

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/103/2022

26th May, 2022

ORDER

In the matter of Mr. Manish Kumar Gupta, Insolvency Professional (IP) under Section 220 of the Insolvency and Bankruptcy Code, 2016 read with Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 and Regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017.

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/R(INSP)/2019/9 dated 22.02.2022, issued to Mr. Manish Kumar Gupta, who is a Professional Member of the Indian Institute of Insolvency Professionals of ICAI and an Insolvency Professional ('IP') registered with the Insolvency and Bankruptcy Board of India ('IBBI') with Registration No. IBBI/IPA-001/IP-P00225/2017-18/10424 dated 27.06.2017.

1. Background

- 1.1 Mr. Manish Kumar Gupta was appointed as an interim resolution professional ('IRP') for the corporate insolvency resolution process ('CIRP') in the matter of AVP Buildtech Private Ltd, Corporate Debtor ('CD') *vide* order of the National Company Law Tribunal, Principal Bench, New Delhi ('AA') dated 05.11.2019 which admitted an application for CIRP under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('Code').
- 1.2 The IBBI, in exercise of its powers under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017 appointed an Inspecting Authority (IA) to conduct the inspection of Mr. Manish Kumar Gupta. The IA submitted Final Inspection Report (FIR) to the IBBI on 25.09.2020 and addendum report on 02.08.2021.
- 1.3 The IBBI issued the SCN to Mr. Manish Kumar Gupta on 22.02.2022, based on the findings in the inspection report in respect of his role as an IRP in the CIRP of CD and material available on record. Mr. Manish Kumar Gupta replied to the SCN *vide* email dated 11.04.2022.
- 1.4 The IBBI referred the SCN, response of Mr. Manish Kumar Gupta to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder. Mr. Manish Kumar Gupta availed an opportunity of e-hearing before the DC on 02.05.2022. Mr. Manish Kumar Gupta was represented by Mr. GP Madaan, Advocate who made submissions during the e-hearing. Mr. Manish Kumar Gupta had also submitted his written submissions via email dated 11.05.2022.
- 1.5 The DC heard the oral submissions of Mr. Manish Kumar Gupta on 02.05.2022. The DC has considered the SCN, the reply to SCN, oral and written submissions of Mr. Manish Kumar Gupta, other material available on record and proceeds to dispose of the SCN.

2. Alleged Contraventions and Submissions

- 2.1 The contraventions alleged in the SCN and Mr. Manish Kumar Gupta's written and oral submissions thereof are summarized as follows.

3. Contravention I

- 3.1 NCLAT *vide* its order dated 13.03.2020 in CA (AT) (Ins.) No. 1244 of 2019 and 1249 of 2019 directed the following:

"We direct the Interim Resolution Professional/'Resolution Professional' to call a meeting of the 'Committee of Creditors' including the allottees to take a call on the question whether the matter can be resolved in the manner as settled in the aforesaid two (2) appeals or by way of any other 'Terms of Settlement'. If such decision is taken by more than 50% of the allottees and/or 66% of the 'Committee of Creditors', the 'Terms of Settlement' be placed before this Appellate Tribunal. We make it clear that in the meeting of the 'Committee of Creditors', 'Promoter' should be present to know the result of the voting share but will not take part in the voting. However, it will be open to the Promoter to give a suggestion as to what amount he infused or he intends to infuse as a 'Financial Creditor' and not as a 'Promoter'..."

- 3.2 Instead of honoring the NCLAT order dated 13.03.2020, Mr. Manish Kumar Gupta held meeting with allottees/homebuyers only. This issue was raised by allottees in 2nd meeting allottees/homebuyers dated 31.08.2020 whereby the following was recorded:

"iii) Some allottees raised that meeting to be done with Committee of creditor (COC) and not the allottee- to this IRP replied that his lawyer has different view on the same as Hon'ble NCLAT order has both the words in its order.

iv) One allottee asked to form the Committee of creditor (COC) and this present forum is illegal - To this, IRP replied and referred NCLAT order of November, 2019 to stay the formation of COC. He explained that the intent of Hon'ble court was to give a solution and not to vacate the order and it has to be honored. If court will direct the IRP specifically (after submission of the result of this meeting) then IRP will form the COC immediately."

- 3.3 Even after the issue was raised, Mr. Manish Kumar Gupta did not seek any clarification from Hon'ble NCLAT nor conducted the COC meeting. *Prima facie*, it appears that Mr. Manish Kumar Gupta failed to conduct the COC meeting and by not constituting the COC, he avoided the requirement of the 90 percent vote share for withdrawal under section 12A and thus deprived the stakeholders of their legitimate decision-making opportunity. In view of the above, the said conduct of Mr. Manish Kumar Gupta is *prima-facie* not in consonance with Section 208(2) (a) and (e) of the Code, Regulation 7(2)(h) of IP Regulations read along with Clause 2 and 14 of Code of Conduct specified in the First Schedule of the IP Regulations.

Submissions

- 3.4 With regard to the aforesaid contravention, Mr. Manish Kumar Gupta submitted that the order of the Hon'ble NCLAT dated 14.11.2019 clearly directed him not to make any publication calling for claims, if not yet made, nor constitute any Committee of creditors (CoC), if not yet constituted. The said order also directed him to ensure that the CD remains a going concern. Mr. Manish Kumar Gupta submitted that adhering to these clear-cut directions of the Hon'ble NCLAT, he could not constitute any CoC. Mr. Manish Kumar Gupta further submitted that there was no Authorized Representative (AR) of the class of creditors and therefore, in absence of any AR, no meeting of the CoC can be convened.
- 3.5 Mr. Manish Kumar Gupta has also submitted that status reports dated 21.08.2020, 18.09.2020 and 09.10.2020 had been filed by him before Hon'ble NCLAT along with details of 2 meeting of Committee of Creditors and/or the allottees of the flats conducted on 26.07.2020 and 31.08.2020 along with notice and agenda thereof. The Status Reports mentioned that the IRP of the CD has complied with the order of Hon'ble NCLAT. The voting was done in 2nd meeting.
- 3.6 Mr. Manish Kumar Gupta has further stated that the matter had been listed before the Hon'ble NCLAT a number of times since 13.03.2020 and a number of progress reports had already been filed with the Hon'ble NCLAT and with IBBI by him. The Hon'ble NCLAT has taken cognizance of these progress reports and these progress reports have been duly discussed at length in the order of the Hon'ble NCLAT and have ultimately been taken on record. Mr. Gupta submitted that the Hon'ble NCLAT has not vacated the stay order dated 14.11.2019 on constitution of the CoC till date and in absence of any vacation on status quo, Mr. Manish Kumar Gupta had no other option but to follow the directions of the order of the Hon'ble NCLAT. Mr. Manish Kumar Gupta submitted that he convened the meetings of all allottees and wherever required, the voting was also done on the issue of construction proposal of the promoters of the CD.
- 3.7 Mr. Manish Kumar Gupta submits that there were more than 10 effective hearings before Hon'ble NCLAT and the Hon'ble NCLAT never directed him to form CoC nor questioned his conduct as IRP of the CD in any of its hearings. Mr. Manish Kumar Gupta referred to the order dated 16.02.2022 wherein the Hon'ble NCLAT recognized the status reports submitted by him.
- 3.8 In respect of the allegation against him that by not constituting the CoC, Mr. Manish Kumar Gupta avoided the requirement of 90% vote share for withdrawal under section 12A of the Code, he submitted that the SCN failed to demonstrate a situation where there could have been applicability of section 12A. He submitted that there was no withdrawal proposal from either the creditors or the directors of CD to withdraw the main application on which voting was required under section 12A.
- 3.9 Mr. Manish Kumar Gupta submitted that he has not violated any of the directions of the Hon'ble NCLAT passed *vide* order dated 14.11.2019 and 13.03.2020 and that he has done

his best and has almost completed the construction of two towers of the CD with the assistance of the promoter thereof which shall be ready to be delivered to the allottees in the near future. He stated that some of the flats have already been given to the allottees to do the finishing job on their end.

Analysis and Findings

- 3.10 The DC notes that the Hon'ble NCLAT in its order dated 14.11.2019 stated that *"Till next date, the Interim Resolution Professional will not make any publication calling for claims, if not yet made, nor constitute any Committee of Creditors, if not yet constituted. However, he will ensure that the Corporate Debtor remains a going concern and will help of the Directors, Promoters, Employees, Workmen, etc. for completion of the project/ one or other Tower. He will also ensure that the paid Directors, Officers, Employees, Workmen and Supplier of materials are paid their current dues. Though he will not pay the dues if nay payable prior to the date of admission, i.e., amount payable before 5th November, 2019. The person who signs the cheque on behalf of the Corporate Debtor will continue to sign the cheques but after approval of the Interim Resolution Professional."*
- 3.11 Subsequently, Hon'ble NCLAT on 13.03.2020 gave further order stating that *"We direct the Interim Resolution Professional/'Resolution Professional' to call a meeting of the 'Committee of Creditors' including the allottees to take a call on the question whether the matter can be resolved in the manner as settled in the aforesaid two (2) appeals or by way of any other 'Terms of Settlement'. If such decision is taken by more than 50% of the allottees and/or 66% of the 'Committee of Creditors', the 'Terms of Settlement' be placed before this Appellate Tribunal. We make it clear that in the meeting of the 'Committee of Creditors', 'Promoter' should be present to know the result of the voting share but will not take part in the voting. However, it will be open to the Promoter to give a suggestion as to what amount he infused or he intends to infuse as a 'Financial Creditor' and not as a 'Promoter' ... "*
- 3.12 From the above discussion, it is clear that Hon'ble NCLAT vide its order dated 14.11.2019 has restrained Mr. Gupta from making public announcement for inviting claims, if not yet made and constituting any Committee of Creditors, if not yet constituted till the next date of order. There is no evidence on records that the afore-said restriction was further extended beyond the next date of Hon'ble NCLAT order or Hon'ble NCLAT has stayed the CIRP of the CD. It is pertinent to mention that Hon'ble NCLAT vide its order dated 13.03.2020 directed Mr. Manish Kumar Gupta (IRP) to call a meeting of the 'Committee of Creditors'.
- 3.13 Further, on the direction of Hon'ble NCLAT in its order dated 13.03.2020 to call a meeting of the committee of creditors, Mr. Gupta organized a first virtual meeting of homebuyer/allottees of the CD on 26.07.2020 i.e. after a period of 135 days of directions given by Hon'ble NCLAT. Mr. Gupta conducted the second virtual meeting of the homebuyers/allottees of the CD on 31.08.2020 i.e. after a period of 170 days from the date of Hon'ble NCLAT order dated 13.03.2020. It is pertinent to mention that the Code envisages to completion of the resolution process in 180 days. In this case, Mr. Gupta had

merely called a meeting of homebuyers/allotees only even though a specific direction given by the Hon'ble NCLAT in its order dated 13.03.2020 to call a meeting of Committee of Creditors.

- 3.14 The DC further notes that since Hon'ble NCLAT vide its order dated 13.03.2020 had given a specific direction to Mr. Manish Kumar Gupta (IRP) to call a meeting of 'Committee of Creditors', Mr. Gupta was duty bound to collate all the claims submitted by the creditors in pursuance of public announcement made by Mr. Gupta on 09.09.2019 as per Section 18(b) of the Code, verify the claims as per regulation 13 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), and determine financial position of the CD and constitute Committee of Creditors as per section 21 of Code, and then call a meeting of Committee of Creditors as per provisions of the Code and regulations made thereunder.
- 3.15 The contention of Mr. Gupta during his personal hearing and in his written submission that he had complied with the directions of NCLAT order dated 13.03.2020, by calling a meeting of Homebuyers/allotees of the CD is not tenable as he was directed to call a meeting of the Committee of Creditors. The DC has noted the minutes of meetings of Homebuyers/allotees held on 26.07.2020 and 31.08.2020 wherein the homebuyers/allotees objected the conduct of such meetings despite specific directions given by NCLAT in its order to conduct the meeting of Committee of Creditors.
- 3.16 In the minutes of first meeting of homebuyers/allotees, it is mentioned that *"Following concern of Homebuyers in relation to NCLAT order dated 13.03.2020 in relation to the constitution of the committee of creditors were discussed in details and the same was clarified by the IRP appropriately. Few Homebuyers stated that the meeting was held in terms of the decisions passed by the Hon'ble NCLAT on 13.03.2020 and on the other hand, the notice itself states that the CoC is not formed and a meeting of the allottees/home-buyers is being held. Pertinently, in the order dated 13.03.2020 passed by the Hon'ble NCLAT directed for a CoC meeting of the CD to be held and not the meeting of allottees/homebuyers/financial creditors. The intention of the Hon'ble NCLAT that it is the meeting of the CoC which is to be held is evinced clearly from the order dated 13.03.2020."*
- 3.17 In the minutes of second meeting of homebuyers/allotees held on 31.08.2020, it is mentioned that
- "iii) Some allottees raised that meeting to be done with Committee of creditor (COC) and not the allottee- to this IRP replied that his lawyer has different view on the same as Hon'ble NCLAT order has both the words in its order.*
- iv) One allottee asked to form the Committee of creditor (COC) and this present forum is illegal - To this, IRP replied and referred NCLAT order of November, 2019 to stay the formation of COC. He explained that the intent of Hon'ble court was to give a solution and not to vacate the order and it has to be honored. If court will direct the IRP specifically (after submission of the result of this meeting) then IRP will form the COC immediately."*

- 3.18 It is to be noted that as per provisions of Code and regulations made thereunder, Committee of Creditors can be constituted only after receiving and collating the claims received by the IRP and verification thereof. There is no evidence on record to show that Mr. Gupta while discharging his duty as IRP, has collated and verified the claims received in pursuance of public announcement made by him and constituted a Committee of Creditors as per provisions of the Code and regulations made thereunder. The DC finds that Mr. Gupta had not constituted the Committee of Creditors in accordance with the provisions of the Code and regulations made thereunder, as directed by the NCLAT vide its order dated 13.03.2020.
- 3.19 In view of the above, the DC finds that Mr. Manish Kumar Gupta has contravened the provisions of section 208(2) (a) and (e) of the Code, Regulation 7(2)(h) of IP Regulations read along with Clause 2 and 14 of Code of Conduct specified in the First Schedule of the IP Regulations.

4. Contravention-II

- 4.1 One of the allottee, Ms. Anu Singh, had filed Form CA with Mr. Manish Kumar Gupta on 22.11.2019. However, her name was not appearing in the list of claims as on 30.06.2020 or the list of claims as on 21.08.2020. The said conduct of Mr. Manish Kumar Gupta showed negligence in preparing the list of allottees. In view of the same, the said conduct of Mr. Manish Kumar Gupta is *prima facie* not in consonance with Section 208 (2)(a) and (e) of the Code, Regulation 13(1) of the CIRP Regulations, Regulation 7(2)(h) of IP Regulations read along with Clauses 14 of Code of Conduct specified in the First Schedule of the IP Regulations.

Submissions

- 4.2 With regard to the aforesaid contravention, Mr. Manish Kumar Gupta submitted that it was a matter of only one claim which could not be considered because the email id of the Homebuyer – Ms. Anu Singh was not available in the record of the CD and the claim was filed with wrong email id by Ms. Anu Singh which was not matching with the data available with the IRP as provided by the director of the CD. Ms. Anu Singh voted in the agenda as allottee of the project. After verification of correct email id, the claim of Ms. Anu Singh was admitted and informed to her over email as well. That as on date her name is reflecting in the list of homebuyers, as per the records of the CD.

Analysis and Findings

- 4.3 Since the claim of Ms. Anu Singh has been accepted, the DC accepts the submission of Mr. Gupta.

5. Contravention III

- 5.1 In compliance with Regulation 6 of the Inspection Regulations, the IA had shared the Addendum report with Mr. Manish Kumar Gupta *vide* e-mail dated 12.04.2021. IA further requested Mr. Manish Kumar Gupta *vide* email dated 02.06.2021, 14.06.2021, and 23.07.2021 to provide response on the same. However, Mr. Manish Kumar Gupta failed to provide his comments on the same. In view of the above, the said conduct is *prima facie* not in consonance with Section 208(2)(a) and (e) of the Code, Regulation 4(4) of Inspection Regulations, Regulation 7(2)(h) of IP Regulations read along with Clauses 18 and 19 of Code of Conduct specified in the First Schedule of the IP Regulations.

Submission

- 5.2 Mr. Manish Kumar Gupta submitted that the IA did not give extension of time to file reply on request. Regarding the allegation of non-cooperation with the IA, the IP has clearly denied this bald allegation which has not been substantiated with any proof or evidence. It is IBBI which has not supplied the desired information, particularly the FIR, despite repeated requests from the IP. In absence of said FIR, the IP was not in a position to file a reply to the addendum to FIR.

Analysis and Findings

- 5.3 Regulation 4(4) of the Inspection Regulations mandates the IP to produce before the IA such records in his custody or control and furnish to the IA such statements and information relating to its activities as the IA may require. Further section 208(2) of the Code mandates the IP to abide by the Code of Conduct and clauses 18 and 19 of Code of Conduct prescribed under IP regulations directs the IP to must appear, co-operate and be available for inspections and investigations carried out by the IBBI/ any person authorised by the IBBI and must provide all information and records as may be required by the IBBI. The DC notes that despite repeated requests made by IA to Mr. Gupta *vide* email dated 02.06.2021, 14.06.2021, and 23.07.2021 to provide response on the addendum report shared with Mr. Manish Kumar Gupta *vide* e-mail dated 12.04.2021, Mr. Gupta did not respond on the same. Thus, the DC finds that Mr. Gupta has not acted as per provision of section 208(2)(a) and (e) of the Code, Regulation 4(4) of Inspection Regulations, Regulation 7(2)(h) of IP Regulations read along with Clauses 18 and 19 of Code of Conduct specified in the First Schedule of the IP Regulations.

6. Order

- 6.1 In view of the foregoing contraventions no. I and III, the DC, in exercise of the powers conferred under section 220 of the Code read with Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and Regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017, hereby, suspends the registration of Mr. Manish Kumar Gupta having registration no. IBBI/IPA-001/IP-P00225/2017-18/10424, for a period of two years.

- 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 sent to the CoC of all the Corporate Debtors in which Mr. Manish Kumar Gupta is providing his services, if any. The CoC may decide whether to continue his services or not. In case, CoC decide to discontinue his services, CoC may file an appropriate application before AA. Since CoC has not been constituted in this CD, a copy of the order shall be forwarded to the Registrar of the Hon'ble NCLAT requesting to place this order before Hon'ble NCLAT to consider replacement of Mr. Manish Kumar Gupta who has been appointed as IRP in the instant matter.
- 6.4 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI of which Mr. Manish Kumar Gupta is enrolled as a member.
- 6.5 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, New Delhi, for information.
- 6.6 Accordingly, the show cause notice is disposed of.

Dated: 26th May, 2022
Place: New Delhi

-sd-
(Ravi Mital)
Chairperson, IBBI