

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/232/2024

30 July, 2024

ORDER

This Order disposes of the Show Cause Notice (SCN) No. COMP-11011/43/2023-IBBI/848/142 dated 02.04.2024, issued to Mr. Rakesh Kumar Gupta, who is a Professional Member of the Insolvency Professional Agency of Institute of Chartered Accountants of India and an Insolvency Professional registered with the Insolvency and Bankruptcy Board of India (IBBI/Board) with Registration No. IBBI/IPA-001/IP-P00833/2017-2018/11418.

1. Background

- 1.1. The Hon'ble National Company Law Tribunal, New Delhi Bench (AA) vide its Order dated 17.12.2019, admitted the application filed by operational creditor viz. M/s. Jakson Limited (OC) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) for initiating corporate insolvency resolution process (CIRP) of M/s. Three C Universal Developers Private Limited (Corporate Debtor /CD). Mr. Rakesh Kumar Gupta was appointed as Interim Resolution Professional (IRP) vide the above said order and was later confirmed as the Resolution Professional (RP).
- 1.2. The IBBI in exercise of its powers under Section 218 of the 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.
- 1.3. Accordingly, a notice under Regulation 8(1) of the Investigation Regulation was issued to Mr. Rakesh Kumar Gupta on 01.01.2024 with a request to provide a reply along with relevant documents. Mr. Rakesh Kumar Gupta submitted his reply to the investigation notice vide emails dated 20.01.2024 and 25.01.2024.
- 1.4. 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. Rakesh Kumar Gupta 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 served the SCN along with IA Report to Mr. Rakesh Kumar Gupta on 02.04.2024. The reply of Mr. Rakesh Kumar Gupta on the SCN was received by the Board on 16.04.2024.

- 1.5. The SCN and response of Mr. Rakesh Kumar Gupta to the SCN were referred to this Disciplinary Committee (DC) for disposal of the SCN. Mr. Rakesh Kumar Gupta availed an opportunity of personal hearing before the DC through virtual mode on 14.06.2024 where he along with his advocate Mr. G.P. Madaan were presented. Mr. Rakesh Kumar Gupta submitted additional written submissions also on 29.06.2024.

2. Issue of maintainability of Disciplinary Committee proceedings

- 2.1 Mr. Rakesh Kumar Gupta in his reply to the SCN has raised certain preliminary objections related to the maintainability of the SCN issued to him as follows:

- a) the complainant fails to meet the criteria of "aggrieved" or "stakeholder" as defined in Regulations 2(1)(a) and 2(1)(i) of the IBBI (Grievance and Complaint Handling Procedure) Regulations, 2017 as the complainant is an LLP incorporated after the approval of Resolution Plan;
- b) the complaint was not filed in the prescribed form and manner;
- c) the complaint was time barred as it was filed after 10 months of the approval of the resolution plan;
- d) the Investigation Report, as annexed with the SCN, is devoid of fundamental authenticating elements as it lacks date of issue of Report and signatures of the IA and any official stamp of the IA; and
- e) the Investigation Report, in consequence of which the instant SCN dated 02.04.2024 has been issued, was never provided to him at any stage prior to the issuance of the SCN.

- 2.2 The DC has examined the grounds raised by Mr. Rakesh Kumar Gupta on the issue of non-maintainability of the SCN as follows:

- a) Section 217 of the Code empowers any person who is aggrieved by the functioning of the Insolvency Professional to file a complaint with the Board. As against the averment made by Mr. Rakesh Kumar Gupta, the term stakeholder cannot be strictly construed. Regulation 2(j) of the Insolvency and Bankruptcy

Board of India (Grievance and Complaint Handling Procedure) Regulations, 2017 entitles any person having interest in the insolvency transaction under the Code as a 'stakeholder'. Further, in terms of section 218 of the Code read with Inspection and Investigation Regulations, the Board is empowered to take into account any material made available to it, regarding any alleged misconduct by the service provider. It should be noted that the Board constituted under section 188 of the Insolvency and Bankruptcy Code, 2016 is entrusted with the duty to ensure effective implementation of the provisions and objectives of the Code. Section 196 of the Code bestows various powers and functions on the Board, including that of suspension or cancellation of registration granted to service providers, regulation of working of service providers, carry out inspection and investigation on service providers and pass such orders as may be required for compliance of provisions of the Code and regulations, monitoring of performance of service providers, etc. The conduct of an Insolvency Professional in a CIRP has wide implications and affects the rights and interests of all the stakeholders. Therefore, to effectively discharge its statutorily mandated duties and functions, under the Code, the Board can very well examine the conduct of the IP whenever any information about the conduct related issue is received by the Board by any person.

- b) Chapter-III of Inspection and Investigation Regulations provides the procedure for conduct of investigation and Regulation 10 of the said Regulation provides that IA shall submit the investigation report to the Board. Further, on consideration of the investigation report of the investigating authority, if any prima facie view is formed that there is contravention on the part of IP, then the SCN is issued by the Board which contains the copy of the investigation report and time is granted to IP to provide his explanation on the allegations mentioned in the investigation report before the order is passed by Disciplinary Committee.
- c) The investigation report was provided to Mr. Rakesh Kumar Gupta as an annexure to the SCN and the said SCN was duly signed and dated. Therefore, the investigation report formed part of that SCN and accordingly raising questions on the genuineness of the same does not hold good. There is no prejudice caused to Mr. Rakesh Kumar Gupta through such unsigned investigation report.

2.3 Accordingly, the DC finds no infirmity in the issuance of SCN by the Board subsequent to the investigation conducted on grounds of sufficient material found on the basis of investigation report. The DC will now in following paragraphs, examine the allegations made in the SCN.

3. Alleged Contraventions, Submissions of Mr. Rakesh Kumar Gupta and Findings of DC

The contravention alleged in the SCN, submissions by Mr. Rakesh Kumar Gupta in his reply and written submissions and findings of the DC are summarized as follows:

3.1 Contravention I: Malafide constitution of CoC

3.1.1. It was observed that Mr. Rakesh Kumar Gupta had issued the public announcement for inviting claims from creditors on 19.12.2019. The claim of a certain OC was received by Mr. Rakesh Kumar Gupta on 31.12.2019. At this point of time, Axis Bank being the financial creditor (FC) in respect of the CD had not filed its claim. In the absence of any claim filed by the FC, Mr. Rakesh Kumar Gupta went ahead to form CoC consisting of the sole OC applicant and in the very first meeting of CoC held on 14.01.2020, the following major decisions were taken:

- a) Appointment of IRP as RP
- b) Ratification of cost of IRP
- c) Fixing the expenses to be incurred by the RP

3.1.2. It was further observed that in the second meeting of the CoC held on 17.03.2020, the following decisions were taken:

- a) Ratification of expenses incurred by RP
- b) Appointment of registered Valuers.
- c) Ratification and approval of fee and other expenses of professionals engaged by RP.
- d) Issuance of invitation of EoI

3.1.3. In other CoC meetings also, several major decisions were taken by the sole OC member.

3.1.4. It is noted in the SCN that section 18 of the Code obligates the IRP to collect all information relating to assets, finances, and operations of the CD for determining the financial position of the CD including its liabilities. Instead of verifying and collating the

liability of the CD towards Axis Bank, who is sole FC in this case, Mr. Rakesh Kumar Gupta chose to form the CoC consisting of sole OC in the matter.

- 3.1.5. It is further noted in the SCN that considering the fact that FC plays a pivotal and crucial role in insolvency resolution even in cases where CIRP has been initiated on an application filed by the OC, the reasonable prudence demands from an IP to exercise due diligence and care to find out creditors as per available records of the CD and from other records as mandated under Section 18 of the Code. Furthermore, when only one OC files its claim and the CoC gets constituted with it being its sole member, it raises strong suspicion that Mr. Rakesh Kumar Gupta deliberately did not verify the existence of other creditors from the material mentioned in Sections 17(2)(c) and (d) of the Code read with Regulation 4 of the CIRP Regulations.
- 3.1.6. It was also observed that the Axis Bank, being a secured FC, had submitted its claim on 05.08.2020 only (as per List of Creditors dated 09.12.2020 available on IBBI's website). It was not clear whether Mr. Rakesh Kumar Gupta had taken any action to intimate the Axis Bank about the initiation of CIRP and the need for consequent filing of claim by it. Mr. Rakesh Kumar Gupta was duty bound to verify / examine the books of accounts of the CD and consider the debts of Axis Bank, before the constitution of CoC, in the given circumstances of Axis Bank being the sole FC. It is alleged in the SCN that the chain of facts and circumstances as observed in the Investigation Report indicates that Mr. Rakesh Kumar Gupta was negligent in taking stock of financial debts of the CD and deliberately continued with CoC consisting of a sole OC. By such acts and omissions, Mr. Rakesh Kumar Gupta has not only acted negligently in performing functions under the Code but also with mala fide design.
- 3.1.7. In view of the above, the Board was of the *prima facie* view that Mr. Rakesh Kumar Gupta has contravened Sections 208(2)(a) and (e) of the Code, Regulations 7(2)(a) and (h) of IP Regulations read with Clause 14 of the Code of Conduct for Insolvency Professionals (IP) specified in First Schedule of IP Regulations.

Submissions by Mr. Rakesh Kumar Gupta

- 3.1.8. Mr. Rakesh Kumar Gupta has submitted that he had made public announcement on 19.12.2019 in Financial Express (English) New Delhi Edition and Jansatta (Hindi) New Delhi Edition where the last date for submission of proof of claim was specified as

31.12.2019. Further, the outer limit of 90 days for submission of claims, as per Regulation 12(2) of CIRP Regulations, also came to an end on 16.03.2020.

3.1.9. Mr. Rakesh Kumar Gupta further submitted that till the last day of submission of the claim as per public announcement, only one claim from an operational creditor i.e., Jakson Limited was submitted and the same was collated as per the provisions of the Code and the underlying Regulations. The CoC was constituted on 06.01.2020 and report of the CoC constitution was filed before the Hon'ble Adjudicating Authority, which was taken on record by the AA vide order dated 09.01.2020.

3.1.10. Mr. Rakesh Kumar Gupta further submitted that the following agenda items were put before CoC in I, II, III and IV meetings i.e. prior to the reconstitution of CoC in August 2020:

- (i) Appointment of IRP as RP
- (ii) Appointment of Registered Valuer and Forensic Auditor
- (iii) Issuance of EOI for Prospective Resolution Applicant
- (iv) Appointment of Consultant/ Process Adviser
- (v) Authorization to file an application to Adjudicating Authority for extension of CIRP period by 90 days

3.1.11. Mr. Rakesh Kumar Gupta further submitted that the CoC was reconstituted as per Regulation 12(3) of the Code within the timelines provided in the CIRP Regulation and the agenda papers of aforesaid four meetings of the CoC including the decision thereon were shared with the FC after reconstitution of COC. The FC after inclusion in CoC did not suggest any modification in the decisions taken by the CoC prior to its reconstitution.

3.1.12. Mr. Rakesh Kumar Gupta further submitted that a letter dated 24.12.2019 was sent by hand to Axis Bank intimating the initiation of CIRP of CD which was duly acknowledged by the Axis Bank on 09.01.2020. However, the FC did not submit its claim and intended to put on auction the mortgaged assets (being 81,000 sq. yd. of land) of guarantor M/s. RMC Techno Build Pvt. Ltd., and the auction was scheduled in January 2020.

3.1.13. Mr. Rakesh Kumar Gupta submitted that the Axis Bank submitted its claim on 05.08.2020 and on verification of the claim, an email dated 10.08.2020 was sent seeking clarification regarding the status of the auction proceedings of mortgaged property for loan given by it to the CD. Pursuant to the above, Axis Bank through an email dated

10.08.2020 informed that the auction had failed. Accordingly, the claim of the Axis Bank was accepted on 10.08.2020 and thereafter as per Regulation 12(3) of the CIRP Regulation 2016, the CoC was reconstituted comprising FC and the OC Jakson Ltd was in the CoC having more than 10% of the CoC value, without voting right.

3.1.14. Mr. Rakesh Kumar Gupta submitted that the issue relating to the constitution of CoC has already been dealt by the Board in Complaint No.14302/2020/CRU-IBBI filed by M/s. Moonlight Propbuild Private Limited, on 09.09.2020 and the Board had disposed of the above stated complaint on 27.11.2020. The review application against the disposal of complaint was also disposed by the Board on 05.07.2021 not finding anything substantial in complaint.

3.1.15. Mr. Rakesh Kumar Gupta submitted that Regulation 6A of the CIRP Regulations requires to intimate all the creditors of the CD, as per the last available books of account of CD, however, the said Regulation came into force from 16.09.2022 whereas the CIRP of the CD was initiated on 17.12.2019 and the resolution plan was duly approved by the CoC on 16.01.2021, therefore, Regulation 6A was not applicable.

Analysis and Findings

3.1.16. The Code is based on the creditor in control regime where processes under the Code is carried out in supervision of the committee of creditors under the overall provisions of the Code. The CoC approves and guides all actions of the resolution professional during the insolvency resolution process. The Code envisages, as a default condition, such CoC should be comprised of Financial Creditors. The Banking Law Reforms Committee, 2016 in para 5.3.1 of its report has observed as follows:

“The Committee reasoned that members of the creditors committee must be creditors who are able to evaluate viability and who are willing to negotiate changes to the terms of current liabilities. Ordinarily, operational creditors are neither able nor willing to make decisions on the entity’s insolvency or to incur the risk of delaying payments in exchange for the entity’s future prospects. The Committee concluded that the Code would stipulate that the creditors committee should be limited to only the financial creditors in order for the process to be quick and effective.”

3.1.17. The importance of financial creditors in the Committee of Creditors is also highlighted by Hon’ble Supreme Court in the matter of *Swiss Ribbons Pvt. Ltd. & Anr. V UoI (WRIT*

PETITION (CIVIL) NO. 99 OF 2018). Some of the excerpts is as follows:

“43. Under the Code, the committee of creditors is entrusted with the primary responsibility of financial restructuring. They are required to assess the viability of a corporate debtor by taking into account all available information as well as to evaluate all alternative investment opportunities that are available. The committee of creditors is required to evaluate the resolution plan on the basis of feasibility and viability...

44. Since the financial creditors are in the business of money lending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear”

- 3.1.18. The DC also notes that Regulation 16 of the CIRP Regulations envisages situation of such cases where there is no financial debt or all the financial creditors are related parties to the CD. Only in such situation the committee of Operational Creditors can be formed. The said regulation is as follows:

“16. Committee with only operational creditors.

*(1) Where the **corporate debtor has no financial debt** or where all financial creditors are related parties of the corporate debtor, the committee shall be set up in accordance with this Regulation.*

- 3.1.19. Therefore, in cases where financial debt of a corporate debtor exists, the Resolution Professional is bound with the duty to identify the financial creditors and take all necessary measures to constitute the CoC. The DC notes that in the instant matter, as submitted by Mr. Rakesh Kumar Gupta, a letter dated 24.12.2019 was sent to Axis Bank communicating the commencement of CIRP of the CD and inviting claims. However, no

further effort of Mr. Rakesh Kumar Gupta is observed in getting the sole financial creditor – Axis bank in the CoC. Rather, Mr. Rakesh Kumar Gupta conveniently constituted the CoC with the sole OC even when there was a financial debt of the CD existing and therefore regulation 16 of the CIRP regulations do not come into force. Further, all major decisions pertaining to CIRP of the CD, as mentioned in the SCN and also by Mr. Rakesh Kumar Gupta himself, was taken with a sole operational creditor.

3.1.20. On perusal of the materials made available on record, this DC does not find sufficient due-diligence and efforts being taken by Mr. Rakesh Kumar Gupta to constitute the CoC in accordance with the Code and regulations framed thereunder. Mr. Rakesh Kumar Gupta while submitting the report certifying constitution of CoC with the AA was required to apprise the AA about existence of a Financial Creditor and reasons for why he still wants to go ahead with his recommendation to form the CoC with single OC. Any way to avoid any confusion he had in mind, he was at liberty to sought the directions of AA in this regard. Therefore, the DC finds Mr. Rakesh Kumar Gupta in contravention of sections 208(2)(a) and (e) of the Code, Regulations 7(2)(a) and (h) of IP Regulations read with Clause 14 of the Code of Conduct for Insolvency Professionals (IP) specified in First Schedule of IP Regulations

3.2 Contravention II: Failure to re-constitute CoC.

3.2.1 Regulation 16(1) and (2) of the CIRP Regulations states that:

“(1) Where the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the committee shall be set up in accordance with this Regulation.

(2) The committee formed under this Regulation shall consist of members as under- (a) eighteen largest operational creditors by value:

Provided that if the number of operational creditors is less than eighteen, the committee shall include all such operational creditors;

3.2.2 It was observed that 15 fresh claims were received from other operational creditors (apart from that of Jakson Limited) till 16.03.2020. Mr. Rakesh Kumar Gupta was duty bound to verify these claims and reconstitute the CoC as per Regulation 16 of the CIRP Regulations. However, Mr. Rakesh Kumar Gupta had conducted the 2nd CoC meeting on 17.03.2020 with the sole OC, Jakson Ltd., as member.

3.2.3 The SCN alleges that this fact further corroborates that Mr. Rakesh Kumar Gupta

constituted the CoC with the sole OC applicant with mala fide design.

- 3.2.4 In view of the above, the Board was of the prima facie view that Mr. Rakesh Kumar Gupta has contravened Regulation 16(1) and (2) of the CIRP Regulations and Clause 14 of the Code of Conduct for IP specified in First Schedule of the IP Regulations.

Submissions by Mr. Rakesh Kumar Gupta

- 3.2.5 Mr. Rakesh Kumar Gupta submitted that Regulation 16 of CIRP Regulations deals with the situation where there is no FC and the CoC consists of only OC. There is no provision for reconstitution of CoC in case of receipt of further claims from OC, after the CoC is constituted. However, Regulation 12 (3) of the CIRP Regulation deals with situation and mandates for reconstitution of CoC in case any claim is received from a creditor who is a FC.
- 3.2.6 Mr. Rakesh Kumar Gupta further submitted that without prejudice and without admitting, even if, had the CoC been reconstituted after admitting every claim of the OC, even then the Jakson Ltd would have had more than 81% voting share in the COC, so reconstituted at every stage, would not have affected the outcome of the resolutions passed in the CoC comprising of only Jakson Ltd. Mr. Rakesh Kumar Gupta also submitted that there was no default on his part and there was no mala fide intention in constitution of COC.

Analysis and Findings

- 3.2.7 Regulation 16 of the CIRP Regulations provides as under:

“16. Committee with only operational creditors.

(1) Where the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the committee shall be set up in accordance with this Regulation.

(2) The committee formed under this Regulation shall consist of members as under –

(a) eighteen largest operational creditors by value:

Provided that if the number of operational creditors is less than eighteen, the committee shall include all such operational creditors;

(b) one representative elected by all workmen other than those workmen included under sub-clause (a); and

(c) one representative elected by all employees other than those employees included under sub-clause (a).

(3) A member of the committee formed under this Regulation shall have voting rights in proportion of the debt due to such creditor or debt represented by such representative, as the case may be, to the total debt.

Explanation – For the purposes of this sub-regulation, ‘total debt’ is the sum of- (a) the amount of debt due to the creditors listed in sub-regulation 2(a);

(b) the amount of the aggregate debt due to workmen under sub-regulation 2(b); and

(c) the amount of the aggregate debt due to employees under sub-regulation 2(c).

(4) A committee formed under this Regulation and its members shall have the same rights, powers, duties and obligations as a committee comprising financial creditors and its members, as the case may be.”

3.2.8 The DC notes that Regulation 16 of the CIRP Regulations makes it abundantly clear that the committee of creditors, in absence of any financial creditor, should include eighteen largest operational creditors by value and in any case if the number of operational creditors are less than eighteen, then all the operational creditors should be included in the committee of creditors.

3.2.9 Therefore, as mentioned in the SCN, when Mr. Rakesh Kumar Gupta received claims from fifteen other operational creditors, he was duty bound to admit them in the CoC, after collation and verification of the claims, to satisfy the statutory requirement under Regulation 16 of the CIRP Regulations.

3.2.10 The DC observes that the plea of Mr. Rakesh Kumar Gupta that since there is no provision with respect to reconstitution of CoC consisting only OCs, he could not have reconstituted the CoC, cannot be accepted. When there is a clear statutory requirement under Regulation 16 of the CIRP Regulations, it was the onus and duty of Mr. Rakesh Kumar Gupta to ensure that such statutory requirement is met at all times.

3.2.11 The DC finds that the argument of Mr. Rakesh Kumar Gupta that reconstitution of CoC would not have affected the outcome of the resolutions passed in the CoC as even then the sole member of CoC, viz. Jakson Ltd would have had more than 81% voting share in the COC, cannot be accepted as a plausible explanation for not following the instant

statutory obligation entrusted on him under Regulation 16 of the CIRP Regulations. The essence of constituting the CoC extends beyond mere voting rights; and also includes the objective of providing a platform for comprehensive discussions and informed decision-making. Mr. Rakesh Kumar Gupta's stance undermines the fundamental purpose of the CoC, which is vested with significant commercial wisdom and entrusted with the responsibility of making decisions that are crucial to the CIRP.

3.2.12 The constitution of the CoC in accordance with the provisions of the Code and Regulations made thereunder is a mandatory requirement to achieve better resolution outcomes from the CIRP of the CD. Any deviation from this requirement compromises the integrity and effectiveness of the resolution process. The actions of Mr. Rakesh Kumar Gupta in this regard are therefore arbitrary and are not in sync with the stipulations of the statute thereby reflecting a disregard for the established legal framework and the principles underlying the CIRP of CD.

3.2.13 Accordingly, the DC upholds the contravention made out in the SCN in this regard and finds Mr. Rakesh Kumar Gupta in contravention of Regulations 16(1) and (2) of the CIRP Regulations and Clause 14 of the Code of Conduct for IP specified in First Schedule of the IP Regulations.

3.3 Contravention III: Violation of timelines in inviting EoI.

3.3.1 Regulation 36A(3) of the CIRP Regulations states that Form G shall "provide the last date for submission of expression of interest which shall not be less than fifteen days from the date of issue of detailed invitation. ”

3.3.2 It was observed that the last date to submit EoI as mentioned in the following Form G published by Mr. Rakesh Kumar Gupta was less than 15 days:

- a) Form G dated 29.06.2020 (published on 30.06.2020) had last date to submit EOI as 09.07.2020.
- b) Form G dated 15.07.2020 (published on 16.07.2020) had last date to submit EOI as 25.07.2020.
- c) Form G dated 22.09.2020 (published on 23.09.2020) had last date to submit EOI as 01.10.2020.

3.3.3 In view of the above, the Board was of the prima facie view that Mr. Rakesh Kumar Gupta

has contravened Regulation 36A(3) of the CIRP Regulations.

Submissions by Mr. Rakesh Kumar Gupta

- 3.3.4 Mr. Rakesh Kumar Gupta submitted that Form G was published on 19.03.2020 wherein timelines of 15 days as prescribed by the regulation was followed. However, no EOI was received from any Prospective Resolution Applicant (PRA) due to COVID pandemic in the country. Thereafter, as resolved by the CoC, fresh Form G with a shorter timeline was issued to complete the CIRP within the prescribed timeline. Mr. Rakesh Kumar Gupta further submitted that the decision taken by the CoC is paramount which is held by the Hon'ble Supreme Court in plethora of judgments. Also, no PRA ever raised any objection regarding the reduction in the timelines.
- 3.3.5 Mr. Rakesh Kumar Gupta further submitted that the regulations do not explicitly mandate a 15-day timeline for submission of EoIs in cases of subsequent publications of Form G. A nuanced interpretation of Regulation 36A(3) suggests that the 15-day requirement is specifically applicable to the first issuance of Form G, and not necessarily to subsequent publications within the same CIRP- This interpretation is bolstered by the absence of clear regulatory guidance on timelines for republication scenarios, indicating a degree of flexibility intended by the regulators to adapt to varying circumstances that may arise
- 3.3.6 Mr. Rakesh Kumar Gupta further submitted that the issue regarding the timelines had already been dealt with by the Board and Mr. Rakesh Kumar Gupta was advised by the Board to take due care in future assignments vide letter dated 01.02.2023 which reads thus:-

“This is in reference to the investigation of your records in term of the notice dated August 16, 2022, issued by the IBBI/the Board in exercise of its powers under section 218(1) of IBC, 2016. On consideration of the report in accordance with the Code and Regulations made thereunder, Board has noted that there has been a delay in appointing valuers, delay in filing relationship disclosures with respective IPA and typographical error in Form H.

You are accordingly advised to take due care and precaution in your future assignment to comply with the provisions of the code, the Regulation made thereunder are the specified Code of Conduct.”

Analysis and Findings

- 3.3.7 Regulation 36A (3) of the CIRP Regulations provides as follows:-

“36A. Invitation for expression of interest.

(1).....

....

3) The Form G in the Schedule-I shall –

(a) state where the detailed invitation for expression of interest can be downloaded or obtained from, as the case may be; and

(b) provide the last date for submission of expression of interest **which shall not be less than fifteen days from the date of issue of detailed invitation.**”

3.3.8 The DC notes that the above-said regulation makes it amply clear that the last day for submission of expression of interest shall not be less than fifteen days. It ensures that sufficient time is provided to prospective resolution applicants (PRAs) to prepare and submit their EOIs.

3.3.9 The DC notes that Mr. Rakesh Kumar Gupta published Form G on three occasions with deadlines for EOI submissions that were less than the mandated 15 days, which is in clear contravention of Regulation 36A(3) of the CIRP Regulations, 2016.

3.3.10 The DC holds the view that in the absence of any specific stipulation in the regulations, the argument of Mr. Rakesh Kumar Gupta that this Regulation is applicable only in case of issuance of first expression of interest cannot be accepted. The Regulation needs to be complied with every time the expression of interest is published. Further, the CoC cannot allow or ratify any process in contravention to the statutory provisions. Therefore, Mr. Rakesh Kumar Gupta cannot take cover of approval of CoC for not complying with the mandatory statutory requirements. Being an Insolvency Professional, it was the duty of Mr. Rakesh Kumar Gupta to communicate correct position of law to the CoC.

3.3.11 The DC further notes that the reliance placed by Mr. Rakesh Kumar Gupta on the Board's letter dated 01.02.2023, advising him to take due care in future assignments, is misconceived. As evident from the Board's letter dated 01.02.2023 and as mentioned in para 3.3.6. of the present order, this advisory was issued concerning delays in appointing valuers, delays in filing relationship disclosures with the respective Insolvency Professional Agency (IPA), and typographical errors in Form H. The issue with respect to Form G and the non-compliance with Regulation 36A(3) of the CIRP Regulations, 2016, was not addressed in the said advisory.

3.3.12 Accordingly, the DC upholds the contravention made out in the SCN in this regard and finds Mr. Rakesh Kumar Gupta in contravention of Regulation 36A(3) of the CIRP Regulations.

3.4 Contravention IV: Continuing CIRP beyond stipulated timeline without seeking approval of AA

3.4.1 Section 12(3) of the Code provides that if CIRP cannot be completed within 180 days, the AA may by order extend the duration of such process beyond 180 days by such further period as it thinks fit, but not exceeding 90 days. The CIRP shall mandatorily be completed within 330 days.

3.4.2 The IA has observed (in its IR) that 270 days of the CIRP ended on 19.11.2020. Mr. Rakesh Gupta filed an application for extension of CIRP beyond 270 days and the AA vide order dated 07.12.2020 had granted further extension of 60 days. Therefore, the extension of 60 days would have ended on 18.01.2021. However, Mr. Rakesh Gupta had filed the application for approval of resolution plan only on 21.01.2021, which is beyond the period of extension granted by AA.

3.4.3 In view of the above, the Board was of the *prima facie*, view that Mr. Rakesh Kumar Gupta has violated Section 12(3), 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and (h) of the IP Regulations read with Clause 13 and 14 of the Code of Conduct for IP specified in First Schedule of IP Regulations.

Submissions by Mr. Rakesh Kumar Gupta

3.4.4 Mr. Rakesh Kumar Gupta submitted that the resolution plan was approved by the CoC on 16.01.2021 i.e., before the expiry of the extended CIRP period on 18.01.2021 and filed before AA for its approval on 21.01.2021.

3.4.5 Mr. Rakesh Kumar Gupta had placed reliance on Hon'ble NCLAT decision in the matter of Quantum Ltd Vs. Indus Finance Corporation Ltd in Company Appeal (AT) (Insolvency) No. 35 of 2018 wherein it was held that the application can be filed after the expiry of an extension period. The relevant extract of the judgement is reproduced herein below:-

"4. From sub-section (2) of Section 12, it is clear that resolution professional can file an application to the Adjudicating Authority for extension of the period of the corporate insolvency resolution process, only if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of 75% of the voting shares. The provision does not stipulate that such application is to be filed before the Adjudicating Authority within 180 days."

- 3.4.6 Mr. Rakesh Kumar Gupta further submitted that in compliance with the approved Resolution Plan, Letter of Intent has to be issued to Successful Resolution Applicant and Performance Bank Guarantee have to be obtained from the SRA. This process takes couple of days. Accordingly, the approved resolution plan was filed before the AA on 21.01.2021 after completion of CIRP period and there was no such default as held by the Hon'ble NCLAT in Quantum (supra). Thus, the CIRP was not continued after the extended period and there is no violation in filing the resolution plan after the expiry of the extension granted by the AA. Also, during the process of approval of resolution plan, the AA has already taken note of the dates while issuing notice for approval of resolution plan.

Analysis and Findings

- 3.4.7 Section 12(3) of the Code stipulates that if the CIRP cannot be completed within 180 days, the AA may, by order, extend the duration of such process beyond 180 days by such further period as it deems fit, but not exceeding 90 days. The CIRP must mandatorily be completed within 330 days.
- 3.4.8 Accordingly, the CIRP, including the filing of the resolution plan application with the AA, must be completed within the extended CIRP period granted by the AA and any activity beyond this period constitutes a contravention of the stipulated timelines.
- 3.4.9 The DC notes the series of events in this case. The approval of COC on the resolution plan was received on 16.01.2021, which is within the timelines of extended CIRP period by the AA. However, the filing of the resolution plan by Mr. Rakesh Kumar Gupta with the AA was made on 21.01.2021, i.e. after the expiry of the extended CIRP period. It was incumbent on Mr. Rakesh Kumar Gupta to file for extension of CIRP period with the AA well in advance so that any such situation of carrying out the CIRP process beyond the approved timelines could have been avoided.

3.4.10 However, since the time delay in seeking permission from AA for extension of time-period was for a very short period and no prejudice to any stakeholder has been produced on record, this DC is inclined to take a lenient view on this with a warning to Mr. Rakesh Kumar Gupta to be more cautious of the processes and timelines under the Code.

3.5 **Contravention V: CD and SRA being related parties**

3.5.1 The IA has observed (in its IR) that the successful resolution applicant (SRA) of the CD is Ace Infracity Developers Private Limited, which is a group company of the Ace Group and the other group company of the Ace Group is Three C City Developers Private Limited. Mr. Pratap Singh Rathi was director in SRA from 30.01.2015 till date and in Three C City Developers Private Limited from 21.12.2019 till date.

3.5.2 The IA has further observed that Three C Residency Pvt. Ltd. is a group company of the CD. Mr. Pratap Singh Rathi was also the director of Three C Residency Pvt Ltd from 30.10.2019 to 09.03.2021.

3.5.3 The SCN therefore concludes that Mr. Pratap Singh Rathi was common director in Three C Group company as well as SRA and its group company, as on 10.11.2020 and 16.01.2021, i.e., the date on which resolution plan was submitted to Mr. Rakesh Kumar Gupta and approved by the CoC respectively.

3.5.4 It was observed that the SRA, i.e., Ace Infracity Developers Pvt Limited and Three C group have common director, which gives an indication that both the groups were controlled by same set of individuals/persons. By presenting the resolution plan of Ace Infracity Developers Private Limited for approval before CoC, the Board was of the, *prima facie*, view that Mr. Rakesh Kumar Gupta has violated Sections 5(24)(f) and (i), 29A(c) and (j); 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and (h) of the IP Regulations read with Clause 2 and 14 of the Code of Conduct for IP specified in First Schedule of IP Regulations.

Submissions by Mr. Rakesh Kumar Gupta

3.5.5 Mr. Rakesh Kumar Gupta submitted that the company Three C City Developers Pvt Ltd. in which Mr. Pratap Singh Rathi, director of Ace group was appointed on 21.12.2019, was earlier held by the Three C Group. The shares of Three C City Developers Pvt Ltd.

were sold by CD in the Financial Year 2015-16 as per records available. Therefore, at the time of initiation of CIRP of the Corporate Debtor, Three C City Developers Pvt Ltd. was not a group company of the CD.

- 3.5.6 Mr. Rakesh Kumar Gupta further submitted that the CD held 65% stake in M/s. Three C Residency Pvt. Ltd. - 20% stake directly and 45% stake through a wholly owned subsidiary M/s. Silver Sands Estate Pvt Ltd. The entire stake of 65% was transferred before the initiation of the CIRP of the CD in a manner that the CD sold its 20% stake to M/s. Vistar Constructions Pvt Ltd on 16.08.2018. Later it came to knowledge that the 45% stake held by M/s. Silver Sands Estate Pvt Ltd was also sold to Mr. Vishnu Kumar Gupta on 10.05.2019. Thus, Three C Residency Pvt. Ltd. was also not a group company of the CD at the time of initiation of CIRP of the CD. It was also submitted that an application under section 66 of the code for the fraudulent transaction of transfer of shares was filed on 07.11.2021 before AA and the same is pending for adjudication.
- 3.5.7 Mr. Rakesh Kumar Gupta further submitted that Section 5(24) of the Code has given an exhaustive definition of term 'related party'. A related party in terms of a CD is anybody who can act on a managerial or directorial capacity. The SRA does not fall into any of the provision of definition of related party and criteria laid down u/s 29A. Mr. Rakesh Kumar Gupta further submitted that juxtaposition of Section 5(24) of the IBC and Section 21 of the Code makes it amply clear that the provisions of the Code are to be read as it is, without distorting or twisting its language or inserting any word which is not contained in it. Since Section 5(24) uses the language "related party", in relation to a corporate debtor, "means. ..", it is clear that the definition of, "related party in relation to a corporate debtor" in section 5(24) of the Insolvency & Bankruptcy Code, 2016 is an exhaustive definition and must be interpreted in a strict and literal sense. Mr. Rakesh Kumar Gupta further submitted that he has also got the analysis of Section 29A compliance done from an outside agency.
- 3.5.8 Mr. Rakesh Kumar Gupta further submitted that is also relevant to mention that these issues of Three C City Developers Pvt Ltd and Three C Residency Pvt Ltd were already raised by the complainant in complaint no. 4349612022 and the same was disposed of by the IBBI vide its letter dated 01.02.2023.
- 3.5.9 Mr. Rakesh Kumar Gupta further submitted that the matter regarding SRA being a related

party of the CD and its ineligibility under Section 29A to submit the Resolution Plan is being heard by the AA in IA no. 2593 of 2022 titled as Mr. R. S. Gill vs Rakesh Kumar Gupta and others, which is sub-judice before AA as on date.

Analysis and Findings

- 3.5.10 Section 30(2)(e) of the Code entrusts duty on the resolution professional to examine a resolution plan that it does not contravene any provisions of law. The relevant portion of the provision is as hereunder:

30. Submission of resolution plan. –

(1).....

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –

(a).....

(e) does not contravene any of the provisions of the law for the time being in force”

- 3.5.11 The Resolution Professional is entrusted with the fundamental responsibility to ensure that all Prospective Resolution Applicants (PRAs) are eligible under Section 29A of the Code. This includes a thorough assessment of potential related party relationships that might disqualify a PRA.

- 3.5.12 In the instant matter, the issue for consideration of DC is whether Mr. Rakesh Kumar Gupta, acting as RP of CD, failed in his duty to examine the eligibility of SRA under Section 29A of the Code on the ground that SRA is the related party of the CD.

- 3.5.13 The DC notes the submissions of Mr. Rakesh Kumar Gupta with respect to the cessation of shareholding of CD in Three C Residency Pvt. Ltd and the fact that the issue is also pending adjudication of Hon’ble NCLT. Accordingly, the DC deems it appropriate to refrain from commenting on the merits of this issue.

3.6 Contravention VI: Criteria of PRAs

- 3.6.1 It was observed from the minutes of 2nd CoC meeting held on 17.03.2020 that the criteria fixed for prospective resolution applicant (PRA) of the CD was having minimum net worth of Rs. 10 crore and minimum turnover of Rs. 50 crore.

3.6.2 The minutes of 4th CoC meeting mention that: *"the eligibility criteria can be reduced in following manner.*

1. *Net Worth Rs. 30 Crore.*
2. *Turnover Rs. 75 Crore "*

3.6.3 In the submissions (to the IA), Mr. Rakesh Kumar Gupta had submitted that there was a typographical error in the minutes of 2nd CoC meeting and the actual criteria for minimum net worth and minimum turnover was Rs.50 crore and Rs 100 crore, respectively.

3.6.4 It was further observed that in the Form H submitted by Mr. Rakesh Kumar Gupta, the figures for contingent liability for IDBI Trusteeship Services Limited, Axis Trustee Services Limited, Three C Developers Private Limited, have been mentioned wrongly in lakhs instead of in cores.

3.6.5 The SCN therefore alleges that Mr. Rakesh Kumar Gupta has failed to exercise due diligence in mentioning such important figures in the minutes of the CoC meeting and Form H, to avoid confusion amongst stakeholders.

3.6.6 In view of the above, the Board was of the *prima facie* opinion that Mr. Rakesh Kumar Gupta has violated Section 208(2)(a) and (e) of the Code, Regulation 7(2)(a) and (h) of the IP Regulations read with Clause 2 of the Code of Conduct for IP specified in First Schedule of IP Regulations.

Submissions by Mr. Rakesh Kumar Gupta

3.6.7 Mr. Rakesh Kumar Gupta submitted that the typographical errors in the eligibility criteria to submit the resolution plan in the 2nd CoC minutes, was discussed in the CoC meeting held thereafter. The eligibility criteria figure was revised in 4th CoC meeting in absence of any PRA. However, the issue regarding typo error, and delay in filing have already been dealt by the IBBI in an earlier complaint filed by M/s. CBM Constructions LLP in Complaint no. 43496/2022 dated 30.07.2022. The IBBI has already instructed Mr. Rakesh Kumar Gupta vide its letter dated 01.02.2023 as under:-

"2. On consideration of the report in accordance with the Code and Regulations made thereunder, Board has noted that there has been a delay in appointing valuers, delay in filing relationship disclosures with respective IPA and typographical error in form H.

3. You are accordingly advised to take due care and precaution in your future assignments to comply with the provisions of the code, the Regulations made thereunder and the specified Code of Conduct."

- 3.6.8 Mr. Rakesh Kumar Gupta further submitted that an application for fraudulent transaction under Section 66 of the Code has been filed against promoters for siphoning of Rs. 134.5 crore from Three C Shelter Pvt Ltd., where funds were siphoned off through investment in Kolkata based shell companies and is pending for adjudication before the AA.

Analysis and Findings

- 3.6.9 The DC notes that Mr. Rakesh Kumar Gupta's failure to exercise due diligence in mentioning such important figures in the minutes of the CoC meeting and Form H has already been dealt by the Board in an earlier complaint filed by M/s. CBM Constructions LLP in Complaint no. 43496/2022 dated 30.07.2022. Further, the Board has already instructed Mr. Rakesh Kumar Gupta vide its letter dated 01.02.2023 to take due care and precaution in his future assignments to comply with the provisions of the code, the Regulations made thereunder and the specified Code of Conduct.

4. ORDER

- 4.1 An Insolvency Professional, acting as Interim Resolution Professional or Resolution Professional is entrusted with the duty of carrying out the provisions of the Code with the objective of achieving the purposes of the Code inter alia being balancing the interests of all stakeholders. He has a duty to maintain the sanctity of the processes under the Code by adhering to the provisions of the Code and regulations framed thereunder in letter and spirit.
- 4.2 The DC observes that, as examined in earlier paragraphs, Mr. Rakesh Kumar Gupta has erred in his judgement to constitute the CoC with operational creditors despite having knowledge of existence of a Financial Creditor. This act of omission is against the fundamental design principle as enshrined in the Code. Leaving aside the issue of inappropriate handling of the issue related to inclusion of Financial Creditor, he further erred in his judgement to include relevant numbers of the OCs in the CoC. The pretext that their presence ought not have affected the outcomes, as OC with dominant share any

way would have called the shots, defies any logic and goes against the principle of inclusive decision making. Therefore, such an act of Mr. Rakesh Kumar Gupta, being the resolution professional does not exude his *bona fide* and also dents the confidence and trust of stakeholders of the insolvency resolution ecosystem. Further, Mr. Rakesh Kumar Gupta has also breached the timelines in inviting Expression of Interest in successive attempts and has contravened regulation 36A(3) of the CIRP Regulations. He was also found lackadaisical in his approach in seeking extension of the CIRP period and correctly recording the minutes of the meeting. Mr. Rakesh Kumar Gupta should have exercised more caution in performance of his duties.

- 4.3 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. Rakesh Kumar Gupta (Registration No. IBBI/IPA-001/IP-P00833/2017-2018/11418) for a period of one year.
- 4.4 This Order shall come into force after expiry of 30 days from the date of its issuance.
- 4.5 A copy of this order shall be forwarded to the Insolvency Professional Agency of Institute of Chartered Accountants of India where Mr. Rakesh Kumar Gupta is enrolled as a member.
- 4.6 A copy of this order shall be sent to the CoC/ Stakeholders Consultation Committee (SCC) of all the Corporate Debtors in which Mr. Rakesh Kumar Gupta 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. Rakesh Kumar Gupta.
- 4.7 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.
- 4.8 Accordingly, the show cause notice is disposed of.

Sd/-
(Sudhaker Shukla)
Whole Time Member, IBBI
Insolvency and Bankruptcy Board of India

Dated: 30 July 2024

Place: New Delhi