

# **INSOLVENCY AND BANKRUPTCY BOARD OF INDIA**

## **(Disciplinary Committee)**

No. IBBI/DC/235/2024

02 August 2024

### **ORDER**

This Order disposes of the Show Cause Notice (SCN) No. IBBI/C/2023/00827/815/1452 dated 27.10.2023, issued to Mr. Devendra Singh, an Insolvency Professional registered with the Insolvency and Bankruptcy Board of India (IBBI/Board) with Registration No. IBBI/IPA-002/IP-N00001/2016-2017/10001, who is a Professional Member of the Insolvency Professional Agency of ICSI Institute of Insolvency Professionals and having residential address recorded with IBBI as Assotech Business Cresterra, Office No. 216, 2<sup>nd</sup> Flor, Tower-1, Sector-135, Noida, Uttar Pradesh-201305.

#### **1. Background**

- 1.1 The National Company Law Tribunal, New Delhi Bench (AA) vide its Order dated 04.03.2021, admitted an application filed by financial creditor Punjab National Bank under Section 7 of the Code for initiating Corporate Insolvency Resolution Process (CIRP) of M/s. Sidhartha Buildhome Private Limited (Corporate Debtor / CD). Mr. Devendra Singh was appointed as Interim Resolution Professional (IRP) vide the above-said Order and later confirmed as the Resolution Professional (RP).
- 1.2 The AA vide its order dated 24.05.2023 in I.A./753/2023 in IB/717(ND)/2019 allowed the withdrawal plan under Section 12A of the Code. This order was challenged before the NCLAT in Comp. App. (AT) (Ins.) No. 982 of 2023 & I.A. No. 3346 of 2023 and NCLAT vide its order dated 16.02.2024 set aside the admission order passed by the AA with directions to revive the CIRP of the CD which shall confine to Project Estella. The Hon'ble Supreme Court vide its order dated 07.03.2024 had upheld NCLAT's order dated 16.02.2024.
- 1.3 The AA vide its order dated 22.03.2024 in I.A/1479/2024 in IB/717/ND/2019, on the basis of the resolution passed by the CoC for replacement of the resolution professional, replaced Mr. Devendra Singh with Mr. Deepak Kumar Goyal as the Resolution Professional of the Corporate Debtor.
- 1.4 The IBBI in exercise of its powers under Section 218 of the Insolvency and Bankruptcy Code (Code), read with Regulations 7(1) and 7(2) of Insolvency and Bankruptcy Board of India

(Inspection and Investigation), Regulations, 2017 (Inspection and Investigation Regulations), appointed an Investigating Authority (IA) to conduct investigation in the CIRP of the CD.

- 1.5 Accordingly, a notice under Regulation 8(1) of the Investigation Regulation was issued to Mr. Devendra Singh on 08.02.2023 with a request to provide reply along with relevant documents. Mr. Devendra Singh submitted his reply to the investigation notice vide email dated 27.02.2023.
- 1.6 Based on the findings of the investigation as mentioned in the Investigation Report submitted by the IA, the Board formed a, *prima facie*, view that Mr. Devendra Singh contravened several provisions of the Code, the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) and the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and issued the SCN to Mr. Devendra Singh on 27.10.2023. The reply of Mr. Devendra Singh on the SCN was received by the Board on 10.11.2023. Mr. Devendra Singh submitted additional reply to the SCN, which was received by the Board on 23.11.2023.
- 1.7 The SCN and response of Mr. Devendra Singh to the SCN, were referred to the Disciplinary Committee (DC) for disposal of the SCN. Mr. Devendra Singh availed opportunity of personal hearing before the DC through virtual mode on 12.03.2024. Pursuant to the personal hearing, Mr. Devendra Singh submitted additional written submissions *vide* email dated 19.03.2024 and further on 20.07.2024.

## **2. Alleged Contraventions, Submissions of Mr. Devendra Singh and Findings of the DC**

The contravention alleged in the SCN, submissions by Mr. Devendra Singh and findings of the DC are summarized as follows:

### **2.1 Registration of CD as MSME without approval of the CoC.**

- 2.1.1 It was observed that Mr. Devendra Singh published the Form G on 07.05.2021, inviting the Expression of Interest (EoI) from the Prospective Resolution Applicants (PRA). Pursuant to the said publication, Mr. Devendra Singh received EoIs from several PRAs which resulted in submission of two resolution plans. In the meanwhile, the ex-Director/promoter of the CD, Mr. Siddharth Chauhan, submitted a Section 12A withdrawal proposal on 15.09.2021, which was rejected by the CoC in its 9<sup>th</sup> meeting held on 18.09.2021.

- 2.1.2 Subsequently, Mr. Devendra Singh applied for registration of the CD as an MSME without the approval of the CoC. Mr. Devendra Singh failed to bring this fact to the notice of CoC at least till 18<sup>th</sup> CoC meeting held on 15.02.2022 wherein as per reply submitted to the IA by Mr. Devendra Singh, the detailed EoI document was placed, which contained this status of the CD. In the EoI issued by Mr. Devendra Singh on 23.02.2022, it was mentioned that the provisions pertaining to CIRP of MSME under the Code would be applicable in this matter since the CD falls under MSME.
- 2.1.3 Mr. Devendra Singh's decision on this account was contested by homebuyers and Financial Creditors of the CD before the AA. The AA vide order dated 25.11.2022 directed Mr. Devendra Singh to not place the plan of the suspended director/ promoter before the CoC.
- 2.1.4 In view of the above, the Board was of the *prima facie* view that Mr. Devendra Singh contravened Sections 208(2)(a) & (e) of the Code, Regulations 7(2)(a) & (h) of the IP Regulations read with Clause 3, 5, 12 and 14 of the Code of Conduct specified thereunder.

#### **Submissions by Mr. Devendra Singh**

- 2.1.5 Mr. Devendra Singh submitted that in terms of Section 3 read with Sections 7 and 8 of the MSME Act, 2006 any enterprise which falls within the eligibility criteria as stipulated under the provisions will be treated as MSME and the Act nowhere stipulates any registration certificate which confers the MSME Status. Further, the categorization of an enterprise as an MSME is by operation of law and does not involve any action to be done by such enterprise. The registration of an enterprise under the MSME Udyam scheme was not a mandatory requirement for the enterprise to be termed as a MSME until 26.06.2020. The said notification of 2020 was introduced, for smooth functioning of MSME and enabling them to seek benefits offered by the Government. Also, as per the Notification of the MSME Council dated 05.11.2014, the "Infrastructure and Real Estate activities" were included in the ambit of MSME.
- 2.1.6 Mr. Devendra Singh further submitted that as per the Audited Financial Statement of the CD for the Financial Year 2019-20, the Corporate Debtor had investments in Plant and Machinery worth Rs. 64.84 lakh, which automatically classified the CD as an MSME as on 31.03.2020 i.e. prior to commencement of CIRP. Further, as per the Audited Financial Statement for FY 2020-21 which was finalized and audited in November 2021 i.e., during the CIRP, the investments in plant and machinery were of Rs 52.29 Lakh. The new criteria for MSME was notified on

26.06.2020 and it was made mandatory for registration on Udhyam Portal under MSME. The fact that the Audited Balance Sheet was in the process of finalization till November 2021 and accordingly the MSME registration was done, may not be construed (as observed by the Board) that the registration was applied after the withdrawal proposal under Section 12A of the Code which was rejected by the CoC on 18.09.2021.

- 2.1.7 Mr. Devendra Singh further submitted that after enquiring into the financial statement and affairs of the CD, he being the RP thought it fit to apply for the MSME registration of the Corporate Debtor to avail several benefits which it comprised of and to maintain the Corporate Debtor as a going concern and attract more PRAs. As in the first round of the Form G, all plans and the 12A Proposal were rejected by the CoC, to save the Corporate Debtor from going into liquidation and attract more PRAS, he got the Corporate Debtor registered as an MSME.
- 2.1.8 Mr. Devendra Singh further submitted that as per Section 17(2)(e) of the Code, the RP is responsible for complying with all requirements under the law for the time being in force. As per the said notification dated 26.06.2020, the CD was required to be registered as an MSME. Further, in terms of Section 17(1)(c) of the Code, all officers and managers of the CD shall report to the RP and seek instructions for running the day-to-day affairs of the CD. In terms of Section 20(2)(b) of the Code, the RP is empowered to manage the operations of the CD including entering contracts on behalf of the CD. He further asserted that there is no requirement under the Code or the Regulations to obtain prior consent of the CoC to register the CD as an MSME by the IRP/RP. The MSME Act is a beneficial legislation aimed at providing certain benefits/ exemptions/ concessions to the CD. The aim of registering the CD as an MSME was not to provide any backdoor entry to the promoters or the director of the suspended board of the CD, rather the aim was to extend the benefits of the same to the CD, where more PRAs may be interested in submission of Resolution Plan in the Insolvency Resolution of the CD. The CoC never raised any objection for registration of the CD as MSME since its registration.
- 2.1.9 Mr. Devendra Singh further submitted that the Resolution Professional's powers and duties are mentioned in Section 25 of the Code, which stresses on the duty of the RP to preserve and protect the assets of the CD including the continued business operations of the CD. Mr. Devendra Singh asserted that getting the MSME registration of the Corporate Debtor, which was eligible for registration (even prior to commencement of CIRP), was the duty of the Resolution Professional to get it registered. Accordingly, in case of the CD undergoing CIRP,

the RP is the authorised signatory and can submit the MSME registration form on the Udyam Portal. To support the submission, Mr. Devendra Singh placed reliance on NCLT, Kochi Bench order in the matter of *K. Satheesh Babu Rajesh versus Mr. George Varkey* (I.A. No.64/KOB/2021 in C.P.(IB) No. 52/KOB/2019) and the NCLAT's order in the matter of *Rakesh Kumar Agarwal and others versus Devendra P. Jain, Liquidator of Asis Logistics Limited* [C.A(AT)(Ins.) No. 1034 of 2022].

2.1.10 Mr. Devendra Singh further submitted that the registration of the CD as an MSME was informed to the CoC and all persons at various stages i.e., (i) in the 18<sup>th</sup> CoC Meeting dated 15.03.2022, where the detailed EoI document was placed; (ii) several PRAs through e-mail dated 25.05.2022; (iii) office bearers of Estella Welfare Association, in which all of the homebuyers (Estella Projects of CS) are CoC members, through e-mail dated 09.03.2022, when such association of homebuyers also wished to submit the resolution plan; (iv) all the documents were uploaded on real time basis. Therefore, each and every member of the CoC were duly informed about the status of the CD's registration as an MSME and the CoC never raised any objection on the registration of the Corporate Debtor as MSME.

2.1.11 Mr. Devendra Singh further submitted that based on the findings of Transaction Auditor's report dated 02.08.2021 and further analysis he filed an avoidance application under Section 66 of the Code, against the directors of the director of the suspended board of the CD and through email dated 30.09.2021 had informed the IBBI regarding the transactions falling within Sections 43, 45, 49 and 66 of the Code.

2.1.12 Mr. Devendra Singh further submitted that NCLT in its order dated 25.11.2022 have neither declared that the Corporate Debtor is not a MSME nor Mr. Sidharth Chauhan, suspended director of the CD was declared ineligible. The NCLT in its order dated 25.11.2022 had ordered that, "*RP is directed not to place the resolution plan filed by the suspended director/promoter of the CoC.*" Further, the NCLT had not declared/commented on the action of Resolution Professional for getting the CD registered under MSME without the approval of CoC nor given any direction on such action.

### **Analysis and Findings**

2.1.13 The DC notes the submission of Mr. Devendra Singh that as per the CD's Audited Financial Statement for FY 2020-21, finalized and audited in November 2021 i.e., during the CIRP, the investments in plant and machinery was of Rs 52.29 Lakh. The DC also notes the submission

that Mr. Devendra Singh, being the RP of the CD, thought it fit to apply for the MSME registration of the Corporate Debtor to avail several benefits to maintain the Corporate Debtor as a going concern and attract more PRAS. Further, Mr. Devendra Singh had applied for the registration of the Corporate Debtor as a MSME on 23.11.2021 since the audited Balance Sheet was in the process of finalization till November 2021 and accordingly the MSME registration was done.

2.1.14 The DC notes the submission of Mr. Devendra Singh that as per the CD's Audited Financial Statement for FY 2020-21, finalized and audited in November 2021 i.e., during the CIRP, the investments in plant and machinery was of Rs 52.29 Lakh. The DC also notes the submission that Mr. Devendra Singh, being the RP of the CD, thought it fit to apply for the MSME registration of the Corporate Debtor to avail several benefits to maintain the Corporate Debtor as a going concern and attract more PRAS. Further, Mr. Devendra Singh had applied for the registration of the Corporate Debtor as a MSME on 23.11.2021 since the audited Balance Sheet was in the process of finalization till November 2021 and accordingly the MSME registration was done.

2.1.15 The DC perused the audited Balance Sheet of Corporate Debtor for F.Y. 2020-21 and observed that audited Balance Sheet for F.Y. 2020-2021 was finalised and signed by the auditor on 29.11.2021 whereas the application for MSME registration of the Corporate Debtor was applied by Mr. Devendra Singh on 23.11.2021 (as evident from the acknowledgement e-mail dated 23.11.2021 placed on record). The submission of Mr. Devendra Singh that he had applied for the registration of the Corporate Debtor as a MSME on 23.11.2021 since the audited Balance Sheet was in the process of finalization till November 2021 does not help his case, as till the time accounts are not finalized, he is not in a position to know what would be final result of the audit specifically in regard to the eligibility criteria of CD as MSME. So, the argument that he had applied for registration of MSME at this particular time and not earlier, does not hold good as even at this point of time the situation in respect of the veracity of the financials of the CD was same as earlier to the audit process being undertaken.

2.1.16 The DC notes Mr. Devendra Singh's assertion that registering the Corporate Debtor as an MSME was intended to secure various benefits and maintain its status as a going concern. However, Mr. Devendra Singh failed to provide any submission or document demonstrating how the Corporate Debtor had been benefited from specific policies, preferences, or advantages associated with MSME registration that would have supported its status as a going concern or

had benefited the CD in maximizing the value of assets of the CD during the CIRP. This raises serious questions regarding the tangible advantages gained by the Corporate Debtor as a result of its MSME registration. Therefore, DC is of the opinion that the MSME certificate obtained by Mr. Devendar Singh was not motivated by business decision of keeping the CD as a going concern. It is also pertinent to note, that the CD before coming into CIRP had never taken MSME registration.

2.1.17 The DC notes the submission of Mr. Devendra Singh that the aim of obtaining the MSME registration was to extend the benefits of the same to the corporate debtor as the more PRAs may be interested in submission of Resolution Plan in the Insolvency Resolution of the Corporate Debtor.

2.1.18 The DC notes that the first Form-G was published on 07.05.2021, pursuant to which resolution plan(s) were received from two (2) Prospective Resolution Applicants (PRAs) which were submitted on 27.07.2021 and put to vote in the 18<sup>th</sup> CoC Meeting held on 15.02.2022 wherein both the resolution plan(s) were rejected by CoC with 100% voting. The DC further observes that Mr. Sidharth Chauhan, director of the suspended board and promoter of the Corporate Debtor had submitted proposal under Section 12A of the Code before CoC on two occasions i.e., (i) withdrawal proposal dated 15.09.2021 rejected by the CoC with 100% voting in 9<sup>th</sup> CoC Meeting held on 18.09.2021 and (ii) withdrawal proposal dated 05.01.2022 rejected by the CoC with 100% voting in 18<sup>th</sup> CoC Meeting held on 15.02.2022.

2.1.19 The DC also notes that Mr. Devendra Singh had applied for the MSME registration on 23.11.2021, subsequent to which the CoC meetings were held on four occasions i.e., (i) 24.11.2021 (14<sup>th</sup> CoC Meeting), (ii) 05.01.2022 (15<sup>th</sup> CoC Meeting), (iii) 13.01.2022 (16<sup>th</sup> CoC Meeting) and (iv) 05.02.2022 (17<sup>th</sup> CoC Meeting) wherein the progress in the CIRP of the Corporate Debtor was informed to the CoC, however, surprisingly, Mr. Devendra Singh had not informed the CoC about obtaining MSME registration of the CD in the said meetings. The CoC was informed about the MSME Status of the Corporate Debtor after a period of more than 3 months, and that too when the approval of the CoC for re-issuing the Expression of Interest was placed before the CoC for its approval in the 18<sup>th</sup> CoC Meeting.

2.1.20 The DC further observes that pursuant to obtaining MSME Certificate, the CoC in its 18<sup>th</sup> CoC Meeting held on 15.02.2022, item B7 of the agenda of the meeting discussed eligibility criterion of the PRAs and authorised Mr. Devendra Singh to re-invite expressions of interest from the

PRAs with 87.45% voting. The minutes of the 18<sup>th</sup> CoC Meeting has also been perused, and it is observed that explicitly nothing is recorded in the minutes of 18<sup>th</sup> CoC Meeting regarding the placement of detailed Expression of Interest before the CoC or the RP's step of taking MSME registration of the CD, however, it is the case of Mr. Devendra Singh that detailed Expression of Interest was placed before the CoC, which contained the status of the CD as registered MSME and no objection on the registration of the CD as an MSME being raised by any member of CoC in the 18<sup>th</sup> CoC Meeting. Further, even if the status of the CD as MSME was to be discussed in that meeting, the same could not have been changed by the discussion of the CoC. The CoC was left with, *fait accompli*, by seeking registration of the CD as MSME, which could not have been reversed by them. Mr. Devendra Singh, in effect had changed the eligibility criteria for the PRAs without discussion with the CoC which is in the domain of the CoC.

2.1.21 Further, pursuant to the re-issuance of Form-G on 23.02.2022, resolution plan(s) were received from two (2) Prospective Resolution Applicants (PRAs) namely (i) M/s. Alpha Corp Development Private Limited and (ii) Sidharth Chauhan, director of the suspended board and promoter. It is noted that the NCLT vide its order dated 25.11.2022 in I.A No. 3024/2022 had directed the Resolution Professional not to place the resolution plan submitted by Mr. Sidharth Chauhan, director of the suspended board and promoter before the Committee of Creditors for approval. Consequent to NCLT's order dated 25.11.2022 and in compliance of the NCLT's order dated 25.11.2022, the resolution plan submitted by Mr. Sidharth Chauhan, was not placed before the CoC. However, later Mr. Sidharth Chauhan, director of the suspended board and promoter of the Corporate Debtor has submitted proposal under Section 12A of the Code on 06.12.2022 for the third time for the consideration of Committee of Creditors.

2.1.22 The Resolution Professional is duty-bound to invite PRAs, who fulfil such criteria as may be laid down by him with the approval of CoC, to submit the Resolution Plan. The DC is of the view that, approval of the Committee of Creditors for obtaining the MSME certificate, consequent to which the relaxation as provided under Section 240A of the Code, 2016 to the eligibility criteria of Resolution Applicant will be applicable, is a pre-requisite and the Resolution Professional cannot without the prior consent of the CoC, take an unilateral action of taking the MSME status of the Corporate Debtor. Therefore, DC is of the view that Mr. Devendra Singh's unilateral action of obtaining MSME certificate for the Corporate Debtor without the CoC consent is not in the consonance of the Code, 2016. Accordingly, in view of



the aforesaid, the submission of Mr. Devendra Singh that there is no requirement under the Code or the Regulations to obtain the prior consent of CoC to register the Corporate Debtor as an MSME by the IRP/RP cannot be accepted by the DC as the registration of the CD as MSME has in effect changed the eligibility criteria for PRAs – a decision which is in the domain of the CoC.

2.1.23 The DC further notes that Mr. Devendar Singh has relied on the NCLT, Kochi Bench order in the matter of **K. Satheesh Babu Rajesh versus Mr. George Varkey (I.A. No.64/KOB/2021 in C.P.(IB) No. 52/KOB/2019)** and NCLAT's order in the matter of **Rakesh Kumar Agarwal and others versus Devendra P. Jain, Liquidator of Asis Logistics Limited [C.A(AT)(Ins.) No. 1034 of 2022]** to justify his action of obtaining MSME Certificate in the CIRP of the CD.

2.1.24 The DC has perused the said judgements and the relevant paragraph of the said judgements as relied upon by Mr. Devendra Singh are reproduced as follows: -

- i. The NCLT, Kochi Bench in the matter of *K. Satheesh Babu Rajesh versus Mr. George Varkey (IA no. 64/KOB/2021 in CP(IB) No. 52/KOB/2019)* has directed that “*the RP of the Corporate Debtor to register the CD as an MSME under the Code, since the CD fulfilled the criteria of being an MSME as per the new definition, introduced by the Notification of 2020.*”
- ii. The NCLAT in *Rakesh Kumar Agarwal and Others v. Devendra P. Jain, Liquidator of Asis Logistics Limited Company Appeal (AT) (Insolvency) No. 1034 of 2020* has held that, “*Corporate Debtor which is in Liquidation is well within the qualified category to be MSME in view of the enhanced criteria introduced by amendment introduced during 2020. In view of the aforementioned cases, it is clear that the during the CIRP as well Liquidation the Corporate Debtor, falls within the requisite parameters to qualify as MSME there cannot be any embargo to get the same registered with Udyam.*”

2.1.25 The DC has perused the aforesaid judgements as relied by Mr. Devendra Singh and observes a stark difference between the facts of the given judgement relied on and the facts of the present case. While in the matter of *K. Satheesh Babu Rajesh*, the NCLT had specifically directed the RP to obtain the MSME certificate, in the present matter of the CD, there is no such specific directions to the RP.

- 2.1.26 The DC further notes that the judgment of the NCLAT in *Rakesh Kumar Agarwal and Others v. Devendra P. Jain, Liquidator of Asis Logistics Limited*, as relied upon by Mr. Devendar Singh, is on a completely different footing. In the relied upon judgment, the issue before the NCLAT was whether the revised MSME criteria would be applicable retrospectively to the Corporate Debtor undergoing liquidation proceedings at the time the revised MSME criteria came into effect. In that case, the NCLAT held that there cannot be any embargo on a Corporate Debtor undergoing CIRP or liquidation from getting registered with Udyam by virtue of an amendment to Section 7 of the MSMED Act, 2006, via notification dated 01.06.2020
- 2.1.27 In cases relied upon by Mr. Devendra Singh, the issue is, “whether the CD which is eligible for MSME registration can take MSME registration during CIRP/Liquidation”. These cases are not dealing with the issue involved in present case i.e., “the authority of the Resolution Professional to take the MSME registration and whether the prior approval of the CoC is required to be taken before proceeding with the MSME registration of the Corporate Debtor.” This issue is entirely different from the one in the judgments relied upon. Accordingly, the judgments relied upon by Mr. Devendar Singh are not relevant in the present case.
- 2.1.28 The DC concludes that Mr. Devendar Singh’s failure to seek the CoC’s prior approval in obtaining the MSME certificate for the Corporate Debtor, despite being aware of its significant implication, constitutes a serious and grave procedural oversight. This oversight has the potential to undermine the fairness and transparency of the insolvency resolution process under the Code.
- 2.1.29 The DC notes Mr. Devendra Singh’s submission that he had also preferred an avoidance application (I.A./4290/2021) against Mr. Sidharth Chauhan, suspended director and promoter, and others under Sections 43, 45, 49, and 66 of the Code, 2016, and had duly informed the IBBI about the avoidance transactions to take cognizance against the suspended directors for the avoidance transaction. However, this action by Mr. Devendra Singh cannot be used as a defence for his arbitrary action of obtaining of the MSME registration without the CoC’s approval.
- 2.1.30 In view of the above, the DC finds Mr. Devendra Singh in contravention of Section 208(2)(a) and (e) of the Code, Regulation 7(2)(a) & (h) of the IBBI (Insolvency Professional) Regulations, 2016 (IP Regulations) read with Clause 3,5,12 and 14 of the Code of Conduct specified thereunder.

## **2.2 Issue regarding deposit taken from ex-director:**

- 2.2.1 In the CIRP of the CD, the director of the director of the suspended board had deposited an amount of rupees five crore along with his Section 12A proposal. The proposal was, however, rejected in the 18<sup>th</sup> CoC meeting held on 15<sup>th</sup> February 2022.
- 2.2.2 Once, the Section 12A proposal was rejected by the CoC, the deposit made should have been returned. However, in the reply submitted to the IA, Mr. Devender Singh stated that the deposit of rupees five crore was not returned to the proposer and the entire amount was utilized towards completion of the pending project and to maintain the CD as a going concern.
- 2.2.3 In view of the above, the Board was of the, *prima facie*, view that Mr. Devendra Singh contravened Section 208(2)(a) and (e) of the Code, Regulation 7(2)(a) & (h) of the IP Regulations read with Clause 3, 5 and 14 of the Code of Conduct specified thereunder.

### **Submissions by Mr. Devendra Singh**

- 2.2.4 Mr. Devendra Singh submitted that the CoC in its meeting held on 30.04.2021 approved the eligibility criteria, RFRP and Evaluation Matrix for the PRA. As per the approved RFRP, the PRA had to submit an earnest money deposit (EMD) of rupees one crore along with the Resolution Plan and performance bank guarantee (PBG) amount of rupees three crore in case the Resolution Plan is approved by the CoC. In the approved RFRP, there was no provision for either deposit of EMD or PBG in case of the proposal under Section 12A of the Code. The amount of Rs. 5 Crore was taken as deposit from the Promoter/Director of the suspended board of the CD along with the 12A proposal, only on the discussion and decision of the CoC. The Section 12A proposal submitted by the Promoter/Director of the suspended board was later rejected by the CoC in its 18<sup>th</sup> CoC meeting held on 15.02.2022. The amount of deposit of Rs. 5 Crore was not returned to the proposer.
- 2.2.5 Mr. Devendra Singh has further submitted that during that the CIRP, the construction activity was started on the specific request of the Homebuyers for completion of the pending project of NCR Green at Sector-95, Gurugram and 195 units were completed for fit out. Most of them were handed over to the homebuyers. This entire amount of rupees five crore was utilized towards completion of the pending project and to maintain the CD as a going concern as per the provisions of Sections 18, 20 & 25 of the Code, which does not require any prior approval of the CoC. The expenses incurred on the completion of project along with the cash flow

statement was placed before the CoC in its meeting held on 05.02.2022, 11.03.2022, 03.06.2022 & 10.01.2023. Hence, the CoC was fully aware of the utilization of the above said deposit amount of rupees five crore. The same is also minutized in the 17<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> & 27<sup>th</sup> CoC meeting held on 05.02.2022, 01.03.2022, 03.06.2022 & 10.01.2023.

- 2.2.6 Mr. Devendra Singh has further submitted that the amount of rupees five crore deposited along with the Section 12A proposal was taken as deposit and not EMD with the pre-conditions of the CoC/Stakeholders. This amount was merely a deposit in order to establish the credential by the Promoter/Director of the suspended board and his sincerity towards the completion of long pending project, which have been deposited by him on the specific demand of the CoC/stakeholders. Therefore, this deposit amount of rupees five crore can never be termed either EMD or borrowing. There is no violation in utilising that deposit in the completion of the pending project. Further, the financial creditors in a class (homebuyers) in the eighteenth CoC meeting which was held on 15.02.2022 requested the RP regarding forfeiture of rupees five crore, the same was minutised at the page no. 26 of 18<sup>th</sup> CoC meeting as follows -:

*"Some of the observers, Financial Creditors in a Class (homebuyers) informed that the EMD amount of rupees five crore deposited by the Promotor/Director of the suspended board should be forfeited by the RP and no need to return the same. RP clarified that any decision on the same would be taken as per the terms of the documents/proposal submitted by the Promotor/Director of the suspended board"*

- 2.2.7 Mr. Devendra Singh has further submitted that the 18<sup>th</sup> CoC meeting was also attended by the Promotor/Director of the suspended board wherein the Stakeholders / CoC mentioned about the forfeiture of rupees five crore and there was no objection raised by the Promotor/Director of the suspended board as well as afterwards also till date.
- 2.2.8 Further, it was submitted that the Promotor/Director of the suspended board, who deposited this amount of rupees five crore never demanded the return of rupees five crore till date. Also, in the Section 12A proposal dated 26.12.2022 (third Time Section 12A proposal), it was clearly mentioned that Rs. 100 Crore would be infused in a period of 9 months from the date of approval of withdrawal proposal by the NCLT and Rs. 5 Crore deposited along with the second time submission of Section12A Proposal be treated as "amount already deposited".
- 2.2.9 Mr. Devendra Singh also submitted that Section 12A proposal and Settlement Proposal Cum Agreement dated 26.12.2022 along with other documents / annexures (was also circulated /

shared with all the CoC members on 26.12.2022 itself) was placed in the 27<sup>th</sup> meeting of the CoC and the same was discussed in detail by the CoC, which clearly substantiate the fact from the record of Section 12A proposal and Settlement Proposal Cum Agreement dated 26.12.2022 and establishes the evidence of concurrence of the CoC about the treatment of rupees five crores which he deposited along with the 12A proposal (second Section 12A proposal). Further, to note that from the date of deposit of this rupee five crores to till date, no Stakeholders/CoC member raised any objection ever either on non-returning of this amount or its utilization including the Promotor/Director of the suspended board.

2.2.10 Further in order to provide the more clarity on the instant issue of rupees five crores, Mr. Devendra Singh referred to page no. 4, 30, 32 & 42 of withdrawal proposal dated 26.12.2022 and page no 11 of settlement proposal cum agreement dated 26.12.2022 (Section 12A proposal) which was approved by the AA vide its order dated 24.05.2023 and page no. 7 and first paragraph second line from bottom of page no. 46 of minutes of 27<sup>th</sup> CoC meeting held on 10.01.2023 which clearly clarified about the matter of Rs. 5 Crore. The relevant portion (Page No. 4 & 5 of 12 A proposal dated 26.12.2022) of the above document are produced hereunder:

**“Investment/Infusion of the required funds by the Proposer for the completion of the projects.**

The proposer proposes to infuse Rs. 100 Crores in the Corporate Debtor towards construction and financial settlement, out of which Rs. 25 Crores will be infused within 12 days from the date of approval of Withdrawal plan by CoC and balance of Rs.75 Crores within a period of 9 months from the date of approval of withdrawal proposal by NCLT which will be utilized for completing the pending construction of the projects and to pay off the liabilities of the banks and other creditors The proposer to show his *bonafide* intention hereby undertakes that he shall deposit INR 15 Crores the before the voting on the Withdrawal Proposal by the CoC and another INR 5 Crores within 12 days from the approval of the Withdrawal Proposal by the CoC, thereby infusing an aggregate amount of INR 25 Crores (including the EMD amount paid earlier of INR 5 Crores at the time of submission of Expression of Interest) even before the approval by the NCLT. The aforesaid two tranches of additional fund infusion of INR 20 crores within 12 days from the date of CoC approval, shall be deposited into the designated escrow account with the condition that the funds shall be utilized only for the purposes as per the terms of the withdrawal proposal. The proposer envisages the resumption of construction work immediately after the CoC approval, As per the terms of the Escrow account, if the voting by CoC is not in the favour of the Proposer, INR 15 Crores deposited in the Escrow account shall be returned to the Proposer within 3 days from the date of rejection of withdrawal proposal by the CoC and further the EMD of INR 5 Crores will be returned to the proposer in the manner as per the terms of the RFRP document. After receiving CoC approval, in case the proposer defaults on any the commitments made in this proposal the

CoC has the right to first seek correction of default, if not the CoC has the right to forfeit INR 25 Crores infused before NCLT approval. However, in the event after receiving the CoC approval, the withdrawal proposal is rejected by the NCLT, the additional fund infusion of INR 20 crores by the proposer, as aforesaid shall be treated as interim finance to the Corporate debtor in the CIRP Process, forming part of CIRP cast and shall be payable in priority over settlement of any other creditors **and further of EMD of INR 5 Crores will be returned to the proposer in the manner as per the terms of the RFRP documents"**

2.2.11 Mr. Devendra Singh has also drawn attention towards treatment of EMD which is in the RFRP issued on 17.03.2022 in pursuance to publication of Form-G on 23.02.2022. The last paragraph at page no. 30 which is reproduced hereunder:-

"It is clarified that any retention of the Earnest Money Deposit by the Interim Resolution Professional/Resolution Professional, or any Person acting on behalf of the Interim Resolution Professional/Resolution Professional, shall not limit any rights or remedies that the Interim Resolution Professional/Resolution Professional may have under Applicable Law or otherwise against any Resolution Applicant, or Successful Resolution Applicant, as the case may be."

**(Extract of Minutes of Page No. 46)**

"The proposer has confirmed in their withdrawal proposal that he would bring in Rs. 20 Crore before the 12A proposal is put to vote before the CoC and Rs. 5 Crore within 12 days from the CoC approval. **Rs. 5 Crore already deposited by the proposer**, therefore in order to put the Resolution Under Section 12A before the CoC for voting, the proposer has to deposit Rs. 15 Crore."

**(Extract of Minutes of Page No. 54)**

"The RP also categorically stated that any Monitoring Committee which is either being proposed by the Proposer or Resolution Applicant, kindly do not consider the name of the RP for any role in the Monitoring Committee. The undersigned clarified that he is not available for any Monitoring Committee".

2.2.12 Mr. Devendra Singh has further submitted that in the 12A proposal dated 26.12.2022 (third time Section 12A proposal), it was clearly mentioned that rupees hundred crore would be infused in a period of 9 months from the date of approval of withdrawal proposal by the NCLT and rupees five crore deposited along with the second time submission of 12A proposal to be treated as "amount already deposited" and the AA approved the same vide its order dated 24.05.2023. The Director/Promoter of the director of the suspended board, who deposited this amount of rupees five crore, have never demanded for the return of rupees crore. Further, it was submitted that no prejudice is caused to any stakeholder/CoC rather it contributed for the

completion of the long pending apartments in NCR Green project situated at Sector-95, Gurugram.

### **Analysis and Findings**

2.2.13 Mr. Devendra Singh during the hearing had submitted that Rs.5 Crore submitted by the promoter along with the second withdrawal proposal was in the nature of deposit and was not liable to be returned. The DC observed that the Rs.5 Crore was referred as EMD throughout his proposal. Accordingly, the DC had sought evidence from Mr. Devendra Singh how the same was not in the nature of deposit.

2.2.14 Mr. Devendra Singh submitted his reply dated 19.03.2024, giving explanation to the same along with the documents relied upon by him to substantiate his stand and concluded as follows: -

*“It is evident and substantiated from the above additional clarification provided from the documents available on record and annexed hereinabove that the amount of Rs. 5 Crore which was deposited alongwith 12A proposal (Second 12A) was merely the bona-fide amount just to establish the intention and seriousness of the Proposer. Afterwards, the RFRP dated 17.03.2022 issued in pursuance to publication of Form-G on 23.02.2022, in the said RFRP the provision of EMD/PBG for the 12A withdrawal Proposal / Resolution Plan by the erstwhile Director/Promoter of CD was incorporated. **Accordingly, in the subsequent 12A withdrawal Proposal (Third 12A), amount already deposited of Rs. 5 Crore was treated as EMD as per the documents approved by the CoC (RFRP dated 17.03.2022).** Till the time of submission of 12A withdrawal Proposal (Third 12A), the same was not EMD as per the documents submitted by the proposer (Second 12A).”*

2.2.15 The DC notes that the RFRP document (first RFRP Document) was approved by the CoC in its 2<sup>nd</sup> CoC Meeting held on 07.06.2021, wherein no provision of EMD/ PBG was incorporated for the submission of either Section 12A proposal or the Resolution Plan.

2.2.16 The DC also notes that Mr. Sidharth Chauhan, the promoter and director of the suspended board had submitted his second Section 12A proposal dated 05.01.2022 (‘second Section 12A proposal’) wherein in Chapter 12 (Feasibility and Viability of the Plan) of the second Section 12A proposal, it was proposed that he will infuse fund of Rs.75 crore in the project in the pre-determined manner. It was further mentioned that an amount of Rs. 1 crore had already been deposited and further amount of Rs. 4 crores will be deposited before the voting. Also, an EMD of Rs. 5 crores in form of Bank Guarantee shall be provided in favour of the CD after approval of the proposal by the CoC, but before filling of the application before the NCLT. The second

Section 12A proposal was rejected by the CoC with 100% voting in the 18<sup>th</sup> CoC meeting dated 15.02.2022.

2.2.17 The DC notes the submission of Mr. Devendra Singh that the amount of Rs. 5 Crore, which was deposited along with the second Section 12A proposal dated 05.02.2022 was merely the bonafide amount just to establish the intention and seriousness of the promoter/director of the suspended board and is not the EMD, since the second Section 12A proposal dated 05.02.2022 clearly provides that the EMD of Rs. 5 Crores will be given after the proposal is approved by the CoC, which was not approved in the present case.

2.2.18 The DC observes that consequently, the CoC in its 19<sup>th</sup> CoC Meeting held on 16.03.2022 had approved the RFRP document which was issued on 17.03.2022, wherein the provision for submission of EMD/ PBG either for a Section 12A proposal or Resolution Plan submitted by the suspended directors or PRA's was incorporated. The relevant extract of page 29 of the RFRP dated 17.03.2022 is reproduced herein: -

“The Erstwhile Director of the Corporate Debtor file/submit proposal under Section 12A or Resolution Plan, if any, shall provide/ deposit an amount of Rs.5,00,00,000/- (Rupees Five Crore Only) alongwith Proposal under Section 12A as an Earnest Money Deposit (EMD), in the form of either Bank Guarantee (BG) with any Scheduled Commercial Bank or deposit in the bank account as detail below”

2.2.19 Further, the relevant clause for the return of Earnest Money Deposit in the RFRP document which was issued on 17.03.2022 is extracted as follows:-

*“The Earnest Money Deposit of the **Resolution Applicant** who has not been selected as the Successful Resolution Applicant, shall be returned without interest within 90 days of the date of declaration of the Successful Resolution Applicant or within 7 days of the date on which certified true copy of the liquidation order passed by the Hon’ble Adjudicating Authority is received by the Interim Resolution Professional/Resolution Professional, whichever is earlier. It is clarified that any retention of the Earnest Money Deposit by the Interim Resolution Professional/Resolution Professional, or any Person acting on behalf of the Interim Resolution Professional/Resolution Professional, shall not limit any rights or remedies that the Interim Resolution Professional/Resolution Professional may have under Applicable Law or otherwise, against any Resolution Applicant, or Successful Resolution Applicant, as the case may be.”*

2.2.20 The DC further notes that the suspended director had submitted the third Section 12 A proposal dated 06.12.2022 (‘third Section 12A proposal’) wherein it is clearly mentioned that the EMD of Rs. 5 crore submitted earlier for second Section 12A proposal dated 05.01.2022 shall be



considered for the purpose of this settlement plan. The relevant extract of the third settlement plan is extracted in paragraph 2.2.10 of this order. The DC also notes that the third Section 12A proposal dated 06.12.2022 was approved by the NCLT vide its order dated 24.05.2023.

2.2.21 Considering the facts, the DC observes that second Section 12A proposal was submitted in the month of January 2022 whereas third Section 12A proposal was submitted in the month of December 2022, which is a gap of almost a year. The DC *vide* email dated 15.07.2024 had raised following queries to Mr. Devendra Singh :-

- a) Whether any CoC approval is taken for retaining the said amount of Rs.5 crore as submitted by Suspended director with their second 12A proposal?
- b) Whether the CoC was informed that the suspended director had requested to consider the amount of Rs.5 crore as submitted with second Section 12 A proposal as EMD to the third Section 12 A proposal ?
- c) Whether approval of the CoC was taken for using the said amount towards completion of the pending projects of the CD?
- d) Details of EMD as submitted by Mr. Sidharth Chauhan, suspended directors while submitting his resolution plan pursuant to the Form G dated 23.02.2022.

2.2.22 Mr. Devendra Singh submitted his reply dated 20.07.2024 to the DC queries and the same are summarized as follows: -

- a) The amount of Rs. 5 crores deposited along with the second Section 12 A proposal was to establish the bonafide intention and the entire set of documents of second Section 12A proposal was silent about the event of rejection of Section 12A withdrawal proposal and the treatment of already deposited amount of Rs. 5 crores in case of rejection of the CoC.
- b) The third Section 12 A proposal was submitted by the erstwhile Director/Promoter of CD on 06.12.2022, which was circulated to the members of CoC. Hence all the members of the CoC were duly informed and well aware of the facts. Furthermore, it is pertinent to mention here that the amount of Rs. 5 Crores submitted by the erstwhile Director/promoter of the Corporate Debtor along with their second Section 12A withdrawal proposal was only considered as EMD amount in reference to the Resolution Plan submitted by him. Whereas it clearly specifies in the third Section 12A

withdrawal proposal that "to show his bonafide intention he hereby undertakes that Rs. 25 Crores will be deposited (including EMD of 5 Crores submitted at along with EOI)".

- c) The members of the CoC were duly apprised regarding the utilization of the concerned amount of Rs. 5 Crore, which were utilised for the completion of the pending project, the cash flow statement alongwith the expense incurred by the RP were placed before the CoC in its 22<sup>nd</sup> (Page No. 39) & 27<sup>th</sup> (Page No. 41) the CoC meeting, wherein in the cash flow statement it is clearly stated "Received From Mr. Sidharth Chauhan" and its utilisation thereof. It is mentioned, that neither the Authorized representative of Financial Creditors nor banks who are the members of CoC raised any concern/debate/query/objection on the utilization of Rs. 5 Crores submitted by the erstwhile Director/Promoter of Corporate Debtor along with his 2<sup>nd</sup> 12 A withdrawal proposal, to establish his bonafide intention for completion of pending projects of the Corporate Debtor.
- d) Mr. Sidharth Chauhan submitted his Resolution Plan on 20.04.2022, wherein he stated that "The EMD amount have already deposited the Earnest Money Deposit (EMD) of Rs. 5,00,00,000/- (Rupees Five Crores Only), while considering my revival plan filed U/S 12 A (second proposal)".

2.2.23 From the submission of Mr. Devendra Singh, the DC observes a clear contrast between his responses dated 19.03.2024 and 20.07.2024. In his reply dated 19.03.2024, Mr. Devendra Singh categorically stated that, *"in the subsequent 12A withdrawal proposal (Third 12A), the amount already deposited of Rs. 5 Crore was treated as EMD as per the documents approved by the CoC (sRFRP dated 17.03.2022)."* However, in his reply dated 20.07.2024, Mr. Singh asserted that, *"the amount of Rs. 5 Crore submitted by the erstwhile Director/promoter of the Corporate Debtor along with their Second 12A Withdrawal Proposal was only considered as EMD amount in reference to the Resolution Plan submitted by him. It is clearly specified in the third 12A withdrawal proposal that "to show his bona fide intention, he hereby undertakes that Rs. 25 Crore will be deposited (including EMD of Rs. 5 Crore submitted along with EOI)."*

2.2.24 The above contrasting statements of Mr. Devendra Singh clearly reflect repeated inconsistency in the submissions of Mr. Devendra Singh. Additionally, it appears that Mr. Devendra Singh himself is unclear about the utilization of the Rs. 5 Crore deposit submitted with the second Section 12A proposal. It is further pertinent to note that the defence of Mr. Devendra Singh,

claiming that neither the homebuyers nor the financial creditors had objected to the utilization of the Rs. 5 Crore deposit towards the CIRP expenses or for considering the said deposit of Rs. 5 crores subsequently as EMD, will not be justify in defending his careless and negligent approach towards utilization the said amount of Rs. 5 crores without necessary approval.

2.2.25 The DC notes that Mr. Devendra Singh did not seek approval from the CoC for considering the deposit of Rs. 5 crores received with the second Section 12A proposal dated 05.02.2022 as the Earnest Money Deposit for the Resolution Plan submitted by the ex-management or for considering the same in third Section 12A proposal dated 06.12.2022.

2.2.26 The DC also notes the submission of Mr. Devendra Singh that the entire amount of Rs. 5 crore was utilized in completion of the Corporate Debtor's pending unit in NCR Green project situated at Sector-95, Gurugram. However, Mr. Devendra Singh had failed to place on record any specific resolution evidencing the approval of the CoC authorising Mr. Devendra Singh to utilize the same towards the CIRP expenses.

2.2.27 The DC observes that the deposit of Rs. 5 crores submitted by the Suspended Directors with the second Section 12A withdrawal proposal was unilaterally used as EMD for the Resolution Plan submitted by the ex-management or towards the third Section 12A withdrawal proposal, based solely on the instructions of the ex-management, without the approval of the CoC. Furthermore, Mr. Devendra Singh has conveniently claimed that the said amount was used towards the CIRP cost of the Corporate Debtor. However, it is important to note that no CoC approval was obtained for utilizing the Rs. 5 crore deposit towards CIRP expenses. These acts demonstrate the carelessness and lack of seriousness on Mr. Devendra Singh's part towards compliance with the provisions of the Code, and the Regulations made thereunder. Mr. Devendra Singh's act of taking these decisions about treatment of deposit and its utilisation on his own without taking CoC in confidence is inappropriate and is in violation of the Code of Conduct.

2.2.28 In light of the above, the DC finds Mr. Devendra Singh has failed to take reasonable care and diligence while performing his duties. Accordingly, Mr. Devendra Singh has contravened Section 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and (h) of the IP Regulations read with Clause 3, 5 and 14 of the Code of Conduct specified thereunder.

### **3. ORDER**

- 3.1. In view of the foregoing, the DC in exercise of the powers conferred under Section 220 of the Code read with Regulation 13 of the Inspection and Investigation Regulations and Regulation 11 of the IP Regulations hereby suspends the registration of Mr. Devendra Singh (Registration No. IBBI/IPA-002/IP-N00001/2016-17/10001) for a period of one year.
- 3.2. This Order shall come into force after expiry of 30 days from the date of its issuance.
- 3.3. A copy of this order shall be forwarded to the Insolvency Professional Agency of Institute of Company Secretaries of India where Mr. Devendra Singh is enrolled as a member.
- 3.4. A copy of this order shall be sent to the CoC/ Stakeholders Consultation Committee (SCC) of all the Corporate Debtors in which Mr. Devendra Singh is providing his services, if any, and the respective CoC/SCC, as the case may be, shall decide about continuation of existing assignment of Mr. Devendra Singh.
- 3.5. 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.
- 3.6. Accordingly, the show cause notice is disposed of.

Sd/-  
(Sandip Garg)  
Whole Time Member  
Insolvency and Bankruptcy Board of India

Sd/-  
(Jayanti Prasad)  
Whole Time Member  
Insolvency and Bankruptcy Board of India

Dated: 02 August, 2024  
Place: New Delhi