

# INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/83/2022

14<sup>th</sup> March, 2022

## ORDER

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

This order disposes of the Show Cause Notice (SCN) No. IBBI/IP/INSP/2019/35 dated 09.06.2021, issued to Ms. Rita Gupta, R/o 45-46, Basement, Satya Niketan, Moti Bagh-2, New Delhi - 110021 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-P00149/2017-2018/10313 dated 06.06.2017.

### Background

- 1.1 Ms. Rita Gupta, was appointed as an interim resolution professional (IRP) for the corporate insolvency resolution process (CIRP) in the matter of M/s Shilpi Cable Technologies Ltd., Corporate Debtor (CD) *vide* order of the National Company Law Tribunal, Principal Bench, New Delhi (AA) in CP (IB)-64(PB)/2017, dated 13.07.2017. *Vide* order dated 24.05.2017, the order of admission for CIRP under Section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) was passed. As no IP was suggested in the application, the AA appointed Ms. Gupta as IRP *vide* order dated 13.07.2017. The order of admission passed by AA was challenged before the Hon'ble NCLAT which *vide* its order dated 01.08.2017 set aside the admission order. The order of Hon'ble NCLAT dated 01.08.2017 was challenged before Hon'ble Supreme Court which *vide* its order dated 15.12.2017 in Civil appeal No. 15135/2017 remanded back the matter to the Hon'ble NCLAT. The IRP was allowed to function pursuant to order dated 15.01.2018 passed by the Hon'ble NCLAT. The IRP was confirmed as the Resolution Professional (RP) by the Committee of Creditors (CoC) in the 1<sup>st</sup> CoC meeting held on 15.02.2018.
- 1.2 The IBBI, in exercise of its powers under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017 appointed an Inspecting Authority (IA) to conduct the inspection of Ms. Rita Gupta *vide* order dated 31.01.2020 on having reasonable grounds to believe that Ms. Rita Gupta contravened provisions of the Code, Regulations and Circulars issued thereunder. A draft inspection report prepared by the IA, was shared with Ms. Rita Gupta *vide* email dated 31.07.2020, to which Ms. Rita Gupta submitted reply *vide* email dated 14.08.2020. The IA submitted the Inspection Report to IBBI on 05.02.2021.
- 1.3 The IBBI issued the SCN to Ms. Rita Gupta on 09.06.2021, based on the findings in the inspection report in respect of her role as an IRP/RP in the CIRP of CD and material available on record. The SCN alleged contraventions of provisions of sections 208(2)(a) and (e) of the

Code, regulations 34 of the CIRP Regulations, regulations 4(4) of the IBBI(Inspection and Investigation) Regulations, 2017 (Inspection Regulations), 7(2)(a), (g) and (h) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and clauses 19 and 26 of the Code of Conduct specified in Schedule I of the IP Regulations.

- 1.4 The IBBI referred the SCN, response of Ms. Rita 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. Ms. Rita Gupta availed an opportunity of personal e-hearing before the DC on 04.08.2021.

### **Alleged Contraventions and Submissions**

2. The contraventions alleged in the SCN and Ms. Rita Gupta's written and oral submissions thereof are summarized as follows:

#### **I Contravention**

- 2.1.1 The agenda for approval of RP's fees was not approved in the 1st CoC meeting, nor was it fixed by CoC in its subsequent meetings. Ms. Rita Gupta was replaced by another RP i.e. Mr. Huzefa Fakhri Sitabkhan on 07.06.2018. Subsequently, Ms. Gupta filed an application before AA for fees and the AA *vide* order dated 05.07.2018 directed the CoC to consider her claim.
- 2.1.2 In the 7th CoC Meeting held on 13.07.2018, CoC approved fees at Rs. 40,000/- per month plus GST for Ms. Rita Gupta's services as RP and out of pocket expenses at Rs. 45,000/- per month plus GST. Thus, the total amount of Rs. 8,37,393/- was payable for the period of Ms. Gupta's assignment as IRP/RP. However, from the books of accounts of CD it is observed that a total amount of Rs. 20,80,268/- (net of TDS) was paid to Ms. Gupta. Out of this total Rs. 20,80,268/-, a sum of Rs. 19,28,340/- was withdrawn by Ms. Gupta on 26.03.2018, i.e., after the 1st CoC meeting (held on 15.02.2018), before the application filed before AA for recovery of fees payable to her.
- 2.1.3 Mr. Huzefa Fakhri Sitabkhan replaced Ms. Gupta as the RP and he called upon Ms. Gupta to return the excess amount of Rs. 12,42,875/- which was withdrawn without CoC's approval. However, the said excess funds were not remitted back by Ms. Gupta. It was noted that Rs.20,80,268/- was paid to Ms. Gupta without the due approval of the CoC as against Rs. 8,37,393/- which was approved in the 7th CoC meeting. Therefore, the IBBI was of the *prima facie* view that Ms. Gupta's conduct of withdrawing money from the CD without the approval of the CoC is in contravention of the regulation 34 of the CIRP Regulations and clause 26 of the Code of Conduct of IP Regulations.

## **I Submission**

- 2.2.1 Ms. Rita Gupta submitted that the CD was a peculiar case with a series of orders and directions passed in the first year of its CIRP including on the validity of CIRP commencement order, her appointment as IRP and RP, and determination and payment of her fees.
- 2.2.2 Ms. Gupta submitted that on 24.05.2017, the AA admitted an application under section 9 of the Code filed by Macquarie Bank Limited (an Operational Creditor) and initiated CIRP in respect of the CD. As the Operational Creditor did not nominate any name of IP to be appointed as IRP, the AA, while admitting the application directed IBBI to nominate an IP. There were no IBBI approved panels maintained with various Benches of the AA then.
- 2.2.3 The IBBI recommended her for appointment. The Hon'ble NCLT vide order dated 13.07.2017 confirmed my appointment as the IRP as below:
- “ The Insolvency & Bankruptcy Board of India vide letter dated 23.06.2017 has recommended the name of Ms. Rita Gupta ; Regn No. ( IBBJ I IPA - 001 I IP - P00149 I 2017-18 I 10313), 45-46, Basement Satya Niketan, Moti Bagh - II, New Delhi - 110021, Email: ritaca\_1996@yahoo.co.in, Mobile Nos.: 9811652355, as the Insolvency Resolution Professional. We accept the recommendation.”*
- 2.2.4 In an appeal filed against the order dated 24.05.2017, the Hon'ble NCLAT vide order dated 01.08.2017 was pleased to set aside the order dated 24.05.2017. By the same order, the Hon'ble NCLAT directed the AA to fix Ms. Gupta's fee if she was appointed as IRP and further directed that the said fees shall be paid by the appellant i.e. management of CD, for the period IRP has functioned. The relevant part order dated 01.08.2017 is reproduced below:
- “ Learned Adjudicating Authority will fix the fee of IRP, if appointed and the Appellant will pay the fees of the IRP, for the period the /RP has functioned.”*
- 2.2.5 Accordingly, a sum of Rs.1,51,928 was paid by the management of CD including towards expense of Public Announcement made in Form-A and other miscellaneous expenditure incurred by Ms. Rita Gupta during her tenure as IRP. This sum was wrongly alleged by the CoC as withdrawn by her without the CoC approval.
- 2.2.6 The order dated 01.08.2017 passed by the Hon'ble NCLAT was challenged before the Hon'ble Supreme Court in Civil Appeal No. 15135/2017. The Hon'ble Apex Court was pleased to set aside the order dated 01.08.2017 and remand back the matter to the Hon'ble NCLAT. Pursuant to the directions of the Hon'ble Supreme Court, the appeal was taken up by the Hon'ble NCLAT and vide its order dated 15.01.2018, the Hon'ble NCLAT directed, that Ms. Gupta will continue and complete the process from the stage when the IRP left the process in view of the order dated 15.01.2018 of the Hon'ble NCLAT. The order is given below:

*“The Interim Resolution Professional / Resolution Professional will continue and complete the process from the stage when 'Interim. Resolution Professional left the process in view of the order passed by this Appellate Tribunal.”*

2.2.7 On 22.01.2018, the Hon’ble NCLAT held that the RP has resumed office on 03.01.2018. The relevant extract of order dated 22.01.2018 is reproduced herein below:

*“On 22.01.2018, taking into consideration the fact that because of the order passed by this Appellate Tribunal on 1 August, 2017, the Resolution Professional could not function. Now, pursuant to the Hon'ble Supreme Court order as the Resolution Professional has resumed the office on 3 January, 2018 and allowed to function pursuant to this Appellate Tribunal's interim order dated 15th January, 2018, we hold that the period from 1 August, 2017 to 14th January, 2018 will not be counted for the purpose of counting total period of 180 days for completing the Resolution Process.”*

2.2.8 Ms. Rita Gupta submitted that the CD was a large company. It required massive efforts by her as resolution professional, to keep the enterprise as a going concern, manage the CIRP process, collate claims and take other necessary steps. With the claims filed by creditors aggregating Rs. 15,69,90,36,657, assistance of legal advisors was required. The advisors were also required to help her deal with the on-going litigation effectively. Appointment of valuers and process advisors was also required as was done by all other RPs.

2.2.9 Ms. Gupta submitted that she proposed highly reasonable fee proposal to the CoC on 15.02.2018 for Rs. 10,00,000/- per month. However, the CoC did not approve the proposed fees in the first CoC meeting held on 15.02.2018. Nor did the CoC fix any fees on its own or make a counter offer. It is well-known that in other large cases filed in IBC around that time the IRP/ RPs charged much higher monthly fees (often running into crores) than what she quoted.

2.2.10 She continued to discharge functions beyond 30 days term of the IRP as it was then provided in IBC and discharged all functions the functions of the RP diligently. She filed CA. No.51 of 2018 before the Hon’ble NCLT seeking clarification regarding her appointment and fees. The AA *vide* order dated 07.02.2018 confirmed her appointment as the RP and further directed the CoC to pay her fees for her tenure as an IRP as per the Rules. It was further directed that the fee of as the IRP and RP shall be paid expeditiously and the bill be placed before the CoC for sanctioning the same. The relevant extract of order dated 07.02.2018 passed by the Hon'ble NCLT are reproduced herein below:

*“We dispose of all aforesaid Company Petitions and the application C.A. No. 51 (PB)/2018 by issuing the following directions:*

*a. The claim made by the claimant in ( IB ) -563 ( PB ) / 2017 on 25.10.2017 before the Resolution Professional and as well as by other claimants in ( IB ) -405 ( PB)I 2017, ( IB ) -430 f PB ) I 2017 ( IB ) 449 ( PB ) I 2017 ( IB ) -460 ( PB ) I 2017 shall be entertained by the Resolution Professional subject to the provisions of the statute and fulfilment of requirements*

*mentioned in the public notice issued.*

*b. The Interim Resolution Professional would act as Resolution Professional as the Hon'ble Appellate Tribunal has excluded the period from 01.08.2017 to 14.01.2018. However, her entitlement to fee shall be in respect of the whole period which shall be considered by the Committee of Creditors as per the Rules.*

*c. The fee of the Interim Resolution / Resolution Professional shall be paid expeditiously and the bill be placed before the Committee of Creditors for sanctioning the same. It is clarified that the date of claim will not make any difference as long as the same are preferred within the period prescribed in the public notice inviting the claims and such claims fulfil the requirement of the law.”*

2.2.11 While considering CA. No. 177(PB) of 2018 filed for seeking clarification regarding CIRP period the AA *vide* order dated 05.03.2018 clarified that the term of IRP shall not exceed 30 days. The relevant contents of the said order are reproduced herein below:

*“ ORDER CA No. 177 (PB)/2018*

*This is an application seeking clarification as to whether the period of 180 days will commence from the date of admission of the petition or it will commence from the date when the Interim Resolution Professional was appointed. It is appropriate to mention that the petition was admitted on 24.05.2017 and the Interim Resolution Professional was appointed on 13.07.2017. A perusal of the order dated 24.05.2017 admitting the petition shows that the moratorium in terms of Section 14 of the Insolvency and Bankruptcy Code 2016 (for brevity the Code) commenced from 24.05.2017 and the period of 180 days would commence from that date.. However, the Interim Resolution Professional cannot start functioning before the date of his appointment. In terms of Section 16 (3)(a), (4) & (5) of the Code the terms of the Interim Resolution Professional shall commence from the date of his appointment which shall not exceed 30 days. According to the statutory guidance the period of 30 days would commence for the Interim Resolution Professional from 13.07.2017.”*

2.2.12 During this period of almost a year, Ms. Gupta submitted that she received only two tranches of payments. The first, amounting to Rs.1,51,928 from the reinstatement of CD, in accordance with the directions of the Hon'ble NCLAT *vide* order dated 01.08.2017 in respect of professional fee and expenses incurred by her for the purposes of publication of Form-A i.e. Public Announcement in various newspapers and other miscellaneous expenses incurred from 13.07.2017-31.07.2017. Since the CIRP Proceedings initiated against CD was set aside by the Hon'ble NCLAT and the suspended board of directors were reinstated and were put in the control, question of CoC approval did not arise for the said tranche. This tranche was never withdrawn by her. During the period of serving as RP for more than 10 months, she withdrew advance fees only once, on 26.03.2018, of Rs. 19,28,340/- towards fees and expense. This was fully disclosed to the CoC. As is clear from the following paragraphs. The CoC never objected to withdrawal by her. This withdrawal was made in good faith and to

serve the objectives of the Code and not for any personal gain.

2.2.13 After Ms. Gupta was replaced, the CoC apparently instructed the new resolution professional to recover this sum from her. The recovery letters 14.09.2018, 25.09.2018 & 01.10.2018 demanding a refund of this amount was only to harass her. The second tranche aggregating to Rs.19,28,340/- was withdrawn on 26.03.2018.

2.2.14 Ms. Gupta submitted that instead of deciding her fees, the CoC passed a resolution for replacing her with Mr. Huzefa Fakhri Sitabkhan. On the application filed for replacement of RP, the AA *vide* order dated 07.06.2018 appointed Mr. Huzefa Fakhri Sitabkhan as the RP of CD. Even on the date of replacement that is, 07.06.2018, the her fee had not been decided by the CoC despite directions from the AA to decide and pay all pending bills expeditiously. Ms. Gupta filed an application bearing CA. No. 428 of 2018. The AA *vide* order 05.07.2018 issued directions to the CoC to consider and pay her fee within two weeks. The relevant contents of the said order are given below:

*“CA – 428 (PB) / 2018*

*This is an application filed on 23.05.2018 by the erstwhile IRP/ RP with a prayer for payment of her fee during the period of her working as well as the expenses incurred. On behalf of the CoC time to file reply has been sought. After perusal of the averments made in the application and the nature of prayer made therein we are of the view that ends of justice would be met by directing the CoC to consider the claim made by the erstwhile RP with regard to her fee and expenses etc. The CoC shall do the needful within two weeks from today.”*

2.2.15 In terms of the directions issued to the CoC, Ms. Gupta’s fee was discussed and deliberated in the 7th meeting of CoC held on 13.07.2018. However, the prescribed minimum period of notice of 48 hours for the said meeting was not provided to her. The notice was sent *vide* email dated 11.07.2018 at 7:52 p.m. Ms. Gupta submitted that she could not attend the meeting at such short notice as she was out of Delhi and visiting her in-laws for some personal family urgency and the same was communicated to the RP *vide* email dated 12.07.2018 at 12:11 p.m. In the same email, she again clarified that the invoices for services rendered by her had already been provided to the CoC. The CoC in the said meeting resolved and approved her fee at an arbitrary sum of Rs.40,000/- per month as against Rs. 10,00,000/- per month claimed by her and fixed the out of pocket expenses at a paltry sum of Rs.45,000/- whereas the fees of RP, Mr. Huzefa Fakhri Sitabkhan was fixed at Rs.16,00,000/- with no cap at expense.

2.2.16 Ms. Gupta also submitted that Mr. Sitabkhan issued letters dated 14.09.2018 seeking an unjustified refund of fees that too wrongly computed as the recovery amount included the professional fee & expenses incurred by her for period of 13.07.2017-31.07.2017, which was paid by the management of CD in terms of directions passed by Hon’ble NCLAT. Further, Mr. Sitabkhan issued two more letters dated 25.09.2018 & 01.10.2018, wherein he sought along with the purported excess fee and the payments made to consultants. However, the CoC did not address the grievance of the undersigned.

2.2.17 Ms. Gupta submitted that aggrieved by the unjustified action taken by Mr. Sitabkhan and the CoC, she filed an application bearing CA No.1208 (PB) of 2018 & CA. No. 1268 (PB) of 2018 against the decision of the CoC before the AA. On 11.02.2019, the AA while observing the difference in fees of Ms. Gupta and Mr. Sitabkhan, directed RP to consider her fees and take a reasonable and rationale decision. The relevant extract of order dated 11.02.2019 passed by the Hon'ble NCLT is as below:

*“ CANo. 1208 (PB) / 2018*

*It has been brought to our notice that the applicant - IRP Reeta Gupta has to be paid Rs. 40,000/- per month. In her place the new RP has been engaged for a fee of Rs. 16,00,000/- per month. The Resolution Professional is directed to consider the fee of the applicant and take a reasonable/rational decision at the earliest. List on 28.02.2019.”*

2.2.18 Ms. Rita Gupta also stated that again no decision was taken by the CoC in terms of the above order. On 01.05.2019, the AA ordered liquidation of CD. The AA *vide* order dated 22.11.2019 in CA. No. 1357 (PB) of 2019 filed by Ms. Gupta for *inter alia* fixation of fees, noted that as the liquidation process had commenced, the Liquidator shall be competent and directed her to file a claim before the Liquidator. The relevant extract of order dated 22.11.2019 by the Hon'ble NCLT are reproduced herein below:

*“CA - 1357 (PB)/2019*

*This is an application principally for fixing the fee for the applicant namely Ms. Reeta Gupta Interim Resolution Professional. A further prayer has been made to set aside the letter dated 14.09.2018, 25.09.2018 & 01.10,2018 and directing the CoC to pay for the period of appointment from 15.01.2018 to 11.06.2018. It is not disputed before us that in pursuance of Section 33 of the Insolvency & Bankruptcy Code CA-1144 (PB)/ 2018 was accepted on 01.05.2019 and liquidation of the corporate debtor was ordered as recommended by the CoC. The liquidation proceedings are in progress and are pending before the Liquidator. Any claim by anyone would be competent before the Liquidator and if any adverse decision is given by the Liquidator then the provisions for filing an appeal has been made. In view of the above, the applicant is relegated to the remedy of filling the claim before the Liquidator. CA - 1357 (PB) I 2019 stands disposed of.”*

2.2.19 Ms. Rita Gupta submitted that as the liquidator does not have jurisdiction to decide the fees and the CoC was insisting on recovery of the illegal demand, she filed an appeal before the Hon'ble NCLAT (Company Appeal (AT) (Ins.) No.10 of 2020) which is pending adjudication. Ms. Gupta submitted that she claimed the following reliefs in the above appeal:

- a. Allow the present appeal;
- b. Set aside the impugned order dated 22.11.2019 passed by the Adjudicating Authority;
- c. Quash RP s letter dated 14.09.2018 (Recovery of the Excess Fee), letter dated 25.09.2018 (Recovery of the Excess Fees: Reply to Your Letter dated September 20, 2018) and letter dated 01.10.2018(violations of the provisions of IBC and failure to fulfil the duties/functions of a Resolution Professional as prescribed under IBC and Regulations);
- d. Set aside the agenda No. 6 and '7th Coe meeting held on 13.07.2018;

- e. Fix the fee of the Appellant at Rs.10 lakhs per month from January 18 till June 2018,
- f. Direct the CoC to pay for the period of her appointment as Resolution Professional of the Corporate Debtor from 15.01.2018 till 11.06.2018 after adjustment of the fee with the Resolution Professional on account; and
- g. Pass any other direction in the facts and circumstances of the. present appeal and in the interest of justice.

2.2.20 She submitted that she served as IRP for a period of 30 days starting from 13.07.2017. She was appointed as RP by the Hon'ble NCLAT and the appointment was continued from 13.07.2017 till her replacement on 07.06.2018. She served a total period of 10 months and 25 days. Ms. Gupta also submitted that unlike an ordinary case, where the RP is confirmed or appointed by the CoC under section 22 of the Code, present case was a case of appointment of RP by the Hon'ble NCLAT and AA on their own. Further, she submitted that this was not a case where fee arrangement was agreed between the IP and CoC prior to confirmation/appointment as RP. Here, the appointment was made by the Hon'ble NCLAT/AA and thereafter, the CoC was directed to decide the fees.

2.2.21 Ms. Rita Gupta submitted that Regulation 34 of CIRP Regulation does not apply even to the second tranche withdrawn by her. According to Ms. Gupta, regulation 34 of the CIRP Regulation is a bi-product of section 22 of the Code. According to her, it is based on the premise that the CoC shall fix the expense at the time of making the appointment under section 22 of the Code as that is the provision in Code from which the CoC draws its powers to appoint the RP. Ms. Gupta was appointed as RP by the Hon'ble NCLAT/ NCLT and not by the CoC and therefore, regulation 34 of the CIRP Regulations was not triggered. Ms. Gupta placed before the DC the order of NCLAT dated 01.08.2017 wherein the Appellate Tribunal observe as follows:

*“5. Learned Adjudicating Authority will fix the fee of IRP, if appointed and the Appellant will pay the fees of the IRP, for the period the IRP has functioned.”*

2.2.22 Ms. Gupta submitted that as she was appointed by the Hon'ble NCLAT/ NCLT, she was under a legal and statutory obligation to continue to discharge her duties, from 13.07.2017 to 07.06.2018, and to run the enterprise as a going concern, protect assets, run the CIRP process including appointing advisors to assist in verification of claims, carry out valuation, advise on legal cases, appear in Hon'ble NCLAT and NCLT proceedings.

2.2.23 Ms. Rita Gupta stated that while the CoC was directed by the Hon'ble NCLT to consider and approve the fees for the period she served as RP, the CoC did not approve the fees and it remained a subject matter of jurisdiction of the Hon'ble NCLT under whose order she was serving in office as RP, which directed CoC to reconsider the fees it had decided. She submitted that the intent of regulation 34 of the CIRP Regulations was not to override or defeat a judicial order or allow unfettered jurisdiction to the CoC or to act arbitrarily.

2.2.24 Ms. Rita Gupta submitted that if the Hon'ble NCLAT accepts her plea in the pending appeal, the CoC may be hauled up for paying Rs. 16 lakh per month to one IP and only Rs. 40,000/- to another for the same work, and, if directed to pay reasonable fees in comparison to what

has been fixed for Mr. Huzefa Fakhri Sitabkhan, the CoC would need to pay Ms. Gupta an amount higher than the amount sought as refund. Ms. Gupta stated that she and Mr. Sitabkhan both functioned as the RP for the CD for 329 days (13.07.2017-07.06.2018) and 328 days (07.06.2018- 01.05.2019), respectfully. She stated that she functioned one day more than Mr. Sitabkhan, however, the professional fee approved for Mr. Sitabkhan is more than 60% what she claimed. She said that fee for Mr. Sitabkhan, for 11 months would be Rs.1,76,00,000/- (One Crore Seventy Six Lakh Only) whereas the fee approved by the CoC for her tenure as RP is merely Rs.4,36,126/ -(Four Lakh Thirty Six Thousand One Hundred Twenty Six Only) which is around 2% of the total fee of Mr. Sitabkhan and that there is bias against her and the CoC was not fair in deciding and approving the professional fee.

2.2.25 Ms. Rita Gupta submitted that the fee withdrawn by her was reasonable and in consonance with the circular no. IBBI/ IP/013/2018 dated 12.06.2018 in respect of fee and other expenses incurred for CIRP. She stated that though the above circular was issued by IBBI post her replacement as RP but the factors which are provided in the circular were contemplated while charging her professional fee. She submitted that CD was one of the largest case in the history of the Code at that juncture and the total claims were aggregating to Rs. 15,69,90,69,657/-. The management of affairs of the CD was complex task since the Code was at nascent stage at that point of time. There was no precedence and clarity available as it is today. Therefore, her time was consumed in effort to manage the affairs of the CD. She completed major work related to the corporate insolvency resolution process in addition to keep the CD as a going concern during her tenure. Many challenges were faced by her during the tenure but saw no reward, as there was continuous dispute regarding the fee of RP.

2.2.26 She placed reliance on the judgment of Hon'ble NCLAT in *Mr. Devarajan Raman, Resolution Professional Poonam Drum & Containers Pvt. Ltd . Vs. Bank of India Ltd.* Company Appeal (AT) (INS) No. 646 of 2020 dated 30.07.2020 wherein it was held that fixation of fee is not a business decision depending upon the commercial wisdom of the CoC. Further, the Hon'ble NCLT in IA No. 1099 of 2020 in CP No. 859/ I&B/2019 titled as *Mr. Mukesh Kathuria, Interim Resolution Professional of VRG Digital Corporation Pvt. Ltd.* held that "*the fixation of the fees of IRP/RP does not come within the domain of Commercial wisdom of CoC and hence, is justiciable.*" 'Justiciable', as per Black Law's dictionary means - proper to be examined in courts of justice, subject to action of court of justice.

2.2.27 Ms. Rita Gupta submitted that the show cause notice failed to consider that the CoC did not fix the fee reasonably and *ex facie* it is apparent that the CoC chose to fix the fee of the RP at Rs. 16 Lakh whereas the fee fixed for her is only Rs. 40,000 + Rs. 45,000 for expenses. Both professionals have worked for the same period of time in the capacity of RP and understandably the fee for two professionals can vary but her fee was merely 2% in comparison to the RP, which neither is reasonable nor fair. Ms. Gupta submitted that this point was noted by the Hon'ble NCLT in CA No. 1208/ 2018 *vide* order dated 11.02.2019, wherein the CoC was directed to consider her fee and take a reasonable/ rational decision at the earliest. However, no decision was taken by the CoC.

2.2.28 Ms. Rita Gupta submitted that priority as per the Black's law dictionary means "*A legal*  
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*preference or precedence. When two persons have similar rights in respect of the same subject matter, but one is entitled to exercise his right to the exclusion of the other, he is said to have priority.*” She submitted that the show cause notice failed to take into consideration that the fixation of fee of IRP is justiciable and the issue of fee was pending before the Hon'ble NCLAT in Company Appeal (AT) (INS) No. 10 of 2020, wherein the Hon'ble NCLAT will decide a very important question of whether the liquidator can fix the fee for IRP/ RP. Since the matter is pending adjudication before the Hon'ble NCLAT, the present proceedings initiated against her are not maintainable. Further, the professional fee and expense withdrawn by her do not even sum up to two months remuneration out of period of eleven months she functioned as IRP/ RP which amount if calculated at Rs. 10,00,000 although she is entitled to the same fees as paid to Mr. Huzefa Fakhri Sitabkhan which works out Rs. 1,00,40,000/- (rupees One Crore Forty Thousand). The CoC was well aware of the same facts and never objected to withdrawal made by her. She mentioned that in the 3rd CoC meeting, IDBI Bank requested her to not make any further payments to the consultant unless approved by CoC, however, her professional fee was never stopped or objected to, yet she did not withdraw any further sum.

## **II Contravention**

- 3.1.1 Any expense towards CIRP cost is to be undertaken after approval of the CoC as provided in regulation 34 of the CIRP Regulations. Ms. Rita Gupta engaged three consultants to help her discharge her duties as IRP and RP. In the 1st and 3rd CoC meeting, voting agenda for approval of fees of the consultants were not approved with the requisite majority of the CoC. Despite this, Ms. Gupta paid part of the fees of the consultants to the tune of Rs.11,70,000/- out of the cash flow of the CD. Further, it was noted that 3 Dimensions Capital Services Ltd. was engaged for consultancy on various matters related to CIRP till constitution of CoC at Rs. 10Lakhs (50% before the start of the work and 50% on finalization of CoC), Kundra and Bansal to provide legal support to RP at Rs. 15 lakh for the entire CIRP period and Barkha and Company for broad review of all secretarial compliances.
- 3.1.2 It was observed that a total sum of Rs. 11,70,000/- was paid as advance payments to the three consultants without the due approval of the CoC. The ledger accounts of the CD reflect that some part of the fees of the consultants was paid even before the same was placed for consideration of CoC. The part payment of the fees made to the consultants without the due approval from the CoC is in violation of the provisions of the Code, the Regulations made thereunder and the Code of Conduct. Therefore, the IBBI was of the *prima facie* view that Ms. Rita Gupta contravened regulation 34 of the CIRP Regulations.

## **II Submission**

- 3.2.1 Ms. Rita Gupta submitted that as IRP appointed the process advisors, way before the CoC was constituted as their services were needed from day one. She submitted that the Code cannot use Regulation 34 to defeat the right to appoint advisors by not approving fees. No reasons were given by the CoC for not approving fees. The CD was one of the largest cases filed in

IBC and required massive efforts to maintain the CD as a going concern, manage the CIRP process, collate claims and take other necessary steps. All eyes were on the outcome of this case and therefore, there was no place for any negligence or mistake. With the claims filed by creditors aggregating Rs. 15,69,90,69,657, assistance of legal advisors was required. The advisors were also required to help her deal with the on-going litigation effectively.

3.2.2 Ms. Rita Gupta submitted that the CoC did not decide the fee despite the repeated directions from the Hon'ble NCLT. Unfortunately, due to indecision of the CoC, she was left with no option but to withdraw some interim payments from time to time to meet her fees and expense, and to make payment to the advisors. She submitted that had she not sought assistance of advisors, she would have not been able to discharge her duties as IRP and RP and that would have caused irreparable loss and damaged the value of the CD and in turn caused, loss to the creditors and stakeholders. She submitted that it was a withdrawal made by her after serving as RP for almost seven months. Therefore, the withdrawals were made when it became necessary, and no other option was left.

3.2.3 Ms. Gupta submitted that regulation 34 of the CIRP Regulations will not apply to the payments made to the three consultants as the intent of regulation 34 is not to override or defeat substantive provisions of the Code like sections 20(2) and 25(2)(d) of the Code, which give powers to the IRP/RP to appoint advisors. Approval of advisors to be appointed by the IRP/RP is not in the domain of the CoC, but only their fees. She submitted that it is the prerogative of the IRP to select and appoint its advisors. She submitted that notice does not take into consideration the factual position regarding payments made to three consultants, namely M/s. Dimension Capital Services Ltd., Kundra & Bansal and Barkha & Co. M/s. Dimension Capital Services Ltd. & Barkha & Co. were engaged well before formation of CoC, the same was disclosed to IBBI by her via email dated 01.02.2018 and Kundra & Bansal, legal consultants were appointed in March, 2018 after constitution of CoC, the same was also disclosed to the Board via email dated 17.04.2018 and the CoC was well verse with said engagement. She submitted that the M/s. Dimension Capital Services Limited was paid in advance in January, 2018 and at that time, the CoC was not constituted and therefore, she was well within her rights to make the payment, whereas Barkha & Co. was paid in between January-April, before the constitution of CoC as well as after and Kundra & Bansal was also paid in only April, 2018.

3.2.4 Ms. Gupta submitted that the CoC never objected to the withdrawal made by her, nor did the CoC prohibit her from withdrawing the sum or asked for refund. Only one member (IDBI Bank) out of 26 members of CoC raised some objection in the 3rd CoC meeting. The CoC, as a whole, did not object as the other 25 members did not object. Therefore, it was deemed that the CoC approved the withdrawal and no specific resolution was required in view of the reasons stated above.

3.2.5 Ms. Rita Gupta submitted that she had right to appoint the advisors for the much needed assistance in respect of the process and to meet the timeline and restructure the CD and to deal with numerous litigations. Therefore, she appointed the advisors keeping in view section 18

& 25 of the Code. She performed the aforesaid acts in discharge of the obligations under the Code, even though the CoC did not approve her fee and expenses. She submitted that when the CoC requested her not to make further advance payments to service providers, she acted accordingly. Therefore, it is evident that she always performed her functions & duties diligently and appointed the consultants only when deemed necessary.

3.2.6 She submitted that she disclosed the amounts withdrawn by her, to the CoC, regularly. It is not a case where she fraudulently took any money without disclosing it to the CoC. In fact, after the CoC in its meeting held on 05.05.2018 requested her not to make any further payments to advisors, she did not. She further stated that at no point in time did the CoC object to her having made the withdrawal. This was because they were aware that she was working hard, performing statutory functions diligently and sincerely, and sum withdrawn was small compared to the amount she had claimed as monthly fees which by then was nearly one crore. The CoC also knew it would be unjust, unfair and arbitrary to expect her, a professional appointed by the Hon'ble NCLT, to continue to discharge her functions without receiving any payment at least as an interim measure.

3.2.7 Ms. Rita Gupta submitted that the lack of bonafide of CoC is clear from the fact that they have refunded selective payments those suited them, even though paid without the approval of the CoC have been accepted and issues not raised in respect of them such as payment of fees of valuers and auditors. She stated that the CoC post her replacement has approved payments made to the valuers earlier rejected by them in the 1st CoC meeting. The discrimination in payment of service providers appointed by her is bereft of any reasonable classification and appears to be an attempt to arm twist and punish her.

3.2.8 She further stated that as per the Section 18 & 25 of the Code, the IRP is empowered to appoint any advisor required for the conduct of the CIRP. In the discussion paper of Board titled '*Engagement of 'professionals' in a Corporate Insolvency Resolution Process*', according to Ms. Gupta, the Board discussed & provided clarity as when the professional should be appointed or when a professional is not eligible for appointment. She states that from a plain reading of the discussion paper, it is clear the IRP is required to only consult the CoC but is not bound by its advice. Therefore, she was not required to wait for the CoC's approval. It is clear that the appointment of the advisors was made in good faith and to protect the interest of the CD and smooth process of CIRP.

### **III Contravention**

4.1.1. The Inspecting Authority *vide* email dated 13.02.2020 directed Ms. Rita Gupta to provide copy of documents by 20.02.2020. In response to this, Ms. Gupta *vide* email dated 20.02.2020 informed her inability to provide the documents to the Inspecting Authority and informed that she had handed over all the documents relating to the CIRP of the CD to Mr. Huzefa (the replaced RP) in compliance of the NCLT's order dated 07.06.2018.

4.1.2. Regulation 39A of CIRP Regulations requires the IRP or RP to preserve a physical as well as

the electronic copy of records relating to CIRP of the CD w.e.f. 05.10.2018. Further, regulation 7(2) (g) of IP Regulations, results out of section 31(3) (b) of the Code, which provides that the RP shall forward all records relating to the conduct of the CIRP and the resolution plan to the Board to be recorded on its database and that this regulation pertains to cases where the RP completes the term as RP. It does not apply to those cases where the RP is replaced under section 22 because in matters of replacement, the provisions of section 23(3) will apply which require the IRP to provide all the information, documents and records pertaining to the CD in his possession to the RP. Ms. Rita Gupta admitted that Inspecting Authority directed her to furnish all the available records of the CD, however she failed to submit the documents.

### **III. Submissions**

4.2.1. Ms. Rita Gupta submitted that she handed over all the records to Mr. Huzefa Fakhri Sitabkhan in terms of section 23(3) of IBC and order dated 07.06.2018 passed by the Hon'ble NCLT. She stated that she did not keep any electronic copy of the record as there no legal requirement to keep electronic record. Regulation 39A of CIRP Regulations, which requires the IRP/RP to preserve a physical as well as the electronic copy of records relating to CIRP of the CD, was issued by notification dated 05.10.2018. She stated that she had already been replaced by the Hon'ble NCLT *vide* order dated 07.06.2018, i.e., prior to regulation 39A coming into effect.

4.2.2. She submitted that under regulation 7(2) (g) of IP Regulations, an IP is required to maintain records of all assignments undertaken by him under the Code for at least three years from the completion of such assignment. According to her, this regulation results out of section 31(3) (b) of the Code which provides that the RP shall forward all records relating to the conduct of the CIRP and the resolution plan to the Board. The regulation pertains to cases where the RP completes the term as RP and does not apply to cases where the RP is replaced under section 22 of the Code because in matters of replacement, the provisions of section 23(3) of the Code will apply which require the IRP to provide all the information, documents and records pertaining to the CD in his/her possession and knowledge to the RP. The CIRP of CD was never completed under her tenure as IRP and RP till 07.06.2018. She was replaced by the Hon'ble NCLT *vide* order dated 07.06.2018 and in adherence to the terms of section 23(3) of the Code, she handed-over all the records and thus, now no record is available with her. Therefore, she acted in good faith and handed over all the records to Mr. Huzefa Fakhri Sitabkhan without retaining the entire record.

4.2.3. The circular dated 06.01.2021 having ref. no IBBI/CIRP/ 38/2021 issued by the Board in relation to the retention of records relating to CIRP, wherein the following was directed:

*'4. (ii) An IP shall preserve records relating to that period of a CIRP when acted as IRP or RP, irrespective of the fact that he did not take up the assignment from its commencement or continue the assignment till its conclusion. For example, an IP served for three months as RP before he was replaced by another JP, who served till conclusion of the CJRP. The former shall preserve records relating to the first three months, the latter shall preserve records relating to the balance of the CIRP.'*

4.2.4. She submitted that the above circular was issued in January 2021 only, whereas she was replaced as the RP of the CD in June 2018 when the Code was at nascent stage and there was ambiguity with respect to the conduct of CIRP. She in her reply to Draft Inspection Report has already apologized and submitted that she will be mindful of her professional duties and conduct in future assignment. She submitted that she had handed over the record to Mr. Huzefa Fakhri Sitabkhan in terms of section 23(3) of the Code and communicated the same to the Board *vide* letter dated 19.02.2020. She submitted that in reply to Draft Inspection Report, she allocated the documents & records pertaining to the CIRP of the CD and submitted a brief compendium of documents which were there on her email. She submitted that she submitted all documents with respect to CIRP during her tenure i.e. 13.07.2017-07.06.2018 with her reply, despite the fact that she had handed over all the records to the RP. Therefore, according to her there is no violation of Section 18(1)(d), 23(2), 25(1) and 208(2)(a), (e) of the Code and Regulation 34 of CIRP Regulations. There is also no breach of Regulation 7(2)(a), (g) and (h) of IBBI (insolvency Professional) Regulations, 2016 read with clause 19 and 26 of the Code of Conduct in First Schedule of the IP Regulations. There is no violation of regulation 4(4) of the Inspection Regulations.

## **FINDINGS AND ANALYSIS**

5.1.1 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. The IP is conferred under the Code, with vast powers to manage the affairs of the CD and to conduct the process of insolvency resolution.

5.1.2 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.*

...”

- 5.1.3 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.
- 5.1.4 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.
- 5.1.5 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. One of the conditions for registration as IP is that an IP shall at all times abide by the Code and Rules, Regulations and Guidelines made thereunder and the bye-laws of the insolvency professional agency with which he/she is enrolled.
- 6.1.1 With regard to the issue relating to withdrawal of money by Ms. Gupta from CD's account without approval of the CoC, the DC notes that the application for initiation of CIRP was admitted by the AA *vide* order dated 24.05.2017. Since no name for appointment as IRP was suggested by the applicant, the AA made a reference to the IBBI to furnish the name of an RP within a period of ten days in accordance with section 16(4) of the Code. The relevant portion of the order dated 24.05.2017 is given below:
- “23. .... As no insolvency resolution professional has been named by the applicant we request the Insolvency and Bankruptcy Board of India (IBBI) to appoint one. Let a reference be made to the Insolvency and Bankruptcy Board of India to furnish the name of a resolution professional within a period of ten days in accordance with Section 16(4) who shall, thereafter, perform all functions and duties as per the provisions of Sections 13,14,15,17,18 of the Code so on and so forth. All the personnel of the Corporate Debtor, its promoter or any other person associated with the management of the Corporate Debtor are duty bound to extend all assistance and co-operation to Interim Resolution Professional as may be required for managing the affairs of the Corporate Debtor. In case such co-operation is not rendered, then the interim resolution professional shall be entitled to file application before this Tribunal as per the terms of Section 19(2) of the Code.”*

6.1.2 The IBBI recommended the name of Ms. Rita Gupta who was then appointed as IRP by the AA *vide* order dated 13.07.2017. Thereafter, the Hon'ble NCLAT *vide* order dated 01.08.2017 set aside the order dated 24.05.2017 and 13.07.2017 passed by the AA. Further, the Hon'ble Supreme Court *vide* order dated 15.12.2017 set aside the order dated 01.08.2017 passed by the Hon'ble NCLAT. The Hon'ble NCLAT *vide* order dated 15.01.2018 directed that the IRP/RP will continue and complete the process. Furthermore, *vide* order dated 22.01.2018, the Hon'ble NCLAT directed that the period between 01.08.2017 to 14.01.2018 will not to be counted for purpose of CIRP. However, it also held that the RP will be entitled to fee for the whole period which shall be considered by the CoC as per the Rules. The AA *vide* order dated 07.02.2018 directed that the IRP would act as the RP. The IRP was confirmed as RP *vide* resolution of the CoC dated 15.02.2018.

6.1.3 In view of the above orders, the DC observes that Ms. Gupta functioned as an IRP/RP from 13.07.2017 to 07.06.2018, for a total period of 10 months 25 days. The DC notes that the agenda for consideration and fixation of fee of IRP/RP was placed before the CoC in its 1<sup>st</sup> meeting held on 15.02.2018 and in the 3<sup>rd</sup> meeting of CoC held on 05.05.2018, respectively. However, it appears that the fee was only fixed after the replacement of RP Ms. Rita Gupta, i.e., on 13.07.2018.

6.1.4 The DC notes that Regulation 34 of the CIRP Regulations provides that the CoC shall fix the expenses to be incurred on or by RP and the expenses that shall be included in cost of CoC. Regulation 34 of the CIRP Regulations is reproduced below:

*“34. Resolution professional costs.*

*The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs. Explanation. - For the purposes of this regulation, “expenses” include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional.”*

6.1.5 The DC observes that the moot point is not the quantum of fees for an RP or what fee the CoC fixed for another RP, but whether Ms. Rita Gupta as IRP/RP withdrew amount towards her fees as IRP/RP without the approval of the CoC and if so whether the same was ratified by the CoC or not. The Code is clear that the fees of an IRP/RP is to be fixed by the CoC and only that amount which has been fixed by the CoC can be withdrawn. In case of any dispute regarding fees, the AA can be approached, which Ms. Gupta did. The DC notes that the AA had noted the fact of fee fixed for replaced RP at Rs. 16 lakhs and Ms. Gupta's fee of Rs. 40,000/- fixed by the CoC and AA directed the replaced RP to consider the fee of Ms. Gupta and take a reasonable decision. Despite the directions of AA, Ms. Gupta's fee was not revised and she was asked to refund the amount withdrawn in excess by replaced RP.

6.1.6 The contention of Ms. Rita Gupta, with regard to withdrawal of fee that the CoC delayed approval of IRP/ RP fees and that the CoC fixed higher fees for another RP, is not tenable as being inconsistent with the provisions of the CIRP Regulations.

6.1.7 The DC notes that Ms. Gupta has filed an appeal bearing Comp. App. (AT)(INS) No. 10/2020 titled *CA Rita Gupta V. M/s Shilpi Cable Technologies Ltd.* before the Hon'ble NCLAT. The question to be considered in the appeal is whether the fees and cost incurred by the 'Resolution Professional', after order of 'Liquidation' can be determined by the 'Liquidator', if the 'Resolution Professional' is not a Claimant/ Creditor. The prayer made by Ms. Gupta is given below:

“

- a. *Allow the present appeal;*
- b. *Set aside the impugned order dated 22.11.2019 passed by the Adjudicating Authority;*
- c. *Quash RP's letter dated 14.09.2018 (Recovery of the Excess Fee), letter dated 25.09.2018 (Recovery of the Excess Fees: Reply to Your Letter dated September 20, 2018) and letter dated 01.10.2018 (violations of the provisions of IBC and failure to fulfil the duties/functions of a Resolution Professional as prescribed under IBC and Regulations);*
- d. *Set aside the agenda No. 6 and 7th Coe meeting held on 13.07.2018;*
- e. *Fix the fee of the Appellant at Rs.10 lakhs per month from January 18 till June 2018,*
- f. *Direct the CoC to pay for the period of her appointment as Resolution Professional of the Corporate Debtor from 15.01.2018 till 11.06.2018 after adjustment of the fee with the Resolution Professional on account; and*
- g. *Pass any other direction in the facts and circumstances of the. present appeal and in the interest of justice.”*

The appeal is still pending before the Hon'ble NCLAT.

6.1.8 The DC notes that an amount of Rs. 1,51,928/- was paid to Ms. Gupta in terms of the direction of the Hon'ble NCLAT *vide* order dated 01.08.2017. Subsequently, Ms. Rita Gupta withdrew an amount of Rs.19,28,340/- on 26.03.2018 without the approval of the CoC. The total fee payable to Ms. Rita Gupta, as approved by the CoC, was Rs. 8,37,393/-. The DC notes that the fee approved by the CoC was Rs.40,000/- as RP's fee and Rs.45,000/- towards out of pocket expenses, per month, while the replaced RP's fee has been fixed for Rs.16 lakh per month. Hence, she has withdrawn an amount of Rs. 10,90,947/- in excess of the amount approved by the CoC. Regulation 34 of the CIRP Regulations clearly provides that the CoC shall fix the expenses to be incurred on or by the RP. Ms. Rita Gupta should not have withdrawn fees without the approval of the CoC. Therefore, the DC finds that Ms. Rita Gupta, by withdrawing fee without the approval of the CoC, contravened Section 208(2)(a) and (e) of the Code, regulation 34 of the CIRP Regulations and regulation 7(2)(a) and (h) of the IP Regulations and Clause 26 of the Code of Conduct of IP Regulations.

7.1.1 With regard to the issue relating to payment of fee to the consultants without approval of the CoC, the DC observes that section 18 of the Code provides the duties of the IRP. Section 20 provides that the IRP shall manage the operations of the CD as a going concern and Section 25

provides the duties of the RP. The discretion to make appointment of professionals is with the IRP, however, the fee to be paid to such professionals is fixed by the CoC as has been provided under regulation 34 of the CIRP Regulations which provides that the CoC shall fix the expenses to be incurred on or by the RP and the same shall constitute the cost of CIRP.

7.1.2 The DC observes that fee of the professionals M/s Dimensions Capital Services Ltd., Kundra & Bansal and Barkha & Co. should have been fixed by the RP with the CoC's approval. The DC observes from the minutes of the 1<sup>st</sup> CoC meeting that the agenda for approval of fee to be paid to the Consultants was placed before the CoC and put to e-vote. The DC observes from the minutes of the 2<sup>nd</sup> CoC meeting that the agenda on the outstanding professional fees to be paid to consultants who delivered their services and whose services were required as a going concern was placed by Ms. Gupta but same were not deliberated upon.

7.1.3 The DC observes that in a time bound process, the CoC also needs to approve certain agenda items to facilitate the CIRP. The CoC is entrusted with critical commercial decision-making powers and functions under the Code. Most importantly, the CoC is vested with the responsibility to assess the viability of the CD and determine the manner in which its distress is to be resolved. They should expeditiously decide on the agenda items put forth by the RP, especially in a time bound process, particularly fee and expenses of IRP/RP and other professionals.

7.1.4 The DC notes that under section 18(1) of the Code, the IRP is duty bound to manage the operations of the CD till the RP is appointed by the CoC and monitor the assets of the CD. Further, the IRP, under section 20(1) is under a mandate to protect and preserve the value of property of the CD and manage the operations of the CD as a going concern. Also, to fulfill the purpose of section 20(1) of the Code, section 20(2)(a) of the Code allows the IRP to appoint accountants, legal or other professionals as may be necessary. An RP is required to conduct the process within stipulated timelines and manage the affairs of the CD. The DC notes that in a time bound process, everyday is important and a RP/IRP is empowered under the Code to engage consultants and such consultants begin their work on the assurance of being paid reasonable remuneration which is required to be timely decided by the CoC. The issue, in the instant matter, is a result of the indecisiveness of the CoC. In view of the above and the fact that payment made to the consultants was only towards advance fee and not full payment, the DC takes a lenient view.

8.1.1 With regard to the issue relating to providing the documents to Inspecting Authority, the DC notes that Regulation 4(4) of the Inspection Regulations provides that a service provider (here service provider is the RP) is duty bound to produce records in his/ her custody or control and furnish to the Inspecting Authority such statements and information as it may require. Clause 19 of the Code of Conduct mandates the RP to provide all information and records as required by the Board. All IPs are to abide by the Code of Conduct mandatorily as provided under regulation 7(2)(h) of the of IP Regulations read with section 208(2) of the Code.

- 8.1.2 The DC notes that the Ms. Rita Gupta was replaced as RP by Mr. Huzefa Fakhri Sitabkhan and all the documents with respect to the CIRP were handed over to the new RP as per section 23(3) of the Code. The DC notes her submission that she was unable to provide the documents with regard to the CIRP of the CD as the same had been handed over to the new RP in compliance of order dated 07.06.2018 passed by the AA and was not required to maintain the same, in view of the Circular No.: IBBI/CIRP/38/2021 dated 06.01.2021 which was notified after handing over of documents to the new RP. This submission is accepted. Further, regulation 39A of the CIRP regulations which required preservation of physical as well as electronic record of the CIRP of the CD came into effect from 05.10.2018, much after the documents had been handed over by Ms. Gupta to the new RP Mr. Sitabkhan. Therefore, the DC finds that Ms. Rita Gupta did not contravene Regulation 4(4) of the Inspection Regulations.
9. In view of the above, the DC finds that Ms. Rita Gupta has contravened provisions of section 208(2)(a) and (e) of the Code, regulation 34 of the CIRP Regulations and regulation 7(2)(a) and (h) of the IP Regulations and Clause 26 of the Code of Conduct of IP Regulations, for withdrawal of money towards fee of IRP/RP without the approval of the CoC.

### **Order**

- 9.1 The DC, therefore, in exercise of the powers conferred under section 220 (2) of the Code read with sub-regulations (7), (8), (9) and (10) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and Regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017, hereby, directs that -
- (i) Ms. Rita Gupta shall not seek or accept any process or assignment or render any services under the Code for a period of one year from the date of coming into force of this Order. She shall, however, continue to conduct and complete the assignments/processes she 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.
- 9.2 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI of which Ms. Rita Gupta is enrolled as a member.
- 9.3 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.
10. Accordingly, the show cause notice is disposed of.

Dated: 14<sup>th</sup> March, 2022  
Place: New Delhi

-sd-  
(Dr. Mukulita Vijayawargiya)  
Whole Time Member, IBBI