

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/28/2020

4th September, 2020

Order

In the matter of Mr Avishek Gupta, Insolvency Professional 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 .

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/SCN/2020/02 dated 21st May 2020 issued to Mr Avishek Gupta, CK 104, Sector 2, Salt Lake, Kolkata, West Bengal-700091, who is a Professional Member of the Insolvency Professional Agency of Institute of Cost Accountants of India and registered with the Insolvency and Bankruptcy Board of India (IBBI) as an Insolvency professional (IP) with Registration No. IBBI/IPA-003/IP-N000135N000135/2017-18/11499.

Background

2. The Insolvency and Bankruptcy Board of India (IBBI) issued the Show Cause Notice (SCN) to Mr Avishek Gupta, based on material available on record in respect of his role as an interim resolution professional (IRP) and / or resolution professional (RP) in corporate insolvency resolution process (CIRP) of M/s Sri Ganesh Sponge Iron Private Limited (CD). The material on record is the appointment letter dated 12th April 2019 issued to R.K. Associates Valuers & Techno Engineering Consultants Private Limited (R K Associates), valuation reports relating to Industrial Plant & Machinery and Industrial Land & Building both dated 4th June 2019, valuation report relating to Current Assets dated 8th July 2019, letter issued to IP by the IBBI dated 11th October 2019 and the reply dated 1st November 2019 to the said letter issued to the IP by the IBBI.

2.1 The SCN alleged contraventions of clauses (a) & (e) of section 208 (2) of the Insolvency and Bankruptcy Code, 2016 (Code), clauses (a), (h) & (i) of regulation 7 (2) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clauses 10 and 14 of the Code of Conduct contained in Schedule 1 of the IP Regulations, regulation 27 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (CIRP Regulations) and IBBI Circular IBBI/RV/019/2018, dated 17th October 2018. Mr Avishek Gupta replied to the SCN vide letter dated 18th June 2020.

2.2 The IBBI referred the SCN, response of Mr Avishek 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. The IP availed an opportunity of e-hearing before the DC on 14th August 2020 wherein he was represented by Mr Sanwal Tibrewal, Advocate. Thereafter, Mr Gupta submitted some additional documents vide email dated 15th August 2020 in support of his submissions made during the course of e-hearing.

3. Show Cause Notice

A summary of contraventions alleged in the SCN are summarised as follows:

Pursuant to regulation 27 of the CIRP Regulations, it is the duty of the IP to appoint registered valuers within 7 days of their appointment and not later than forty-seventh day from insolvency commencement date to determine the fair value and liquidation value of the Corporate Debtor. Further, IBBI Circular IBBI/RV/019/2018 (w.e.f. 1st February 2019) specifies that only valuers registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017 (Valuer Rules) may be appointed by the IP. It has been observed that the IP in the present matter has appointed RK Associates (which was not registered with the IBBI under the Rules) as one of the valuers in the CIRP on 12th April 2019. Therefore, the IBBI is of *prima facie* view that the IP has violated section 208 (2) (a) & (e) of the Code, regulation 7 (2) (a), (h) & (i) of the IP Regulations read with clause(s) 10 and 14 of the Code of Conduct contained in Schedule 1 of the IP Regulations, regulation 27 of the CIRP Regulations and IBBI Circular IBBI/RV/019/2018.

Submissions by Mr Gupta

4. Mr Gupta submitted vide reply dated 18th June 2020 that the CIRP of the CD commenced on 18th February 2019 and he was appointed as an IRP by NCLT, Kolkata Bench (AA). Subsequently, he was confirmed as RP by the Committee of Creditors (CoC) on 4th June 2019 and currently the resolution plan approved by the CoC on 30th November 2019 is pending with NCLT, Cuttack Bench. Further, Mr Gupta has submitted that this was his first assignment as RP and hence, he gained practical experience for conducting a CIRP. Mr Gupta submitted that he had discussed the scope of work with individual registered valuers (RVs) and since three RVs, viz., Mr Lakhan Lal Gupta, Mr Sandeep Kumar Agrawal and Mr Rajesh Gupta, informed him that they were associated with and working under the umbrella name of R. K. Associates Valuers & Techno Engineering Consultants Private Limited and for the purpose of communication only, the engagement letter was addressed to R. K. Associates Valuers & Techno Engineering Consultants Private Limited. It was amply clear that the appointment was for individual in personal capacity as RV. Accordingly, the non-disclosure and confidentiality undertaking was also taken from RVs in their individual capacity. Further, the separate invoices raised by the individual RVs have also been placed on record.

4.1 Mr Gupta submitted that he later realized that his communication for making appointment was not suitable in reference to IBBI Circular IBBI/RV/019/2018. The IP also submitted that the delay in appointment of RVs was due to CoC not giving consent for cost/fee of valuers on time and non-cooperation from the erstwhile management of the Corporate Debtor. Further, additional clarity was brought regarding appointment of RVs by IBBI Circular IBBI/RV/022/2019 dated 13th August 2019.

4.2 During the personal hearing dated 14th August 2020, the counsel for Mr Gupta reiterated the submissions of the reply to SCN. Thereafter, Mr Gupta himself submitted that the CoC, during the first meeting held on 19th March 2019, voted 100% against appointment of RVs mentioning that State Bank of India (SBI) would prefer to appoint valuer from their empanelment list and that matter may be taken up in subsequent meeting. Mr Gupta provided minutes of 3rd CoC meeting dated 2nd May 2019 *vide* email dated 15th August 2020. The minutes of the said meeting ratifies the fee of the RVs with names mentioned individually under the name of RK Associates and total fee ratified as Rs. 1,10,000/- plus GST.

4.3 Mr Gupta submitted that he envisaged appointment of RVs on individual basis only and that it was conveyed to the RVs that valuation reports which have been made under the name and letterhead of RK Associates must be modified in the name of individual RVs and that the invoices of the RVs have been kept pending till date due to the same reason. However, admittedly, no documentary proof is available regarding the same. Mr Gupta has also placed on record *vide* email dated 15th August 2020, the CIRP Form 2 digitally signed by the IP on 24th September 2019 wherein the names of individual RVs have been mentioned under the section of professionals appointed.

Analysis and findings

5. The DC, after considering the SCN, the reply to SCN, written and oral submissions of Mr Avishek Gupta, additional documents, other material available on record and the provisions of the Code, regulations, Circulars, proceeds to dispose of the SCN.

5.1 The DC notes that provisions of the Code and regulations made thereunder are spelt out in a plain and simple language which can be easily understood. Section 25 (2) (d) of the Code empowers the resolution professional to appoint accountants, legal or other professional in the manner as specified by the IBBI. In the resolution process, valuation of assets of any corporate debtor is one of the key determinator to decide the fate of the corporate debtor. The DC notes that for this purpose, regulation 27 of CIRP Regulations lays down the requirement of appointment of two registered valuers by the RP for determination of the fair value and liquidation value of the any corporate debtor and also the manner of their appointment. It reads as follows:

“27. Appointment of registered valuers.

The resolution professional shall within seven days of his appointment, but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35:

Provided that the following persons shall not be appointed as registered valuers, namely: (a) a relative of the resolution professional; (b) a related party of the corporate debtor; (c) an auditor of the corporate debtor at any time during the five years preceding the insolvency commencement date; or (d) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director.”

5.2 The DC also notes that the IBBI is the ‘Authority’ under the Companies (Registered Valuers and Valuation) Rules, 2017 to register the eligible and qualified persons enrolled with the Registered Valuer Organisation as valuer professionals.

5.3 The DC further notes that the IBBI Circular No. IBBI Circular IBBI/RV/019/2018 dated 17th October 2018 (which came into effect from 1st February 2019) clearly stated that no person other than a registered valuer will be appointed to conduct valuation under the Code. Para 6 of the said circular reads as follows:

“ [E]very valuation required under the Code or any of the regulations made thereunder is required to be conducted by a „registered valuer“, that is, a valuer registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017.”

5.4 The credibility of the processes under the Code depends upon the observance of the Code of conduct by the IRP/RP during the process. Section 208(2) of the Code provides that every insolvency professional shall abide by the Code of conduct. It reads as follows:

“ 208. Functions and obligations of insolvency professionals.-

(2) Every insolvency professional shall abide by the following code of conduct: –

- (a) to take reasonable care and diligence while performing his duties;*
- (b) to comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member;*
- (c) to allow the insolvency professional agency to inspect his records;*
- (d) to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and*
- (e) to perform his functions in such manner and subject to such conditions as may be specified.”*

5.5 An IP is under an obligation to follow at all times the provisions of the Code and Regulations and the bye-laws of Insolvency Professional Agency of which the IP is a member and also follow the Code of Conduct specified in the First Schedule to the IP Regulations. The certificate of registration granted to an IP is also subject to this condition. In this regard, clauses(a), (h) and (i) of regulation 7 (2) of the IP Regulations provide as follows:

“7. Certificate of registration.

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

- (a) at all times abide by the Code, rules, regulations, and guidelines thereunder and the bye-laws of the insolvency professional agency with which he is enrolled;*
- (h) abide by the Code of Conduct specified in the First Schedule to these Regulations; and*
- (i) abide by such other conditions as may be imposed by the Board.”*

Further, the Code of Conduct specified in the First Schedule of the IP regulations enumerates a list of code of conduct for insolvency professionals including maintaining professional competence for rendering professional service (clause 10) and not to act with malafide or with negligence (clause 14).

5.6 Thus, from a bare reading of the provisions of the Code and the regulations made and Circular issued thereunder, it is undoubtedly clear that it is the duty of the RP to appoint registered valuers within 7 days of his appointment, but not later than 47th day from the insolvency commencement date to determine the fair value and liquidation value of the corporate debtor. The IBBI further clarified in explicit terms through the said circular that no

insolvency professional shall appoint a person other than a registered valuer to conduct any valuation under the Code or any of the regulations made thereunder and reiterated by another circular that appointment of any person, other than a 'registered valuer', on or after 1st February, 2019, to conduct any valuation required under the Code or any regulations made thereunder is illegal and amounts to violation of the Circular aforesaid and the payment to a person other than registered valuer shall not form part of IRPC.

5.7 The responsibilities of the IRP/RP under the Code require highest level of standing, calibre and integrity which inspire confidence and trust of the stakeholders and the society. The role of IP is vital to the efficient operation of the insolvency and bankruptcy resolution process. The Insolvency Professional forms a crucial pillar upon which rests the credibility of the entire resolution process. For that purpose, the Code provides for certain duties, obligations as well as Code of Conduct for taking due diligence in the conduct of process to establish integrity, independence, objectivity and professional competence in order to ensure credibility of both the process and profession as well.

5.8 The BLRC, the recommendations of which has led to the enactment of the Code, in its Final Report, has also laid emphasis on the role of an IP as follows:

“The 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... This creates Role of Resolution Professionals in CIRP the positive externality of better utilisation of judicial time.”

5.9 The DC notes that the IBBI has made every endeavour and left no effort in clarifying to the IPs and other stakeholders about the provisions relating to appointment of valuers. The IBBI, in addition to the said circular dated 17th October, 2018, again reiterated *vide* Circular IBBI/RV/022/2019 dated 13th August 2019 that (i) appointment of any person, other than a 'registered valuer', that is, a valuer registered with the IBBI under the Valuers Rules, on or after 1st February, 2019, to conduct any valuation required under the Code or any regulations made thereunder, including the CIRP Regulations and the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, is illegal and amounts to violation of the Circular dated 17th October 2018; and (ii) payment, whether as fee or otherwise, to any person, other than a 'registered valuer' for any valuation referred to in paragraph (i), shall not form part of the insolvency resolution process costs (IRPC) or liquidation cost.

6. In the present matter, the DC notes from the records available that in the matter of CIRP of the CD, the RP Mr Gupta, for the purpose of valuation, issued two engagement letters dated 12th April 2019, one to R.K. Associates Valuers & Techno Engineering Consultants Private Limited (RK Associates) and other to Adroit Technical Services Pvt. Ltd (Adroit Services).

There were three RVs under the umbrella of R. K Associates which is an unregistered entity and three RVs under the umbrella of Adroit Services which is a registered valuer entity. As per the records of minutes of 3rd CoC meeting, dated 2nd May 2019, the fee for six valuers engaged by these two entities was ratified by CoC.

6.1 The DC finds that Mr Gupta failed to appoint RVs by the 47th day, *i.e.*, by 7th April 2019. The DC further notes that R K Associates being an unregistered valuer entity was engaged as a valuer in the CIRP of the CD in consideration of the fee of Rs. 1,00,000/- plus GST (along with Rs. 10,000/- out of pocket expenses) vide engagement letter dated 12th April 2019, *i.e.*, by the 52nd day of commencement of CIRP. The engagement letter has been issued effective from 6th April 2019.

6.2 The DC further finds that despite the IBBI Circular No. IBBI Circular IBBI/RV/019/2018 dated 17th October 2018 (which came into effect from 1st February 2019) which clearly states that no person other than a RV will be appointed to conduct valuation under the Code, and Circular dated 13th August 2019 that such appointment is illegal, Mr Gupta appointed an entity which was not registered with the IBBI as a registered valuer as on date of its appointment.

6.3 The contention of Mr Gupta that the appointment letter issued to R K Associates was issued on the advice of the three individual RVs who were supposedly working under the umbrella of R K Associates for communication purpose only, is untenable as the valuation reports have been issued under the name and letterhead of R K Associates along with file number. The DC also finds that the disclaimer in the valuation reports is also in the name of R K Associates. There is a lack of due diligence on part of Mr Gupta while appointing R K Associates as a valuer in the CIRP. The valuation by an unregistered valuer may adversely affect the credibility of whole CIRP and the resolution based on such valuation. In the instant matter, there is a lapse or negligence on the part of Mr Gupta in not taking due diligence while appointing a valuer not having registration certificate. Thus, there has been a clear violation of section 208 of the Code, clauses (a), (h) and (i) of regulation 7(2) of IP Regulations, regulation 27 of the CIRP regulations, provisions of the said Circulars and clauses 10 and 14 of the Code of Conduct to IP Regulations.

6.4 The DC notes that every registered valuer is bound by the terms of the engagement letter. In the present case, engagement letter is issued to R K Associates which is not a registered valuer. Though reports are signed by the individual registered valuers of this entity but there are no separate engagement letters to those individual RVs for valuation of the assets of the CD.

6.5 Further, Mr Gupta contended that he understood later that the communication made to R K Associates in the form of the engagement letter was not suitable. When he became aware of the irregularity, then he should have taken steps to rectify the same which he did not do. Mr Gupta has not shown any document to prove that he has taken steps to rectify the error on his part. The DC finds that the valuation reports have not been revised after becoming aware of the mistake and the same have already been considered by the CoC while approving the resolution plan in the CIRP which is currently pending before NCLT Cuttack Bench for approval. A professional should never hesitate in rectifying errors wherever possible which further strengthens his or credibility as well as of the process.

Order

7. In the aforesaid backdrop and on the basis of aforesaid analysis and findings, this DC finds that Mr Avishek Gupta, the RP, who has appointed R K Associates, not being a registered valuer as a valuer for valuation of assets of CD. This conduct of Mr Gupta is in contravention of the following provisions of the Code and Regulations:-

- I** (a) clauses (a) and (e) of 208 (2) of the Code;
(b) clauses (a), (h) and (i) of regulation 7(2) of the IP Regulations read with clauses 10 and 14 of the Code of Conduct contained in the First Schedule of the IP Regulations;
(c) Regulation 27 of the CIRP Regulations.

II Further, Mr Gupta also did not comply with IBBI Circular IBBI/RV/019/2018 dated 17th October 2018 which provided in para 6 that no insolvency professional shall appoint a person other than a registered valuer to conduct any valuation under the Code or any of the regulations made thereunder and the Circular dated 13th August 2019 which provides that appointment of such unregistered valuer is illegal and remuneration of such valuer cannot be part of IRPC.

8. This DC is conscious of the fact that this is the first assignment of Mr Gupta as a Resolution Professional and that the CIRP Form 2 along with minutes of 3rd meeting of the CoC in respect of the said CD contains names of three RVs, viz., Mr Lakhan Lal Gupta, Mr Sandeep Kumar Agrawal and Mr Rajesh Gupta along with the name of R K Associates, it may call for some leniency.

9. In view of the above, the Disciplinary Committee, in exercise of the powers conferred under section 220 (2) of the Insolvency and Bankruptcy Code, 2016 and in pursuance of sub-regulations (7), (8), (9) and (10) of Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, disposes of the SCN with the following directions:-

- (i) Mr Gupta shall not seek or accept any process or assignment or render any services under the Code for a period of two months from the date of coming into force of this Order. He shall, however, continue to conduct and complete the assignments / processes he has in hand as on date of this order.
(ii) This Order shall come into force on expiry of 30 days from the date of its issue.
(iii) A copy of this order shall be forwarded to the Insolvency Professional Agency of the Institute of Cost Accountants of India where Mr Avishek Gupta is enrolled as its member.
(iv) A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, for information.

10. Accordingly, the show cause notice is disposed of.

-Sd-

Dated: 4th September, 2020
Place: New Delhi

(Dr. Mukulita Vijayawargiya)
Whole Time Member, IBBI
And
Disciplinary Committee