

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/84/2022

22nd March, 2022

ORDER

In the matter of Mr. Umesh Garg, 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.

This order disposes of the Show Cause Notice (SCN) No. IBBI/IP/MON/2021/221/333/2155 dated 29.07.2021, issued to Mr. Umesh Garg, R/o C-334, Pocket C, Sarita Vihar, New Delhi - 110076 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-P00135/2017-2018/10277 dated 30.05.2017.

Background

- 1.1 Mr. Umesh Garg, was appointed as an interim resolution professional (IRP) for the corporate insolvency resolution process (CIRP) in the matter of M/s Piyush Colonisers Ltd., the corporate Debtor (CD) *vide* order of the National Company Law Tribunal, Principal Bench, New Delhi (AA) in CP (IB)-449(PB)/2019, dated 30.09.2017 which admitted an application for CIRP under Section 7 of the Insolvency and Bankruptcy Code, 2016 (Code). The IRP was confirmed as the Resolution Professional (RP) by the Committee of Creditors (CoC) constituted by the CD in the 1st CoC meeting held on 30.10.2019.
- 1.2 The IBBI, in exercise of its powers under section 218 of the Code, on having reasonable grounds to believe that Mr. Umesh Garg contravened provisions of the Code, Regulations and Circulars issued SCN dated 29.07.2021 to Mr. Garg.
- 1.3 The SCN alleged contraventions of provisions of sections 18(1)(c), 25(1)(e), 21(2), 208(2)(a) and (e) of the Code, regulations 12(3) and 13(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (CIRP Regulations), 7(2)(a) and (h) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and clauses 10, 13 and 14 of the Code of Conduct specified in Schedule I of the IP Regulations.
- 1.4 The IBBI referred the SCN, response of Mr. Umesh 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. Umesh Garg availed an opportunity of e-hearing before the DC on 06.10.2021. Mr. Umesh

Garg was represented by Ms. Mamta Binani, Advocate who made submissions during the e-hearing.

Alleged Contraventions and Submissions

2. The contraventions alleged in the SCN and Mr. Umesh Garg's written and oral submissions thereof are summarized as follows:

Contravention

- 2.1.1 Section 5(7) of the Code defines a financial creditor to mean any person to whom a "*financial debt*" is owed. Further "*financial debt*" as defined under Section 5(8)(f) read with the explanation of the Code, clarifies that any amount raised from an allottee under a real estate project shall be deemed to be financial debt and the allottees of the said real estate projects are to be regarded as "*financial creditors*".
- 2.1.2 Further, section 21(2) of the Code prescribes that CoC shall comprise of all financial creditors of the CD. Thus, it was Mr. Umesh Garg's duty to constitute CoC with all the financial creditors of the CD including such 'class of creditors'. The Code does not make a distinction between the financial creditors on basis of the nature of financial debt. Furthermore, section 21 of the Code does not exclude the financial creditor in class from being a part of CoC depending on the timing of filing and admission of their claims. As such, the applicable law does not create any difference between the financial creditors and the 'class of creditors' under the Code
- 2.1.3 It was seen that Mr. Umesh Garg appointed as IRP by Hon'ble AA *vide* its order dated 30.09.2019 in respect of the CIRP of CD. The Hon'ble AA *vide* said order declared moratorium in terms of section 14 of the Code from 30.09.2019. Mr. Umesh Garg was later confirmed as the RP by the CoC in the 1st CoC meeting held on 30.10.2019. Several complaints were received from 'class of creditors' as defined under clause (b) of sub-section (6A) of section 21 of the Code and the issues raised in the complaints were examined by the Board.
- 2.1.4 It was seen that a significant number of 'class of creditors' submitted their claim forms with Mr. Garg on 24.10.2019, well within the period stipulated under Regulation 12 of the CIRP Regulations. However, even upon submission and thereafter verification of such claims, these 'class of creditors' were not included in the CoC by Mr. Garg. After a substantial gap of time, *vide* email dated 08.01.2021, Mr. Garg informed the said 'class of creditors' that their names had been included in the list of members of CoC and thereafter, given voting rights. As a consequence of the action of Mr. Garg, the 'class of creditors' could exercise their voting rights only a year later from the date of submission of their claim, i.e., in the 11th CoC meeting held on 25.02.2021, which was after 490 days from date of submission of their claims.

- 2.1.5 Further, the AA *vide* order dated 27.11.2020, in the IA No. 1772 of 2020 filed by Mr. Umesh Garg, observed that “*We do not think we are supposed to give general clarifications over the procedure prescribed by IBBI unless factual aspects warrant NCLT to examine the Regulations as to whether IBBI framed Regulations within the power conferred upon it. The reason is IBBI prescribes the procedure through regulations with the power conferred upon it.*”
- 2.1.6 Further, even after the pronouncement of the above order of the AA on 27.11.2020, it was only in the 11th CoC meeting held on 25.02.2021, you had included the ‘class of creditors’, i.e., after a delay of three months.
- 2.1.7 The Board was of *prima facie* view that Mr. Umesh Garg contravened section 18(1)(c), 25(1)(e), 21(2), 208(2)(a) and (e) of the Code, regulation 7(2)(a) and (h) of the IP Regulations, regulation 12(3) and 13(1) of the CIRP Regulations, clauses 10, 13 and 14 of the Code of Conduct.

Submission

- 2.2.1 Mr. Umesh Garg submitted that the Oriental Bank of Commerce filed a petition under section 7 of the Code before AA seeking initiation of CIRP against the CD. The AA admitted the petition vide order dated 30.09.2019 and appointed Mr. Umesh Garg as IRP. He further submitted that the public announcement dated 03.10.2019 was issued, whereby the creditors of CD were called upon to submit their claims on or before 14.10.2019 as per provisions of the Code and regulations made thereunder.
- 2.2.2 Mr. Garg submitted that consequent to issuance of public announcement, he received claims from FCs covered under regulation 8 of CIRP Regulations and FCs in a class covered under regulation 8A of the CIRP Regulations. He submitted that the 1st CoC was constituted on 21.10.2019 with FCs covered under regulation 8 and regulation 8A who filed their claims upto 14.10.2019 i.e. in accordance with the period stipulated in the public announcement and under regulation 12(1) of the CIRP Regulations. He also submitted that he was confirmed as RP in the 1st CoC meeting held on 30.10.2019.
- 2.2.3 Mr. Garg submitted that subsequent to 14.10.2019, he continued to receive claims from both FCs under regulation 8 and FCs in a class under regulation 8A of the CIRP Regulations. He submitted that the claims of FCs of the CD covered under regulation 8 and 8A who had submitted their claim after 14.10.2019 were admitted as per regulation 12(2) and they were included in the list of creditors. Consequent to updations of list of creditors, in terms of regulation 12(2) and (3), name of FCs under regulation 8 only were included in the list of members of CoC.
- 2.2.4 Mr. Umesh Garg submitted that the Board issued notification bearing No. IBBI/2018-19/GN/REG031 dated 03.07.2018, whereby various amendments were made to the

CIRP Regulations. Mr. Garg referred to para 8 and para 11 of the said Notification. Mr. Garg submitted that para 8 of the said Amendment Notification introduced a new regulation 8A titled "Claim by Creditor in Class". Para 11(c) of the Amendment notification substituted words "a financial creditor under Regulation 8" in place of the words "a financial creditor" in Regulation 12 (3). He submitted a table comparing the regulation position prior to notification dated 04.07.2018 and after the notification.

2.2.5 Mr. Garg tabulated the regulation 12(3) before and after amendment notification dated 04.07.2018, which is as under:

Before	After
<p>(1) Where the creditor in sub-regulation (2) is a financial creditor, it shall be included in the committee from the date of admission of such claim:</p> <p>Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.</p>	<p>(3) Where the creditor in sub-regulation (2) is [a financial creditor under regulation 8], it shall be included in the committee from the date of admission of such claim:</p> <p>Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.</p>

2.2.6 Mr. Garg submitted that the substitution clearly showed that creditors who had filed their claim after last date of submission of claims as mentioned in the public announcement, i.e., 14.10.2019, the law makers had consciously decided to include specifically financial creditors covered under regulation 8 in CoC. It is clearly evident that in the case of financials creditors in class covered under regulation 8A who had filed their claims after last date of submission of claims as mentioned in the Public Announcement, the law makers consciously chose not to include such creditors in CoC. Mr. Umesh Garg referred to the judgment of *B. Premanand & Ors. Vs. Mohan Koikal & Ors. (Civil Appeal No. 2684 of 2007)* dated 16.03.2011, wherein the Hon'ble Supreme Court observed as under:

“In our opinion, Rule 27(c) of the Rules is plain and clear. Hence, the literal rule of interpretation will apply to it. No doubt, equity may be in favour of the respondents because they were selected earlier, but as observed earlier, if there is a conflict between equity and the law, it is the law which must prevail. The law, which is contained in Rule 27(c), is clearly in favour of the appellants. Hence, we cannot accept the submission of the learned senior counsel for the private respondents. The language of Rule 27(c) of the Rules is clear and hence we have to follow that language.

In M/s. Hiralal Ratanlal vs. STD, AIR 1973 SC 1034, this

Court observed:

“In construing a statutory provision the first and foremost rule of construction is the literally construction. All that the Court has to see at the very outset is what does the provision say. If the provision is unambiguous and if from the provision the legislative intent is clear, the Court need not call into aid the other rules of construction of statutes. The other rules of construction are called into aid only when the legislative intent is not clear.”

2.2.7 That on account of being excluded from the CoC, certain creditors in a class covered under Regulation 8A of the CIRP Regulations who had filed their claim after 14.10.2019 made request to Mr. Garg to include them also in CoC in the month of February, 2020. Mr. Garg submitted that in view of modified provision of regulation 12(3), he was not able to include them, therefore, he promptly sought legal opinion from Vaish Associates on the said issue. Mr. Garg referred to certain paras of the legal opinion in his reply which is given below:

1.5 It appears from language used in Regulation 12 (3) that only those financial creditors that are forming part of Regulation are allowed to be part of Committee of Creditors even after submission of claims between the period of 14 and 90 day of insolvency commencement date.

1.6 Whereas for the Financial Creditors forming part of Regulation 8A i.e. "Creditors in Class" seem to be not included specifically from taking part in Committee of Creditors if the claim is submitted after the date provided in the Public Announcement.

1.7 It is also important to bear in mind that the Regulation 8A and amendment to Regulation 12 (3) were brought by Notification No. IBBI/2018-19/GN/REG031, dated 3rd July, 2018, therefore, it appears that the Insolvency and Bankruptcy Board of India consciously chose to not include Financial Creditors falling under Regulation 8A to be included in the CoC.

2.2.8 Mr. Garg further submitted that Vaish Associates opined that the Resolution Professional may approach the AA seeking clarification in this regard and referred to the concluding para of the opinion, which is as under:

“1.9. Having regard to the conundrum above due to the contrasting interpretation of the provisions of the Code and CIRP regulations and considering the objections raised by the certain "Financial Creditor in a Class", it is advisable that the Resolution Professional may approach the Adjudicating Authority, National Company Law Tribunal seeking clarification in this regard. Since, inclusion of

creditors at a later stage would not impact the decision taken earlier and that the resolution process is time bound, the Resolution Professional can consider continuing with the meeting of the Committee of Creditors as per the extant provisions of the CRP regulations.”

2.2.9 Mr. Umesh Garg submitted that he filed before AA an application bearing No. IA 1772/2020 on 04.03.2020, seeking clarification with respect to inclusion of Creditors in a Class in CoC, who had filed their claim after last date of submission of claim, i.e., 14.10.2020. The AA in its order dated 12.03.2020 in IA 1772/2020 dealt with the contentions raised in the Application in detail and observed that sub-regulation (3) of Regulation 12 did not refer to Regulation 8A due to which the right of the financial creditors in a class will get affected. Relevant para is reproduced herein for ready reference:

“2. The sub-regulation (2) of Regulation 12 of CIRP Regulations provides that 'creditor can file claim within 90 days of the Insolvency Commencement date, whereas sub-regulation (3) of Regulation] 2 provides that where the creditor in sub-regulation (2) is a financial creditor under Regulation 8 he shall be included in the committee from the date of admission of such claims. In other words, sub-regulation (3) of Regulation 12 provides that the financial creditors referred to in Regulation 8(1) shall be included in the committee from the date of admission of such claims but such inclusion shall not affect the validity of any decision of committee made prior to such inclusion. But, sub-regulation (3) of Regulation 12 did not refer to Regulation 8A due to which the right of the financial creditor belonging to a class of creditors will get affected. In other words, in the event the claims of the class of creditors are admitted they could not be included in the committee from the date of admission of such claims.”

2.2.10 Mr. Garg submitted that the AA affirmed the view taken by him that regulation 12 (3) does not refer to financial creditor in a class and hence, right of the financial creditor in a class will be affected as they cannot be admitted to CoC. He submitted that the AA *vide* order dated 27.11.2020 disposed of IA No. 1772/2020 without giving any clarification. The relevant para of the order is as under :

“We do not think we are supposed to give general clarifications over the procedure prescribed by IBBI unless factual aspects warrant NCLT to examine the Regulations as to whether IBBI framed Regulations within the power conferred upon it. The reason is IBBI prescribes the procedure through regulations with the power conferred upon it.”

2.2.11 Mr. Umesh Garg submitted that he did not have discriminatory approach towards the financial creditors in a class, but could not admit them in CoC, as his hands were tied by law in light of CIRP Regulation 12(3). He took all the possible legal steps available to him to find a remedy and there cannot be even distant allegation of *malafides*. He also submitted that IA 1772 /2020 was disposed of vide order dated 27.11.2020 which was uploaded on the website of the AA after around 10 days. Mr. Garg then initiated the process of revising the list of creditors and list of constitution of members as soon as final order in IA 1772 of 2020 was uploaded on the website. List of Creditors and list of constitution of members of CoC was revised on 02.01.2021 and report on updated list of creditors as well as updated list of constitution of CoC was filed with AA on 04.01.2021 vide IA No. 32/2021. He further submitted that the next CoC meeting i.e., 11th CoC meeting was convened on 25.02.2021, wherein the financial creditors in a class duly participated. He submitted that there was no CoC meeting held between order dated 27.11.2020 and 11th CoC meeting held on 25.02.2021.

2.2.12 It was submitted by Mr. Garg that no disadvantage or harm accrued upon the financial creditors in a class due to the time taken in obtaining clarity on the question of law. He submitted that it was not the case of the financial creditors in a class that a plan was approved prejudicial to their interest or any other step was taken by the CoC against their interest, which itself shows that there is no malafide involved. Mr. Garg submitted that he as IRP issued public announcement on 03.10.2019, inviting the claim of creditors by 14.10.2019 as per provisions of the Code and relevant CIRP Regulations. The financial creditors covered under regulation 8 as well as financial creditors in a class covered under regulation 8A, who had filed their claim upto 14.10.2019 were admitted to CoC. Financial creditors covered under regulation 8 who had filed their claim after 14.10.2019 were also made member of CoC as per provisions of regulation 12 (3), but the financial creditor in a class under regulation 8A who had filed claim after 14.10.2019 were not included in the list of members of CoC, as regulation 12(3) specifically allowed inclusion of financial creditors covered under regulation 8 only.

2.2.13 Mr. Umesh Garg submitted that section 5(7) and section 21(2) of the Code have to be read with CIRP Regulation 12(3). According to Mr. Garg, an RP is supposed to read the law, including the Regulations “as is” basis, which specifically provides that financial creditors under regulation 8 shall be included in CoC. By making an amendment to regulation 12(3), w.e.f. 04.07.2018, the law makers consciously chose not to include in CoC the financial creditor in a class under regulation 8A who had filed claims after last date of submission of claims in the public announcement. He submitted that he could not have acted contrary to law laid in CIRP Regulations.

2.2.14 Mr. Garg submitted that there was no active intent on his part to jeopardize the insolvency process of the CD nor was the voting rights of the financial creditor in

a class restricted, which deprived them of their rightful voting share/rights in the CIRP for a considerable period of time. He submitted that his action had not deprived such "class of creditors" with the option and powers to assess the viability of the CD and determine the manner in which its state of distress was to be resolved. He submitted that he acted as per provisions of CIRP Regulations specifically regulation 12 and he took every possible legal step to proactively find solution to the issue by seeking legal opinion and approaching the Hon'ble Adjudicating Authority for clarifications. Mr. Umesh Garg submitted that he acted strictly as per provisions of the Code and Regulations made thereunder and abided by Code of Conduct as prescribed under Section 208 (2) of the Code.

FINDINGS AND ANALYSIS

- 3.1.1 The objective of the Code is, *inter alia*, to promote entrepreneurship, maximisation of value of assets, make available credit and balance the interests of all stakeholders, in a time bound manner. In its endeavour to maximize the value of assets of the CD, uniform valuation standards have been adopted to get a fair estimate of the value of the assets of the CD, which enables the CoC and the prospective resolution applicants to make an informed decision regarding the CD.
- 3.1.2 The Bankruptcy Law Reforms Committee in its report has laid emphasis on the role of an IP in Chapter 4 titled Institutional Infrastructure, at point 4.4 titled Insolvency Professional, which are as follows:

“Insolvency professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process.

...

In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. The latter include the identification of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings if it is an enterprise, preparation of the resolution proposal, implementation of the solution for individual resolution, the construction, negotiation and mediation of deals as well as distribution of the realisation proceeds under bankruptcy resolution. In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IPs to carry out these tasks in an efficient and professional manner. The role of the IPs is thus vital to the efficient operation of the insolvency and bankruptcy resolution process.

...”

- 3.1.3 The role of the RP is crucial and critical to fulfill the objective of the Code. It is imperative that the RP functions and discharges his/ her duties independently in a fair and transparent manner and facilitate the fulfilment of the objectives of the Code. Various checks and balances have been provided in the Code and Regulations made thereunder to ensure independent, fair and transparent functioning of the IRP/RP. It is the duty of an IRP/ RP to perform and discharge his/ her duties in accordance with the Code and the Regulations made thereunder, in letter and spirit to achieve the objectives of the Code.
- 3.1.4 The responsibilities of the IRP/RP under the Code require highest level of standards, calibre and integrity which inspire confidence and trust among the stakeholders and the society. The role of the RP is vital to the efficient operation of the insolvency and bankruptcy resolution process. The IP forms a crucial pillar upon which rests the credibility of the entire resolution process. For that purpose, the Code provides for certain duties, obligations for undertaking due diligence in the conduct of the insolvency process to establish integrity, independence, objectivity and professional competence in order to ensure credibility of both the process and profession as well.
- 3.1.5 Section 208 of the Code provides for the functions and obligations of the IP which provides *inter alia* that the IP shall abide by the Code of Conduct to take reasonable care and diligence when performing his duties and to perform his functions in such manner and subject to such conditions as may be specified.
- 3.1.6 Section 25(2)(e) of the Code provides that the RP shall maintain an updated list of claims. Further, Section 18 (1)(c) of the Code provides that the IRP shall constitute the CoC. Further, Section 21(2) provides that the CoC shall comprise of all financial creditors of the CD. Section 21(2) of the Code reads as under:

“21. Committee of creditors. -

(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor,] shall not have any right of representation, participation or voting in a meeting of the committee of creditors:

Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the insolvency commencement date.”

3.1.7 The Code provides that an allottee under a real estate project is also a financial creditor in terms of section 5(8) of the Code which defines ‘financial debt’ and, *inter alia*, provides that any amount raised from an allottee under a real estate project shall be deemed to be financial debt and the allottees regarded as financial creditors. Section 5(8) of the Code reads as under:

“5. (8) “financial debt” means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes–

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;”

3.1.8 The financial creditors in a class are to be represented by an authorised representative under the Code. Section 21(6A)(b) of the Code provides for appointment of authorized

representative for a class of creditors which reads as under:

“(6A) Where a financial debt—

...

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

...

and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.”

- 4.1.1 The DC notes that in the instant matter, the CIRP in the case of CD commenced *vide* order of AA dated 30.09.2019 and Mr. Umesh Garg was appointed as an IRP. Mr. Garg stated that he issued a public announcement dated 03.10.2019 inviting claims from creditors of the CD on or before the 14.10.2019 in accordance with regulation 12(1) of the CIRP Regulations. The DC notes from the submission of Mr. Garg that he kept receiving more claims even after the last date, *i.e.*, 14.10.2019. The meeting of the 1st CoC was held on 30.10.2019.
- 4.1.2 The DC notes that section 21 of the Code provides for constitution of CoC. As per section 21(2) of the Code, the CoC shall comprise of all financial creditors. Proviso to section 21(2) provides that if the financial creditor or the authorized representative of the financial creditor referred in section 24(6) or section 24(6A) are related party of the CD then such financial creditor or authorized representative shall not have any right of representation, participation or voting in a meeting of CoC. As per section 21(6A) where financial debt is owed to a class of creditors, exceeding specified number (10 as per regulation 2(1)(aa) of CIRP Regulations), the IP shall appoint another IP as their authorized representative to attend the CoC meetings and to vote on behalf of each financial creditor to the extent of voting share of such creditor. Further, section 21 (7) provides that the Board may specify the manner of voting and determining of the voting share in respect of financial debts covered under sub-section (6) and (6A).
- 4.1.3 From a bare perusal of the provisions of section 21, the DC notes that the Code provides for inclusion of financial creditors in a class in CoC, their representation, participation and voting in the meetings of CoC through an authorized representatives. It has been observed by the AA in the instant matter in its order dated 27.11. 2020 that the procedure is to be prescribed by the IBBI. The procedure for submission of

claims is laid down in CIRP regulations, claim forms in regulation 8 and 8A , and time period for submission of claims is laid down in regulation 12(1) and (2).

4.1.4 The DC notes from submission of Mr. Garg that he acted as per the provisions of regulations 8, 8A and 12 (1) and (2) of the CIRP regulations while considering the claims of financial creditors and creditors in a class (homebuyers). The provisions of regulation 8 and 8A of the CIRP Regulations read as under:

“8. Claims by financial creditors.

(1) A person claiming to be a financial creditor, other than a financial creditor belonging to a class of creditors, shall submit claim with proof to the interim resolution professional in electronic form in Form C of the Schedule:

Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.

(2) The existence of debt due to the financial creditor may be proved on the basis of

–

(a) the records available with an information utility, if any; or

(b) other relevant documents, including –

(i) a financial contract supported by financial statements as evidence of the debt;

(ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;

(iii) financial statements showing that the debt has not been paid; or

(iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.”

“8A. Claims by creditors in a class.

(1) A person claiming to be a creditor in a class shall submit claim with proof to the interim resolution professional in electronic form in Form CA of the Schedule.

(2) The existence of debt due to a creditor in a class may be proved on the basis of-

(a) the records available with an information utility, if any; or

(b) other relevant documents, including any-

(i) agreement for sale;

(ii) letter of allotment;

(iii) receipt of payment made; or

(iv) such other document, evidencing existence of debt.

(3) A creditor in a class may indicate its choice of an insolvency professional, from amongst the three choices provided by the interim resolution professional in the public announcement, to act as its authorised representative.”

Regulation 12 (1) and (2) of the CIRP Regulations reads as under:

“12. Submission of proof of claims:

- (1) Subject to sub-regulation (2), a creditor shall submit claim with proof on or before the last date mentioned in the public announcement.*
- (2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.”*

4.1.5 The DC notes that regulation 8 (1) of the CIRP Regulations provides for Form C for submission of claim by financial creditors other than class of creditors, while regulation 8A of the CIRP Regulations provides for Form CA for submission of claim by financial creditor belonging to a class. Further, regulation 8(2) and regulation 8A of the CIRP Regulations provides for documents or evidence to be considered as a proof for existence of debt. Regulation 12 (1) and (2) provides for time period for submitting the claims with proof.

4.1.6 The DC notes that Mr Garg while constituting CoC included financial creditors and creditors in a class (homebuyers) on the basis of claims received within the stipulated time in the public announcement. Thereafter, he admitted the claims of both the classes of financial creditors as per regulation 12 (2) of the CIRP Regulations which provides that a creditor who fails to submit claim with proof within time period in the public announcement, may submit the claim to the IRP or RP on or before the 90th day of insolvency commencement date. He included the financial creditors who submitted claims under regulation 12(2) in the CoC, however he excluded creditors in a class in the CoC due to provisions of regulation 12 (3) which provides that a financial creditor under regulation 8 who has submitted claim beyond the stipulated time but within 90 days of insolvency commencement date shall be included in the CoC and there is no mention of creditors in a class under regulation 8A therein. Regulation 12(3) of the CIRP Regulations reads as under:

“12. Submission of proof of claims:

(3) Where the creditor in sub-regulation (2) is a financial creditor under regulation 8, it shall be included in the committee from the date of admission of such claim:

Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.”

4.1.7 The DC observes that in construing a statutory provision, the first and foremost rule of construction is the literal construction rule. It is clear from bare reading of regulation 12(3) that it provides for only financial creditors under regulation 8 and does not mention regulation 8A, thus it is explicit that there is exclusion of financial creditors in a class under regulation 12 (3). The DC notes that provisions of regulation 12 (3) excludes financial creditors in a class who have submitted claims within 90 days of public announcement and Mr Garg followed the provisions of regulation 12 (3).

4.1.8 The DC finds that regulation 12(3) of the CIRP Regulation, as modified *vide* notification dated 4.7.2018, provides that only financial creditors under regulation 8 of the CIRP Regulations are to be admitted to CoC and not the financial creditors in a class under regulation 8A who have submitted claims beyond the stipulated date, which is not the intent, or the object of the Code as provided under section 21 of the Code. It is noted that most of the homebuyers are not in business and many a time do not take notice of public announcement like other creditors, and they submit their claims later but within 90 days of public announcement. If the inclusion of homebuyers in the CoC is made conditional or excluded, then it certainly affects the voting in CoC and in consequence the rights of such homebuyers. It appears that Mr. Garg was faced with confusion while reading provisions of section 21 and regulation 12 (3) and therefore, he took legal opinion on the issue and thereafter filed an application before the AA for guidance and clarification. Mr. Umesh Garg made his sincere efforts in approaching the AA for seeking guidance and clarification on this issue. Thus, Mr. Garg acted in good faith. If there would have been a mention of regulation 8A in regulation 12(3), then this situation would not have arisen. However, Mr. Garg included the financial creditors in a class in the 11th CoC meeting. Thus, DC finds that Mr. Umesh Garg did not contravene any of the provisions as alleged in the SCN.

Order

5.1 In view of the above, the DC, in exercise of the powers conferred under section 220 of the Code read with sub-regulations (7), (8), (9) and (10) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 disposes of the SCN without any directions.

5.2 The Order shall come into force with immediate effect in view of para 5.1.

5.3 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI of which Mr. Umesh Garg is enrolled as a member.

5.4 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, New Delhi, for information.

Accordingly, the show cause notice is disposed of.

-sd-

Dated: 22 March, 2022
Place: New Delhi

(Dr. Mukulita Vijayawargiya)
Whole Time Member, IBBI