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INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/46/2020

1st December, 2020

Order

In the matter of Mr. Ajay 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 Professionals) Regulations, 2016.

Background

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/INSP/2019/32 dated 17th June, 2020 issued to Mr. Ajay Gupta, 7-A, Siddhartha Extension, Pocket-B, New Delhi-110013, who is a Professional Member of the Indian Institute of Insolvency Professional of ICAI (IPA) and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P00140/2017-18/10304.

- 1.1 The Hon'ble National Company Law Tribunal, New Delhi Bench (AA) vide order dated 3rd January, 2019 admitted an application for Corporate Insolvency Resolution Process (CIRP) of M/s Alisa Infratech Private Limited (CD) under section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) and appointed Ms. Monika Agarwal as an Interim Resolution Professional (IRP). However, she was not confirmed by the Committee of Creditors (CoC), hence, she could not continue as Resolution Professional (RP). The CoC approved the appointment of Mr. Gupta as RP which was confirmed by the AA vide order dated 22nd February, 2019.
- 1.2 In exercise of its power under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017, the IBBI vide Order dated 23rd December, 2019 appointed an Inspecting Authority (IA) to conduct an inspection of Mr. Ajay Gupta, on having reasonable grounds to believe that he had contravened provisions of the Code, or the rules or regulations made, or directions issued thereunder.
- 1.3 The IA submitted its final report on 13th February, 2020 and IBBI issued SCN against Mr. Gupta on 17th June, 2020 based on the findings of the IA in respect of his role as RP in the CIRP of the CD.
- 1.4 The SCN alleged contraventions of sections 23(1), 25(1), 208 (2) (a) & (e) of the Insolvency and Bankruptcy Code, 2016 (Code), regulation 7(2) (h) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and Clause 14 of the Code of Conduct under Schedule 1 of the IP Regulations. Mr. Ajay Gupta replied to the SCN vide letter dated 14th July, 2020.

- 1.5 The Board referred the SCN, reply of Mr. Gupta to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the provisions of the Code and Regulations made thereunder. Mr. Gupta availed an opportunity of personal hearing before the Disciplinary Committee (DC) on 17th September, 2020 wherein he was represented by Mr. Arvind Kumar Gupta and Mr. Manohar Malik, Advocates on his behalf. Post the hearing, the DC is in receipt of email dated 18th September, 2020 from Mr. Anurag Solanki on behalf of India Infoline Finance Limited (IIFL), Financial Creditor, which was mailed on request of Mr. Gupta.

Show Cause Notice

The contraventions alleged in the SCN are summarized as follows:

2. It is provided in section 25(1) of the Code that it is the duty of the resolution professional to preserve and protect the assets of the corporate debtor. However, it has been observed that Mr. Gupta failed to do so and had handed over charge of the CD, back to the erstwhile directors after the stay order dated 29th March, 2019 was passed by the Hon'ble Supreme Court in Writ Petition (Civil) No. 354 of 2019. This led to preferential transactions conducted by the ex-management in the form of payment of interest dues to IIFL, one of the financial creditors of the CD. Therefore, the Board was of the prima facie view that Mr. Gupta has violated sections 25(1), 208(2)(a) & (e) of the Code, regulation 7(2)(h) of the IP Regulations and clause 14 of the Code of Conduct under Schedule 1 of the IP Regulations.
- 2.1 Further, according to section 23(1) of the Code, it is the duty of the resolution professional to conduct the entire CIRP and manage the operations of the corporate debtor during the CIRP. However, it has been observed that Mr. Gupta failed to do so and handed over the documents of the CD to erstwhile management after the Hon'ble Supreme Court granted stay in respect of the further proceedings before the Adjudicating Authority (AA) in the said CIRP. Therefore, the Board was of the prima facie view that Mr. Gupta has violated sections 23(1), 208(2)(a) & (e) of the Code, regulation 7(2)(h) of the IP Regulations and clause 14 of the Code of Conduct under Schedule 1 of the IP Regulations.

Submissions by Mr. Gupta

3. Mr. Gupta *vide* reply dated 14th July, 2020 submitted his reply to the SCN and a rebuttal to the allegations of contraventions made with respect to specific provisions of the Code, which are summarized as follows.
- 3.1 It was submitted that the CD was incorporated on 12th December, 2012 as a real estate company. On 31st March, 2017, IIFL became the only secured creditor of the company. The title deeds of the property of the CD were kept as security by IIFL and the same were entrusted in a debenture trustee, Vistra (ITCL) India Limited. Mr. Gupta submitted that the secured loan was being serviced by the CD without default, there were no overdues and the CD was never an NPA. However, the CIRP commenced on 3rd January, 2019 on the application by one of the allottees and Ms. Monika Agarwal was appointed as an IRP. The IRP was replaced by Mr. Gupta after the decision of the Committee of Creditors (CoC) in

its 1st meeting on 5th February, 2019 and the same was confirmed by the AA on 22nd February 2019.

- 3.2 It was submitted that in the 3rd CoC meeting held on 10th March, 2019, a resolution was passed authorizing Mr. Gupta to make payments towards statutory dues and interest due to IIFL. However, Mr. Gupta, after obtaining legal opinion on non-payment of interest during continuance of the CIRP, did not pay any interest to IIFL.
- 3.3 It was submitted that the erstwhile directors of the CD approached the Hon'ble Supreme Court by way of a writ petition and the Hon'ble court granted the stay on further proceedings in the CIRP vide order dated 29th March, 2019. This was brought to the notice of Mr. Gupta on 9th April, 2019, after which, Mr. Gupta obtained a legal opinion from Mr. Manohar Malik, Advocate and in view of the legal opinion, handed over custody and control of the CD to the erstwhile management.
- 3.4 It was submitted that the Hon'ble Supreme Court disposed of the writ petition on 9th August, 2019, after which, Mr. Gupta requested the AA to give him instruction for resuming his duties as RP. The AA passed an order on 17th September, 2019 to obtain the custody and control back from the erstwhile management which was duly obtained by Mr. Gupta on 18th September, 2019. Subsequently, Mr. Gupta convened a CoC meeting on 27th November, 2019 to resolve the CIRP by way of settlement and discussed the broad settlement terms.
- 3.5 It was submitted that upon a miscellaneous application filed by the erstwhile director of the CD, the Hon'ble Supreme Court granted a stay on further CIRP proceedings vide order dated 17th December, 2019 until the AA adjudicates upon the defense raised by the erstwhile directors in accordance with its judgment dated 9th August, 2019 in the matter of Writ Petition (Civi) No. 43 of 2019, *Pioneer Urban Land and Infrastructure Limited & Anr, Vs. Union of India & Ors.* before Supreme Court of India (*Pioneer Urban*) before taking decision to revive the CIRP in the present matter.
- 3.6 It was submitted that on 12th February, 2020, the creditors of the CD reached a settlement and the CoC unanimously voted to withdraw the CIRP by moving an application before the AA under section 12A of the Code. The application was allowed by the AA on 14th February 2020.
- 3.7 With regard to the handing over of control during stay of proceedings, Mr. Gupta submitted that upon the imposition of stay on the further proceedings, he could not have taken any action with respect to the CIRP. Since the CD was a going concern and the construction was continuing, it required a day to day monitoring and certain contractual payments were required to be made. Therefore, the only option available with him was to handover the possession back to the erstwhile management and it is submitted that this was done after informing the majority CoC member, IIFL. The fact that IIFL were aware of the same has also been reiterated *vide* email dated 18th September, 2020 from Mr. Anurag Solanki of IIFL, which was mailed to IBBI upon the request of Mr. Gupta. It is submitted that since

Mr. Gupta was not made a party to the proceedings before Hon'ble Supreme Court, he could not approach the same for clarification.

- 3.8 The custody and control of the CD was handed over to the erstwhile management on the basis of legal opinion received by Mr. Gupta. He has submitted that the reasoning employed for taking such a decision during the pendency of a stay on the proceedings is based on the order dated 11th September, 2017 in the matter of *Chitra Sharma & Ors. Vs. Union of India & Ors.*, Writ Petition (Civil) No. 744 of 2017 before the Hon'ble Supreme Court of India. The said order was passed by the Hon'ble Supreme Court upon an application moved for modification/vacation of the original stay order passed by the Hon'ble court in the same matter. In the said matter, the interim resolution professional had handed over the charge of the corporate debtor back to the ex-management upon stay of proceedings by the Hon'ble Supreme Court. The Hon'ble court modified its order and held as under:

“a) The IRP shall forthwith take over the management of JIL. The IRP shall formulate and submit an Interim Resolution Plan within 45 days before this Court. The Interim Resolution Plan shall make all necessary provisions to protect the interests of the home buyers;

...

e) All suits and proceedings instituted against JIL shall in terms of Section 14(1)(a) remain stayed as we have directed the IRP to remain in Management.”

- 3.9 With regard to the issue of preferential transactions, Mr. Gupta submitted that the transaction of payment of interest dues to IIFL did not have the effect of putting IIFL in beneficial position than any other creditor. Since, in the event of liquidation, the entire liquidation value would have belonged to IIFL, thus, any payment to IIFL would not have effect of putting it in beneficial position to the one it would have been, in the event of liquidation. Further, no prejudice/loss/injury could have been caused to any party and no damage/injury has been claimed by any party since the withdrawal of CIRP. Also, Mr. Gupta was not aware of such transactions since these happened when the control was in the hands of the erstwhile management during the period of stay imposed by the Hon'ble Supreme Court. Mr. Gupta also filed application under section 43 of the Code before the AA.
- 3.10 During the personal hearing, Mr. Gupta along with Mr. Arvind Kumar Gupta and Mr. Manohar Malik, Advocates, reiterated the submissions made in the reply and prayed to this DC to consider the contentions of Mr. Gupta and drop the SCN.
- 3.11 Post the hearing, the DC is in receipt of email dated 18th September, 2020 from Mr. Anurag Solanki on behalf of India Infoline Finance Limited (IIFL), Financial Creditor, wherein Mr. Solanki has stated as under:

“1. That the conduct of the RP during the CIRP process was satisfactory as in our eyes he conducted the CIRP process with an independent approach ensuring compliances under the law.

2. That the RP played a crucial role in the settlement discussions and ensured that the interests of all the CoC members are duly taken care of. We feel that due to his efforts the minority COC members could achieve better returns on their investment as the petitioners themselves signed a Settlement Agreement and we were also able to realise our debt in full.

3. That we as majority COC member were fully aware of the action of RP when he handed back control of the corporate debtor upon imposition of stay on CIRP process by Hon'ble Apex Court vide its order date 29.03.2019. In fact we had also consulted on the matter with our senior advocates who were also of the same opinion that the control be reverted in view of the order. It is also pertinent to mention that effectively even when RP handed back the control, he reinstated our control on operations/ bank accounts as the prime lender pursuant to various loan agreements executed by the corporate debtor in our favour.

4. That after the settlement of the CIRP process the company has been sold at a value which resulted in complete payments to our debts including interest accrued to that date.

5. That the assets of the corporate debtor comprised of a parcel of land which was mortgaged in our favour and even during the CIRP the original title deeds of the land were kept under safe custody of debenture trustee, and as such no harm could have been caused to the asset of the company.

6. From our standpoint as our debt including interest has been paid we can say that there was/has been no erosion for us in value of the asset of the company/ loss occurred due to handing back of control by RP.” [Emphasis supplied]

Analysis and Finding

4. The DC, after considering the SCN, oral and written submissions of Mr. Gupta and the provisions of the Code as well as the regulations made thereunder, proceeds to dispose of the SCN.

4.1 The DC notes that, with the enactment of the Code, there is a paradigm shift from debtor in possession regime to creditor in control regime for the purpose of resolution of insolvency. The Banking Law Reforms Committee (BLRC) in its November 2015 report provides as under:

“The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it.”

4.2 In a given situation of the creditor in control premise under the Code, the custody and control are handed over to the RP whose appointment is approved by the CoC. During the whole process, there is a moratorium and calm period to facilitate time bound process. The Code confers powers of management of the affairs of the corporate debtor on the IRP/RP, particularly, under sections 17, 18, 20, 23 and 25 of the Code. There are other provisions wherein he plays a key role in the CIRP. The DC further notes that as per section 23 of the Code, the RP has dual role to play during CIRP, viz., he has to manage the day-to-day operations of the CD and he has to conduct the time-bound corporate insolvency resolution process. The DC further notes that it is the duty of the resolution professional under the Code to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor under section 25 of the Code. Sections 23(1) & 25(1) of the Code are as under:

“23. Resolution professional to conduct corporate insolvency resolution process. –

(1) Subject to section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period:”

“25. Duties of resolution professional. –

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.”

4.3 During the CIRP, the RP performs various duties, receives, collates, verifies claims, conducts meetings of the creditors, prepares information memorandum, reports to the AA from time to time etc. For certain actions, he is required under section 28 of the Code to seek prior approval of the CoC also. All the draft resolution plans received by him which meet the requirements under the Code are put up by the RP before the CoC for approval.

4.4 The DC notes that an IP must not act with *mala fide* or be negligent while performing his functions and duties under the Code, as is entrenched in clause 14 of the Code of Conduct under Schedule 1 of the IP Regulations.

4.5 In the present matter, an application for CIRP was filed by Mr. Gulshan Sethi, one of the allottees of the CD under section 7 of the Code which was admitted by the AA vide order dated 3rd January, 2019. The CIRP commenced on 3rd January 2019. Ms. Monika Agarwal was appointed as an IRP and was replaced by Mr. Ajay Gupta as RP vide order of the AA dated 22nd February, 2019. The Hon’ble Supreme Court in Writ Petition (Civil) No. 354 of 2019, *Arun Kumar Vs. Union of India & Ors.* passed the order on 29th March, 2019 that there shall be stay of further proceedings before the Ld. AA and tagged the matter with Writ Petition (Civi) No. 43 of 2019, *Pioneer Urban Land and Infrastructure Limited & Anr, Vs. Union of India & Ors.* before Supreme Court of India (*Pioneer Urban*).

- 4.6 The DC notes that Mr. Gupta handed over control and custody of the assets of the CD as well as the documents of the CD back to the erstwhile management after the stay order passed by the Hon'ble Supreme Court on 29th March, 2019 on the basis of legal opinion obtained by him and also to ensure that the CD remains a going concern.
- 4.7 The DC further takes on record the submission of Mr. Gupta taking analogy from the orders passed in the matter of *Chitra Sharma & Ors. Vs. Union of India & Ors.*, Writ Petition (Civil) No. 744 of 2017 before the Hon'ble Supreme Court of India wherein the interim resolution professional had handed over the charge of the corporate debtor back to the ex-management upon stay of proceedings by the Hon'ble Supreme Court. Later, the stay order was modified vide order dated 11th September, 2017 and in that case interim resolution professional was directed to take back the control of the corporate debtor.
- 4.8 Mr. Gupta submitted that no order similar to the aforementioned order dated 11th September, 2017 was passed by the Hon'ble Supreme Court in the present matter. Hence, it would be in contempt of court if Mr. Gupta would have continued to retain control over the CD during stay of proceedings. However, the DC notes that no application for modification of the order of the Hon'ble Supreme Court was moved by Mr. Gupta or any other stakeholder before the Hon'ble Supreme Court. The reason for the same, as informed by Mr. Gupta, is that he was not made a party to the proceedings before the Hon'ble Supreme Court. Further, Mr. Gupta did not move any such clarificatory application before the AA as well before taking a decision to handover the control of the CD as well as the documents of the CD to the ex-management. The DC notes that this action of Mr. Gupta is not in consonance with the duties of the IP under the Code and regulations thereunder.
- 4.9 In the present matter, once the stay order was passed and the CIRP was stayed by the Hon'ble Supreme Court, Mr. Gupta should not have handed over the control of the CD to the ex-management. At the time of stay of proceedings, the control of the assets as well as the documents of the CD were with Mr. Gupta in the capacity of the RP. The stay was on further proceedings and there was no indication in the order for handing over the assets and the documents of the CD. It is imperative that the situation should have remained the same till the disposal of the concerned writ petition before the Hon'ble Supreme Court. However, Mr. Gupta handed back the control of the CD to the erstwhile management, which was in violation of the provisions of the Code.
- 4.10 It has been submitted by Mr. Gupta that his move of handing over possession back to the erstwhile management has not caused any erosion of assets or monetary loss to the CD or other stakeholders. The same has been confirmed vide email dated 18th September, 2020 sent by Mr. Anurag Solanki on behalf of IIFL wherein Mr. Solanki has, inter alia, stated that due to efforts of the RP, the minority CoC members could achieve better returns on their investment as the petitioners themselves signed a Settlement Agreement and were also able to realise the debt in full, including interest. It has been submitted that, there was/has been no erosion in value of the asset of the company/ loss occurred due to handing back of control by RP.

- 4.11 In the present case, after stay on further proceedings by the Hon'ble Supreme Court, Mr. Gupta handed over the control and custody of the assets to ex-management which was against the fundamental jurisprudence of the Code relating to creditor in control mechanism. His conduct is in violation of key procedural norm of keeping with him the control and custody of the assets of the CD throughout the CIRP period, including the period when stay was imposed on further proceedings. Thus, Mr. Gupta failed in his duty of preserving and protecting the assets of the CD when he handed over management of the CD back to ex-management. Further, in the said order there was no direction for handing over the management and control back to the ex-management. Handing over the assets to the ex-management of the CD has been done under the misconstrued pretext that Hon'ble Supreme Court did not clarify in its stay order as to whom the management of the CD will rest during the period of stay. Mr. Gupta did not move any application either before the Hon'ble Supreme Court or before the AA to clarify with regard to retaining/giving back control of the management of the CD which he should have done instead of seeking legal opinion on the issue.
- 4.12 With regard to the issue of preferential transaction during the period when control was given back to the ex-management by Mr. Gupta, it has been submitted that Mr. Gupta has filed application under section 43 of the Code before the AA to counter said preferential transaction. However, the reason for the said transaction, in the first instance, is due to the transfer of control of CD to the ex-management by Mr. Gupta. Therefore, filing an application before the AA against transactions which have resulted due to the conduct of handing over of the management of the CD by Mr. Gupta to the ex-management does not exonerate him of his action committed in violation of the Code.
5. In the aforesaid backdrop and on the basis of analysis and findings in para 4, the DC finds that the conduct of Mr. Gupta of handing over the management of the CD back to the ex-management is in contravention of sections 23(1), 25(1), 208 (2) (a) & I of the Code, regulation 7(2) (h) of the IP Regulations and Clause 14 of the Code of Conduct under Schedule 1 of the IP Regulations.

Order

6. In view of the above, the Disciplinary Committee, in exercise of the powers conferred under section 220 of the Code read with sub-regulations (7) and (8) of regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and regulation 13 of IBBI (Inspection and Investigation) Regulations, 2017, disposes of the SCN with the following directions: -
- (i) Mr. Ajay Gupta shall not seek or accept any process or assignment or render any services under the Code for a period of six 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 Indian Institute of Insolvency Professional of ICAI where Mr. Ajay Gupta is enrolled as a 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.

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

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(Dr. Mukulita Vijayawargiya)
Whole Time Member, IBBI

Date: 1st December, 2020

Place: New Delhi



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