INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/22/2020

21st April 2020

Order

In the matter of Mr. Bhupesh Gupta, 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).

1. Background

1.1 This Order disposes of the Show Cause Notice (SCN) dated 24th October 2019 issued to Mr. Bhupesh Gupta, 2181, Sector 38C, Chandigarh-160036, who is a Professional Member of the ICSI Institute of Insolvency Professional, Insolvency Professionals Agency and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board) with Registration No. IBBI/IPA-002/IP-N00030/2016-2017/10067.

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 4th April 2019 appointed an Inspecting Authority (IA) to conduct an inspection of Mr. Bhupesh Gupta, 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 24th October 2019 had issued the SCN to Mr. Bhupesh Gupta, based on findings of an inspection in respect of his role as an Interim Resolution Professional (IRP), Resolution Professional (RP) and Liquidator in Corporate Insolvency Resolution Process (CIRP) and Liquidation of Supreme Tex Mart Ltd. The SCN alleged contraventions of several provisions of the Code, the IBBI (Insolvency Professionals) Regulations, 2016 and the Code of Conduct under regulation 7(2) thereof, the IBBI (Liquidation Process) Regulations, 2016 and IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Mr. Bhupesh Gupta replied to the SCN vide letter dated 25th November 2019.

1.4 The Board referred the SCN, response of Mr. Bhupesh Gupta to the SCN, Addendum to the Reply of 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. Bhupesh Gupta availed an opportunity of personal hearing before the DC on 6th January, 2020 when he reiterated the submissions made in his written reply and also made a few additional submissions. Thereafter, the IP submitted an Addendum on 20th January, 2020.

2. Consideration of SCN

The DC has considered the SCN, the reply to SCN, oral submissions of Mr. Bhupesh Gupta, Addendum to reply to SCN, 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. Bhupesh Gupta's written and oral submissions thereon and their analysis with findings of the DC are as under:

3.1 **Contravention:** As per section 25 (2) (g) of the Code, it is the duty of the Resolution Professional to prepare the Information Memorandum (IM). Therefore, there is a duty on the IP to provide accurate information. As per the IM, A.K. Plastic Industries, one of the operational creditors has submitted a claim of Rs. 7,47,276/-. The same claim was admitted for Rs. 4,74,017/-. As per IM, the amount as per the books of the account of the CD was also Rs. 4,74,017. However, the 5th Progress report submitted to NCLT, Chandigarh shows the admitted amount as Rs. 7,47,017/-. There is a difference of Rs. 2,73,000/- in the amount recorded in IM and amount reflected in the said progress report submitted to NCLT. This shows a negligence in the conduct of the IP as the IM and the progress report shows varying amount for the same claim.

Submission: The IP submitted that the actual amount claimed is Rs.7,47,017/- and the amount in IM is a typing error. Total amount claimed under CIRP is Rs. 43.39 Crores and the total difference of Rs. 2,73,000/- is inadvertent and negligible in view of the volume of claims that have been received. The mistake was not amended as CIRP was already completed and liquidation was ordered, hence amendment had become irrelevant. And if desired by authorities IP would amend the same.

During the personal hearing on 6th January, 2020, it was further submitted by the IP that the typing error was inadvertent and that there is no *mala fide* intent while making the mistake. He reiterated that the claim amount and admitted amount in the books of accounts of CD has been wrongly reflected in the IM but has been subsequently corrected in the 5th Progress Report submitted before the NCLT, Chandigarh.

Analysis: Section 25(2)(g) of the Code provides:

"25. (2) *For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -*
(g) prepare the information memorandum in accordance with section 29;"

Further, Section 29 (1) of the Code provides that –
"29. (1) The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan."

As per Regulation 36 (2) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 it has also been provided that:

"*36. (2) The information memorandum shall contain the following details of the corporate debtor-*

(d) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;"

It is an admitted fact that the IP in the IM indicated the claim amount of A.K. Plastic Industries (OC) to be Rs.7,47,276/- and admitted claim amount as Rs. 4,74,017/-. However, the same has been erroneously reflected. Further, the IP in the 5th Progress Report submitted to NCLT, Chandigarh had corrected this data. It is also to be noted that the CD has gone into liquidation on 08.08.2018 and the claims are to be proved again on the liquidation commencement date.

Regulation 16 of the IBBI (Liquidation process) Regulations, 2016 (prior to amendment dt. 25.07.2019) provides that:

A person, who claims to be a stakeholder, shall prove his claim for debt or dues to him, including interest, if any, as on the liquidation commencement date."

Thus, as per Regulation 16 of the IBBI (Liquidation Process) Regulations, 2016, a person claiming to be a stakeholder shall prove his claim again on liquidation commencement date. Keeping this in view and correct data submitted in 5th Progress Report to NCLT, a typographical error in IM may not be sufficient to hold a person liable for contravention.

Findings: When a CD undergoes CIRP, an IP is vested with the management of its affairs and he manages its operations as a going concern. He complies with the applicable laws on behalf of the CD and conducts the entire CIRP. Such responsibilities of an IP require the highest level of professional excellence, dexterity and integrity. Since the highest degree of professionalism is expected from him, he should perform his duties diligently with due care and caution.

In the present case, the RP admittedly committed an error while stating the admitted amount of claim in the IM. However, since the admitted amount and the amount as per the records of CD has been correctly stated in the 5th Progress Report submitted to NCLT, Chandigarh, IP cannot be strictly held liable for this typographical error even though there has been negligence on his part while preparing the IM.

3.2 **Contravention:** The details of all assets of CD are to be contained in IM. However, two assets of CD i.e. Plot Khewat in village Kanagawal and Flat No.402 were not captured in IM despite the fact that information about these assets had been provided to the RP by

one of the financial creditors. In this case vital information relating to CD was either missing or incorrectly recorded in IM. IP is expected to exercise professional due care and diligence in preparation and presentation of IM.

Submission: The RP submits that the details of the assets of the CD have already been provided in the IM, the plot Khewat in village Kanagawal has been mentioned as '*Worker Colony*' and Flat No. 402 has been indicated as '*Building-Flat'*. Also, the information was provided to valuers and has been included in valuation reports as well. During the personal hearing, it was submitted by the IP that adequate disclosure of assets has been made with their value in IM. Further, the IP in the Addendum to the Reply to SCN has submitted that both these assets were mortgaged in favour of ICICI Bank Limited. ICICI Bank Limited has been a member of the Committee of Creditors (CoC) and that no member of the CoC raised the issue of non-inclusion of these two assets in the IM as there was no incident of non-inclusion of these assets in the IM.

Analysis:

Regulation 36(2)(a) and (d) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides,

"The information memorandum shall contain the following details of the corporate debtor-

(a) assets and liabilities, as on the insolvency commencement date, classified into appropriate categories for easy identification, with estimated values assigned to each category; ...

……(d) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims…"

Thus, in accordance with the provisions contained in the abovementioned regulations, the RP is duty bound to submit a correct and accurate financial position of the CD because this information is vital for the prospective resolution applicants who, based upon the information so furnished, take a decision to make a bid for the CD through submission of a resolution plan. Hence, the correctness of information provided by RP in the IM is central for the revival of the CD.

Further, the Bankruptcy law Reforms Committee on compilation of IM has observed that,

"*The RP must provide the most updated information about the entity as accurately as is reasonably possible to this range of solution providers*."

It also details the duties of RP in preparing the IM as under,

"*The information collected on the entity is used to compile an information memorandum, which is signed off by the debtor and the creditors committee, based on which solutions can be offered to resolve the insolvency. In order for the market to provide solutions to keep the entity as a going concern, the information memorandum*

must be made available to potential financiers within a reasonable period of time from her appointment to the IRP. If the information is not comprehensive, the RP must put out the information memorandum with a degree of completeness of the information that she is willing to certify.

For example, as part of the information memorandum, the RP must clearly state the expected shortfall in the coverage of the liabilities and assets of the entity presented in the information memorandum. Here, the asset and liabilities include those that the RP can ascertain and verify from the accounts of the entity, the records in the information system, the liabilities submitted at the start of the IRP, or any other source as may be specified by the Regulator."

In the present case, it has been observed from the Individual Technical Report of ICICI Bank Limited submitted by the RP in the Addendum to the Reply to SCN, that the plot Khewat in the village Kanagawal, Ludhiana corresponds to the asset description provided in the IM as '*Worker Colony*' and also that the abovementioned plot has been occupied for the purpose of Labour Quarters.

The RP had also submitted the sale deed of Flat no. 402, which was executed on 03.02.2010 with the CD. Based on the document furnished it was observed that the asset detailed as *Building-Flat'* in the IM corresponds to the description of Flat no. 402 which is a portion of property no. B-20-1437402.

Further, at page no. 191 of the IM, Collateral Security details (ICICI Bank) of Plot Khewat and Flat No. 402 has been mentioned.

Findings:

Essentially the RP has to facilitate the entire resolution process while attempting to address and balance the interests of all stakeholders. To achieve this objective, RP has to assume a wide array of duties and responsibilities which they must fulfill.

In the present case, the documents furnished by the RP clearly establish that the RP has provided details of the assets in the IM i.e. the plot Khewat in village Kanagawal has been mentioned as '*Worker Colony*' and Flat No. 402 has been indicated as '*Building-Flat'*. These assets have been indicated as collateral security of ICICI Bank Limited in the IM. (ICICI Bank Limited has been a member of the Committee of Creditors (CoC) and has not raised the issue of non-inclusion of these two assets in the IM) In such circumstances, DC cannot hold the RP liable for non-inclusion of these assets in the IM.

3.3 **Contravention:** Regulation 27 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides for appointment of two registered valuers to determine the fair value and liquidation value of the CD in accordance with Regulation 35 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The RP had appointed two valuers namely M/s Anmol Sekhri

Consultants Pvt. Ltd and Crest Capital Group Pvt. Ltd. to determine the fair value and liquidation value of CD. The liquidation value given by these two valuers were Rs. 175 Crores and Rs. 215 Crores respectively. However, in 6th CoC meeting dated 01.05.2018, CoC desired to appoint a third valuer. In the same meeting the third valuer, Er Gurmeet Singh for Plant & Machinery and Daya Singh for land & building were appointed from the panel of registered valuers of SBI. As per Regulation 35 (1) (b) of CIRP Regulations, the third valuer is to be appointed only if in the opinion of the RP the estimates submitted by the two valuers appointed earlier are significantly different. The IP in reply to IA admitted that there was no significant difference between the two valuations and that there was no need for third valuer. It was further, admitted that the third valuation was conducted only on the instruction of the CoC. This is in contravention to Regulation 35(1)(b) of the CIRP Regulations which states that a third valuer may be appointed only if in the opinion of RP, the estimates submitted by the two valuers are significantly different.

Submission: The IP in his reply to the SCN has admitted that the results of the two valuations were not significantly different and even the result of the third valuation was almost the same. He further admitted that the third valuation was done for the satisfaction of the stakeholders only. The IP also submitted that the conduct of third valuation on the desire of the CoC does not invalidate the decisions or actions taken by RP while conducting the CIRP and has not, in any way, affected the acceptance or the rejection of resolution plan. During the personal hearing, the IP reiterated the submissions made by him in the reply to the SCN.

In the Addendum to the reply to the SCN, the IP again submitted that the third valuation of assets of the CD had been conducted as per the decisions and the directions of the CoC and the RP had no grounds to challenge or reject the decision of the CoC. He further added that the CoC, in its commercial wisdom, had decided to conduct a third valuation and had directed the RP to get the third valuation done. The RP had no option but to accept and execute the decisions of the CoC. He has also replied that the decision of the CoC to get fresh valuation done is also an exercise of its commercial wisdom and there is always a possibility that after a fresh valuation, the CoC may be in a better position to take a final call to accept/reject a Resolution Plan which may be placed before it for consideration.

Analysis:

Regulation 35 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that:

"35. (1) Fair value and liquidation value shall be determined in the following manner:-
(a) the two registered valuers appointed under regulation 27 shall submit to the resolution professional an estimate of the fair value and of the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor;

(b) if in the opinion of the resolution professional, the two estimates of a value are significantly different, he may appoint another registered valuer who shall submit an estimate of the value computed in the same manner; and"

Further under Section 25 (2)(d) of the Code it has been provided that:

"25. (2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -
(d) appoint accountants, legal or other professionals in the manner as specified by Board;"

Hence, it is the explicit mandate of the Code that it is the primary duty of the RP to appoint professionals including valuers. The RP cannot delegate or assign his duties and responsibilities as provided under the Code to any third party. The RP can only appoint a third valuer as per Regulation 35(1)(b) when he is of the opinion that there is a significant difference between the two estimates of the value.

It has been observed that there is a difference of about Rs. 40 crores between the valuation done by Anmol Sekhri Consultants Pvt. Ltd and Crest Capital Group Pvt. Ltd. where the fair value is given as Rs. 275.9 crores and Rs 232.86 crores respectively and a liquidation value of Rs. 214.38 Crores and Rs.175.25 Crores respectively. Though the RP has submitted that there is no substantial difference, the resulting difference of about Rs.40 crores amount is about 20% of the liquidation value and even the total claim amount under the CIRP is about 43.39 Crores. (as has been submitted by the RP). However, the RP has categorically stated in his reply to SCN that there is no significant difference between the two estimates of a value in his opinion and it was only upon the desires of the CoC that a third valuer was appointed. Since the report of the third valuer was not significantly different from the earlier two valuations, the cost incurred for the conduct of third valuation was a futile endeavor resulting in additional costs to CD without any value maximization or benefit to CD. It merely served to fulfill the desires of the CoC members.

The responsibilities of CoC and IP are clearly demarcated by the Code. The CoC must not encroach upon the role of IP and must not allow the IP to encroach upon its role. Similarly, the IP must not compromise his independence in favour of the CoC.

From the minutes of 6th CoC meeting, it has been observed as under:

"***<u>To take note of appointment of third valuer</u>***

As desired by the COC, another valuation of the assets of the Co. has been assigned. The third valuers from the Panel of registered valuers of SBI Er Gurmeet Singh for Pant & Machinery and Sh Daya Singh for Land & Building have been appointed and they shall submit their report which will be placed before the COC in the next

meeting."

It has been observed that it was only upon the desires of the members of CoC, third valuer was appointed, and valuation was conducted. Regulation 35 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 clearly provides that a third valuer may be appointed by the RP, if he is of the opinion that the two estimates of a value are significantly different. However, in the present case, the RP despite his own lack of satisfaction about significant difference of value between the two valuations, allowed CoC to usurp his authority and thereby compromised his independence in favour of the CoC.

Furthermore, it is pertinent to mention that under the Code, both the IP and the CoC have defined roles. While specifying their roles, the Code does not envisage one assuming the role of the other and thus, it is necessary that the IP and the CoC must have a complete and clear understanding of their roles and responsibilities during CIRP. In all circumstances, they must not encroach upon each other's powers and must function independently without any cross influences.

Findings:

It is found that the RP has admitted that the valuation was done as per desires of the CoC. The appointment of valuers and conduct of valuation are not responsibilities of CoC but of the RP. Further, the fee incurred on the third valuer is an added financial burden on an ailing CD which is entangled in a web of debts.

In the present case, the RP, despite holding that there is no significant difference between the results of two valuations, he conceded to the desire of the CoC and appointed a third valuer. Thus, he abdicated his authority in favour of the CoC.

Hence, there has been a contravention of Section 208(2)(a) and (e) of the Code, Regulation 35(1)(b) of the CIRP Regulations and Regulation 7(2)(a) and 7(2)(h) of the IP Regulations, read with clauses 2,3,5 and 14 of the Code of Conduct as given in the First Schedule of the IP Regulations.

3.4. Contravention: As per the minutes of 9th CoC meeting dated 13th June 2018, CoC discussed the resolution plan submitted by Resolution Applicant Mr. Pradeep Sareen and Mr. Sandeep Gupta. CoC advised the Resolution Applicant to consider and improve their offer and revert by 18th June 2019. It was decided that in case resolution applicant plans to improve their offer, they may revert by 18th June 2019, otherwise the CD will go into liquidation. There was no resolution that has been approved by CoC with regard to fee payable to liquidator, but the liquidator continued to draw the same remuneration as was paid to him in the capacity of RP. In cases where the fee of liquidator has not been decided by the CoC, the liquidator should draw the fee in accordance with the table provided in Regulation 4(3) of IBBI (Liquidation Process) Regulations, 2016. However,

by continuing to draw the same fee in the capacity of a liquidator as the IP was taking in the capacity of RP, he has acted in contravention of Regulation 4(3) of IBBI (Liquidation Process) Regulations, 2016.

Submission: IP submitted that the fee as RP was charged only till units were kept as going concern and that all the four units were being run as during CIRP by the full involvement of all the team members, which required hectic movement from unit to unit, taking decisions regarding purchase and sale, recovery of book debts, statutory compliances, legal and NCLT cases, maintenance of machinery, security arrangements, handling of staff/workers etc. Further, no fee has been charged after the units were closed. The IP also submitted that during liquidation there was realization of CD for which fees is yet to be calculated as per Regulation 4(3) of IBBI (Liquidation Process) Regulations, 2016 and it is part of liquidation estate of which the liquidator is entitled to a percentage.

It was further submitted in the Addendum to the reply to the SCN, that as the assets of the CD have been valued thrice and as per the least valuation of the assets at Rs.159.17 Crores, the liquidator shall be entitled to a fees of Rs. 111.11 lacs, presuming a maximum period of two years for the purpose of liquidation. However, during this period of liquidation, the liquidator has kept the CD as a going concern and total turnover during this tenure are to the tune of Rs. 80 Crores approx. Though as per the Schedule given in Regulation 4, the liquidator would have been entitled to a remuneration of approx. Rs. 75 lacs to be calculated on the basis of percentages given in the schedule, however, the liquidator has charged a meagre amount of Rs. 31 lacs only during this period. Also, the IP submits that he reserves his right to charge the remaining fee out of the Liquidation Estate as the law mandates the payment of Liquidation Cost out of the Liquidation Estate. The IP asserts that he is entitled to a balance of Rs.44 lacs to be reimburse to him out of the Liquidation Estate.

Analysis:

Regulation 4 of IBBI (Liquidation Process) Regulations, 2016 deals with the liquidator's fee. It reads as under:

4. Liquidator's fee.

(1) The fee payable to the liquidator shall form part of the liquidation cost.

(2) The liquidator shall be entitled to such fee and in such manner as has been decided by the committee of creditors before a liquidation order is passed under sections 33(1)(a) or 33(2).

(3) In all cases other than those covered under sub-regulation (2), the liquidator shall be entitled to a fee as a percentage of the amount realized net of other liquidation costs, and of the amount distributed, as under:

Amount of Realisation / Distribution (In rupees)	***Percentage of fee on the amount realized / distributed***			
	in the first six months	***in the next six months***	***in the next one year***	***Therea fter***

Amount of Realisation (exclusive of liquidation costs)				
On the first 1 crore	*5.00*	*3.75*	*2.50*	*1.88*
On the next 9 crore	*3.75*	*2.80*	*1.88*	*1.41*
On the next 40 crore	*2.50*	*1.88*	*1.25*	*0.94*
On the next 50 crore	*1.25*	*0.94*	*0.68*	*0.51*
On further sums realized	*0.25*	*0.19*	*0.13*	*0.10*
Amount Distributed to Stakeholders				
On the first 1 crore	*2.50*	*1.88*	*1.25*	*0.94*
On the next 9 crore	*1.88*	*1.40*	*0.94*	*0.71*
On the next 40 crore	*1.25*	*0.94*	*0.63*	*0.47*
On the next 50 crore	*0.63*	*0.48*	*0.34*	*0.25*
On further sums distributed	*0.13*	*0.10*	*0.06*	*0.05*

(4) The liquidator shall be entitled to receive half of the fee payable on realization under sub-regulation (3) only after such realized amount is distributed.

Hence, Regulation 4(3) provides that in cases where the Liquidator fee has not been decided by the CoC, then the fee payable shall be ascertained in the manner provided in the table given under Regulation 4(3) of IBBI (Liquidation Process) Regulations, 2016. The submission made by the RP that he continued to charge the same fee that he was charging while acting as an RP during Liquidation process only till the time the units remained as going concern and that the liquidator is entitled to an additional amount of Rs. 44 lacs which he is yet to claim is immaterial as the provision of the Regulation clearly provides for a separate structure of fees for the Liquidator. The Bankruptcy law Reforms Committee had given the rationale behind the fee structure of the Liquidator as,

"*In fact, it has been found that often the Liquidator has the incentive to prolong the Liquidation process purely as a mechanism to seek rents from the creditors. They earn rents either by deploying the capital realised, or differentiating payouts to those who can pay for it. The Committee agrees that the Code and the regulations thereunder should incentivise good behaviour by the Liquidator by imposing a structure on fees charged in Liquidation. An ideal structure will be one that incentivises the Liquidator to preserve time value of transactions in Liquidation.*

The fees that the Liquidator can charge must be a decreasing function of time. Under such a fee structure, the same realisation obtained in the second year will mean a smaller fee for the liquidator than the fee for the realisation in the first year. The precise function can be specified by the Regulator, and can vary from case to case in regulations. However, irrespective of the variations, because fees earned must be lower in a later year than in an earlier year, the Liquidator is motivated to realise value sooner rather than later."

It is an admitted fact that the IP while acting as liquidator has charged Rs. 31.9 lakh during the liquidation period out of the liquidation estate. During the liquidation period,

liquidator holds the property of CD in trust. This is a general law that there must be proper authorization and documentation to withdraw money from the account of a trustee. However, in the present case, the RP, while acting as a liquidator, unilaterally took away the trust property without any authorization from the persons to whom the property belongs.

The IP has also submitted that as liquidator he is entitled to an additional amount. Such an argument cannot sustain as a professional has to charge fee as per provisions of the prevalent law. Regulation 4 of IBBI (Liquidation Process) Regulations, 2016 is very clear on liquidator's fee.

Thus IP, by disregarding the provisions of the Regulation, has displayed a casual attitude and lack of his understanding of the law.

Findings:
By continuing to draw the same fee in the capacity of a liquidator as he was taking in the capacity of RP, he has acted in contravention of Regulation 4(3) of IBBI (Liquidation Process) Regulations, 2016. He has also violated Section 208(2)(a) and (e) of the Code and Regulation 7(2)(a) and 7(2)(h) of the IP Regulations, read with clause 2, 14 and 25 of the Code of Conduct as given in the First Schedule of the IP Regulations.

3.5 Contravention: An arbitration petition was filed by Oriental Insurance Co Ltd (OICL) against CD in the court of Additional District Judge, Ludhiana (ADJ) challenging an arbitral award dated 12.01.2009 which was passed in favor of CD. On 01.09.2018, the Ld. ADJ passed an award wherein Oriental Insurance Co Ltd. has handed over a Demand Draft of Rs. 8,30,77,161/- towards full and final settlement of claim to Mr. Kuldeep Singh, director of CD, who has accepted the DD towards the full and final settlement of claim. CIRP of CD was started on 29.9.2017 and all these activities took place during CIRP. As per section 17 of the Code, the management and control of CD during CIRP is vested with the RP and he is authorized to act and execute in the name and on behalf of CD in all such matters. Further, it is also the duty of the RP to represent and act on behalf of the CD with third parties, exercise rights on behalf of CD in judicial, quasi-judicial or arbitration proceedings as per section 25(2)(b) of the Code. Therefore, the Board is of the *prima facie* view that the RP has violated section 25(2)(b), 208(2)(a) and 208(2)(e) of the Code and regulation 7(2)(a) and regulation 7(2)(h) of the IP Regulations read with clause 2 and 14 of the Code of Conduct of the IP Regulations.

Submission: IP submits that the promoter and ex-director had never informed the RP regarding the settlement of an insurance claim with OICL. The affidavits had been filed by them in the case in a clandestine and wrongful manner, keeping the IP in the dark. The details were subsequently found by IP. Further, after procuring the information, the IP filed an application in NCLT on 24.05.2019 claiming the amount of Rs.2,35,49,408 from OICL and appropriate action against the ex-director and promoter under section 66 and 67 have been initiated.

During the personal hearing, the IP repeated the submissions made in the reply to the SCN and also informed that the Demand Draft was in the name of the Company and not in the name of the ex-director of the CD. The IP also submitted that no payment was made to the promoters/ ex-directors of the CD from the amount, but it was utilized in making payment to the suppliers. It was submitted by IP that he had taken over all the bank accounts and operations of CD but when questioned by the DC about how he did not come to know about the deposit of the insurance claim amount which was credited into the account of the CD, the IP claimed that a member of the RP team, one Mr. Parminder Singh, IP did not take due diligence in finding the Rs. 8 Crores received in the bank account. It skipped their notice because of the large number of transactions, and the RP trusted the team to inform him.

It was further submitted in the Addendum to the reply to the SCN, that the ex-director Mr. Ajay Gupta dealt with OICL without the knowledge, consent or permission of the RP. And after the receipt of the claim amount from the Insurance Company, the IP filed an application before NCLT seeking direction to OICL to pay additional claim amount of Rs. 2,35,40,000/- as the difference between the amount claimed and amount disbursed, and the petition is pending before the Adjudicating Authority. The IP also submitted that the proceeds of Insurance claim were deposited by the ex-directors of the CD in the bank account of the CD without the knowledge of the IP and the entire sum so received has been utilized to keep the CD as a going concern. Further, the RP has initiated legal action against the Insurance Company before NCLT and impleaded the ex-directors of the CD.

Analysis:
The CIRP of the CD was initiated on 29.09.2017. However, on 30.05.2018 the amount of insurance claim was decided by the ADJ, Ludhiana in the matter of OICL v. M/s Supreme Yarn Ltd. now known as Supreme Tex Mart Ltd., where the CD was being represented by the ex-managing director, Mr. Sanjay Gupta. Thereafter, the Order dated 30.05.2018 passed by the ADJ, Ludhiana recorded the settlement of the amount of insurance claim of Rs. 8,30,77,161/- which was paid by OICL to the ex-director of the CD, Mr. Kuldeep Singh.

Section 25 (2)(b) of the Code provides that:
"25. (2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:—

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

It is observed that there is no reasonable ground to believe that the insurance claim proceeding before the ADJ, Ludhiana in the matter of OICL v. M/s Supreme Yarn Ltd., (now known as Supreme Tex Mart Ltd) was not within the knowledge of the RP. This is due to the reason that during CIRP, RP must have obtained complete control over the operations of the CD and all the notices/ orders in the abovementioned matter must have been addressed to the registered address of CD, and not to the residential address of the ex-directors of CD. The RP having effectively taken over the records and documents of

CD cannot assert that the proceeding before the ADJ, Ludhiana in the name of the CD was kept away from him in a wrongful and clandestine manner.

In the circumstances where RP admittedly had taken control over all bank accounts and operations of CD, it cannot be said that the RP was ignorant of the award of the Insurance claim when the amount was received in the bank account of CD. Further, the fact that the RP made payments to the suppliers in ignorance of receipt of the large sum of insurance claim amount to the tune of Rs. 8.30 Crores being deposited in the account is unfathomable. The argument that a member of the RP team failed to take due diligence in finding that an amount of Rs. 8.30 Crores has been received in the bank account is untenable since under the provisions of the Code, it is a primary duty of the IP himself to take immediate custody and control of all the assets of the CD and he is the authorized signatory to all the cheques through which payments to the suppliers were made.

Further, the IP filed the application before the Adjudicating Authority seeking a direction to OICL to pay additional claim amount of Rs. 2,35,40,000/- while impleading the ex-directors/ promoters only after IA had raised the issue during inspection.

Findings:
The issue relates to a financial transaction for which examination of all relevant documents are to be required. Since adequate material/ records relating to financial transactions are not on record, the DC is not in a position to give a viewpoint on this allegation.

The DC is of the further view that this matter requires further investigation. Adequate material and additional documents (indicated below) may be obtained from the IP and thereafter may be examined by the Board as per the provisions of the Code and the Regulations made thereunder.

The indicated additional documents are as follows:
i) Statement of accounts showing details of funds/ proceeds of insurance claims deposited,
ii) Details of parties to whom payment has been made out of insurance claims,
iii) Statement of all bank accounts (ongoing/closed during the CIRP),
iv) Audited Financial Statement for F.Y 2017-2018 and 2018-2019,
v) Any other relevant document/s.

3.6 Contravention: Regulation 21(3) of the CIRP Regulation provides that every notice of CoC meeting shall contain a list of the issues to be voted upon and copies of all documents relevant to the matter be enclosed. Further, it is the duty of RP to provide necessary documents, along with the notice of the meeting to all the participants of the meetings. However, the RP failed to submit the agenda alongwith notice to the participants of the CoC meetings. This failure to furnish the requisite documents with the notice was observed in the following meetings:
i) Notice dated 14.11.2017 for 2nd CoC meeting held on 18.11.2017,
ii) Notice dated 15.05.2018 for 5th CoC meeting held on 21.05.2017,
iii) Notice dated 23.05.2018 for 6th CoC meeting held on 25.05.2018,
iv) Notice dated 11.06.2018 for 9th CoC meeting held on 13.06.2018.

Submission: The IP submits that the agenda of the meetings was duly sent to all CoC members in hard copy along with notice and the email was only advance information. The email mode was not a substitute for the physical notice, which was accompanied by agenda, without fail. Also, during the personal hearing, the IP reiterated the same as given in his reply to SCN.

It was further submitted in the Addendum to reply to the SCN, that the notice and agenda of 2nd CoC meeting held on 18.11.2017, 7th CoC meeting held on 21.05.2018, 8th CoC meeting held on 25.05.2018 and 9th CoC meeting held on 13.06.2018 had been duly sent to all the CoC members. These meetings were attended by members having more than 99 percent of the voting share of the CoC and all the decisions, whenever required were taken unanimously. Further, the IP admits that the 8th and 9th CoC meeting were held to discuss the Resolution Plan to be presented before the CoC by resolution applicant. The agenda of discussion on the resolution plan was very much part of the notice which was issued to all the CoC members. As the resolution plan was to be tabled before the meeting only, no agenda notes were possible to be circulated in advance.

Analysis:
Regulation 21(3) of the CIRP Regulations provides as under:

"*21. Contents of the notice for meeting:*
(3) The notice of the meeting shall-
(a) contain an agenda of the meeting with the following-
(i) a list of the matters to be discussed at the meeting;
(ii) a list of the issues to be voted upon at the meeting; and
(iii) copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting; ..."

The RP is obligated to provide a copy of the notice along with the agenda to all the members of the CoC, so as to ensure preparedness of the members to vote on the various crucial issues that require the attention of the CoC. It also serves as a route map of the meeting and enables the members to take effective and timely decisions thereby saving valuable time during the CIRP. In the absence of a well-thought-out agenda, there is a possibility of needless delays and lack of consensus amongst the members which could be detrimental to the entire resolution process.

Thus, the RP provides a copy of the agenda to the members of the CoC along with the notice of the upcoming CoC meeting which is necessary for uniform dissemination of information amongst all the members of CoC. It further aids in creating a record of proceedings of the CoC. Hence, it is vital that the RP reaches out to all the CoC members prior to each meeting and provide them a copy of the notice along with the list of agenda to ensure that there is no requirement of reiteration of the context and background of the agenda and thus, enables him to seek their immediate opinions on the various critical issues.

On perusal of documents submitted by RP, it has been observed that the 7th CoC meeting was held on 21.05.2017 and not the 5th CoC meeting. Similarly, notice dated 23.05.2018 was for 8th CoC meeting and not the 6th CoC meeting. Further, the notice and agenda

dated 15.11.2017 of 2nd CoC meeting held on 18.11.2017, and notice and agenda dated 16.05.2018 of 7th CoC meeting held on 21.05.2018 has been sent to the CoC members vide emails dated 16.11.2017 and 17.05.2018 respectively. With regards to the agenda for 8th and 9th CoC meeting, it has been submitted by the RP in his addendum dated 20.01.2020 as under:

"the 8th and 9th meetings held on 25.05.2018 and 13.06.2018 were held just to discuss the resolution plan to be presented before the CoC by Resolution Applicants themselves. The agenda of discussion on the resolution plan was very much part of the notice which was issued to all the CoC members. As the resolution plan was to be tabled before the meeting only, no agenda notes were possible to be circulated in advance."

It has been observed from the emails dated 23.05.2018 for the 8th CoC meeting and 11.06.2018 for the 9th CoC meeting that the RP gave notice to the CoC about the schedule for the respective meetings adding that the meetings shall be conducted *'**to discuss the resolution plan**'*.

Upon a perusal of the documents abovementioned, it has been observed that all the documents are in order.

Findings:
The RP has submitted relevant documents to establish that he has provided the CoC members, a copy of agenda along with the notice for every meeting before the same was convened. These documents have been submitted to the satisfaction of the DC. Hence, the DC cannot hold the IP liable for his failure to furnish agenda and notice to the CoC members for various meetings.

4. **Conclusion**:

4.1 The Code envisages the role of an Insolvency Professional to manage the entire resolution process and to conduct liquidation of a Corporate Debtor. The RP is appointed by the Adjudication Authority and is given wide power by them to effectively run and manage the entity as a going concern, and also to manage the assets of the entity at all times during the process of CIRP. Further, the RP have been given immense powers under the Code, but they also have the corresponding responsibility to abide by the Code, rules, regulations and guidelines at all times.

4.2 The BLRC also noted that: "*In the case of insolvency resolution, a failure of the process may result from two main sources: collusion between the parties involved and poor quality of execution of the process itself. Hence, it is important that the professionals responsible for implementing the insolvency resolution process adhere to certain minimum standards so as to prevent failures of the process and enhance credibility of the system as a whole.*

In India today, there are professionals and intermediaries that offer services to resolve financial distress of both registered entities as well as individuals. These include lawyers, accountants and auditors, valuers and specialist resolution managers. However, given the critical role that the Code envisages for these entities in the resolution process, the Committee believes that the Board should set minimum standards for the selection of these professionals, along with their licensing,

appointment, functioning and conduct under the Code.

To this end, the Code empowers the Board to lay down the minimum professional standards and the code of conduct to be followed to by IPs at each stage of the insolvency and bankruptcy resolution process. Mandates for IPs, which may be prescribed through delegated legislation."

4.3 In this matter, the DC observes that Mr. Bhupesh Gupta displayed a negligent approach during the conduct of CIRP which can be elaborated as below:

4.3.1 The duties of IP and CoC are clearly provided under the provisions of the Code. In the present case, the RP permitted conduct of third valuation upon the desire of CoC despite his disbelief in conducting the third valuation. He further incurred additional financial costs upon an over-burdened CD through conduct of such third valuation. Thus, he allowed the members of CoC to usurp his powers thereby putting additional burden on an already ailing CD.

4.3.2 Regulation 4(3) of IBBI (Liquidation Process) Regulations, 2016 clearly states that in cases where the Liquidator fees has not been decided by the CoC, then the liquidator is entitled to a fee as per the table provided in the abovementioned provision. Despite such clear and unambiguous position of the law, the IP continued to charge the same fees during liquidation process which he was charging while acting as an RP.

4.4 Thus, Mr. Bhupesh Gupta has displayed utter misunderstanding of the provisions of the Code and Regulations made thereunder. He has, therefore, contravened provisions of:

i. Sections 208(2)(a) and (e) of the Code,
ii. Regulation 35(1)(b) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016,
iii. Regulation 4(3) of the IBBI (Liquidation Process) Regulations, 2016 and
iv. Regulations 7(2)(a) and 7(2)(h) of the IBBI (Insolvency Professionals) Regulations, 2016 read with clauses 2, 3, 5, 14 and 25 of the Code of Conduct under the said Regulations.

5. **Order**

5.1 During the personal hearing, Mr. Bhupesh Gupta had submitted that the errors committed by him during the CIRP are inadvertent and unintended.

5.2 In view of the above, the DC, in exercise of the powers conferred under section 220 of the Code read with Regulation 13 (3) of the IBBI (Inspection and Investigation) Regulations, 2017 and sub-regulations (7) and (8) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, issues the following directions:

5.2.1 The DC hereby directs Mr. Bhupesh Gupta to deposit an amount of Rs.

31,09,000/- (Rs. Thirty-One Lakh Nine Thousand only) in the Liquidation Estate of CD which he has drawn without any authorisation during the period 8th August 2018 to 31st October 2019 while acting as liquidator. However, Mr. Bhupesh Gupta is at liberty to claim liquidator fee in accordance with the provisions of Regulation 4(3) of the IBBI (Liquidation Process) Regulations, 2016.

5.2.2 Mr. Bhupesh Gupta shall not accept any new assignment as an IP till he deposits an amount of Rs. 31,09,000/- (Rs. Thirty-One Lakh Nine Thousand only) in the Liquidation Estate of CD and produces evidence to the Board of such deposit.

5.2.3 The DC hereby warns the RP to be extremely careful, diligent, strictly act as per law and similar action should not be repeated.

5.2.4 The DC also issues a direction to the Board to re-examine the Contravention No. 3.5 as per the provisions of the Code and the Regulations made thereunder.

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 also be forwarded to the members constituting the Committee of Creditors.

5.5 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professional, Insolvency Professionals Agency where Mr. Bhupesh Gupta is enrolled as a member.

5.6 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.

5.7 Accordingly, the show cause notice is disposed of.

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

Dated: 21st April 2020
Place: New Delhi