ‘professional’ has not been defined under the Code.

The term ‘Profession’ as defined by the Black’s Law Dictionary, 4th Edition is as under: *“Profession - A vocation, calling, occupation or employment involving labor, skill, education, special knowledge and compensation or profit, but the labor and skill involved is predominantly mental or intellectual, rather than physical or manual.”*

The term ‘professional’ as defined by Merriam-Webster Dictionary is *“of, relating to, or characteristic of a profession”*.

Professionals, in India, are generally members of professional body, which adheres to a model set of Code of Conduct and has acquired expertise in a specialized field such as legal, valuation, accounting etc. In the present case, the RP has submitted that the Code provides for appointment of Insolvency Professional Entity (IPE) which can only be a company, partnership firm or LLP, which clearly provides support to the approach adopted by the RP in appointment of D&P. This contention of RP cannot be accepted as comparison of any company/LLP with an IPE is not correct. A company /LLP generally pursues its activities as per the objects contained in its charter and can apply for registration for all legal objects. As such, no restrictions are imposed on incorporation of a company/LLP in terms of net worth, holding of shares, majority capital contribution by its members, composition of Board/ Partnership etc. which exists in case of IPEs. An IPE is recognised by the Board in accordance with Regulation 12 (1) of the IP Regulations if its sole objective is to provide support services to IPs, who are its partners or directors, as the case may be. Thus, there was nothing to prevent Mr. Garg to join an IPE and consequently avail their services. Moreover, as per explanation to Regulation 33 & 34 of the CIRP Regulations, the term *“expenses”* expressly includes the fee to be paid to IPE.

With regard to the submission made by RP, that the appointment of RP and D&P was envisaged collectively and was duly approved by the CoC(s) of all Gitanjali Group Companies on the collective strength and credentials of RP and D&P is untenable. The Code provides for appointment of an IP based upon his own capabilities and strength to handle CIRPs. If the RP does not possess requisite strength to manage the CIRP and needs additional support to perform his primary functions, it is advisable that the RP shall build up his own capacity before taking up any assignments under the Code. Permitting an arrangement in the nature of tie-in arrangement may prove to be anti-competitive.

The contention of the IP cannot be accepted also because he was not appointed collectively with D&P but was appointed by Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) (“AA”) in his individual professional capacity. If the services of D&P were required by ICICI Bank or other creditors, they were at liberty to engage D&P independently, thereby incurring their expenditure separately.

The RP has also submitted that D&P continues to provide him assistance, however, it has been observed that D&P has provided services without payment of any fee to it. RP has claimed that D&P has paid the cost for conduct of the CIRPs of GGL, NWL and NBL. This manifests some sort of understanding between the RP and D&P to pay D&P exorbitant fee in lieu of the costs borne by it even though it is not a professional.

The 1st meeting of the CoC of GGL was convened by the RP on 1st November 2018. The minutes of the said meeting provide as follows:

“AGENDA ITEM No. 7 AND 10-

(A) RATIFICATION OF APPOINTMENT OF DUFF & PHELPS AND REMUNERATION

The scope of work of Duff and Phelps was discussed in detail with the CoC members. Duff and Phelps is being appointed for providing infrastructure, personnel and back office support to assist in the IRP/RP statutory functions relating to IBC.

The CoC members examined the fee proposal of Duff & Phelps India Private Limited and expressed a desire to re-negotiate the fees.

...

“RESOLVED THAT, pursuant to the applicable provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulation made thereunder, approval of the Committee of Creditors be and is hereby accorded for the appointment of Duff & Phelps as the entity providing infrastructure, personnel and back office support to assist in the IRP statutory functions relating to IBC on the fee Rs 23,75,000/- per month (exclusive of taxes and out of pocket expenses).”

...

AGENDA ITEM No. 15 – ANY OTHER MATTER AS MAY BE DEEMED NECESSARY FOR THE SMOOTH FUNCTIONING OF THE CIRP OF THE COMPANY

... The CoC members agreed to remit upfront 50% of the said amount, as per their voting share, in a CIRP account which will be opened with ICICI Bank Limited, in the name of the Company, and will be operated by the IRP / RP. Accordingly, an initial corpus of Rs. 10,00,00,000 (Rupees Ten Crore) is proposed to be built up in the CIRP account.

Accordingly, the following resolution was agreed to be put to vote for the consideration of the CoC:

RESOLUTION:

“RESOLVED THAT, pursuant to the applicable provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulation made thereunder, approval of the Committee of Creditors be and is hereby accorded for creation of an initial corpus of Rs.10,00,00,000/- (Rupees Ten Crores only) to be contributed by the members of the Committee of Creditors in proportion to their voting share towards incurring CIRP costs.”

The 1st meeting of the CoC of NWL was convened by the RP on 6th March 2019. The minutes of the said meeting provides that:

“The scope of work of Duff and Phelps was discussed in detail with the CoC members. Duff and Phelps is being appointed for providing infrastructure, personnel and back office support to assist in the IRP/RP statutory functions relating to IBC.

They are providing support in the CIRP process of Group's main company viz. Gitanjali Gems Limited (GGL). Since NWL is a subsidiary of GGL, in order to have a consistent approach across the group, it would be prudent to have the same company for providing the back office support.

The CoC decided that the voting will be conducted through e-voting, and accordingly it was agreed that the following resolution shall be put to vote:

RESOLUTION:

“RESOLVED THAT, pursuant to the applicable provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulation made thereunder, approval of the Committee of Creditors be and is hereby accorded for the appointment of Duff & Phelps as the entity providing infrastructure, personnel and back office support to assist the IRP in performing the statutory functions relating to IBC.

RESOLVED FURTHER THAT the aforesaid fees and expenses shall form part of the Corporate Insolvency Resolution Process (CIRP) cost.

“RESOLVED THAT, pursuant to the applicable provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulation made thereunder, approval of the Committee of Creditors be and is hereby accorded for Duff and Phelps's fee of Rs 6,87,500 per month exclusive of taxes and out of pocket expenses.”

RESOLVED FURTHER THAT the aforesaid fees and expenses shall form part of the Corporate Insolvency Resolution Process (CIRP) cost.

RESOLVED FURTHER THAT the IRP/RP of Corporate Debtor be and is hereby authorized to take such steps as may be necessary in relation to the above, if required and to settle all matters arising out of and incidental thereto and sign and execute all documents and writings that may be required and generally to do all acts, deeds, make payments and things that may be necessary, proper, expedient or incidental for the purpose of giving effect to the aforesaid resolution.”

The 1st meeting of the CoC of NBL was convened by the RP on 6th March 2019. The minutes of the said meeting provide that:

“The scope of work of Duff and Phelps was discussed in detail with the CoC members. Duff and Phelps is being appointed for providing infrastructure, personnel and back office support to assist in the IRP/RP statutory functions relating to IBC.

They are providing support in the CIRP process of Group's main company viz. Gitanjali Gems Limited (GGL). Since NBL is a subsidiary of NWL, in order to have a consistent approach across the group, it would be prudent to have the same company for providing the back office support.

The CoC decided that the voting will be conducted through e-voting, and accordingly it was agreed that the following resolution shall be put to vote.

RESOLUTION:

“RESOLVED THAT, pursuant to the applicable provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulation made thereunder, approval of the Committee of Creditors be and is hereby accorded for the appointment of Duff & Phelps as the entity providing infrastructure, personnel and back office support to assist the IRP in performing the statutory functions relating to IBC.

RESOLVED FURTHER THAT the aforesaid fees and expenses shall form part of the Corporate Insolvency Resolution Process (CIRP) cost.

...

“RESOLVED THAT, pursuant to the applicable provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulation made thereunder, approval of the Committee of Creditors be and is hereby accorded for Duff and Phelps’s fee of Rs 6,87,500 per month exclusive of taxes and out of pocket expenses.

RESOLVED FURTHER THAT the aforesaid fees and expenses shall form part of the Corporate Insolvency Resolution Process (CIRP) cost.

RESOLVED FURTHER THAT the IRP/RP of Corporate Debtor be and is hereby authorized to take such steps as may be necessary in relation to the above, if required and to settle all matters arising out of and incidental thereto and sign and execute all documents and writings that may be required and generally to do all acts, deeds, make payments and things that may be necessary, proper, expedient or incidental for the purpose of giving effect to the aforesaid resolution.”

Therefore, the fact of the matter is that D&P was engaged in all three CIRPs (GGL, NWL, NBL) for providing infrastructure, personnel, and back office support at a fee of Rs. 23,75,000/- per month for GGL and Rs. 6,87,500/- per month each for its two subsidiaries i.e, NWL and NBL. Their scope of work as defined in the letters of engagement dated 8th October 2018 (for GGL) and 5th February 2019 (for NWL and NBL) includes assisting the RP in carrying out his obligations under the Code (i.e. receiving claims, collating claims, constituting the CoC, conducting CoC meetings, monitor/manage assets of the Corporate Debtor, preparing Information Memorandum, reviewing accounts/operations of the Corporate Debtor, assist RP in preparation of progress reports and attending all other back office requirements of the Corporate Debtor).

As is evident from the scope of work envisaged in the minutes of the CoC meetings as well as the engagement letters, D&P was only engaged to provide infrastructure, personnel and back office support services which cannot be classified as ‘*professional services*’ involving skill or even a ‘*profession*’ falling within the definition given in Black’s Law Dictionary (as abovementioned). Further, D&P cannot be regarded as an IPE since it has not been recognized by the Board under Regulation 12 of the IP Regulations. Thus, D&P does not fall within the definition of the term ‘*professional*’.

Having examined the first issue, the DC now proceeds to examine the second issue regarding reasonableness of the expenses incurred by the IP with respect to payment of

fees to D&P.

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

“*“insolvency resolution process costs” means—*

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

Regulation 31 of the CIRP Regulations provides as under:

“*“Insolvency Resolution Process Costs” under Section 5(13)(e) shall mean –*

- (a) amounts due to suppliers of essential goods and services under Regulation 32; (aa) fee payable to authorised representative under [sub-regulation (8)] of regulation 16A;*
- (ab) Out of pocket expenses of authorised representative for discharge of his functions under [Section 25A];*
- (b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);*
- (c) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;*
- (d) expenses incurred on or by the interim resolution professional fixed under Regulation 34; and*
- (e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.”*

IBBI Circular No. IBBI/IP/013/2018 dated 12th June 2018 (erroneously stated as 12th June 2019 in the SCN) provides that:

“6. Keeping the above in view, the IP is directed to ensure that:-

- (a) the fee payable to him, fee payable to an Insolvency Professional Entity, and fee payable to Registered Valuers and other Professionals, and other expenses incurred by him during the CIRP are reasonable;*
- (b) the fee or other expenses incurred by him are directly related to and necessary for the CIRP;*
- (c) the fee or other expenses are determined by him on an arms’ length basis, in consonance with the requirements of integrity and independence;*
- (d) written contemporaneous records for incurring or agreeing to incur any fee or other expense are maintained;*
- (e) supporting records of fee and other expenses incurred are maintained at least for three years from the completion of the CIRP;*
- (f) approval of the Committee of Creditors (CoC) for the fee or other expense is obtained, wherever approval is required; and*
- (g) all CIRP related fee and other expenses are paid through banking channel.”*

It has been observed from the minutes of 1st CoC meeting (in the matter of GGL, NWL and NBL) that D&P was engaged for providing infrastructure, personnel and back office support at a fee of Rs. 23,75,000/- per month (excluding taxes and out of pocket expenses) for GGL and Rs. 6,87,500/- per month (excluding taxes and out of pocket

expenses) each for NWL and NBL. The total fee payable to RP was Rs. 1, 25,000/- per month in the CIRP of GGL. It is observed that the payment agreed to be paid to D&P in GGL is 19 times of the fee payable to RP. It is inconceivable that the cost of providing infrastructure, personnel and back office support services in GGL is 19 times of the fee payable to the RP.

In this regard, the RP has submitted that given the peculiarities, complexities, and the work to be undertaken for meeting the objectives of the CIRP in the present case, the professional fee charged by D&P was commensurate and reasonable. Further, the RP has submitted that the mere fact that custody and control of the assets of the Corporate Debtor could not be obtained from the government authorities does not automatically imply that the quantum of services provided by D&P was limited, instead the nature and composition of services provided shall be examined.

As per the scope of work (as indicated in the joint proposal dated 06 September, 2018 submitted by Mr. Vijay Kumar Garg, an IP assisted by D&P to ICICI Bank), its mandate was: (i) initial analysis and strategy, (ii) taking control of business, (iii) monitoring business and cash, (iv) assisting in development of business resolution plan, (v) finalising the resolution plan, and (vi) approval of resolution plan.

The services provided by D&P have been detailed by the RP in paragraphs 17 to 36 of the Affidavit in Rejoinder dated 12th September 2019 filed by the RP before the AA in MA No. 1520 of 2019 & MA No. 254 of 2018. A summary of the work carried out by D&P is represented below:

- a. Liasoning with senior officials of the Enforcement Directorate, Mumbai (ED), Central Bureau of Investigation (CBI) and Serious Fraud Investigation Office (SFIO);
- b. Filing of Intervention Applications, written synopsis, appeals before the National Company Law Appellate Tribunal (NCLAT), Prevention of Money Laundering Authority (PMLA);
- c. Emails/Correspondences and meetings with erstwhile employees of the Corporate Debtor/Company Secretary/Chartered Accountants;
- d. Back office, technology and infrastructural support;
- e. Preparation and execution of action plans in respect of subsidiaries;
- f. Liasoning for protection and preservation of International Assets;
- g. Recovery efforts to recover dues from Domestic Debtors;
- h. Claim verification, conduct of CoC meetings and initiation/follow-up of legal action.

Some of the services, as stated above, should have been provided by other professionals and some of the services like liasoning are those which should have been undertaken by the RP himself or his employees as a part of his professional services.

The AA vide its order dated 14th May, 2019, in the matter of *ICICI Bank Ltd. vs. Gitanjali Gems Ltd.* [MA 1520/2019 in MA 254/2019 in C.P. (IB) 3585(MB)/2018] referred the matter relating to fixation of CIRP cost to the Board. Pursuant to the directions of AA, the Board constituted an Expert Committee to examine and submit a report on the reasonableness of the IRPC involved in the CIRP of GGL and a report was submitted by the Committee to the Board in August 2019. The Report of the Committee provides as under:

“The Committee notes that D& P was engaged by the RP for providing back office support services to RP (as per engagement agreement dated 08.10.2018). The scope of the back-office support work is indicated in items 1 to 7 at page 2 of the agreement. In the present case, except collection and verification of claims around 37 in number, no other item of work was undertaken. The RP has admitted that he was unable to take custody and control of the assets of the CD.

The Committee notes that evaluation of efforts of D&P and amounts payable as fee to D&P was initially estimated to support the entire range of services to be rendered by RP during CIRP (as stated in the role of D & P vis-à-vis time line under IBC, mentioned at paragraph 7 above). However, it is a fact that it was actually confined to supporting the services which the RP was able to render. Therefore, the Committee notes that fee for D & P quoted for supporting those services of RP during CIRP which were not undertaken, did not accrue.

Accordingly, assessment of fee for services rendered by D&P in CIRP is confined to and restricted to the extent of services which in the opinion of the Committee would have supported the services rendered by RP.

Further, the time sheets of D & P furnished by RP are very generic. It indicates activities of verification of claims in October, 2018 (during IRP period) and verification of few claims/revised claims in November-December 2018. Other than the above, most of the other activities mentioned in the time sheets are of the nature of discussions, meetings, follow up, etc. The need for any role of D & P in these activities is beyond the reasoning of the Committee, as lawyers are separately engaged (for which separate bills have been raised by the lawyers) and RP is expected to directly discuss the matters with them.

Also, several activities mentioned therein are those which RP is expected to perform as part of his duties. For instance, meeting investigating authorities, discussions with lenders, lawyers, ex-employees, gaining understanding of PMLA cases and documentation, drafting and reviewing petitions with lawyers, negotiations for transaction audit etc.

As per the model times for CIRP specified under Regulation 40A of the CIRP Regulations, various actions including appointment of valuers, determination of irregular transactions, invitation and submission of EoI should have been completed within 90 from Insolvency commencement date (ICD) (i.e., by 8th January, 2019). None of these activities have been undertaken in the present case.

Considering the fact that CD was not going concern and all assets and books of accounts of the CD were seized by different investigation agencies, there do not seem to be any valid reason for the RP to have continued the services of D&P and such continuance at the originally agreed rates may not be in the best interest of the CD.

In the above circumstance, the Committee is of the view that fees of D & P claimed as part of IRPC is neither reasonable nor can be regarded as necessary for the CIRP.”

While making the above observations, the amount recommended to be paid to D&P by the Committee is as below (extracts of the table on pages 10-13 of the report):

S.	Description	Amount	Recommendation of the	Amount
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No.		claimed	Committee	Recommended
2	D&P fees	Rs. 23.75 lakhs per month excluding taxes & OPE as IRP/RP support fees (Oct-Mar) Total = 1,59,74,250/- (Including GST)	(i) Fee for month of Oct, 2018 = for 21 days 100% of the amount claimed. [considering that quantum of work is more in IRP period] (ii) Fee for month of November, 2018 = for remaining IRP period of 9 days = 100% of the amount claimed. Balance 21 days of the month = 25% of the amount claimed [considering the activities related to claims/ revised claims during this period] Fee for month of December, 2018 = 25% of the amount claimed [considering the activities related to claims/ revised claims during this period] (iii) Fee for month of January – March, 2019 = 10% of the amount claimed [as a reasonable fee toward the commitment for providing support services]	Rs. 48,34,312/- (including GST)

Within the first few months of the CIRP, the RP had become aware of the fact that there were no cash flows of the Corporate Debtor and all the assets of the Corporate Debtor were attached under various investigative authorities. It was the duty of the RP, at this stage, to discontinue the services as not required and to appoint professionals according to need. Making payment of CIRP cost and expenses does not entitle them to continue at an exorbitant fee.

The RP engaged D&P in the 1st CoC meeting of GGL held on 1st November 2018 to provide infrastructure, personnel and back office support services while the appointment of D&P for NBL and NWL (subsidiaries of GGL) was made on 6th March 2019 in their 1st CoC meeting. There was a time gap of approx. 4 months between the two appointments, during which the RP became well aware of the fact that the assets of the Corporate Debtor were already attached by various investigation authorities and could not be taken over. This shows that the engagement of D&P for NBL and NWL (subsidiaries of GGL) at an exorbitant rate of Rs. 6,87,500 per month each (plus taxes and out of pocket expenses) was nothing but a way of siphoning off the money of the

Corporate Debtor.

Findings:

D&P is not a professional, having authorisation of a regulator of any profession to render any professional service, and its conduct and performance is not subject to oversight of any regulator of any profession, therefore, appointment of D&P is in contravention of section 20(2) of the Code. Fee of Rs. 23, 75,000/-(excluding taxes) per month to D&P in the matter of GGL which is 19 times of the fee payable to the RP cannot be said to be reasonable. Fee of Rs. 6,87,500 /-(excluding taxes and out of pocket expenses) per month each in case of NBL and NWL to D&P also cannot be said to be reasonable. Thus there is contravention of Sections 20 (2) (a), 25 (2) (d), 208 (2) (a) & (e) of the Code, Regulation 7 (2) (a), (h) & (i) of the IP Regulations read with clause 27 of the Code of Conduct as given in the First Schedule of the IP Regulations and IBBI Circular dated 12th June 2018.

- 3.2 **Contravention:** In the matter of GGL, RP received approval from the CoC members to get insurance for himself during the course of CIRP. However, the RP purchased two insurance policies from ICICI Lombard General Insurance Company Limited and made D&P a beneficiary in the same. The RP provided unnecessary benefits to D&P even though it was stated in the engagement agreement between the RP and D&P that D&P would act independently of the RP. Costs incurred by RP in providing insurance to D&P was done in violation of section 5(13) of the Code, Regulation 31 of CIRP Regulations and IBBI Circular dated 12th June, 2019 which states that if any fee or other expense, is not directly related to the CIRP, it shall not be included in the IRPC. Therefore, the Board is of the prima facie view that RP has violated Sections 5 (13), 208 (2) (a) and (e) of the Code, Regulation(s) 7 (2) (a), 7 (2) (h) and 7 (2) (i) of the IP Regulations read with clause(s) 1 and 2 of the Code of Conduct of the said IP Regulations, Regulation 31 of the CIRP Regulations and IBBI Circular dated 12th June, 2019.

Submission: The RP has submitted that upon research it was found that no insurance policies were exclusively available for individuals and had to be taken only in the name of entities. The cost of insurance was also found to be lower if the policy is issued in the name of an entity/company. Thus, the RP was constrained to buy a policy with the name of D&P. The insurance company clarified that the policy has been issued in the name of D&P, but the RP is also an insured party under the policy. Further, the coverage amount is Rs 70 Crore, but coverage of D&P is limited to Rs 10 Crore only. The RP further submitted that he had entered into an understanding with D&P that they would bear the insurance cost on pro-rata basis to the extent of the insurance cover provided to D&P under the policy and only the cost incurred regarding the RP would be charged as IRPC.

During the e-hearing on 26th May 2020, it was reiterated by the RP that the premium amount ratified by the CoC regarding the purchase of insurance for the RP was not utilized to cover the insurance of D&P and that D&P is bearing the pro-rata premium incurred in relation to insurance cover provided to D&P under the insurance policies.

Analysis: The 3rd meeting of the CoC was convened by the RP on 31st January 2019. The minutes of the said meeting provide as under:

“RESOLVED THAT, pursuant to the applicable provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulation made thereunder, approval of the Committee of Creditors be and is hereby accorded for an expenditure upto Rs 29 lakhs (Rupees twenty nine lakhs only) plus taxes to be incurred for the purchase of insurance policy for the IRP/RP and that the same be reimbursed to Duff & Phelps India Pvt Ltd if payment is made by them prior to creation of the Corpus Fund approved for the CIRP of GGL.

RESOLVED FURTHER THAT the said expenditure towards insurance policy for the IRP/RP shall form part of the Insolvency Resolution Process cost.

RESOLVED FURTHER THAT the Resolution Professional be and is hereby authorised to take such steps as may be necessary, in relation to the above if required and to settle all matters arising out of and incidental thereto and sign and execute all applications, documents and writings that may be required and generally to do all acts, deeds and things that may be necessary, proper, expedient or incidental for the purpose of giving effect to the aforesaid Resolution.”

Thus, it is clear that the CoC approved an expenditure of Rs. 29 Lakhs (plus taxes) for purchase of insurance policy for the IRP/RP. Even though the approval by the CoC was with regards to an insurance policy for the RP, he purchased two insurance policies i.e. Directors & Officers Liability Insurance (D&O) for the period of 8th February 2019 till 5th November 2019 and Professional Liability Insurance (PL) for the period 8th February 2019 till 5th November 2019. Both the policies were issued in the name of Duff & Phelps India Private Limited with a total insurance cover of Rs. 70 Crores (with D&P having total coverage of Rs. 10 Crores) and gross insurance premium of Rs. 16,52,000/- each. Total insurance premium (inclusive of taxes) on both policies being Rs. 33,04,000, the amount of premium accruable to D&P being Rs. 4,72,000 (inclusive of taxes i.e. 18% GST).

The RP has submitted that upon approval of insurance from the CoC, he conducted a search of policies available in the market and since no policies were available exclusively for the RP, he was constrained to buy a policy in the name of D&P. This information is factually incorrect since such policies were available in the market as on 8th February 2019. Another insolvency professional (name withheld due to confidential reasons) purchased ‘Errors and Omissions Liability Insurance’ policy from SBI General Insurance for the period of 4th December 2018 till 3rd December 2019. This policy was in the nature of ‘Professional Indemnity for IP during the CIRPs’. Further, the RP has contradicted his own submission by stating as under:

“2.4... Upon speaking with representative of various insurance companies, the RP was given to understand that the cost of the IP insurance policy would decrease/be lesser, if D&P’s name was on the policy since the risk of an insurance company would be higher if an individual only is covered rather than an individual backed by a Multinational Corporation. Hence, it is submitted that the cost of the insurance policy was lower than it would have been had the name of D&P not been there on the policy.”

Further, he has submitted that he sought clarification on the same from the insurance company, ICICI Lombard General Insurance Company Limited. The company has clarified vide email dated 27th August 2019 that:

“The policies issued by us are based on products approved by IRDA, the regulator. In accordance with the filing, the said products can be issued to entities, i.e. not individuals. However, the policies are structured to cover the individual, as is explained below.

The D&O policy has been issued to Duff & Phelps, but the insured under the policy is Mr. Vijay Garg (see ENDORSEMENT NO 8). There is no cover for Duff & Phelps under this policy. Besides, the D&O policy has reference to the work done by Mr. Vijay Garg for Gitanjali Gems under ENDORSEMENT NO 8).

The PI Policy has Duff & Phelps as the name insured in the schedule, but the endorsement No 5, amends it to include Mr. Vijay Garg also. ENDORSEMENT 4 restricts the cover to Duff & Phelps to INR 10 cr only. Besides, the PI policy also has reference to the work done for Gitanjali Gems under Item 3- PROFESSIONAL SERVICES.”

A letter dated 20th December 2019 has also been issued by D&P recording the understanding between the RP and D&P. The letter provides as under:

“Please refer to the Insurance Policy taken by the RP for the Gitanjali Gems Ltd CIRP assignment from ICICI Lombard Ltd. in which Duff and Phelps is also one of the co-insured. The policy is for Rs 70 Crores out of which D&P’s coverage has been limited to only Rs 10 Crores. The premium was Rs 28 lakhs plus GST.

It may be recalled that D&P has agreed to lend its name, solely to enable the RP to obtain an insurance policy, since the Insurance Company had advised that as per IRDAI guidelines the concerned policies could only be issued in the name of an entity and individual could become a co-insured by way of an endorsement. The policy finally issued was structured accordingly and D&P’s coverage was restricted to a small amount to meet compliance requirements, subject to the understanding that pro-rata cost would be met by the respective beneficiaries i.e. the RP and D&P.

Since there were no cash flows and the agreed Corpus is still not created by the CoC, D&P has paid the entire amount of Rs 28 lakhs plus GST which is yet to be reimbursed. We hereby reiterate and confirm the understanding that D&P will bear the pro-rata cost, in the same percentage as the coverage given to it under the policy, which works out to Rs 4 lakhs plus GST. We may therefore be reimbursed only Rs 24 lakhs plus GST instead of Rs 28 lakhs plus GST which we have paid to the Insurance Company.”

Clause 1 of the Code of Conduct as given in the First Schedule of the IP Regulations provides as under:

“1. An insolvency professional must maintain integrity by being honest, straightforward, and forthright in all professional relationships.”

IPs play a vital role in the resolution process and forms a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the resolution process. An IP must ensure that no unnecessary benefits are provided to a third party at the expense of the CIRP. In the present matter, the insurance was approved by the CoC, solely for the RP. However, the RP purchased insurance policies in the name of a third party, i.e. D&P. The RP was, therefore, not straightforward and forthright in his professional relationships.

Section 5 (13) of the Code defines the IRPC as under:

““insolvency resolution process costs” means—

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

Regulation 31 of the CIRP Regulations provides:

““Insolvency Resolution Process Costs” under Section 5(13)(e) shall mean –

- (a) amounts due to suppliers of essential goods and services under Regulation 32;*
- (aa) fee payable to authorised representative under [sub-regulation (8)] of regulation 16A;*
- (ab) Out of pocket expenses of authorised representative for discharge of his functions under [Section 25A];*
- (b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);*
- (c) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;*
- (d) expenses incurred on or by the interim resolution professional fixed under Regulation 34; and*
- (e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.”*

The IBBI Circular dated 12th June 2018 provides as under:

“7. The Code read with regulations made thereunder specify what is included in the insolvency resolution process cost (IRPC). The IP is directed to ensure that:-

- (a) no fee or expense other than what is permitted under the Code read with regulations made thereunder is included in the IRPC;*
- (b) no fee or expense other than the IRPC incurred by the IP is borne by the corporate debtor; and*
- (c) only the IRPC, to the extent not paid during the CIRP from the internal sources of the Corporate Debtor, shall be met in the manner provided in section 30 or section 53, as the case may be.*

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

- (a) any fee or other expense not directly related to CIRP;*
- (b) any fee or other expense beyond the amount approved by CoC, where such approval is required;*
- (c) any fee or other expense incurred before the commencement of CIRP or to be incurred after the completion of the CIRP;*
- (d) any expense incurred by a creditor, claimant, resolution applicant, promoter or member of the Board of Directors of the corporate debtor in relation to the CIRP;*
- (e) any penalty imposed on the corporate debtor for non-compliance with applicable*

laws during the CIRP; [Reference: Section 17 (2) (e) of the Code read with circular No. IP/002/2018 dated 3rd January, 2018.]

- (f) any expense incurred by a member of CoC or a professional engaged by the CoC;
- (g) any expense incurred on travel and stay of a member of CoC; and
- (h) any expense incurred by the CoC directly; [Explanation: Legal opinion is required on a matter. If that matter is relevant for the CIRP, the IP shall obtain it. If the CoC requires a legal opinion in addition to or in lieu of the opinion obtained or being obtained by the IP, the expense of such opinion shall not be included in IRPC.]
- (i) any expense beyond the amount approved by the CoC, wherever such approval is required; and
- (j) any expense not related to CIRP.”

It has been observed that the D&O policy has been purchased in the name of D&P and the insured under the same is the RP as per Endorsement No. 8 on page 25 of the policy document where the RP has been made the beneficiary of the policy in the place of D&P. This has been done by replacing the definition of 'You' (which is the insured person as per page 1 of the policy document) as mentioned in clause 3.15 of the policy document as under:

**“ENDORSEMENT NO 8
SPECIFIC MATTER ENDORSEMENT**

It is hereby understood and agreed that Definition 3.15- You, is deleted and replaced as below.

- (a) Mr. Vijay Kumar Garg, Resolution Professional, Gitanjali Gems Ltd
- (b) the legal representatives, heirs, assigns or estate of a person defined above in (a) in the event of the Insolvency/Lunacy/Incapacity/Death of the person mention in (a)
- (c) The lawful spouse or domestic partner of person mentioned in (a) In the event where recovery is sought solely because joint property is held or owned by or on behalf of the spouse or domestic partner (the spouse or domestic partner, however, is not insured under this Certificate in his or her own right).

All other coverage, terms, conditions and exclusions shall remain unchanged.”

Further, Endorsement No. 5 on page 21 of the PL policy document purchased in the name of D&P provides that the insured under the policy is D&P as well as the RP. This has been done by replacing the definition of 'Insured' as mentioned in clause V Definition G of the policy document as under:

**“ENDORSEMENT 5
SPECIFIC MATTER ENDORSEMENT-Amended Insured definition**

*Notwithstanding anything contained to the contrary in the Policy, it is hereby understood and agreed that Clause V Definition G **Insured**, is deleted in its entirety and replaced with the following*

Insured & Named Insured means

- (a) ***The Insured Organization as Insolvency resolution entity for Gitanjali Gems Ltd.***
- (b) ***Mr. Vijay Kumar Garg as Insolvency Resolution Professional for Gitanjali Gems Ltd***
- (c) ***The estate, heirs, executors, administrators, assigns and legal representatives of any***

persons mentioned in (a) or (b) above in the event of such person's death, incapacity, insolvency or bankruptcy, but only to the extent that such person would otherwise be provided coverage under this Policy

*However, the **Underwriter's** liability for cover for **Insured Organization** as insolvency resolution entity for Geetanjali Gems Ltd shall be sub-limited to INR 100,000,000 (which limit forms a part of and is not in excess of the **Limit of Liability**)*

All other terms and conditions remain unchanged."

Additionally, Endorsement no. 4 on page 20 of the PL policy document states that the combined limit for both the policies issued to D&P (including the RP) shall not be more than Rs. 70 Crores with sub-limit for D&P to be Rs. 10 Crores. The RP has submitted that the pro-rata cost of insurance accruable to D&P is being borne by D&P, and therefore, the same will not be included in the IRPC. However, this is an after-thought as the total cost (Rs. 3,57,47,494/-) submitted before the AA in MA 254/2019 in C.P. (IB) 3585(MB)/2018 includes the amount of premium paid in full i.e. Rs. 33,04,000/- (including GST).

Findings:

Initially the RP charged the premium paid in full towards the insurance policies to the IRPC, however, subsequently (i.e. after being pointed out by the IA) made an attempt to rectify this irregularity by obtaining a copy of the letter dated 20th December, 2019 from D&P clarifying the understanding between RP and D&P regarding bearing the pro-rata cost. Thus, the RP created an additional burden on the ailing Corporate Debtor by unnecessarily extending benefits to a third party i.e. D&P. Therefore, the RP failed to act in a forthright manner which is in contravention of Sections 5(13), 208 (2) (a) & (e) of the Code and Regulation 7 (2) (a), (h) & (i) of the IP Regulations read with clause(s) 1 & 2 of the Code of Conduct as given in the First Schedule of the IP Regulations, Regulation 31 of the CIRP Regulations and IBBI Circular dated 12th June 2018.

- 3.3 **Contravention:** In the matter of GGL the CIRP period was over and an application for liquidation was filed by the RP on 17th April 2019. After filing this application, the RP has conducted two meetings of the CoC (7th & 8th meeting on 31st May 2019 and 01st August 2019, respectively) in violation of Sections 5 (14) and 12 of the Code. Considering CIRP period was over and liquidation application had already been filed, the said meetings cannot be said to have been related to the CIRP. Hence, unnecessary expenses were incurred by the RP in conducting the said meetings after completion of the CIRP period in violation of Section 5 (13) of the Code, Regulation 31 of CIRP Regulations and IBBI Circular dated 12th June, 2019. Therefore, the Board is of the prima facie view that RP has violated Sections 5 (13), 5(14), 12, 208 (2) (a) and (e) of the Code, Regulation(s) 7 (2) (a), 7 (2) (h) and 7 (2) (i) of the IP Regulations read with clause(s) 14 and 27 of the Code of Conduct of the said IP Regulations and Regulation 31 of the CIRP Regulations.

Submission: The RP has submitted that with a view to avoid any adverse impact on the CIRP, it was considered important for RP to continue till the liquidation order was

passed. A prayer in the liquidation application has also been made to the same effect. RP further submitted that the 7th & 8th meeting of the CoC were convened to ensure continuity in the process and the RP is duty bound to pursue various matters before a number of legal fora for which expenses were required to be approved by the CoC. Further, the RP stated that he would be remiss in his duty and not be acting in the spirit of the Code if he abruptly stops discharging his duties after the expiration of CIRP and before the appointment of liquidator, thereby causing grave prejudice to the stakeholders and GGL. In this regard, reference has to be made to the Insolvency and Bankruptcy (Amendment) Ordinance, 2019 (now the Insolvency and Bankruptcy Code (Amendment) Act, 2020), wherein amendment has been made to Section 23 of the Code to allow IPs to continue managing operations of a CIRP till the resolution plan is approved by the adjudicating authority or a liquidator is appointed by the adjudicating authority.

Analysis:

Under the Code, an IP plays a crucial role in resolution, liquidation and bankruptcy processes. He takes important business and financial decisions that may have substantial bearing on the interests of all stakeholders. In such a scenario, it becomes imperative for an IP to perform his duties with utmost care and diligence and act in accordance with the provisions of the Code.

Section 5 (14) of the Code provides as under:

“(14) “insolvency resolution process period” means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day;”

Section 12 (1) of the Code provides as under:

“12. Time-limit for completion of insolvency resolution process. - (1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.”

Section 25 (2) (f) of the Code provides as under:

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

...

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

Regulation 18 of the CIRP Regulations provides as under:

“18. Meetings of the committee. A resolution professional may convene a meeting of the committee as and when he considers necessary, and shall convene a meeting if a request to that effect is made by members of the committee representing thirty three per cent of the voting rights.”

The CoC functions only during the period of CIRP. In the matter of GGL, CoC in its 6th meeting, recommended liquidation of GGL. There is no provision under the Code to convene meetings of the CoC after the completion of the CIRP period.

Section 23 (1) of the Code (prior to the Insolvency and Bankruptcy Code (Amendment) Act, 2020 (“2020 Amendment”)) provides:

“23. Resolution professional to conduct corporate insolvency resolution process. –

(1) Subject to section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period:

Provided that the resolution professional shall, if the resolution plan under sub-section (6) of section 30 has been submitted, continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period until an order is passed by the Adjudicating Authority under section 31.”

The above proviso is specifically applicable when a resolution plan under sub-section (6) of section 30 has been submitted by the RP and not when an application has been filed for liquidation upon approval of CoC. There was no provision for continuation of RP if resolution plan has not been submitted *under sub-section (6) of section 30 of the Code.*

Section 23 (1) of the Code (post the 2020 Amendment) provides:

“23. Resolution professional to conduct corporate insolvency resolution process. –

(1) Subject to section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period:

Provided that the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period, until an order approving the resolution plan under sub-section (1) of section 31 or appointing a liquidator under section 34 is passed by the Adjudicating Authority.”

The amended Section 23(1) of the Code provides that a resolution professional may continue to manage the operations of the corporate debtor until an order approving the resolution plan under Section 31 of the Code or appointing a liquidator under Section 34 of the Code is passed by the adjudicating authority. However, in the present case, it has been observed that in the CIRP of GGL, a liquidation application has been filed by the RP before the AA on 17th April 2019 i.e. before the commencement of the 2020 Amendment and thus, the same shall not be applicable to the facts of the present case.

Further, it has also been observed that the liquidation application filed by the RP has prayed for the following:

“(a) to pass order to liquidate the Corporate Debtor;

(b) to grant leave to Applicant to submit written consent to act as liquidator for the purposes of liquidation of the Corporate Debtor, subject to finalization of terms and conditions of the appointment between the Applicant and the CoC;

(c) pending hearing and final disposal of this application to pass order for continuation of the Applicant as the Resolution Professional of the Corporate Debtor and continuation of the CIRP process in terms of the IBC;

(d) to pass any other order in the interest of justice which this Hon'ble Tribunal deems fit;”

The RP in prayer clause (c) has prayed for continuing as the RP and also for continuation of the CIRP process in terms of the provisions of the Code till a liquidator is appointed by the AA. However, this application is still pending before the AA.

It is observed that the 7th and 8th meetings of the CoC were convened by the RP on 31st May 2019 and 1st August 2019, respectively. The RP submits that the meetings of the CoC were convened to avoid any adverse impact on the CIRP and to ensure continuity of the process as well as ratification of some expenses incurred during CIRP.

The 5th meeting of the CoC was convened by the RP on 28th March 2019 and as per the minutes of the said meeting, it is observed that the RP made an application, MA 254/2019 to the AA to allow the RP to operate a separate bank account for the expenses incurred during the CIRP. This was allowed by the AA and the relevant portion of the order of the AA was discussed by the RP in the 5th meeting of the CoC which is as under:

“Resolution Professional is directed to open an Account for CIRP purpose of Geetanjali Gems Limited, if deem fit under “No Lien Account” not subject to control of any authority or bank. This bank account shall be operated as an ‘Escrow Account’ under the control and supervision of NCLT, Mumbai Bench along with the Members of the Committee of Creditors. Needless to mention the withdrawals are therefore to be ratified and also to be verified by the Members of the Committee of Creditors. Thereafter the decision in this regard of CoC to be placed before the Adjudicating Authority to seek permission of withdrawal. With these directions this Application is allowed.”

Therefore, the AA gave directions to the RP to get all expenses under the CIRP to be ratified as well as verified by the members of the CoC and thereafter, seek permission of the AA for withdrawal of the ratified and verified amount.

The key agendas of the 7th meeting of the CoC can be found in the detailed agenda circulated by the RP before the meeting. These are provided as under:

“Agenda Item No 4: Discussion on the way forward of the Liquidation Process

...

Agenda Item No 5: Status of contribution to the Corpus for the CIRP process

...

Agenda Item No 6: Creation of Corpus for Liquidation Proceedings

...

Agenda Item No 7: Appointment of Insurance consultant

...

Agenda Item No 8: CIRP Expenses incurred upto May-2019.”

The key point of discussion of the 8th meeting of the CoC can be found in the minutes of the meeting. These are provided as under:

“While NCLT has allowed opening of the bank account, it has stipulated that the expenses to be ratified by the CoC and RP to approach Hon’ble NCLT for permission to withdraw the funds from the account. RP informed that CoC has already verified and ratified the expenses of Rs 3.57 cr. incurred till March 2019 and that he has filed an application with the Hon’ble Tribunal for permission to withdraw the same from the Corpus.

Accordingly, RP requested the CoC to ratify the expenses incurred & taken on record from April 2019 onwards, as given in para 10 A above, to enable the RP to seek

permission of the Hon'ble NCLT for withdrawal of the amount.

(a) While expenses/ monthly payments/ out of pocket expenses (at actual) and other operational costs as mentioned in Sr Nos 1, 2, 3, 5 (a), 5 (b), 5 (d), 10 (a), 16 and 18 (Rs. 65,88,934) were approved by the CoC in its previous meetings, approval of other expenses mentioned therein is now being sought.

(b) RP requested the CoC for its approval for the remaining expenses of Rs. 13,45,159 mentioned at Sr Nos 5 (c), 10 (b), 17,19,20,21.”

It is observed that the RP convened the meetings of the CoC post the completion of the CIRP period not only in order to ratify the expenses incurred by the RP after the completion of the CIRP period but also for other items beyond the ratification of expenses. The expenses were to be ratified by the CoC to enable the RP to withdraw the amount from the corpus of funds maintained under the directions of the AA. Conducting two CoC meetings after filing the application for liquidation of the Corporate Debtor before AA and discussing agendas other than as directed by AA i.e. ratification of IRPC, are beyond the provisions of the Code and the directions of the AA. Therefore, the intention of the RP in convening the 7th and 8th CoC meetings was not only limited to ratify expenses in order to withdraw the amount from the corpus of funds but also for discussion on agenda items beyond the same which do not explicitly fall under the ambit of 'managing the operations of the corporate debtor' as provided in Section 23 (1) of the Code.

Findings:

Conducting two meetings of the CoC beyond the CIRP period and discussing agendas other than as directed by AA i.e. ratification of IRPC, are beyond the provisions of the Code and the directions of the AA. Therefore, RP has contravened provisions of Sections 5(13), 5 (14), 12, 208 (2) (a) & (e) of the Code and Regulation 7 (2) (a), (h) & (i) of IP Regulations read with clause(s) 14 & 27 of the Code of Conduct as given in the First Schedule of the IP Regulations and Regulation 31 of the CIRP Regulations.

4. Conclusion

4.1 A corporate insolvency resolution process rests on the shoulders of an IP. He is duty bound to preserve and protect the assets of the corporate debtor as well as run the CD as a going concern. The list of duties and responsibilities of an IP in a CIRP have been detailed in the Code and Regulations made thereunder. As compared to the role envisaged in the Code for an IP in CIRP, the conduct of the RP in this matter is disturbing. The DC finds as under:

- a) Appointment of a professional is based on the need. Only when professional expertise is not available inside the CD, the IRP may appoint a professional from outside. It is an independent responsibility of the IRP based on his professional assessment. He must make such appointment on merits, not under the influence of a creditor or any other person. In this case, the IRP appointed D&P under section 20(2) of the Code, as per pre-agreed plan prior to his appointment as IRP, under the influence of a creditor, who has no locus either in running the business of the CD or conduct of the CIRP.
- b) The fee payable to Mr. Vijay Kumar Garg is a handsome amount. He is expected to serve as IRP / RP and use his employees, if required, to assist him. The law enables him to use the services of an IPE of which he is a partner or director. It is not

permissible for an IP to tie-up with a third party and bid for a work jointly, whereby the IP and the third party are collectively appointed on their collective strength. This amounts to converting a noble profession to a business and manipulating the market for insolvency professional services through anti-competitive, tie-in arrangement. An IP, who wishes to compete on his own merit and does not indulge in nefarious tie-in arrangements, would never get any assignment.

- c) Mr. Garg has claimed that he engaged D&P as a professional under section 20(2) read with section 25(2) of the Code. However, as per the scope of work (as indicated in the joint proposal dated 06 September, 2018 submitted by Mr. Vijay Kumar Garg, an IP assisted by D&P to ICICI Bank), its mandate was: (i) initial analysis and strategy, (ii) taking control of business, (iii) monitoring business and cash, (iv) assisting in development of business resolution plan, (v) finalising the resolution plan, and (vi) approval of resolution plan. None of these services is a service of a professional. The first three are responsibilities of the RP himself and for this, he may need support services, for which he has option either to use his employees or take assistance of an IPE, if he is a member of that IPE. Services at (iv) and (v) are the responsibilities of a resolution applicant. The service at (vi) is the responsibility of CoC and the RP. None of these services fall within the ambit of services of a professional. Procurement of services, other than services of a professional, is not permissible under section 20(2).
- d) Mr. Garg claims that he appointed D&P for professional services. Since D&P is not a professional, having authorisation of a regulator of any profession to render any professional service, and its conduct and performance is not subject to oversight of any regulator of any profession, appointment of D&P is in contravention of section 20(2) of the Code. Further, by not appointing a professional and by appointing a person who is not professional, Mr. Garg deprived the CD of professional services.
- e) Section 20(1) of the Code provides that the interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern. Section 23(2) reasserts this responsibility. Instead of preserving and protecting the value of the CD, Mr. Garg frittered away the resources of the ailing CD for unlawful purposes.
- f) As claimed by Mr. Garg, the appointment of the IRP (Mr. Garg) and D&P was always envisaged collectively, and they were appointed on their collective strength and credentials of the RP and D&P. It makes it clear that he has been appointed not on his own strength or merit, but on the strength of D&P. This makes him beholden to D&P and explains his undue favour to D&P. This makes clear that Mr. Garg alone is not capable of discharging the responsibilities as an IP.
- g) The law envisages appointment of an IRP by the Adjudicating Authority, which appointed Mr. Garg as IRP. It does not envisage a collective appointment, either by the Adjudicating Authority or the CoC; it empowers the IP to appoint a professional. If a particular creditor wanted the services of D&P, that creditor may engage him and bear the fee of D&P. That cannot be a part of the insolvency resolution process cost. In order to get the assignment, Mr. Garg mortgaged the interests of the CD to the creditor, by committing to engage D&P and transfer crore of rupees to D&P in the guides of fee.

- h) Policy in the nature of ‘Professional Indemnity for IP during the CIRPs’ was available from SBI General Insurance on the date of purchase of policy (i.e. 8th February 2019). Mr. Garg had no business to buy policy in the name of D&P and unnecessarily extending benefits to a third party i.e. D&P. This establishes the meeting of mind of RP and D&P.
- i) Mr. Garg conducted two meetings of the CoC even after filing the application for liquidation of the CD before AA and transacted business beyond the order of AA and beyond the provisions of the Code.
- j) Mr. Garg and D&P never had a professional-client relationship. The relationship between them is mysterious. It is observed that D&P has funded about Rs.1.62 crore to meet the various expenses of Mr. Garg/ CD. No professional-client relationship enables money lending, that too, of this order, to a client. The RP buys an insurance policy to cover himself and employees of D&P. The terms of appointment of D&P in GGL indicate that it would be paid Rs 23.75 lakh per month. The fee of Rs.1.6 crore for the CIRP period was prima facie considered exorbitant by the AA and the Expert Committee constituted by the IBBI. Engagement of D&P is only a façade to siphon off funds of the ailing CD. Findings at (a) to (g) relates to all three CIRPS i.e. GGL, NWL and NBL and (h) and (i) relates to CIRP of GGL only.

4.2 Thus, Mr. Vijay Kumar Garg has contravened provisions of:

- i. Sections 5(13), 5(14), 12, 20 (2)(a), 25, 208(2)(a) and (e) of the Code,
- ii. Regulation 31 of the CIRP Regulations,
- iii. Regulations 7(2)(a), 7(2)(h) and 7(2)(i) of the IP Regulations, 2016 read with clauses 1, 2, 14 and 27 of the Code of Conduct under the said Regulations, and
- iv. IBBI Circular No. IBBI/IP/013/2018 dated 12th June 2018 on “Fee and other expenses incurred for Corporate Insolvency Resolution Process”.

5. Order

5.1 Mr. Vijay Kumar Garg converted the noble insolvency profession to a business, converted professional client relationship to that of money lending and borrowing, manipulated the market for insolvency professional services, attempted to siphon off crores of rupees from the ailing CD to its partner in crime, acted under the influence of one creditor, and contravened every provision of the Code, Regulations and the Code of Conduct for ulterior purposes. Such conduct does not call for any leniency. However, in view of the directions of the AA and the recommendations of the IBBI Expert Committee about reasonableness of fee, the DC is inclined to allow payment of fee, as determined by the Expert Committee to D&P in the matter of GGL, even though the engagement of D&P is illegal.

5.2 In view of the above, the DC, in exercise of the powers conferred under Regulation 13 (1) of the IBBI (Inspection and Investigation) Regulations, 2017 and Section 220 (2) of the Code read with sub-regulations (7) and (8) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, after considering the prohibition on taking new assignments since issue of the SCN till this date, disposes of the SCN with the following directions:

- (i) Mr. Vijay Kumar Garg shall pay a penalty equal to 25% of fee payable to him as

per agreed terms and conditions in CIRPs of GGL, NBL and NWL where he has acted as an IRP/RP. The penalty amount shall be deposited by a crossed demand draft payable in favour of the “Insolvency and Bankruptcy Board of India” within 45 days of this order. The Board in turn shall deposit the penalty amount in the Consolidated Fund of India.

- (ii) Mr. Vijay Kumar Garg shall ensure that no amount beyond the reasonable fee, as determined by the Expert Committee, is paid to D&P. If any amount beyond this has been paid, Mr. Vijay Kumar Garg shall make it good to the CD within 45 days of this order and confirm the same to the Board.
- (iii) Mr. Vijay Kumar Garg shall undergo pre-registration educational course from the IPA of which he is a member and pass the Limited Insolvency Examination again to build his capacity to take up assignments on his own.
- (iv) Mr. Vijay Kumar Garg may take any new assignment/ process under the Code, only after compliance with the three [(i), (ii) and (iii) above] directions.
- (v) Mr. Vijay Kumar Garg shall, however, continue to conduct and complete the assignments/processes he has in hand as on the date of this order.

- 5.3 This Order shall come into force on expiry of 30 days from the date of its issue.
- 5.4 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Vijay Kumar Garg is enrolled as a member.
- 5.5 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, for information.
- 5.6 Accordingly, the show cause notice is disposed of.

Sd/-
(Dr. Navrang Saini)
Whole Time Member, IBBI

Dated:08th June 2020
Place: New Delhi