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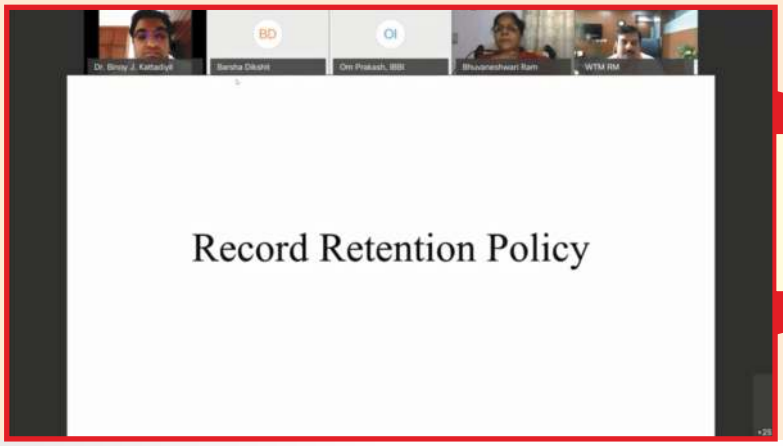

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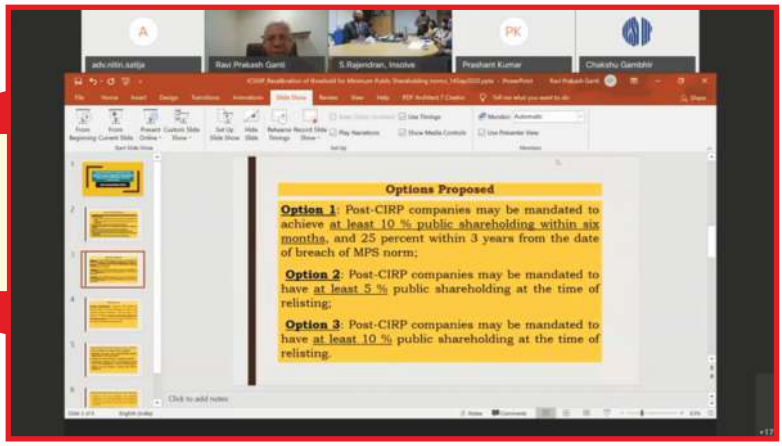
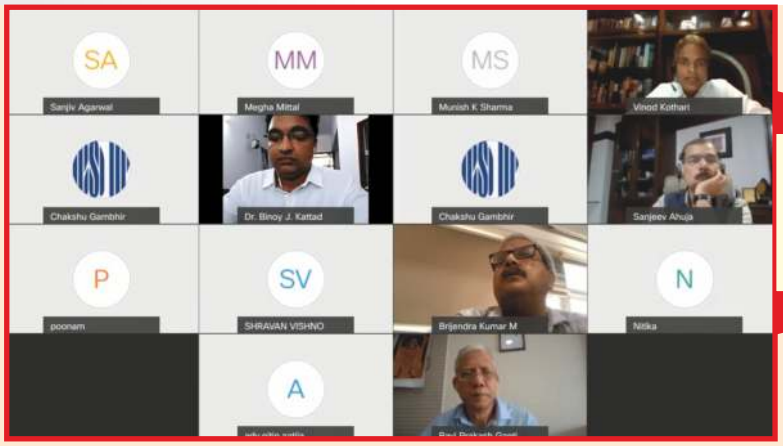
Round-table Discussion on “SEBI Consultation Paper (dt. 19th August 2020)” held on 14th Sept. 2020





Round-table discussion on IBBI's Discussion Paper on “Governance Issues in Insolvency Professional Agencies” held on 18th Sept. 2020.

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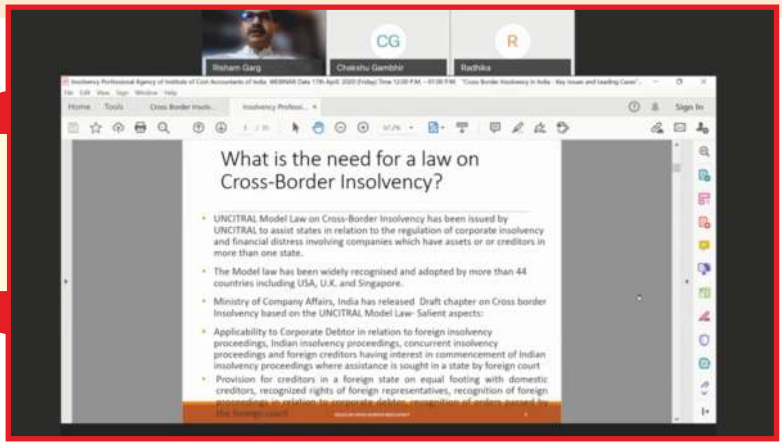

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At a Glance

No. 8 | Pg. 1-100 | SEPTEMBER 2020

Section 4 of the Indian Telegraph Act, 1885 - Exclusive privilege in respect of telegraphs and power to grant licenses - Definition of gross revenue - Whether where there were huge arrears on telecom companies concerning spectrum licence, telecom companies were to be allowed to pay Adjusted Gross Revenue (AGR) charges within a period of ten years in equal yearly instalments and for demand raised by Department of Telecom in respect of AGR dues determined by instant Court, there shall not be any dispute raised by any Telecom Operator and there shall not be any reassessment - Held, yes - Whether further, in event of any default in making payment of annual instalments, interest would become payable as per agreement along with penalty and interest without reference to Court - Held, yes -

Whether various companies through Managing Director/Chairman or other authorised officer were to furnish an undertaking within four weeks, to make payment of arrears as per order and existing bank guarantees that had been submitted regarding spectrum shall be kept alive by Telecom service providers until payment is made - Held, yes (Para 38)

- **Avishek Gupta, *In re***
  (2020) 120 taxmann.com 193 (IBBI) • P-299

Section 208 of the Insolvency and Bankruptcy Code, 2016, read with regulation 7 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 - Insolvency professionals - Functions and obligations of - IBBI issued show cause notice (SCN) to 'A', based on material available on record in respect of his role as a Insolvency Professional (IP) in Corporate Insolvency Resolution Process (CIRP) of corporate debtor - IP had appointed RK which was not registered with IBBI as one of valuers in CIRP and, therefore, IBBI was of prima facie view that IP had violated section 208 - Whether appointment of RK which was not a registered valuer as a valuer for valuation of assets of corporate debtor was in contravention of section 208(2) and regulation 7(2) of IP Regulations - Held, yes - Whether IP also did not comply with IBBI Circular No. IBBI/RV/019/2018, dated 17-10-2018 which provided that no Insolvency Professional shall appoint a person other than a registered valuer to conduct any valuation under Code - Held, yes - Whether Disciplinary Committee was justified in directing that IP would not seek or accept any process or assignment or render any services under Code for a period of two months from date of coming into force of order - Held, yes (Paras 7 and 9)

- **Dinesh Sood, *In re***
  (2020) 120 taxmann.com 194 (IBBI) • P-307

Section 208 of the Insolvency and Bankruptcy Code, 2016, read with regulation 7 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 - Insolvency professionals - Functions and obligations of - IBBI had issued show cause notice (SCN) to 'D' based on material available on record in respect of his role as resolution professional (RP) in appointing an unregistered valuer in corporate insolvency resolution process (CIRP) of corporate debtor - SCN alleged contravention of section 208(2)(a) & (e) - SCN alleged that RP had appointed 'C' as one of valuers for valuation of assets in matter of corporate debtors and that 'C' was not registered with IBBI and, therefore, IBBI prima facie held view that RP had violated section 208(2)(a) & (e) and regulation 7(2) of IP Regulations - Whether conduct of RP in appointing 'C', a company which was not a registered valuer, as a valuer for valuation of assets of corporate debtors, was in contravention of section 208(2), and regulation 7(2) of IP Regulations - Held, yes - Whether Disciplinary Committee, in exercise of powers conferred under regulation 11 of IBBI (Insolvency Professionals) Regulations, 2016, directed that RP would not seek or accept any process or assignment or render any services under Code for a period three months from date of coming into force of order - Held, yes (Paras 5 & 5.1)

- **Abhishek Ahuja, *In re***
  (2020) 120 taxmann.com 192 (IBBI) • P-315

Section 208 of the Insolvency and Bankruptcy Code, 2016, read with rules 15, 16 and 17 of the Companies (Registered Valuers and Valuation) Rules, 2017 - Insolvency professionals - Functions and obligations of - Whether a valuer to be registered with IBBI, has to first enroll himself/herself with a Registered Valuer Organization ('RVO') recognized by IBBI and complete 50 hours mandatory educational programme and subsequently, has to clear valuation examination conducted by IBBI and thereafter he may register with IBBI - Held, yes - Show cause notice (SCN) was issued by IBBI to AA (Noticee) alleging that prior to his being registered as valuer with IBBI he undertook valuation assignment in CIRP of AIIPL and also submitted valuation report without being eligible or registered to do so - Noticee submitted that his mistake was not intentional and was made due to a lack

of clarity as to procedural issues - It was found that Noticee undertook assignment, despite IBBI Circular dated 17-10-2018 clearly stating that no person other than a registered valuer will be appointed to conduct valuation under Code - Whether noticee despite having mandatory training and qualifying valuers examination, had displayed his lack of understanding of provisions of Rules and standards of valuation profession, allowed resolution professional to engage him as registered valuer in a CIRP even though he was not registered as a valuer and also submitted valuation report; hence, his conduct was in violation of Companies (Registered Valuers and Valuation) Rules, 2017 - Held, yes - Whether however, in view of fact that he had refunded amount of fee charged for valuation services and had cleared valuation examination at time of his engagement in CIRP, he was to be warned not to accept any assignment for valuation until he had again under gone 50 Hours educational programme with IOV Registered Valuers Foundation where he was enrolled as a member - Held, yes (Paras 6, 6.1 and 6.2)

Knowledge Centre 43-46

Policy Update 113-120

P.K. Malhotra
ILS (Retd.) and Former
Law Secretary
(Ministry of Law & Justice,
Govt. of India)

From Chairman's Desk

Great things never come from comfort zones

As the pandemic is unfolding, the realizing of *uncertainty* in the global economy is becoming all the more visible. In such circumstances, a strong initiative and a determination coming from the Government of India in the form of building an "*atma nirbhar bharat*" or "*self-reliant India*" has a lot of merits. The policy, which is in the form of a campaign to make India more self-reliant, aims to make our domestic dependency for *goods* and *services* to be satisfied from the working of our domestic industry itself. The Special Economic package announced by the Government of India is definitely a *shot in the arm* for industry to grow by leaps and bounds. History tells us that, as a nation, we reform the best when our *back is to the wall*, and so, reforms shall be an inevitable outcome of the current crises.

In a market economy like India, it lies at the very core that there has to be not only *freedom of entry* for the businesses, but also *freedom of exit* to enable efficiency in resource

allocation. The suspension of certain IBC provisions due to impact of COVID-19 pandemic (and the consequent lockdown) has attracted comments from different quarters. There are some who believe that since IBC has a market driven process, suspension of its provisions is not likely to bring in desired results. The view point expressed thereof is, thus, regardless of the circumstances, if a business becomes financially unsustainable, the remedy of invocation of IBC provisions against the defaulter company has to be there. *On the other hand*, there are also some who believe that since financial stress is almost universal to all businesses, forcing an otherwise viable business to insolvency (and/or liquidation) may not bring in desired results, especially when it is difficult to find a rescuer for the failing firms. Keeping in view the arguments expressed on both sides of the aisle, on a balance, one can easily understand the strong reasons and rationale behind government's decision. However, plugging exit routes (under IBC) is only a temporary measure, and is intended to only deal with the current extraordinary situation/circumstance posed by the pandemic.

In normal circumstances, in case of a failing firm, IBC allows market forces to operate, so that, all viable entities can be rescued, while the unviable ones can be liquidated. In case of rescue, one of the most critical factors to be taken into account, is, who shall be the rescuer who can take over CD's management, to run it for its profitable operation. In the current circumstances, wherein almost every firm, every industry and every economy is under economic distress, the likelihood of finding such a rescuer is extremely remote, and therefore, the need to temporarily suspend certain IBC provisions has arisen. In other words, if the IBC provisions are not suspended and all defaulting entities are made to undergo insolvency proceeding, most of them are likely to end up being liquidated. The situation is compounded by the fact that the chances of having a saviour rescuing such entities are negligible. In case such firms are liquidated, they would have a premature death, and the assets would be put to distress sale. In all this what needs to be taken care is that the first order objective of IBC which is to rescue a firm's life and not take it away prematurely at these unusual times. At the same time, the duration of such suspension and the costs thereof are factors which would definitely need due deliberation and consideration by the stakeholders at several

levels since allowing exit barriers to be there for long will only impede efficient allocation of resources.

IBC, undoubtedly, is an empirical legislation, and has been defined very appropriately as *a road under construction* by Dr. Sahoo. It has also shown flexibility in its application making it suitable to the current circumstances. The challenges before the stakeholders in giving effect to objectives of the Code have been duly addressed through amendments made to the Code as well as subordinate legislations. The last amendments being increase of threshold limit of default for initiation of IBC proceedings from 1 lakh to 1 crore, and temporary suspension of certain provisions of IBC to take care of the unprecedented situation caused by COVID-19 pandemic.

With the passing of the Insolvency and Bankruptcy (Second Amendment) Act, 2020, the Ordinance promulgated earlier has been repealed and Amendment Act given retrospective effect from 5th June, 2020. Further, the Central Government, *vide* its notification dated 24TH September, 2020, has, while exercising its powers under section 10A of the IBC, extended the suspension period of IBC by another 3 months (from 25TH September, 2020 till 24TH December, 2020).

The IBBI, which is a key pillar of the entire ecosystem built around IBC, is now due to complete four glorious years of its existence on 1st October, 2020. It is everybody's experience that this journey of 4 years has been both challenging as well as rewarding one. The accomplishments made are far more satisfying and gives a good reason for all of us to smile.

Looking forward to a very successful journey ahead!

Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

Managing Director's Message

Your limitation—it's only your imagination

There are many phases in the life of a legislation. Generally, a landmark legislation, like the IBC which symbolises and is a reflection of nation's resolve to implement a long awaited reform and makes a departure from the erstwhile legal regime, is always met with initial challenges of finding acceptability with those who had a vested interest in the continuation of the previous legal regime (and the arrangements thereof). Nonetheless, as with all good steps, the determination to stay onto the path payed-off, and realising the merits of this new legal regime, acceptability started trickling from all quarters.

With a firm establishment and support from all stakeholders, the Code started yielding results even in the early days of its implementation; the results, perhaps, exceeded the expectations of even the Government and the Regulator. However, as the proverb goes, *the Road to Success is always under construction,* challenges emerged in the form of the spread of COVID-19 pandemic which impacted not only the

Indian Economy, but economies of almost all the nations. While immediate measures were adopted to minimise the impact of the pandemic on our health, the inevitable consequence thereof was substantial reduction in the economic activity. The Government of India, realising the need to introduce immediate measures to revive the economy, came up with a huge financial package to play the role of a market mover. It was realised that credit has to be provided to the companies in order to add liquidity to the economy. Steps were further taken to minimise cases of job loss by people (especially in the rural sector). For this, a huge additional sum was allocated under the MGNREGA scheme intending to provide an employment boost. To reduce the impact of pandemic on the industry, the minimum threshold limit for invocation of IBC was enhanced from 1 lakh INR to 1 Crore INR which did prevent some of the unintended consequences of the Code. Further, a provision was introduced into the Code (s. 10A) whereby the right to file application for initiation of CIRP for defaults (of payment) taking place from 25TH March, 2020 was taken away for an initial period of 6 months, which was further extended for another 3 months (till 24TH December, 2020). This essentially means that insolvency proceedings could not be initiated against a CD for defaults committed on or after March 25, 2020, and while the suspension has been extended by further three months (until the last week of December), the Government has the option to further extend IBC suspension period by another three months, if it considers it fit and proper to do so.

While an overwhelming majority of stakeholders have understood and appreciated the rationale for the decision (IBC suspension), there are some (especially from the Banking industry) who have expressed concerns of some unwanted consequences also following and leading to rise in stress. Some Experts have also claimed that *"if we don't have any debt restructuring possibilities, there is no possibility to resolve debt in bankruptcy and debt burdens keep rising..."* The Regulator (IBBI) has clarified on the concerns, acclaiming that the decision to suspend "*reinforces the prime objective of the Code, that is, to rescue the lives of companies from market pressure, but also endeavours to rescue companies having stress from force majeure circumstances."* It is thus clear, that, under the Ordinance CD is not absolved of its COVID-19 defaults, rather such defaults have been merely

excluded from the purview of CIRP, to provide an assurance of protection to CDs from legal troubles flowing from default of payment under IBC. However, such defaults can be used as a trigger to initiate proceedings against Personal Guarantors to CDs (PG to CD). Therefore, there are clear checks and balances in place to discourage cases of wilful defaults (though possibility of some cases taking place cannot be completely ruled out).

Policy decisions are taken for the larger public good and necessarily involves a balancing exercise. Some remote possibility of misuse of a protection granted under a law cannot be the reason to not legislate it. Criticism has also come questioning the decision on the issue of differential treatment being given to COVID-19 defaults (from the normal ones). The clear answer thereof is that there is an intelligible differentia between the two cases. Law allows differential treatment to be given to different cases provided there is a clear and rationale nexus between the basis of classification and the object intended to be achieved through it. The requirements of Article 14 of the Constitution of India are thus clearly satisfied in the present case.

There are some comments made highlighting the move to suspend certain provisions of IBC as some kind of a setback to the insolvency reforms in India. The Government and the IBBI, however, have been very forthright in denouncing such a perception. The position has been made amply clear with the clarifications issued.

We look forward to keep receiving your support in all our future endeavours!

Legal & Practical Aspects in getting a successful Resolution Plan under CIRP

Anshul Gupta
Director

1. Introduction:

The Vision and Objective of Code is to resolve Insolvency and to revive the Corporate Debtor to the extent possible. For the purpose of achieving the objective, Resolution Plan is the backbone of Insolvency & Bankruptcy Code 2016.

National Company Law Appellate Tribunal (NCLAT) in its order ***"Binani Industries Ltd. v. Bank of Baroda"*** (2018) 99 taxmann.com 164/150 SCL 703, mentioned:

> "The 'I&B Code' defines Resolution Plan' as a plan for insolvency resolution of the 'Corporate Debtor' as a going concern. It does not spell out the shape, colour and texture of 'Resolution Plan', which is left to imagination of stakeholders. Read with long title of the 'I&B Code', functionally, the 'Resolution Plan' must resolve insolvency (rescue a failing, but viable business); should maximise the value of assets of the 'Corporate Debtor', and should promote entrepreneurship, availability of credit, and balance the interests of all the stakeholders."

It further mentions that Resolution Plan is:

- **Not a sale of Corporate Debtor** – It is resolution of the 'Corporate Debtor' as a going concern. One does not need a 'Resolution Plan' for selling the 'Corporate Debtor'.
- **Not an Auction** – Each plan has a different likelihood of turnaround depending on credibility and track record of 'Resolution Applicant' and feasibility and

viability of a 'Resolution Plan' are not amenable to bidding or auction. It requires application of mind by the 'Financial Creditors' who understand the business well.

- **Not Recovery** – While recovery bleeds the 'Corporate Debtor' to death, resolution endeavours to keep the 'Corporate Debtor' alive. In fact, the 'I&B Code' prohibits and discourages recovery in several ways.

- **Not Liquidation** – The 'I&B Code', therefore, does not allow liquidation of a 'Corporate Debtor' directly. It allows liquidation only on failure of 'Corporate Insolvency Resolution Process'. It rather facilitates and encourages resolution in several ways.

The Resolution Professional is duty bound to endeavour all his efforts to achieve the said objective of IBC in all those cases where he has been appointed IRP/RP. Resolution Professional being his role as a "Chief Executive Officer" of the Corporate Debtor has to perform all his duties not only within the existing laws, rules and regulations but also has to take extra steps to achieve his final objective.

2. Provisions of IBC related to the process of Resolution Plans

The various legal provisions related to the process for the Resolution Plans have been summarized as under:

Insolvency and Bankruptcy Code, 2016:

- Section 5(26) of IBC 2016, defines 'Resolution Plan' means a plan proposed by Resolution Applicant for the insolvency resolution of Corporate Debtor as a going concern.

- Section 5(25) defines 'Resolution Applicant' means a person, who individually or jointly with any other person, submits a resolution plan to the Resolution Professional pursuant to the invitation made under clause (*h*) of sub-section (2) of section 25.

- Section 30 of the IBC, 2016 deals with submission of resolution, various requirements and contents in Resolution Plan and approval by Committee of Creditors.

- Section 31 of the IBC, 2016 deals with approval of resolution plan by Adjudicating Authority.

- Section 32 of the IBC, 2016 deals with appeal against the approved resolution plan by the Adjudicating Authority.

IBBI (Insolvency Resolution Process for Corporate Persons) Reg, 2016.

Chapter X of the Insolvency Resolution Regulations deals with Resolution Plans.

- **Regulation 36** - Deals with the preparation of the Information Memorandum.

- **Regulation 36A**- Deals with invitation for Expression of Interest.

- **Regulation 36B**- Deals with Request for Resolution Plan.

- **Regulation 37** - Provides for various

options and measures while making a resolution plan.

- **Regulation 38** - Provides for the mandatory contents of the Resolution Plan.
- **Regulation 39** - Provides for approval of Resolution Plan by CoC and Adjudicating Authority.

Model Timelines for the purpose of approval of Resolution Plans are:

Provision	Activity	Timeline
Regulation 36 (1)	Submission of Information Memorandum to CoC	T+54
Regulation 36A	Invitation of EOI	T+75
	Publication of Form G	T+75
	Provisional List of Resolution Applicants	T+100
	Final List of Resolution Applicants	T+115
Regulation 36B	Issue of Request for Resolution Plan, which includes Evaluation Matrix and Information Memorandum to Resolution Applicants	T+105
Regulation 36B	Last date for submission of Resolution Plan	T+135
Section 30(6)/ Regulation 39(4)	Submission of CoC approved Resolution Plan	T+165*
Section 31(1)	Approval of Resolution Plan	T+180*

**In case of Extension of CIRP tenure, the said dates will get extended by 90 days.*

3. Resolution Plan approved from March 2017 to March 2020

Sr. No.	Particulars	Total number
1	Total admitted cases	3744
2	Closed on Appeal/Review/Settled	312
3	Closed by Withdrawal under section 12A	157
4	Closed by Resolution	221
5	Closed by Liquidation	914

Out of total cases closed, till date only 20% of the cases have been closed by approving a resolution plan. The major reasons of failure of getting a successful resolution plan are non receipt of resolution plans or non-acceptance of plan by CoC.

Thus being a Chief Executive Officer of the Corporate Debtor the role of Resolution Professional becomes most important for getting a successful resolution plan.

4. Role of Resolution Professional:

1. Role as defined under IBC, 2016 and regulations:

   Preparation of Information Memorandum (IM) & Data Room –

   - Section 29 of IBC, 2016 provides that the resolution professional shall prepare an Information Memorandum as may be specified by the Board for formulating a resolution plan.
   - Reg. 36 of IBBI (Insolvency Resolution Professional for Corporate Persons) Reg., 2016, provides for the contents of the Information Memorandum and the manner in which it will be submitted to each member of the committee and any potential resolution applicant. IM shall contain the following :
     - Assets and liabilities as on Insolvency Commencement date with estimated values assigned to each category.
     - Latest Annual Financial Statements.
     - Audited financial statements of the Corporate Debtor for last two financial years, provisional financial statements for the current financial year made upto a date not earlier than 14 days from the date of the application.
     - List of creditors.
     - Particulars of debt due from or to related parties.
     - Details of guarantees.
     - Details of members/partners of Corporate Debtor.
     - Details of material litigations and investigations.
     - Details of workmen and employees.
   - Data Room/all the relevant information should be provided to the Resolution Applicant for their due diligence.

Fixation of Eligibility Criteria & Evaluation Matrix and publication of Expression of Interest in Form G –

- Section 25(2)(*h*) of IBC, 2016 provides that the Resolution Professional can fix criteria of persons who can submit a resolution plan. The criteria should be fixed in consultation with committee of creditors. Further the person should not be ineligible to submit resolution plan as defined under section 29A of IBC, 2016.
- Regulation 2(1)(*ha*) of IBBI defines Evaluation Matrix. It means such parameters to be applied and the manner of applying such parameters, as approved by the committee, for consideration of resolution plans for its approval.

It includes both qualitative and quantitative parameters:

Qualitative Parameters

- Industry Experience of the Resolution Applicant in the sector in which Corporate Debtor is operating.
- Ability to turnaround distressed companies.
- Acquisition made by the resolution applicant in the immediate previous 5 financial years.
- Financial strength of the resolution applicant/group (Net worth, Revenue, EBIDTA).
- External credit rating of the Resolution Applicant.

Quantitative Parameters

- Upfront cash recovery as per resolution plan.
- Net present value of the cash component of amount offered inclusive of upfront cash recovery.
- Fresh equity infusion.
- Term of resolution plan (no of years after approval of resolution plan by NCLT.

- **Regulation 36A of IBBI** provides for invitation for Expression of Interest (EoI):

  It states that the Resolution Professional shall publish brief particulars of the invitation for Expression of Interest in Form G of the Schedule at the earliest, not later than ***seventy fifth*** day from the insolvency commencement date, from interested and eligible prospective resolution applicants to submit resolution plans.

  The Form G in the schedule shall:

  - state where the detailed invitation for expression of interest/EoI can be downloaded or obtained from, as the case may be; and
  - provide the last date for submission of **expression of interest** EoI which shall not be less than ***fifteen*** days from the date of issue of detailed invitation.

  The invitation for EoI shall further :

  - Specify the criteria for prospective resolution applicants, as approved by the committee in accordance with clause (h) of sub-section (2) of section 25;
  - State the ineligibility norms under section 29A to the extent applicable for prospective resolution applicants;
  - Provide such basic information about the Corporate Debtor as may be required by a prospective resolution applicant for expression of interest; and

- No payment required of any fee or any non-refundable deposit for submission of Expression of Interest.

Evaluation of Resolution Plans –

- Resolution plan should be submitted as per the time lines mentioned by Form G.
- Resolution Applicant should not have disqualification as mentioned under section 29A of IBC, 2016.
- Resolution Plan should have mandatory contents as required under section 30 and regulation 38.
- Payment of unpaid insolvency resolution cost in priority to

any other debt and to identify specific sources of funds.

- Identification of sources of funds arranged by the Resolution Applicant.
- To pay liquidation value to operational creditors in priority to the financial creditors.
- The term of the plan and its implementation schedule.
- The management and control of the business of the corporate debtor during its term; and adequate means for supervising its implementation.
- Should not contravene any provisions of law.

5. Presenting of Resolution Plan to COC & AA for Approval

- Section 30(3) of IBC, 2016 provides that the Resolution Professional shall present to the CoC for its approval those plans which confirms the conditions in section 30(2) of IBC as mentioned above.
- Section 30(6) of IBC, 2016 provides that the Resolution Professional shall submit the Resolution Plan as approved by CoC to the Adjudicating Authority for its approval.

2. Role of RP beyond what is defined based on the requirement of the Corporate Debtor:

   As a Chief Executive Officer of the Corporate Debtor, Resolution Professional might have to face circumstances and situations where a thoughtful, proactive and a positive approach to handle such situation is required. Few of such situations might be as under:

   - Correspondences/Negotiations with various investors/customers to re-start the operations of the Corporate Debtor.

- Handling of complaints/ grievances faced by the local workmen/employees in understanding the process of submitting claims to IRP/RP because of lack of knowledge.
- Utilization of non-core/dead assets.
- Appointment of additional security to ensure adequate security at the factory in order prevent any theft or mishappening at the factory.
- Restoration of electricity at a low contention for security purpose so as to avoid local labour problems.
- Insurance of the assets of the Corporate Debtor to mitigate the losses arising from unforeseen circumstances.
- Undertaking various market strategies to obtain maximum bids/response from the Prospective Resolution Applicants.

Resolution Professional also faces a lot of concerns from investors/ resolution applicants at the time of invitation of Expression of Interest. General Concerns which create difficulties in getting interest of resolution applicants:

- Lack of Information/Understanding about the Corporate Debtor & its Industry.
- Operational Status & Technical capabilities of the Plants of Corporate Debtor.
- Ongoing litigations related to business, labour and assets of the Corporate Debtor.
- Lack of Understanding of IBC process and requirements in the Resolution Plan.

As a Resolution Professionals, we have to accept the fact that in very few cases the investors will be readily available, in all the other cases RP has to put extra efforts and his professional skills to get a resolution applicant for the corporate debtor.

The above concerns can be dealt by the Resolution professional (RP) by taking few steps as under:

- Preparation of Detailed Information Memorandum which contains all the possible concerns of the prospective Resolution Applicants (RA).
- Understanding of Industry, Manufacturing plant & Peer Groups – Technical expertise should be taken, if required.
- Approaching the prospective RA – Keeping in mind the industry, location, size and other factors, RP should approach the prospective resolution applicants.
- Guiding them in the process – Since IBC is a new act which is undergoing lot of changes regularly, not every resolution applicant will be well versed with the latest developments and requirements of IBC. RP

with their expertise can help guide in the entire process.

- Value for Money – Any strategic/financial investor will be interested only if he can foresee a reasonable return by investing in the corporate debtor.

6. Resolution Plan – An Overview

Although there is no prescribed format in IBC for preparation of Resolution Plan but following are the suggestive contents of a Resolution Plan :

- Overview of the Corporate Debtor and Corporate Insolvency Resolution Process.
- Summary of Resolution Plan.
- About the Resolution Applicant and consortium partner and their eligibility details.
- Creditworthiness and financial Capability of the Resolution Applicant.
- Prior experience in managing/ turning around of Companies, if any.
- Financial Plan :
  a. Settlement of creditors.
  b. Restructuring of Corporate Debtor.
  c. Classification of creditors.
- Proposed Resolution Plan.
- Mandatory Contents of the Resolution Plan (As per regulation 38 of IBBI).
- Eligibility norms as proposed in the evaluation matrix.
- Approvals/Waivers/Reliefs and Concessions.
- Indicative timelines of events for implementation of proposed resolution plan (projections).

As per regulation 37, a Resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the Corporate Debtor to maximize its asset and run it as a going concern. It may be done by:

- Transfer of all or part of the assets of the Corporate Debtor (**CD**) to one or more persons.
- Sale of all or part of the assets whether subject to any security interest or not.
- Restructuring of the corporate debtor, by way of merger, amalgamation and demerger;
- Substantial acquisition of shares, or the merger or consolidation of the Corporate Debtor with other persons.
- Cancellation or delisting of any shares of the corporate debtor, if applicable;
- Satisfaction or modification of any security interest.
- Curing or waiving of any breach of the terms of any debt due from the corporate debtor;
- Reduction in amount payable to the creditors;

- Extension of a maturity date or a change in interest rate or other terms of a debt of CD.
- Amendment of the constitutional documents of the corporate debtor;
- Issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;
- Change in portfolio of goods or services produced or rendered by the corporate debtor;
- Change in technology used by the corporate debtor; and
- Obtaining necessary approvals from the Central and State Governments and other authorities.

7. Role of Resolution Applicant

- The Plan submitted by the prospective resolution applicant must provide for measures as may be necessary for the insolvency resolution of the CD for maximization of the value of its assets, which may include transfer or sale of assets or part thereof, whether subject to security interests or not.
- The Plan may provide for either satisfaction or modification of any security interest of a secured creditor and may also provide for reduction in the amount payable to different classes of creditors.
- The prospective resolution applicant has a right to receive complete information as to the CD, debts owed by it, and its activities as a going concern.

8. Role of Committee of Creditors:

The committee shall evaluate the resolution plans strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit. The committee of creditors may approve a resolution plan by a vote of not less than 66% of voting share of the financial creditors, after considering:

- its feasibility and viability,
- the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board.

The committee shall also record its deliberations on the feasibility and viability of the resolution plans.

9. Various legal judgments/case laws related to Resolution Plans

1. Priority & treatment of stakeholders with regard to the payment of their dues:
   - Supreme Court in its order dated 15th November, 2019 - Committee of Creditors of Essar Steel India Ltd. *v.* Satish Kumar Gupta (2019) 111 taxmann.com 234: Fair and equitable

treatment should be given to all the stakeholders but it does not mean that FCs and OCs or Secured and Unsecured must be paid the same amount, percentage wise under the resolution plan.

2. Evaluation of Feasibility & Viability of the Resolution Plan

   - NCLAT in its order dated 11th September, 2019 – Sreeram E Techno School (P.) Ltd. v. Beans and More Hospitality Pvt. Ltd. (Company Appeal (AT)(Insolvancy) No. 936 of 2019, dated 11-9-2019) through RP Prabhjit Singh Soni: Feasibility, Viability and other conditions like going concern has to be decided by COC and cannot be looked by NCLT or NCLAT.

3. Commercial Wisdom of COC cannot be questioned

   - Supreme Court in its order dated 15th November, 2019 - Committee of Creditors of Essar Steel India Ltd's case (*supra*)

   - Supreme Court in its order dated 5th February, 2019 – *K Sashidhar v. Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312.

   - Supreme Court in its order dated January 22, 2020 – *Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh* (2020) 113 taxmann.com 421/158 SCL 567. There is no provision in the code in which the bid of any resolution applicant has to match liquidation value in order to arrive in the manner provided in Clause 35 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

4. Resolution Applicant has no right to claim that his resolution plan must be approved

   - NCLT Chennai in its order dated 11th June, 2019 – *Mrs. Pavithra v. A Arumugam*.

5. Treatment of Statutory Dues as Operational Debt

   - NCLAT in its order dated 20th March 2019 – *Pr.DGIT* v. *Synergies Dooray Automotive Ltd.* (2019) 103 taxmann.com 361/153 SCL 77.

6. Resolution Plan cannot be rejected straightaway by the Committee of Creditors merely on a ground that it was submitted after the expiry of the stipulated time fixed by the CoC:

   - NCLT, Mumbai bench order dated 21.12.2018 - *ICICI Bank Ltd* v. *Unimark Remedies Ltd.* and *Omkara Asset Reconstruction P. Ltd.* v. *Resolution Professional of Unimark Remedies Ltd*: (MA No. 1529 of 2018) Purely on the basis of technicalities, the rejection of Resolution Plan even without looking into its

merits is certainly an act which shall go against the very spirit of the Code and may even result in a huge loss to the Company.

7. In order to challenge an approved resolution plan, appeal should be under grounds provided in section 61(3) of the IBC, 2016 :

   ◆ NCLAT in its order dated January 2, 2020- *Kaushal Ramesh Mehta* v. *Metallica industries Ltd Company*. mentioned that **appeal should be under the following grounds:**

   - The approved resolution plan is in contravention of the provisions of any law for the time being in force;
   - There has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;
   - The debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;
   - The insolvency resolution process costs have not been provided for repayment in priority to all other debts;
   - The resolution plan does not comply with any other criteria specified by the Board.

8. Corporate Debtor would not be liable for any offence committed prior to commencement of the corporate insolvency resolution process and the corporate debtor would not be prosecuted if a resolution plan has been approved by the Adjudicating Authority.

   ◆ Delhi High court in its order dated March 16, 2020 -*Tata Steel BSL Ltd v. Union of India* (2020) 117 taxmann.com 660

9. All stakeholders including the Promoters/shareholders are entitled to know the fair value/liquidation value of the Corporate Debtor

   ◆ NCLAT in its order dated October 25, 2019- *Sri Ch. Sridhar* v. *Dr. G.V. Narasimha Rao* (Company Appeal (AT) Insolvency Nos. 1132-1133 of 2019).

10. If the 'Resolution Plan' placed before the Adjudicating Authority under Section 13 has been approved, it is not possible for the Appellate Tribunal to decide the claim on the basis of the disputed question of fact.

    ◆ NCLAT in its order dated November 13, 2019 - *Encote Energy (India) P. Ltd.* v. *V. Venkatachalam* (Company Appeal (AT) Insolvency No. 1226 of 2019).

11. Key issues resolved by Hon'ble Supreme Court in the matter of committee of Creditors of *Essar Steel India Ltd's* (*Supra*).

    - Creditors have a right to proceed against the guarantor even after resolution plan is approved.
    - Resolution plan is binding on the guarantors as well and their claim of sub rogation on the Corporate Debtor can be extinguished.
    - Successful Resolution Applicant need to takeover the business of the Corporate Debtor on a fresh slate and he cannot suddenly face undecided claims from the guarantors or any other claimants.
    - Fair and equitable treatment should be given to all the stakeholders.
    - Commercial Wisdom of Committee of Creditors can not be questioned.

12. If Resolution Plan is prepared and approved before the amendment to Regulation 38, then the plan cannot be challenged on the basis of it.

    - Hon'ble Supreme Court in *Rahul Jain v. Rave Scans P. Ltd.* (2020) 113 taxmann.com 342/157 SCL 531. held that once a plan has been approved, the plan attains its finality.

13. Adjudicating Authority cannot *suo-motu* direct the CoC to consider new resolution plan and reconsider already approved Resolution plan.

    - NCLAT in its order dated May 29, 2020 *Chhatisgarh Distilleries Ltd. v. Dushyant Dave* (2020) 117 taxmann.com 385.

14. Changes in payment time lines of resolution plan due to COVID-19 allowed by NCLT.

    - NCLT, Ahmedabad Bench in its order dated May 27, 2020 - *Sunil Kumar Agarwal (Resolution Professional of Digjam Limited)* v. *Suspended Board of Directors of Digjam Ltd.*

15. The resolution can be taken even during the CIRP, if any promoter as investor agrees to invest the money for keeping the company as a going concern and complete the infrastructure project within the time frame.

    - NCLAT in its order dated February 5, 2020 - *Rajesh Goyal v. Babita Gupta* (2020) 117 taxmann.com 720.

10. Conclusion

Not every thing can be mentioned under the code or the regulations. Keeping in mind the intend of law, Resolution Professional should put all his knowledge and efforts to achieve the object of the Code. Resolution Applicants may require Resolution Professional's expert support which should always be extended by RP.

Can A Resolution Professional Be Biased?

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1. WHAT IS BIAS?

In the case of *Rex* V.*Sussex* ((1924)1 KB 256), the principle, "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done", was established.

"BIAS" is against the principles of natural justice. Bias, in the context of a litigation before judicial or quasi-judicial proceedings, fall into two broad classes:

(A) where the Judge has a pecuniary interest in the subject-matter of the litigation; or

(B) where the Judge may have a bias in favour of one of the parties.

In this article, we are concerned with that kind of bias which falls into Category B. Whether a Resolution Professional can be biased in favour of his former employer Financial Creditor. In the case of *State Bank of India v. Metenere Ltd.* (2020)118 taxmann.com 143/161 SCL 513 (NCL-AT), the Financial Creditor Bank had proposed appointment of one Mr.Shailesh Verma as Interim Resolution Professional. Mr.Shailesh Verma was a former employee of the said Financial Creditor for 39 years. The NCLT, Principal Bench, New Delhi had directed the Bank to change the Interim Resolution Professional as it was of the view that Mr. Shailesh Verma having worked with the State Bank of India for 39 years before his retirement in 2016, there was an apprehension of bias and Mr. Shailesh Verma was unlikely to

act fairly and could not be expected to act as an Independent Umpire. Aggrieved by the said order, the Bank had filed an appeal before the NCLAT, the Appellate Tribunal. However, the NCLAT had supported the view of the NCLT and held that the Interim Resolution Professional should be replaced with another one while making the following observations:

> "The fact that the proposed `Resolution Professional' Mr. Shailesh Verma had a long association of around four decades with the `Financial Creditor' serving under it and currently drawing pension coupled with the fact that the `Interim Resolution Professional' is supposed to collate all the claims submitted by Creditors, though not empowered to determine the claims besides other duties as embedded in Section 18 of the `I&B Code' raised an apprehension in the mind of Respondent- `Corporate Debtor' that Mr. Shailesh Verma as the proposed `Interim Resolution Professional' was unlikely to act fairly justifying the action of the Adjudicating Authority in passing the impugned order to substitute him by another Insolvency Professional. Observations of the Adjudicating Authority in the impugned order with regard to `Interim Resolution Professional' to act as an Independent Umpire must be understood in the context of the `Interim Resolution Professional' acting fairly qua the discharge of his statutory duties irrespective of the fact that he is not competent to admit or reject a claim."

The Hon'ble NCLAT had relied on the decision of the Supreme Court, in the case of *Ranjit Thakur* v. *Union of India* (AIR 1987 SC 2386) where the Supreme Court had held as under:

> "As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the judge is not to look at his own mind and ask himself, however, honestly, "Am I Biased?"; but to look at the mind of the party before him"

Similarly, in the case of *Kanakabha Ray* v. *Narayan Chandra Saha* (MANU/NL/0317/2020), the NCLAT had once again insisted on change of Resolution Professional as he was in the employment of the Financial Creditor Bank which appointed him as a Resolution Professional.

2. WHETHER A RESOLUTION PROFESSIONAL CAN BE BIASED?

Whether a Resolution Professional could be biased in favour of one of the Financial Creditors and to the prejudice of the Corporate Debtor or other Financial Creditors in Corporate Insolvency Resolution Proceeding (CIRP) is the moot question.

Bias is where the decision maker is shown to have an interest in the outcome of the case. Bias denotes an Umpire who allows a decision to be influenced by partiality or prejudice and thereby deprives the party to the dispute a fair trial. But, whether a Resolution Professional can act in favour of one of the Financial Creditors? Is he a decision maker? Let us examine the powers and functions of the Resolution Professional under the scheme of Insolvency and Bankruptcy Code, 2016.

3. WHO IS A RESOLUTION PROFESSIONAL?

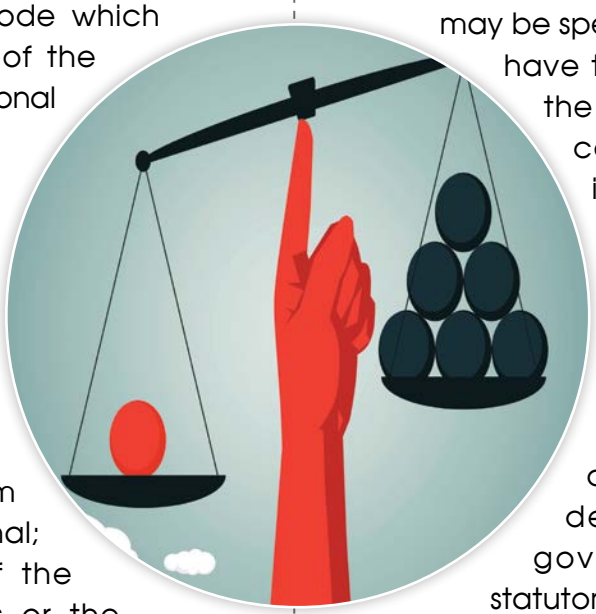
Section 5(27) defines the expression "Resolution Professional" as under:

"resolution professional", for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional"

4. POWERS AND DUTIES OF A RESOLUTION PROFESSIONAL

Section 23(2) of the IBC, 2016 provides that the resolution professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional under this Chapter.

Section 17(1) of the Code which deals with the powers of the Interim Resolution Professional as under:



"From the date of appointment of the interim resolution professional, — (*a*) the management of the affairs of the corporate debtor shall vest in the interim resolution professional; (*b*) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional;

(*c*) the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional; (*d*) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional. (*2*) The interim resolution professional vested with the management of the corporate debtor shall— (*a*) act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any; (*b*) take such actions, in the manner and subject to such restrictions, as may be specified by the Board; (*c*) have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor; (*d*) have the authority to access the books of account, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified.

Section 18 specifies the duties of the Interim Resolution Professional as under:

"The interim resolution professional shall perform the following duties,

namely:— (*a*) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to— (*i*) business operations for the previous two years; (*ii*) financial and operational payments for the previous two years; (*iii*) list of assets and liabilities as on the initiation date; and (*iv*) such other matters as may be specified; (*b*) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15; (*c*) constitute a committee of creditors; (*d*) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors; (*e*) file information collected with the information utility, if necessary; and (*f*) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including— (*i*) assets over which the corporate debtor has ownership rights which may be located in a foreign country; (*ii*) assets that may or may not be in possession of the corporate debtor; (*iii*) tangible assets, whether movable or immovable; (*iv*) intangible assets including intellectual property; (*v*) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies. (*vi*) assets subject to the determination of ownership by a court or authority; (*g*) to perform such other duties as may be specified by the Board."

Section 20 provides as under :

"(1) The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern. (2) For the purposes of sub-section (1), the interim resolution professional shall have the authority— (*a*) to appoint accountants, legal or other professionals as may be necessary; (*b*) to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process; (*c*) to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property: Provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt. (*d*) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern; and (*e*) to take all such actions as are necessary to keep the corporate debtor as a going concern."

It would appear from the above provisions that the Resolution Professional has

been endowed with vast powers. No doubt, till the constitution of COC, the IRP functions independently. However, Section 21 (1) provides that the Interim Resolution Professional shall constitute a Committee of Creditors (CoC). Regulation 17 of the INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2016 provides that such CoC shall be constituted within 30 days of his appointment. Thereafter, Section 28 of the Code comes into picture which provides as under:

(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely:— (*a*) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting; (*b*) create any security interest over the assets of the corporate debtor; (*c*) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company; (*d*) record any change in the ownership interest of the corporate debtor; (*e*) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting; (*f*) undertake any related party transaction; (*g*) amend any constitutional documents of the corporate debtor; (*h*) delegate its authority to any other person; (*i*) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties; (*j*) make any change in the management of the corporate debtor or its subsidiary; (*k*) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business; (*l*) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or (*m*) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

(2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).

(*3*) No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of sixty-six per cent of the voting shares.

(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.

(5) The committee of creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code.

Therefore, a RP's independent powers last only till the constitution of the Committee of Creditors. On constitution of the COC, it may be observed that, the `Resolution

Professional' has no powers and only acts as a facilitator in the 'Corporate Insolvency Resolution Process' as all decisions are taken only with the approval of the 'Committee of Creditors'. The 'Financial Creditor' in whose employment the Resolution Professional was in also will not be in a position to influence the outcome of the CIRP in a particular direction as he plays his part only to the extent of its voting share as a member of Committee of Creditors.

Section 30(2) appears to have empowered a Resolution Professional to place a Resolution Plan before the CoC which conforms to the Code and Regulations. However, even when he decides that a Resolution Plan does not conform to the Code and Regulations, he is duty bound to place the facts before the CoC as to why a particular Resolution Plan did not conform to the Code and Regulations and deal with the objections raised by the CoC. Further, the Adjudicating Authority, NCLT is the authority to approve the Resolution Plan approved by the CoC, not the Resolution Professional. Any aggrieved party may move the NCLT/NCLAT to get the decision of the RP and CoC nullified. In the case of, *Kotak Investment Advisors Ltd* v. *Krishna Chamadia* (2020) 114 taxmann.com 113/161 SCL 696 (Bom.), it was alleged by the Resolution Applicant that the RP had illegally placed the Resolution Plan of the successful resolution applicant as the same was received after the last date for submission of the Resolution Plan.

Therefore, relying upon the decision of the Supreme Court (cited above) by the NCLAT is completely misplaced as the Resolution Professional is not the Adjudicating Authority. Supreme Court's decision on which the NCLAT had relied was in a case of a member being on the Court Martial which was constituted to try the delinquent military officer. The facts and circumstances of that case were completely different as such member was in a position to influence the outcome of the court martial proceedings.

Further, in a recent case of "*Government of Haryana PWD Haryana (B and R) Branch* v. *G.F. Toll Road (P) Ltd.* ((2019) 3 SCC 505), a question arose before the Supreme Court of India whether nominating a former employee of the Government as one of the arbitrators would vitiate arbitration process of arbitration proceedings. It was held by the Supreme Court as under :

> "The objection of reasonable apprehension of bias raised was wholly unjustified and unsubstantiated, particularly since the nominee arbitrator was a former employee of the State over 10 years ago. This would not disqualify him from acting as an arbitrator. Mere allegations of bias are not a ground for removal of an arbitrator."

This is when an arbitrator is a like judge of a court of law and his biased decision could prejudice the position of one of the parties to the arbitration proceedings.

Whereas, in the case of a Resolution Professional, the question of being bias does not arise as he is not in a position of favouring his former employer Financial Creditor, however he wants to.

5. PENALTIES UNDER IBBI (INSOLVENCY PROFESSIONAL) REGULATIONS, 2016

Furthermore, a Resolution Professional, being

an Insolvency Professional, is governed by the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016. The Disciplinary action under the said regulations for violation of the Code or for any misconduct on the part of the Resolution Professional is rather stringent.

In the year 2018, for the first time, IBBI had penalized five Insolvency Professionals for misconduct while acting as Resolution Professional. IBBI had cancelled the registration of Mukesh Mohan, an insolvency professional in a matter involving four corporate debtors - JEKPL Pvt. Ltd, Carnation Auto India, Athena Demwe Power, and Tirupati Links. He was debarred from seeking a new registration for 10 years. He was indicted for engaging in private communication with a single lender, abrupt resignation, lapses in finding irregular transactions, and appointing the same registered valuer in all four assignments.

Similarly, Dinkar T. Venkatasubramanian of Ersnt & Young LLP, was imposed with a penalty of Rs. 1 lakh, as the interim resolution professional authorised payment of his professional fee to Ernst & Young LLP. Payment was released to EY LLP based on IRP's instruction to bank.

IBBI permanently cancelled the registration of Rakesh Wadhwa, an interim resolution professional in the case of Ved Cellulose Ltd.. He breached the standard norms of holding meetings, extending his services beyond the stipulated time. He also did not accept the claim of Bank of India and consequently, Bank of India was kept outside the committee of creditors.

IBBI suspended the registration of Bhavna Sanjay Ruia, in the case of Madhukon Project, for a year. She charged much higher fees - as much as Rs. 14 crore - for the entire assignment while the total debt of the company was only Rs. 4.16 crore.

In the Electrosteel case, the Resolution Professional Dhaivat Anjaria had to pay one-tenth of the total fees to IBBI as penalty for disregarding the timeline of CIRP. Recently, in the month of June, 2020, Insolvency regulator's Disciplinary Committee(DC) had imposed a penalty of Rs. 34.22 lakhs on an insolvency professional, Mohan Lal Jain who acted as a Resolution Professional of a Corporate Debtor namely Mack Soft Tech Pvt. Ltd. The penalty imposed is equal to 25 per cent of the fee that he had received as a resolution professional in the Corporate Insolvency Resolution Process (CIRP) of the said Corporate Debtor. The contravention related to the RP continuing to make payments to HDFC during CIRP which is in violation of provisions on moratorium contained in the IBC and imposed by the Adjudication Authority.

This being the position, there is no scope for a Resolution Professional to be biased especially he is not the adjudicating authority and stringent regulations to contain the misconduct of a Resolution Professional are in place under the Regulations by which he is governed.

6. CONCLUSION

However, in the above case *Metenere Ltd. (Supra)* NCLAT had held as under:

> "9. In the given set of circumstances, we are of the considered opinion that the apprehension of bias expressed by the 'Corporate Debtor' qua the

appointment of Mr. Shailesh Verma as proposed `Interim Resolution Professional' at the instance of the Appellant-'Financial Creditor' cannot be dismissed off hand and the Adjudicating Authority was perfectly justified in seeking substitution of Mr. Shailesh Verma to ensure that the `Corporate Insolvency Resolution Process' was conducted in a fair and unbiased manner. This is notwithstanding the fact that Mr. Shailesh Verma was not disqualified or ineligible to act as an `Interim Resolution Professional'. Viewed thus, we find no legal flaw in the impugned order which is free from any legal infirmity and has to be upheld. It goes without saying that the Appellant- `Financial Creditor' should not have been aggrieved of the impugned order as the same did not cause any prejudice to it."

The matter was carried forward in appeal by SBI before the Supreme Court. It was observed by the Supreme Court, in its order dated 19.8.2020, that the approach of the National Company Law Appellate Tribunal, New Delhi (NCLAT) was not correct that merely Resolution Professional who remained in the Service of SBI and is getting pension, was disentitled to be the Resolution Professional.

Therefore, now it is open to a Financial Creditor Bank to engage a Resolution Professional who is their former employee. In fact, being associated with a Bank for about 30 years, an ex-Banker turned Resolution Professional would have a very good and vast understanding of all aspects of a business organisation, be it Finance or Management, viability or feasibility, technology or administration and hence he is very well suited to be Resolution Professional than any other professional like Company Secretary, Chartered Accountant, Cost Accountant or an advocate.

●●●

(2020) 119 taxmann.com 26 (SC)

SUPREME COURT OF INDIA

Union of India *v.* Association of Unified Telecom Service Providers of India Etc.

ARUN MISHRA, S. ABDUL NAZEER AND M.R. SHAH, JJ.

CIVIL APPEAL NOS. 6328-6399 OF 2015
M.A. (D) NO. 9887 OF 2020

SEPTEMBER 1, 2020

Section 4 of the Indian Telegraph Act, 1885 - Exclusive privilege in respect of telegraphs and power to grant licenses - Definition of gross revenue - Whether where there were huge arrears on telecom companies concerning spectrum licence, telecom companies were to be allowed to pay Adjusted Gross Revenue (AGR) charges within a period of ten years in equal yearly instalments and for demand raised by Department of Telecom in respect of AGR dues determined by instant Court, there shall not be any dispute raised by any Telecom Operator and there shall not be any reassessment - Held, yes - Whether further, in event of any default in making payment of annual instalments, interest would become payable as per agreement along with penalty and interest without reference to Court - Held, yes - Whether various companies through Managing Director/Chairman or other authorised officer were to furnish an undertaking within four weeks, to make payment of arrears as per order and existing bank guarantees that had been submitted regarding spectrum shall be kept alive by Telecom service providers until payment is made - Held, yes (Para 38)

FACTS

Under section 4(1) of the Telegraph Act, the Central Government has the exclusive privilege of establishing, maintaining, and working telegraphs. Section 4 of the Telegraph Act enables the Central Government to part with the exclusive privilege in favour of any other person by granting a licence on such conditions and considering such terms as it thinks fit. The Parliament had approved spectrum sharing as part of 'National Telecom Policy, 2012'. However, DOT issued and approved the final guidelines in the year 2015. Spectrum sharing was a policy that permitted the sharing of radio access network equipment of operators. Single radio network equipment was used to provide services by two operators using both the entities' spectrum. By sharing the radio network equipment, two operators use their spectrum and create their respective businesses' capacity. Liability to pay necessary Adjusted Gross Revenue (AGR) and licence fee remains with the respective companies. The licensee does not own the spectrum and had merely been granted a right to use, which was based on fulfilment of the conditions of the contract in the form of a Licence Agreement.

There were huge AGR dues pending which telecom companies were required to clear in line with the judgment in *Union of India v. Association of Unified Telecom Service Providers of India* (2019) 110 taxmann.com 457 (SC). The telecom companies had proposed different timelines for clearing of dues.

The Union of India, after envisaging the larger interest, economic consequences on the nation and to ensure that the order of this Court is complied with in its letter and spirit, had taken a conscious decision and sought approval of this Court to a formula for recovery of past dues from the telecom service providers. A prayer had also been made to pay the remaining dues through annual instalments spanning over 20 years.

The Union of India on the representation made by the telecom service providers and Indian Banks' Association, had decided to provide the facility of making payment in instalments within 20 years.

HELD

Considering the various factors taken into account and the letters written by the Indian Banks Association, it is opined that the decision of the Cabinet is based on the various factors, and in the interest of the economy and the consumers. The decision is taken after extensive deliberations and consultations, and till the date of judgment, the dues have been worked out as per the decision rendered by this Court. Only for the subsequent period, some relaxation has been given as to the rate of interest, penalty, and interest on penalty, which is permissible. The arrears have accumulated for the last 20 years. It is also to be noted that some of the companies are under insolvency proceedings, validity of which is to be examined, and they were having huge arrears of AGR dues against them. For protecting the telecom sector, a decision has been taken on various considerations which cannot be objected to. (Para 35)

However, it is considered that the period of 20 years fixed for payment is excessive.

It is felt that it is a revenue sharing regime, and it is grant of sovereign right to the TSPs. under the Telecom Policy. It is felt that some reasonable time is to be granted, considering the financial stress and the banking sector's involvement. It is deemed appropriate to grant facility of time to make payment of dues in equal yearly instalments. The decision of the Cabinet, shall stand except the modifications concerning the time schedule for making payment of arrears. But, at the same time, it is to be ensured that the dues are paid in toto. The concession is granted only on the condition that the dues shall be paid punctually within the time stipulated by this Court. Even a single default will attract the dues along with interest, penalty and interest on penalty at the rate specified in the agreement. (Para 36)

It is also placed on record that the demand of AGR was raised as against non-telecom Public Sector Undertakings (PSUs). On the strength of the judgment passed by this Court, pursuant to the Court's directions, the matter has been re-examined and considering the representations filed by PSUs, it is stated in the affidavit dated 18-6-2020 that non-telecom public sector undertakings are non-telecom entities involved in providing services such as power transmission, oil and gas exploration, and refining, metrorail service, etc., and that they are not into the business of providing mobile services to the general public. They are not holding Access Service Licence (ASL). The revenue received by non-telecom public sector undertakings under the head of 'telecom services' forms a very negligible and a small portion and does not form part of the total revenue, *e.g.*, 0.0002 per cent for GAIL, 0.00028 per cent for DMRC and 0.001 per cent for Oil India, etc. DoT has decided to withdraw the demands raised for licence fee based on non-telecom revenue from the non-telecom public sector undertakings, which are Powergrid, GAIL, Oil India Ltd., DMRC, which constitutes about 96 per cent of the demand regarding non-telecom PSUs. In this regard orders have been issued on 13-7-2020 and 14-7-2020. (Para 37)

Resultantly, the following directions are issued:

(*i*) That for the demand raised by the Department of Telecom in respect of the AGR dues based on the judgment of this Court, there shall not be any dispute raised by any of the Telecom Operators and that there shall not be any reassessment.

(*ii*) That, at the first instance, the respective Telecom Operators shall make the payment of 10 per cent of the total dues as demanded by DoT by 31-3-2021.

(*iii*) TSPs have to make payment in yearly instalments commencing from 1-4-2021 up to 31-3-2031 payable by 31st March of every succeeding financial year.

(*iv*) Various companies through Managing Director/Chairman or other authorised officer, to furnish an undertaking within four weeks, to make payment of arrears as per the order.

(*v*) The existing bank guarantees that have been submitted regarding

the spectrum shall be kept alive by TSPs until the payment is made.

(*vi*) In the event of any default in making payment of annual instalments, interest would become payable as per the agreement along with penalty and interest on penalty automatically without reference to Court. Besides, it would be punishable for contempt of Court.

(*vii*) Compliance of order is to be reported by all TSPs. and DoT every year by 7th April of each succeeding year.(Para 38)

CASE REVIEW

Union of India v. Association of Unified Telecom Service Providers of India (2019) 110 taxmann.com 457 (SC) (para 38) *followed.*

CASES REFERRED TO

Union of India v. Association of Unified Telecom Service Providers of India (2019) 110 taxmann.com 457 (SC) (para 1), *Union of India* v. *Association of Unified Telecom Services Providers of India* (2011) 10 SCC 543 (para 2), *Centre for Public Interest Litigation* v. *Union of India* (2012) 3 SCC 1 (para 11), *Embassy Property Development (P.) Ltd. v. State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 11), *Ram Dass* v. *Davinder* (2004) 3 SCC 684 (para 11), *Reliance Communication Ltd. v. State Bank of India* (2019) 102 taxmann.com 331 (SC) (para 11) and *Commitee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 13).

Sriram P., AOR, **Manjul Bajpai**, **Nitin Kala**, **Pukhrambam Ramesh Kumar**, AOR, **Kunal Singh**, **Ms. Anupama Ng.**, **Karun Sharma**, Advs., **Harsh Kaushik**, AOR, **Ranjeeta Rohatgi**, AOR, **E.C. Agrawala**, AOR, **Faisal Sherwani**, AOR, **Gurpreet Singh Kahlon**, Adv., **Gurmeet Singh Makker**, AOR, **Ms. Nikita Chitale**, **Atul Menon**, Advs., **Swetank Shantanu**, AOR, **Ms. Vibha Dhawan**, **Ms. Alvia Ahmed**, Advs., **Akshat Jain**, **Amit Dhingra**, **Rohit Mahajan**, Advs., **S.S. Shroff**, AOR, **Sameer Abhyankar**, AOR, **Harish N. Salve**, Sr. Adv., **K.V. Vishwanathan**, Sr. Adv., **K.R. Sasiprabhu**, AOR, **Raghav Shankar**, **Bhavuk Agarwal**, **Vishnu Sharma**, **Tushar Bhardwaj**, Advs., **Sanjay Kapur**, AOR, **Ms. Megha Karnwal**, **V.M. Kannan**, **Sambit Panja**, **Harshal Narayan**, **Ms. Shikha Sarin**, Advs., **Rahul Narayan**, AOR and **Shashwat Goel**, Adv. *for the Appearing Parties.*

JUDGMENT

1. This Court passed judgment and order in C.A. Nos.6328-6399 of 2015 - *Union of India v. Association of Unified Telecom Service Providers of India* (2019) 110 taxmann.com 457. The Court decided regarding the definition of the 'AGR' and dues to be paid thereunder.

2. The concept of AGR arose in the light of the provisions contained in the policy framed by the Government of India and the provisions of the Indian Telegraph Act. Under section 4(1) of the Telegraph Act, the Central Government has the exclusive privilege of establishing, maintaining, and working telegraphs. Section 4 of the Telegraph Act enables the Central Government to part with the exclusive privilege in favour of any other person

by granting a licence on such conditions and considering such terms as it thinks fit. The licence issued under section 4(1) becomes a contract between a licensor and a licensee. This Court considered the provisions of the Telegraph Act in AUSPI (I) matter *Union of India v. Association of Unified Telecom Service Providers of India* (2020) 119 taxmann.com 26 (SC) in this very case, thus:

> "37. A bare perusal of sub-section (1) of section 4 of the Telegraph Act shows that the Central Government has the exclusive privilege of establishing, maintaining and working telegraphs. This would mean that only the Central Government, and no other person, has the right to carry on telecommunication activities.
>
> ** ** **
>
> 39. The proviso to sub-section (1) of section 4 of the Telegraph Act, however, enables the Central Government to part with this exclusive privilege in favour of any other person by granting a licence in his favour on such conditions and in consideration of such payments as it thinks fit. As the Central Government owns the exclusive privilege of carrying on telecommunication activities and as the Central Government alone has the right to part with this privilege in favour of any person by granting a licence in his favour on such conditions and in consideration of such terms as it thinks fit, *a licence granted under the proviso to sub-section (1) of section 4 of the Telegraph Act is in the nature of a contract between the Central Government and the licensee*.

40. A Constitution Bench of this Court in *State of Punjab* v. *Devans Modern Breweries Ltd.*, (2004) 11 SCC 26, relying on Har Shankar v. *Dy. Excise & Taxation Commr.* case, (1975) 1 SCC 737 and *Panna Lal* v. *State of Rajasthan*, (1975) 2 SCC 633, has held in para 121 at p. 106 that issuance of liquor licence constitutes a contract between the parties. Thus, once a licence is issued under the proviso to sub-section (1) of Section 4 of the Telegraph Act, the licence becomes a contract between the licensor and the licensee. Consequently, the terms and conditions of the licence including the definition of adjusted gross revenue in the licence agreement are part of a contract between the licensor and the licensee. We have to, however, consider whether the enactment of the TRAI Act in 1997 has in any way affected the exclusive privilege of the Central Government in respect of the telecommunication activities and altered the contractual nature of the licence granted to the licensee under the proviso to sub-section (1) of Section 4 of the Telegraph Act.

41. Section 2(*e*) of the TRAI Act quoted above defines "licensee" to mean any person licensed under sub-section (1) of section 4 of the Telegraph Act for providing specified public telecommunication services and section 2(*ea*) defines "licensor" to mean the Central Government or the telegraph authority who grants a licence under section 4 of the Telegraph Act. Sub-section 2(*k*) defines "telecommunication service" very

widely so as to include all kinds of telecommunication activities. These provisions under the TRAI Act do not affect the exclusive privilege of the Central Government to carry on telecommunication activities nor do they alter the contractual nature of the licence granted under the proviso to sub-section (1) of section 4 of the Telegraph Act." (*Emphasis Supplied*)

3. During consideration of the matter, concerning the M.A. filed by the Union of India for extension of time to make the payment, it was pointed out that several telecom service providers were under insolvency proceedings under The Insolvency and Bankruptcy Code, 2016 (for short "the Code"). This Court passed an order on 20-7-2020, and the same is extracted hereunder:

'We have heard the learned counsel appearing for the parties at length with respect to the prayer made by the Central Government and the time frame for making the payment as per the order passed by this Court. During course of hearing, again an attempt was made to wriggle out of our judgment and orders, which were passed by this Court under the guise of reassessment and recalculation. That is not at all permissible. In view of decision, there is no scope of raising any further dispute with respect to any item or to raise fresh dispute. No dispute can be raised with respect to dues and they have to be paid. New round of litigation is prohibited. In the second inning, we have heard the same after remand of the issues to the TDSAT. Thereafter, there is no question of entertaining any kind of dispute with respect to the payment and dues worked out. No dispute shall be entertained. The calculations which have been given and the amount to be recovered at pages 180-181 of M.A.D. No. 9887 of 2020 (application for modification) in C.A. Nos. 6328-6399 of 2015 are taken to be as final amount and there can be no dispute raised about it. No recalculation and self-assessment can be undertaken. The calculations are as under :—

"AMOUNTS RECOVERABLE FROM MAJOR TSPs AS PER PRILIMINARY ASSESSMENTS

Sl. No.	Name of the Company	Total Demand of DoT incorporating C&AG and Special Audit as on October 2019 (Rs. Cr.) (LF+SUC)	Self Assessment by Licensee pursuant to the Hon'ble SC Judgment (Rs. Cr.)	Payment Received till 6-3-2020 (Rs. Cr.)	Balance Due (Rs. Cr.)
		A	B	C	D
Operational TSPs party to the litigation					
1.	BHARTI AIRTEL GROUP	43980.00	13004.00	18, 004.00	25976.00

		A	B	C	D
2.	TELENOR INDIA PRIVATE LIMITED				
	BHARTI GROUP	43980.00	13004.00	18004.00	
3.	IDEA CELLULAR LTD.	58254.00	21533 (LF 14453 + SUC7080)	3, 500.00	54, 754.00
4.	VODAFONE GROUP OF COMPANIES				
	VODAFONE IDEA	58254.00	21533.00	3500.00	54754.00
5.	TATA GROUP OF COMPANIES	16798.00	2197 (LF 1720 + SUC 477)	4, 197.00	12, 601.00
6.	QUADRANT TELEVENTURES LIMITED	189.91	25.28	0.69	189.22
7.	RELIANCE JIO INFOCOMM LTD.	70.53	194.79 (LF 148.03+SUC 46.76)	195.18	-
	Sub-total (1-7)	119292.44	36954.07	25, 896.87	93520.22
TSPs under Insolvency					
8.	AIRCEL GROUP OF COMPANIES	12389.00		-	12389.00
9.	RELIANCE COMMUNICATIO N/ RELIANCE TELECOM LIMITED	25199.27		3.96	25194.58
10.	SISTEMA SHYAM TELESERVICES LTD.		222.1 (LF 166.1+SUC 56)	0.73	
11.	VIDEOCON TELECOMMUNIC ATIONS LTD.	1376.00		-	1376.00
	Sub-total (8-10)	38964.27	-	4.69	38959.58
TSPs which were not party to the litigation					
12.	LOOP TELECOM PVT. LTD.	604.00		-	604.00
13.	ETISALAT DB TELECOM PRIVATE LIMITED				
14.	S TEL PVT. LTD.				
15.	BHARAT SANCHAR NIGAM LIMITED	5835.85	-	-	5835.85
16.	MAHANAGAR TELEPHONE NIGAM LIMITED	4352.09		-	4352.09
	Sub-total (11-16)	10791.94	222.1	0.00	10791.94
TOTAL		169048.65	37176.17	25901.56	143271.74

Note :

1. Total Demands are inclusive of Principal, Interest, Penalty and Interest on Penalty.

2. Total Demands have been calculated generally up to F.Y. 2016-17. On these

outstanding amounts, Interest/ Penalty/Interest on Penalty is calculated up to October, 2019.

3. All dues are subject to further revisions due to departmental assessments, CAG audits, Special Audits, Court Cases etc."

However, when we consider the dues of Telecom Service Providers under insolvency, we find that there are several companies which have dues to the extent of Rs. 38, 964.27 crores, which have gone under liquidation. Since the dues are huge, we propose to examine the *bona fides* of the initiation of the proceedings under the IBC. Let all the documents of the companies *viz.* Aircel Group of Companies, Reliance Communication/Reliance Telecom Limited, Sistema Shyam Teleservices Ltd. and Videocon Telecommunications Ltd. relating to liquidation and orders passed in proceedings be placed on record within 10 days from today.

We have closed the matter with respect to the prayer made for making the payment in instalments and the offer made by the Government, the time frame thereto and how to secure the amount. The order is reserved on that aspect.

However, we will hear the matter separately with respect to the companies under liquidation and test the *bona fides* of their action and how to ensure that the amount is recovered. Let all the documents be placed on record within 10 days from today and the matter be listed for hearing about these companies on the above aspect on 10-8-2020.

Written submissions and the reply, if any, be filed on or before 7-8-2020.'

This Court wanted to examine the *bona fides* of the telecom service providers who have resorted to the process of insolvency, hence, invited them to file their response. Before the initiation of insolvency proceedings, most of the telecom service providers who are under the insolvency proceedings had applied to the Department of Telecommunications to grant permission for trading of licence. The Central Government objected on the ground that it would not be possible for it to grant permission. It declined the permission. There were huge arrears concerning the spectrum licence, which were required to be paid, as a pre-condition to such permission. Various sharing arrangements made *inter se* telecom service providers with respect to the spectrum also came to the fore.

4. The Union of India, Department of Telecommunications' stand is that the spectrum cannot be the subject-matter of the IBC proceedings in view of the provisions in sections 14 and 18. The dues under the licence towards the spectrum's use cannot be put in the category of operational dues. In contrast, the Department of Commerce holds the opinion that the dues under the licence are operational dues, and the provisions of the IBC are applicable. The Department of Telecommunications also

pointed out that as per guideline Nos.10, 11, and 12 of the Guidelines relating to the trading of 2015, it is a pre-condition of trading licence that the seller pays dues of licence arrears. After that, the purchaser has to pay arrears as provided in paras 10, 11, and 12 of the guidelines.

5. The telecom service providers' stand is that the proceedings of insolvency under the Code have been triggered *bona fide*. This Court can examine the limited question in these proceedings whether the proceedings are resorted to as a subterfuge to avoid payment of AGR dues, and it is for the NCLT to decide whether the licence/spectrum can be transferred and be a part of the resolution process initiated under the provisions of the Code. Whether spectrum/licence can be subjected to resolution process as an asset belonging to the telecom service providers, and whether the AGR dues are operational dues and have to be dealt with under the provisions of the IBC by NCLT. With respect to the trading and sharing arrangement to the extent of spectrum traded or shared by different service providers under the sharing arrangement, the liability as per the guidelines, has to be borne by the respective telecom service providers.

6. As per the statutory guidelines issued by the Department of Telecommunications in 2015, spectrum sharing allows the operators to pool their respective spectrum for usage in a specific geographical area. The Central Government framed spectrum sharing guidelines on 24-9-2015.

7. The details of sharing arrangement between different telecom service providers have been given.

8. The "spectrum trading" allows parties to transfer their rights and obligations to another party. In the case of "spectrum sharing", the right to use spectrum remains with the respective telecom service providers, whereas in the case of spectrum trading, the right to use gets transferred from the buyer to the seller. Under spectrum trading guidelines, details of transactions which have taken place, are given.

9. Another aspect is that how much time is to be provided to the telecom service providers to pay AGR dues. The Union of India on the representation made by the telecom service providers and Indian Banks' Association, has decided to provide the facility of making payment in instalments within 20 years.

10. The following three questions arise for consideration:

(1) Whether spectrum can be subjected to proceedings under the Code?

(2) In the case of sharing, how the payment is to be made by the Telecom Service Provider (for short, 'TSP')? and

(3) In the case of trading, how the liability of the seller and buyer is to be determined?

In Re. Whether spectrum can be subjected to proceedings under the Code?

11. Shri Tushar Mehta, learned Solicitor General of India on behalf of Government of India, argued as under:

(*i*) Section 4 of the Indian Telegraph Act, 1885, provides that the Central Government has the exclusive privilege of establishing, maintaining, and working telegraphs. The DoT grants licences which are in the form of contractual arrangements. The TSPs are bound by the terms and conditions contained therein. As per the contractual terms, the licence is strictly contingent upon fulfilment of the terms and conditions, the payment being first and foremost. On failure of payment, the licensor is entitled to take action under the Licence Agreement, including revocation and termination.

(*ii*) The spectrum is a scarce recognised natural resource, and this Court in 2G judgment (C.A. No. 423 of 2010) held that the natural resources belong to the people and cannot be subjected to proceedings under the Code. The State acts as a guardian and trustee of the natural resources.

(*iii*) The licensee does not own the spectrum and has merely been granted a right to use, which is based on fulfilment of the conditions of the contract in the form of a Licence Agreement. Thus, the spectrum cannot be subjected to transfer in proceedings under the Code as the licensee is not the owner. Section 18(*f*), along with its *Explanation* (*a*), mandates that only the corporate debtor's assets can be taken into control and custody by the resolution professionals, which is in the ownership of the corporate debtor. *Explanation* to Section 18 provides that assets owned by a third party in possession of the corporate debtor or held under contractual arrangements are not included in the term `assets' for the purpose of Section 18. It is not an asset for Section 18. The spectrum held under a contractual arrangement is not an asset of the corporate debtor. The spectrum cannot be a subject matter of proceedings under the Code. The resolution professional has no jurisdiction to prepare a resolution plan as per Guidelines for Trading of Access Spectrum by Access Services Providers (for short, `the Guidelines of 2015') issued on 12-10-2015.

(*iv*) Guideline No. 10 provides that for trading of right to use the spectrum, both the licensees shall give an undertaking that they are in compliance with the terms and conditions of the Guidelines for spectrum trading that is seller and buyer both. In case terms and conditions for spectrum trading are not fulfilled, the Government will have the right to take appropriate action including annulment of trading arrangement.

(*v*) As per Guideline Nos. 11 and 12 of the Guidelines of 2015, the seller has to clear the dues. After the trading date, the Government has the discretion to recover the amount from the seller or buyer, jointly or severally.

(*vi*) The permission was sought to trade the licence; however, the Government of India, DoT, declined it because arrears have to be paid, and other conditions were not fulfilled. After that, insolvency proceedings were initiated, which were not permissible concerning the spectrum given provisions contained in Section 18 of the Code.

(*vii*) National Company Law Tribunal (for short, 'the NCLT'), Mumbai *vide* order dated 27-11-2019, held that licence is an asset of State over which the corporate debtor has no right of ownership. The above argument of the State Government was accepted; however, in view of the provisions contained in Section 14 on moratorium being created, the licence could not be revoked. An appeal was filed before the National Company Law Appellate Tribunal (for short, 'the NCLAT') against the order mentioned above, which was dismissed on the ground of limitation. An appeal has been filed in relation to the revocation of licence, which is pending in this Court registered as Diary No. 15564 of 2020.

(*viii*) The licence under section 4 of the Indian Telegraph Act, 1885, was granted on certain terms and conditions. The spectrum did not construe property as defined in Section 3(27) of the Code.

(*ix*) Concerning public trust doctrine, reliance has been placed on *Centre for Public Interest Litigation* v. *Union of India* (2012) 3 SCC 1, in which it was held that natural resources must always be used in the country's interests, not private interests. The corporate debtor can never be said to be in occupation of either the licence or spectrum as per Section 14(1)(*d*) of the Code. Any dispute is to be settled under the provisions of Telecom Regulatory Authority of India Act, 1997 by the Telecom Disputes Settlement and Appellant Tribunal.

(*x*) Reliance has been placed on *Embassy Property Development (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445, in which this Court held that the Code would not apply to right to mine as exclusive possession had not been granted to the corporate debtor and grant was limited to right to mine, excavate and recover *iron ore* and red oxide for a specified period. It was further held that the right not to be dispossessed found in Section 14(1)(*d*) of the Code would have nothing to do with the rights conferred by a mining lease, especially on a Government land.

(*xi*) In *Ram Dass* v. *Davinder*, (2004) 3 SCC 684, it was held that possession amounts to holding property as an owner, while occupy is to keep possession by being present in it. Spectrum is not capable of being in possession of licensee neither in the eye of law they can be said to be in possession.

(*xii*) As per Regulation 32 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the spectrum agreement cannot be held to be essential goods or services under section 14(2) of the Code. Similarly, it cannot be subjected to proceedings under section 18 of the Code. In the resolution plan, selling the right to use the spectrum to some other company could not have been made. A corporate debtor cannot create any third party right in any manner whatsoever. Against the order dated 9-6-2020 passed by the NCLT approving the resolution plan of UVARC, DoT has filed a petition before the NCLAT relating to Aircel Group. Guidelines are statutory and binding. Aircel Licensee has defaulted in making payment of Deferred Spectrum Auction.

(*xiii*) In the case of *Reliance Communication Ltd. v. State Bank of India* (2019) 102 taxmann.com 331 (SC) was filed under Article 32 of the Constitution of India for closure/quashing of the CIRP initiated against it. After that, payment was made to M/s. Ericsson India Pvt. Ltd., who initiated the proceedings under the Code. RCOM has sought NOC to trade Reliance Jio Infocomm Limited (for short, 'RJIL'). DoT informed it on 14-12-2018 that the Government couldn't give the NOC for trading. This Court decided the proceedings on 24-4-2019. Thereafter, the Board of Directors of RCOM decided to continue with the proceeding under the Code and, decided to withdraw the appeal from NCLAT. RCL/RTL defaulted in payment of various deferred spectrum auction instalments.

(*xiv*) The matters of AGR being C.A. Nos. 6328-6399 of 2015 were *sub judice* before the commencement of CIRP. A demand was raised to RCL/RTL. AGR dues amount of RCL/RTL is Rs. 25, 199.27 crores.

(*xv*) In the case of Videocon, DoT was not the party. DoT was not invited to the Committee of Creditors' meetings, in complete violation of the provisions of the Code. The resolution professional applied before NCLT to restrain DoT from encashing certain bank guarantees submitted by Videocon, in which interim injunction has been granted.

12. Shri Harish Salve, learned senior counsel argued as under:

(*i*) The NCLT should decide the question of whether the spectrum can be sold or not. After that, there is a provision for an appeal to NCLAT, and then this Court can look into the matter.

(*ii*) Under Section 18, the spectrum can be subjected to insolvency proceedings. This Court examined the question of recoverability of AGR dues in preference to the dues of secured creditors on the basis that the use of spectrum would rank in priority higher than that of

secured creditors. Leasing of the spectrum is not permissible as per the Guidelines. The RJIL is also not proposing to buy any spectrum from the resolution applicant of RCOM or any other company. Only sharing and trading is permissible subject to the conditions specified in the Guidelines. The assets of RCOM are comprised primarily of the spectrum, real estate, and active assets. Even if this Court permitted the sale of such a spectrum, RJIL is not intending to acquire the same.

(iii) RJIL has paid Rs. 195 crores on a self-assessment basis and shall pay a further sum demanded by DoT.

13. Shri Shyam Divan and Shri Ravi Kadam, learned senior counsel on behalf of Committee of Creditors of RCOM, Aircel Limited, and Dishnet Wireless Limited, argued:

(*i*) the spectrum and telecom licences are assets of the telecom company. Section 18(*f*) of the Code mandates that resolution professional would take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor. Section18(*f*) (*iv*) includes intangible assets. The telecom licence and right to use the spectrum form a part of the intangible assets. The right to use is a valuable right. In the financial statement, telecom licence and the right to use the spectrum had been shown as an intangible asset. Without telecom licences and spectrum, there would be no hope of reviving Aircel entities.

(*ii*) clause 6 of the Licence Agreement deals with the restrictions of transfer of licence by either directly or indirectly without the prior written consent of the licensor. It can be transferred on fulfilment of certain conditions.

(*iii*) Reliance has been placed on Consultation Paper dated 7-3-2012. Its licence/spectrum is considered an intangible asset, and in the Guidelines for the Reporting System on Accounting Separation Regulations, 2016, the right to use spectrum is again shown as an intangible asset. The Indian Accounting Standards-38 has also been referred to indicate that an asset is a resource controlled by the entity for further economic benefits. The spectrum and licence being assets of the telecom company are not assets owned by a third party under a trust.

(*iv*) The licence and spectrum of Aircel Entities are held in security by the lenders in terms of the TPAs to which the DoT is also a party. In the resolution plans, DoT acted as an operational creditor. The NCLT asked to take the approval of the DoT for the transacting spectrum. Thus, it is for the DoT to give permission. Dot has to approve the implementation of the resolution plan.

(*v*) The Code provides that the resolution plan is to be approved

by the Committee of Creditors, and the adjudicating authority of the NCLT in terms of Section 31 of the Code and liquidation is to be made in terms of the priority set out in Section 53 of the Code. Section 5(20) defines 'operational creditor'. Section 5(21) defines 'operational debt' to include dues payable to the Government. Thus, claims of DoT for unpaid dues are operational debts, and DoT is an operational creditor.

(*vi*) Reliance has been placed upon section 31 of the Code. The resolution plan shall be binding on the corporate debtors, including the Central Government, any State Government to whom a debt in respect of the payment of dues arising under any law for the time being in force. Reliance has also been placed on *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC).

(*vii*) The proceedings under the Code cannot be nullified to realise AGR and other dues of DoT.

14. Shri Ranjit Kumar, learned senior counsel, on behalf of Committee of Creditors of Aircel Limited, Aircel Cellular Limited and Dishnet Wireless Limited argued that:

(i) under the Code, UV Asset Reconstruction Company Limited has submitted a resolution plan, which has been approved by the NCLT on 9-6-2020. Aircel Entities are holders of telecom licences. The licences issued by DoT contain the format for the execution of the Tripartite Agreement between the licensor, licensee, and the lenders. He has relied upon the following paragraph:

"With a view to help and facilitate the financing of the Project to be set up by the LICENSEE pursuant to the LICENCE referred to above, the parties hereto are desirous of recording the terms and conditions to provide transfer/assignment of LICENCE as hereinafter provided in this AGREEMENT to protect and secure the Lender's interest arising out of grant of financial assistance to the LICENSEE."

(ii) Aircel Entities have offered lenders spectrum as a security against the loans advanced by the lenders to Aircel Entities. Thus, the DoT claim over the spectrum will be subservient to the claims of the lenders as per the Code, and DoT has to be treated as an operational creditor.

(iii) The Banks are in the business of lending money for the betterment of the national economy, in the same manner, the Government is in the business of spectrum. As per clause 6.3 of the Licence Agreement, licence can be transferred subject to fulfilment of the conditions agreed between the licensor, licensee, and the lenders.

(iv) The right to use spectrum is an asset of the corporate debtor. Paras 8.4 and 8.5 of the Insolvency Law Committee Report have been

referred to. Revocation of Licences, permission-based on past dues, is prohibited under section 14 after the moratorium is created. Current dues have to be paid during the moratorium period. He has referred to Sections 3(27) and 14(1).

(v) The provisions of the Code have to prevail. The Government has entered into a pure business transaction by granting a licence and taking fees against the grant. The spectrum is a raw material for telecom companies. If the spectrum's licence is terminated, the resolution professional will find it difficult to run the company as a going concern. DoT is an operational creditor. AGR dues are contractual dues and cannot have precedence over the dues of secured creditors. He has referred to Section 53 to contend that the operational creditor is protected in a manner provided in the Code. Section 238 of the Code contains a *non obstante* clause to the effect that anything inconsistent therewith contained in any other law for the time being in force, the Code shall prevail. As such, the Code overrides the provisions of the Indian Telegraph Act, 1885, Indian Wireless Telegraphy Act, 1933, and Telecom Regulatory Authority of India Act, 1997.

15. In the case of RCOM, the resolution plan is pending consideration of the adjudicating authority under section 31 of the Code.

16. Whether spectrum can be subjected to proceedings under the Code is a significant question and is required to be gone into. It is a natural resource, and under section 4 of the Indian Telegraph Act, 1885, the Government has the sovereign right. Section 4 of the Indian Telegraph Act, 1885 is extracted hereunder:

> `4. *Exclusive privilege in respect of telegraphs, and power to grant licences.*— (1) Within India, the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:
>
> **Provided** that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain, or work a telegraph within any part of India:
>
> **Provided further** that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working—
>
> (*a*) of wireless telegraphs on ships within Indian territorial waters and on aircrafts within or above India, or Indian territorial waters, and
>
> (*b*) of telegraphs other than wireless telegraphs within any part of India.
>
> *Explanation.*—The payments made for the grant of a licence under this sub-section shall include such sum attributable to the Universal Service Obligation as may be determined by the Central Government after considering the recommendation made in this behalf by the Telecom

Regulatory Authority of India established under sub-section (1) of section 3 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997).

(2) The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso to sub-section (1).

The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions as the Central Government may, by the notification, think fit to impose.

(3) Any person who is granted a license under the first proviso to sub-section (1) to establish, maintain or work a telegraph within any part of India, shall identify any person to whom it provides its services by—

(*a*) authentication under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016); or

(*b*) offline verification under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016); or

(*c*) use of passport issued under section 4 of the Passports Act, 1967 (15 of 1967); or

(*d*) use of any other officially valid document or modes of identification as may be notified by the Central Government in this behalf.

(4) If any person who is granted a license under the first proviso to sub-section (1) to establish, maintain or work a telegraph within any part of India is using authentication under clause (a) of sub-section (3) to identify any person to whom it provides its services, it shall make the other modes of identification under clauses (b) to (d) of sub-section (3) also available to such person.

(5) The use of modes of identification under sub-section (3) shall be a voluntary choice of the person who is sought to be identified and no person shall be denied any service for not having an Aadhaar number.

(6) If, for identification of a person, authentication under clause (*a*) of sub-section (3) is used, neither his core biometric information nor the Aadhaar number of the person shall be stored.

(7) Nothing contained in sub-sections (3), (4) and (5) shall prevent the Central Government from specifying further safeguards and conditions for compliance by any person who is granted a license under the first proviso to sub-section (1) in respect of identification of person to whom it provides its services.

Explanation.—The expressions "Aadhaar number" and "core biometric information" shall have the same meanings as are respectively assigned to them in clauses (*a*) and (*j*) of Section 2 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016)."

17. Section 3(10) defines 'creditor'. The term 'debt' is defined in section 3(11). The expression 'property' is defined in section 3(27). 'Operational creditor' is defined in

section 5(20) in Part II under the head Insolvency Resolution and Liquidation for Corporate Persons. Section 5(21) defines `operational debt'.

18. A question has been raised concerning ownership. Whether TSPs can be said to be the owner based on the right to use the spectrum under licence granted to them? Whether a licence is a contractual arrangement? Whether ownership belongs to the Government of India? Whether spectrum being under contract can be subjected to proceedings under section 18 of the Code? The question also arises whether the spectrum can be said to be in possession, which arises from ownership. What is the distinction between possession and occupation? Whether possession correlates with the ownership right? A question also arises concerning the difference between trading and insolvency proceedings. Whether a licence can be transferred under the insolvency proceedings, particularly when the trading is subjected to clearance of dues by seller or buyer, as the case may be, as provided in Guideline Nos.10 and 11; whereas in insolvency proceedings dues are wiped off. Guideline No. 12 is also assumed to be of significance in case spectrum is subjected to insolvency proceedings, which must be considered.

19. It is also required to be examined that when Government has declined the permission to trade and has not issued NOC for trading on the ground of non-fulfilment of the conditions as stipulated in the Licence Agreement, the spectrum can be subjected to resolution proceedings which will have the effect of wiping off the dues of the Government, which are more than Rs. 40, 000 crores. Whereas the dues of the Banks are much less. Whether obtaining the DoT's permission and its approval to the resolution plan would be a substitute for Trading Guideline Nos.10, 11, and 12?

20. A question also arises of *bona fide* nature of the proceedings under the Code. In the backdrop facts of the cases, question also arises whether spectrum licence subjected to proceedings under the Code, and it overrides the provisions contained in the Indian Telegraph Act, 1885, Indian Wireless Telegraphy Act, 1933, and Telecom Regulatory Authority of India Act, 1997.

21. In view of the fact that the licence contained an agreement between the licensor, licensee, and the lenders, whether on the basis of that, spectrum can be treated as a security interest and what is the mode of its enforcement. Whether the Banks can enforce it in the proceedings under the Code or by the procedure as per the law of enforcement of security interest under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act) or under any other law.

22. A question of seminal significance also arises whether the spectrum is a natural resource, the Government is holding the same as *cestui que* trust. In view of the nature of the resource, it can be subjected to insolvency/liquidation proceedings. Earlier licence was obtained on the payment of fees in advance that was not beneficial to the TSPs, as such a new revenue sharing regime was devised in 1999, and the Central Government has an exclusive right under section 4 of the Telegraph Act,

1885 in use of spectrum, it can part with on certain statutory guidelines, its use is not permissible without the payment of requisite fee.

Whether dues under the licence can be said to be operational dues? It is also to be examined whether deferred/ default payment instalment/s of spectrum acquisition cost can be termed to be operational dues besides AGR dues. Whether as per the revenue sharing regime and the provisions of the Indian Telegraph Act, 1885, the dues can be said to be operational dues? Whether natural resource would be available to use without payment of requisite dues, whether such dues can be wiped off by resorting to the proceedings under the Code and comparative dues of Government, and secured creditors and *bona fides* of proceedings are also the questions to be considered.

23. We consider it appropriate that the aforesaid various questions should first be considered by the NCLT. Let the NCLT consider the aforesaid aspects and pass a reasoned order after hearing all the parties. We make it clear that it being a jurisdictional question, it requires to be gone into at this stage itself. Let the question be decided within the outer limits of two months. We also make it clear that we have not observed on the merits of the case, and we have kept all the questions open to be examined by the NCLT.

In Re. Sharing

24. Coming to the question as to the liability of sharing operator, who is sharing the spectrum of the original licensee of the past AGR dues of the original licensee is concerned, that spectrum sharing is permitted and approved by the Sharing Guidelines dated 24-9-2015. The Parliament has approved spectrum sharing as part of "National Telecom Policy, 2012". However, DoT issued and approved the final guidelines in the year 2015. Spectrum sharing is a policy that permits the sharing of radio access network equipment of operators. Single radio network equipment is used to provide services by two operators using both the entities' spectrum. As per Spectrum Sharing Guidelines of DoT, (*i*) it is a pre-requisite that both operators sharing spectrum need to have spectrum in the same band and the same licenced area; (*ii*) it is also necessary that both operators have a network in the same geographical area; and (*iii*) leasing of the spectrum is not permitted under the policy. By sharing the radio network equipment, two operators use their spectrum and create their respective businesses' capacity. Liability to pay necessary AGR and licence fee remains with the respective companies. Even the DoT in its affidavit and compliance of the order dated 14-8-2020, stated as under so far as the spectrum sharing is concerned:

> `4.It is respectfully submitted that as per the Guidelines issued by DoT in 2015, "Spectrum sharing" allows operators to pool their respective spectrum for usage in a specific geographical area (LSA) thus complementing each other's spectrum needs and facilitating more efficient utilization of the spectrum. The rationale is to facilitate optimization of resources and to create a conducive environment for telecom growth. During the past period of 20 years or more, some operators have been able to acquire subscribers and grow at a

faster rate as compared to other operators. This results in the spectrum lying unutilized with some of the players while other operators face spectrum crunch as spectrum is a scare resource.

Thus, on the one hand spectrum, which is a limited natural resource, may remain unutilized for some Telecom Service Providers (TSPs), while on the other hand, consumers suffer due to poor quality of services on account of spectrum crunch with other TSPs. Moreover, spectrum is allocated to a service provider for a service area which is a large geographical area, normally co-terminus with the state boundaries. In different cities and rural areas, the TSPs may have varying spectrum needs depending upon their customer profile.

Spectrum sharing allows operators to pool their respective spectrum for usage in a specific geographical area within an LSA. The pooling of the spectrum increases the capacity of Telecom Service Providers to carry telecom traffic and may help in enhancing the quality of service.

5. It is submitted that the objective of spectrum sharing was to provide an opportunity to the Telecom Service Providers to pool their spectrum holdings and thereby improve spectral efficiency. It is submitted that sharing can also provide additional network capacities in places where there is network congestion due to shortage of spectrum. It is submitted that these aspects were considered by the Central Government while approving the Guidelines for Spectrum Sharing. It is submitted that Telecom Regulatory Authority of India (TRAI) made recommendations on `Guidelines on Spectrum Sharing' on July 21, 2014, which was considered and approved by the Telecom Commission (TC) in its meeting held on 11.06.2015 (Sic) and subsequently approved by the Central Government. A copy of Spectrum Sharing Guidelines dated 24-9-2015 is attached herewith and marked as ANNEXURE - T2.

6. In case of sharing of spectrum both the service providers (sharers) must be in the same band and in the same service area. To illustrate " it may be pointed out that if there are two service providers holding 100 units of spectrum each in the same band and in the same service area they can share spectrum of each other mutually. The Spectrum Usage Charges (SUC) will be considered for 100 units for each of the TSPs and both will have to pay SUC for their entire spectrum holding (100 units each) in that band and in that service area.

7. With regard to AGR dues for two TSPs sharing spectrum, the following scenario emerges:

i. In case of sharing, the Spectrum does not change hands. Both TSPs simultaneously use and have access to the spectrum held by each.

ii. As per the sharing arrangement, each of the TSPs will continue to make payment of AGR dues arising for the spectrum that each holds.

iii. However, due to the additional spectrum which each TSP gets to use, the AGR based dues (SUC) are assessed at a higher rate for each of the TSPs. There is an addition/increase by 0.5% in the Spectrum Usage Charge rate, applied separately on both TSPs. Thus if SUC rate of each TSP prior to sharing was 3%, then this will increase to 3.5% for both of them.

iv. The use of each others spectrum by means of sharing should normally lead to increase in AGR for both TSPs. This would lead to increased licensed fee and SUC to the Government as these are based on share of AGR.

v. TSPs who share spectrum, continue to pay and are duty bound to pay, their AGR based dues arising from the use of spectrum.

8. So far as the present case is concerned, in accordance with the spectrum sharing guidelines dated 24-9-2015, the requests of the following TSPs for sharing of access spectrum have been taken on record:

i. For Reliance Jio Infocomm Limited (RJIL) and Reliance Communications Limited (RCL), spectrum in 800 MHz band in 21 LSAs (all except Jammu and Kashmir LSA) as per the quantum mentioned in the annexure

ii. For Bharti Airtel Limited and Tata Teleservices Limited/Tata Teleservices (Maharashtra) Limited, spectrum in 1800 MHz band in 3 LSAs (Andhra Pradesh, Maharashtra and Mumbai LSAs) as per the quantum mentioned in the annexure.

iii. For, Bharti Airtel Limited and Tata Teleservices Limited/Tata Teleservices (Maharashtra) Limited, spectrum in 2100 MHz band in 2 LSAs (Gujarat, Haryana, Karnataka, Kerala, Madhya Pradesh, Maharashtra and Uttar Pradesh (West) LSAs) as per the quantum mentioned in the annexure.

iv. For Bharti Hexacom Limited and Tata Teleservices Limited, spectrum in Rajasthan LSA as per the quantum mentioned in the annexure.

12. It is respectfully submitted that the difference between Spectrum Sharing and Spectrum Trading, can therefore be culled out as under:

i. Spectrum sharing allows operators to pool their respective spectrum for usage in a specific geographical area and thus complementing each other's needs for more efficient utilization of the spectrum. This facilitates optimization of resources as also creates conducive environment for the telecom growth.

ii. Spectrum trading allows parties to transfer their spectrum rights and obligations to another party. This allows better spectrum usages as the idle spectrum from the hands of one service provider gets transferred to the other service provider who may be facing spectrum crunch.

iii. In the case of spectrum sharing, the right to use spectrum as granted by the DoT remains with

the respective TSPs, whereas in the case of spectrum trading, the right to use gets transferred from the buyer to the seller."

On going through the entire Sharing Guidelines, it does not stipulate anything about the past dues of the sharing operators. In the case of sharing spectrum usage charges, the rate of each of the licensees post sharing shall increase by 0.5% of adjusted gross revenue. Sharing Guidelines dated 24-9-2015 read as under:

"No. L-14006/04/2015-NTG
Government of India
Ministry of Communications & IT
Department of Telecommunications
WPC Wing, 6th floor, Sanchar Bhawan, New Delhi

Dated: the 24th September, 2015

Subject: Guidelines for sharing of Access Spectrum by Access Service Providers.

National Telecom Policy, 2012 envisage to move at the earliest towards liberalization of spectrum to enable use of spectrum in any band to provide any service in any technology as well as to permit spectrum pooling, sharing and later, trading to enable optimal utilization of spectrum through appropriate regulatory framework. After considering the recommendations of TRAI on spectrum sharing, the Government has decided to allow sharing of access spectrum as per guidelines given below:

(1). Spectrum sharing shall be allowed only for the access service providers holding Cellular Mobile Telephone Service (CMTS)/Unified Access Service License (UASL)/ Unified License (Access Services) (UL(AS)/Unified License (UL) with authorization of Access Service in a Licensed Service Area (LSA), where both the licensees are having spectrum in the same band.

(2). Spectrum sharing is permitted between two Telecom Service Providers utilizing the spectrum in the same band.

(3). Spectrum sharing is not permitted when both the licensees are having spectrum in different bands. Leasing of spectrum is not permitted.

(4). All access spectrum including traded spectrum shall be shareable provided that both the licensees are having spectrum in the same band. Further, if more bands such as 700 MHz are added for allocation of spectrum to Access Service Providers through auction process, the sharing of spectrum shall also be permitted in that band.

(5). The right to share the spectrum shall be subject to the fulfilment of the relevant license conditions and nay other conditions that may be specified by the licensor/ Government from time-to-time.

(6). Both the licensees shall ensure that they fulfil the specified roll-out obligations and specified QoS norms.

(7). A licensee shall not be eligible to share its spectrum if it has been established that it is in breach

of terms and conditions of the licence and the licensor has ordered for revocation/termination of its licence.

(8). Sharing is permitted in the following scenarios:

(*i*). For the spectrum where both the Licensees who plan to share, possess the spectrum for which market price has been paid. Further, in respect of spectrum in 800 MHz acquired in the auction held in March 2013, sharing of spectrum shall be permitted only if the differential of the latest auction price and the March 2013 auction price on *pro rate* basis on the balance period of right to use the spectrum is paid.

(*ii*). In case both the Licensees who plan to share spectrum are having the administratively allotted spectrum in that band, the sharing of spectrum is permitted only when both the licensees have paid One time Spectrum Charges (OTSC) for their respective spectrum holdings, above 4.4 MHz (GSM)/2.5 MHz (CDMA) based on reserve price/auction determined price. However if the said amount is not paid due to judicial intervention in judicial forums barring any coercive action, in the interim, sharing of spectrum in such cases will also be permitted subject to submission of a bank guarantee for an amount equal to the demand raised by the department for one time spectrum charge pending final outcome of the court case.

(*iii*). In case of proposed sharing where one Licensee has spectrum acquired through auction/trading or liberalized spectrum and the other has spectrum allotted administratively, sharing is permitted only after the spectrum charges for liberalizing the administratively allocated spectrum are paid. Further, in case of spectrum acquired in auction held in March 2013, differential amount as indicated in para 7(*i*) above shall be payable in respect of 800 MHz band.

(9) The use of technology shall be governed by the terms and conditions of respective Notice Inviting Application (NIA)/license.

(10) Both the licensees will be individually and collectively responsible for complying with the sharing guidelines, including interference norms.

(11) Spectrum sharing will be restricted to sharing by only two licensees subject to the condition that there will be at least two independent networks provided in the same band.

(12) For the purpose of charging

Spectrum Usage Charges (SUC), it shall be considered that the licensees are sharing their entire spectrum holding in the particular band in the entire LSA.

(13) Spectrum Usage Charges (SUC) rate of each of the licensees post-sharing shall increase 0.5% of Adjusted Gross Revenue (AGR). The sharing of spectrum for part of a month, full one month period shall be counted for the purpose of levying SUC.

(14) The prescribed limits for spectrum cap shall be applicable for both the licensees individually. Further, the spectrum holding of any licensee post-sharing shall be counted after adding 50% of the spectrum held by the other licensee in the band being shared being added as the additional spectrum to the original spectrum held by the licensee in the band.

(15) Spectrum sharing shall be available for upto the balance period of the licence or upto the period of right to use spectrum, whichever is earlier.

(16) Both the licensees sharing the spectrum shall jointly give a prior intimation for sharing the right to use the spectrum at least 45 days before the proposed effective date of the sharing. Application format is attached along with these guidelines as Annexure-I.

(17) Both the licensees shall also give an undertaking that they are in compliance with all the terms and conditions of guidelines for spectrum sharing and the licence conditions and will agree that in the event, it is established at any stage in future that either of the licensee was not in conformance with the terms and conditions of the guidelines for spectrum sharing or/and of the licence at the time of giving intimation for sharing of right to use the spectrum, the Government will have the right to take appropriate action which *inter alia* may include annulment of sharing arrangement. Appropriate modifications will be made in their respective Service License and Wireless Operating License (WOL) to facilitate the spectrum sharing.

(18) A non-refundable processing fee, as prescribed from time to time, shall be payable individually by each licensee for each service area at the time of intimation to WPC Wing. At present, processing fee of Rs. 50, 000/- is to be paid. The payment is to be made by draft in favor of Pay & Accounts Officer (HQ), DoT payable at New Delhi.

(19) Licensor/Government reserves the right to modify the guidelines from time to time as it may deem fit.

Sd/-
(P. S. M. Tripathi)
Assistant Wireless Adviser
for and on behalf of President
of India.'

25. According to the DoT and so stated in the affidavit in compliance of order/ directions dated 21-8-2020, AGR is not calculated bandwise, but from the total revenue earned by the TSP using the entire spectrum (both shared and not shared). According to DoT, in case of sharing of spectrum, there is an increment of 0.5% in SUC rate, and both TSPs pay this incremental SUC on their respective AGRs if they are sharing spectrum. Both the TSPs (sharers) are required to pay this SUC on their respective AGRs. Even in the case of sharing spectrum, the liability of the said operator would be to the extent of using the said spectrum only, and the liability of the sharing operator would be to the extent of the remaining spectrum used by it. Therefore, there shall not be any liability of the said operator with respect to payment of the past dues (post shared) of the sharing operator - licensee. Even according to DoT also, both the TSPs (sharers) are required to pay the SUC on their respective AGRs. Learned counsel appearing on behalf of the Reliance Jio (shared operator), which has entered into the sharing between RCom/RTL has stated at the Bar that Reliance Jio has paid the AGR post sharing including the difference of AGR as per the decision of this Court on their own and based on self-assessment. It is stated at the Bar that still anything is further held to be due and payable and AGR for the period post sharing of the said spectrum originally allotted to RCom on the assessment being done, they will make the said payment. Similar is the ground of counsel for other TSPs. as to sharing arrangement.

26. That in the present case, only part of the spectrum of the licensee has been shared with the case of some of TSPs., which has been approved by the DoT under the Sharing Guidelines, 2015, and there is no provision for the liability of the past dues on the shared operator. Even otherwise, the past dues of sharing operator/ licensee covers AGR for the spectrum used by holder of licence, certain TSPs. such as Reliance came into existence later on, and as observed hereinabove, the liability of such operator of the AGR, would only be to the extent it has used the said spectrum. Shared operator TSPs. cannot be saddled with the liability to pay the past dues of AGR of licensee, that have shared the spectrum with the original licensees.

In Re. Trading:

27. Coming to the question of liability of the telecom companies which are using spectrum under the Trading Guidelines with respect to the AGR dues of the telecom company, Spectrum trading is governed by the Spectrum Trading Guidelines dated 12-10-2015 and under the said Trading Guidelines, part of the spectrum of the telecom company facing insolvency - the other telecom company is using original licensee. The purchaser and buyer's liability shall be as per para 11 of the Spectrum Trading Guidelines dated 12-10-2015, which reads as under:

> "(10). Both the licensees shall also give an undertaking that they are in compliance with all the terms and conditions of the guidelines for spectrum trading and the license conditions and will agree that in the event, it is established at any stage in

future that either of the licensee was not in conformance with the terms and conditions of the guidelines for spectrum trading or/and of the license at the time of giving intimation for trading of right to use the spectrum, the Government will have the right to take appropriate action which *inter alia* may include annulment of trading arrangement.

(11). The seller shall clear all its dues prior to concluding any agreement for spectrum trading. Thereafter, any dues recoverable up to the effective date of trade shall be the liability of the buyer. The Government shall, at its discretion, be entitled to recover the amount, if any, found recoverable subsequent to the effective date of the trade, which was not known to the parties at the time of the effective date of trade, from the buyer or seller, jointly or severally. The demands, if any, relating to licenses of seller, stayed by the Court of Law, shall be subject to outcome of decision of such litigation.

(12). Where an issue, pertaining to the spectrum proposed to be transferred is pending adjudication before any court of law, the seller shall ensure that its rights and liabilities are transferred to the buyer as per the procedure prescribed under the law and any such transfer of spectrum will be permitted only after the interest of the Licensor has been secured."

Para 11 of the Spectrum Trading Guidelines was further clarified *vide* O.M. dated 12-5-2016. Certain telecom operators raised specific questions on the Trading Guidelines dated 12-10-2015. Question No. 2 in respect of para 11, seeks a clarification as to whether the transfer of spectrum is for a specific area and reference to the dues relate to only the spectrum being traded in the concerned area, and seeks clarification whether the buyer will be jointly or severally liable for only those dues if found recoverable after the effective date of trading, which were not known to the seller at the time of the effective trade date.

28. To the aforesaid questions, *vide* O.M. dated 12-5-2016, there was a clarification or the answer relating to para 11 of the Guidelines, which reads as under:

"The Clarification or the answer relating to para 11 of the Guidelines states as follows:

> "As per para 11 of the Guidelines, the seller must clear all its dues pertaining to the LSA where trading is intended including OTSC dues for that band. In case where entire spectrum holding of the TSP in all LSAs is intended to be traded, the seller will have to clear all its pending dues including past dues. DoT will indicate status of Dues. However, the Buyer may perform due diligence. Further, the Government shall, as its own discretion, be entitled to recover the amount, if any, found recoverable subsequent to the effective date of the trade, which was not known to the parties at the time of the effective date of trade, from the buyer or seller, jointly or severally."

Thus, as per para 11 of the Spectrum Trading Guidelines dated 12-10-2015, read with the clarification *vide* O.M. dated 12-5-2016, in

case of a part of the spectrum is under sale, the liability of the purchaser/buyer with respect to past dues of the seller shall not arise. In a case where the entire spectrum is under sale, in that case, the past dues of the seller shall be the liability of the buyer except the amount/dues, if any, found recoverable after the effective date of the trade, which was not known to the parties at the time of the effective date of trade and in such a situation the liability of such dues of the buyer and seller would be jointly or severally and the government at its discretion is entitled to recover such amount. In the present case, it is not in dispute that in some cases only part spectrum was traded, and the remaining spectrum continued with the seller. At the time of agreement for spectrum trading, the AGR dues of the seller were also known. Therefore, on a joint reading of para 11 of the Spectrum Trading Guidelines dated 12-10-2015 read with O.M. dated 12-5-2016, the seller's dues prior to the concluding of the agreement/ spectrum trading shall not be upon the buyer.

29. It is clear that in the case, which was decided by this Court relating to AGR dues, respondents were the parties, and they were litigating with respect to the definition of AGR in the second round of appeal filed in 215 before this Court. Each of them was aware that the dispute as to the definition of AGR was pending in this Court. Thus, it is apparent that it was known to the parties that AGR dues to be finalised as per the decision of this Court in a pending matter, and lis was pending for the last 20 years. The liability cannot be escaped as specified in the Trading Guidelines to the extent that the seller or buyer is liable. They have to pay the AGR as per the judgment rendered by this Court. The purchasers who are not seller or buyer, shall have to pay the dues to the extent they are liable under the Guidelines, as discussed above. It was stated that they have paid dues as per the self-assessment or, in some cases, demands have not been raised. We direct DoT to complete the assessment in such cases of trade and raise demand if it has not been raised and to examine the correctness of self-assessment and raise demand, if necessary, after due verification. In case demand notice has not been issued, let DoT raise the demand within six weeks from today.

Payment of dues of AGR :

30. The Union of India has filed an application through the Department of Telecommunications (DoT) to modify the *Association of Unified Telecom Service Providers of India* case (*supra*) and a separate order of even date passed in the abovesaid civil appeals. M.A. No. 266/2020 was filed by the TSPs./licensees in which order dated 14-2-2020 was passed, and the contempt proceedings against the Desk Officer were drawn. In view of the communication dated 23-1-2020, it was withdrawn on 14-2-2020.

31. It is averred in the application that the sector of TSPs. has its varied features. The TSPs. who are required to make payment, are catering to the services of crores of consumers throughout India, and India's Government has examined the issue in great detail. It has shown prompt alacrity to the sector's market economy. The definition of 'AGR' has been settled after about 20 years, as such, there are huge

arrears. In the event, it is found that any major service provider is impacted resulting into drastic consequences of such service providers facing proceedings under the Code. The following would be the inevitable adverse impact:

(*a*) Impact on telecom services for a large proportion of customers.

Following would be the inevitable adverse impact :

(*i*) Mobile Number Portability (MNP) process has capacity limitations; this may lead to delays in porting numbers from non-operational to operational TSP, and consequent disruption of services for customers.

(*ii*) TSPs. porting in customers from TSPs not able to provide services will also need additional access (and backhaul) spectrum to maintain Quality of Service (QoS), Access spectrum is acquired through auction.

(*b*) Adverse impact on competition in the Telecom Sector with adverse consequences for the consumers;

(*c*) Adverse impact on Quality of Service in the telecom sector. The closure of one or more TSPs and the gap being filled in by other remaining TSPs will not be seamless.

(*d*) Implications for the banking sector:

- A letter dated 15-2-2020 was received from the Indian Banks Association on the subject of distress in the Telecom Sector and Ease of Business. The letter highlighted the issues affecting the Telecom Sector and resultant implications on the banks lending to the Telecom Sector along with suggestions for consideration.

(*e*) Disruption of tax and non-tax revenue on account of licence fee (LF), spectrum usage charges (SUC) and Goods and Services Tax (GST) and loss of revenue on account of spectrum deferred instalments;

(*f*) Locking up of valuable spectrum in Corporate Insolvency Resolution Process (CIRP);

(*g*) Major loss of direct and indirect employment;

(*h*) Cascading negative impact on other sectors of the economy;

(*i*) Foreign Direct Investment (FDI) sentiment will be adversely affected;

(*j*) The closure of one or more TSPs also adversely impacts the digital connectivity in the country. E-commerce, e-banking, e-health, etc., all part of e-governance are affected;

(*k*) This will have an adverse impact in rural areas, particularly Aspirational Districts, and the spread of digitization in backward regions of India.

32. In this regard, a letter dated 15-2-2020 had been written by the Indian Banks Association, adumbrating the aforesaid aspects of the distressed telecom sector. The issues affecting the telecom industry

and companies and the resultant stress on bank lending in this sector were pointed out, culminating into a high incidence of tax and heavy burden, subdued operating matrix due to a steep fall in average revenue per customer. The telecom services remained subdued due to the price war triggered by a new entrant. There was a decline in revenue. The drastic cut in data tariffs has led to a spike in data usage for the last one year, primarily on the 4G network. The vicious circle would adversely affect the capex spending of the service providers and, in turn, impact the revenue earning capabilities. Banks' approach to 5G financing was also mentioned for which significant additional investment is required for 5G related infrastructure with the current leveraged financial position. The total outstanding exposure to the telecom industry from the Indian Banks is huge. The modification in the bank guarantee mechanism pertaining to onerous clauses was also pointed out. Various other difficulties of the telecom sector were also highlighted.

33. The Union of India, after envisaging the larger interest, economic consequences on the nation and to ensure that the order of this Court is complied with in its letter and spirit, has taken a conscious decision and sought approval of this Court to a formula for recovery of past dues from the telecom service providers. The formula is placed for approval of this Court, which is arrived at after detailed and long drawn deliberations at various levels in the administrative hierarchy, including the Cabinet, and keeping in view the vital issues related to financial health and viability of the telecom sector, need for ensuring competition and a level-playing field in the interest of consumers. The following decision has been taken with respect to the mode of recovery:

> 'THE MODE OF RECOVERY FOR CONSIDERATION OF THIS HON'BLE COURT
>
> "1.1 All licensees impacted by the judgment of the Hon'ble Supreme Court be allowed to pay the unpaid or remaining to be paid amount of past DoT assessed/calculated dues in annual instalments over 20 years (or less if they so opt), duly protecting the net present value of the said dues using a discount rate of 8% (based on One Year Marginal Cost of Lending Rate of SBI which is currently 7.75%). Interest on the unpaid amount, penalty, and interest on penalty in relation to the past dues as on the date of the judgment of the Hon'ble Supreme Court (arising due to the said judgment of the Supreme Court) will not be levied beyond the date of the said judgment, and the NPV will be protected using the discount rate. However, the TSPs shall continue to be liable for interest, penalty, and interest on penalty for unpaid dues of LF and SUC which arise prospectively after the date of judgment of the Hon'ble Supreme Court (24-10-2019).
>
> 1.2 Change in amount of past dues arising from the AGR judgment (24-10-2019), if any, determined after reconciliation between TSPs' self-assessment and DoT's assessment/calculation, be added to/adjusted against the payable instalment amounts of the TSP on the same basis as given in paragraph 1.1 above."

34. A prayer has also been made to pay the remaining dues through annual instalments spanning over 20 years. For any lapse, a provision has been made to protect the net present value as per the order passed by this Court up to the date of judgment and the dues thereafter, to be realised using the discounted rate of 8%, which is based on one marginal MCLR rate of SBI which is currently at 7.75%. The interest, penalty, and interest on penalty on the arrears as per agreement not to be levied beyond the date of judgment, and the NPV will be protected. However, for prospective arrears, if any, the TSPs. shall be liable to interest, penalty, and interest on penalty for unpaid dues as per agreement after the date of judgment of this Court.

35. Considering the various factors taken into account and the letters written by the Indian Banks Association, we are of the opinion that the decision of the Cabinet is based on the various factors, and in the interest of the economy and the consumers. The decision is taken after extensive deliberations and consultations, and till the date of judgment, the dues have been worked out as per the decision rendered by this Court. Only for the subsequent period, some relaxation has been given as to the rate of interest, penalty, and interest on penalty, which is permissible. The arrears have accumulated for the last 20 years. It is also to be noted that some of the companies are under insolvency proceedings, validity of which is to be examined, and they were having huge arrears of AGR dues against them. For protecting the telecom sector, a decision has been taken on various considerations mentioned above, which cannot be objected to.

36. However, we consider that the period of 20 years fixed for payment is excessive. We feel that it is a revenue sharing regime, and it is grant of sovereign right to the TSPs. under the Telecom Policy. We feel that some reasonable time is to be granted, considering the financial stress and the banking sector's involvement. We deem it appropriate to grant facility of time to make payment of dues in equal yearly instalments. Rest of the decision quoted above, taken by the Cabinet, shall stand except the modifications concerning the time schedule for making payment of arrears. But, at the same time, it is to be ensured that the dues are paid in toto. The concession is granted only on the condition that the dues shall be paid punctually within the time stipulated by this Court. Even a single default will attract the dues along with interest, penalty and interest on penalty at the rate specified in the agreement.

37. We also place on record that the demand of AGR was raised as against non-telecom PSUs. on the strength of the judgment passed by this Court. Pursuant to the Court's directions, the matter has been re-examined and considering the representations filed by PSUs. It is stated in the affidavit dated 18-6-2020 that non-telecom public sector undertakings are non-telecom entities involved in providing services such as power transmission, oil and gas exploration, and refining, Metrorail service, etc., and that they are not into the business of providing mobile services to the general public. They are not holding Access Service Licence (ASL). The revenue

received by non-telecom public sector undertakings under the head of 'telecom services' forms a very negligible and a small portion and does not form part of the total revenue, *e.g.*, 0.0002% for GAIL, 0.00028% for DMRC and 0.001% for Oil India, etc. DoT has decided to withdraw the demands raised for licence fee based on non-telecom revenue from the non-telecom public sector undertakings, which are M/s. Powergrid, GAIL, Oil India Ltd., DMRC, which constitutes about 96% of the demand regarding non-telecom PSUs. In this regard orders have been issued on 13-7-2020 and 14-7-2020.

(*i*) That for the demand raised by the Department of Telecom in respect of the AGR dues based on the judgment of this Court, there shall not be any dispute raised by any of the Telecom Operators and that there shall not be any re-assessment.

(*ii*) That, at the first instance, the respective Telecom Operators shall make the payment of 10% of the total dues as demanded by DoT by 31-3-2021.

(*iii*) TSPs. have to make payment in yearly instalments commencing from 1-4-2021 up to 31-3-2031 payable by 31st March of every succeeding financial year.

(*iv*) Various companies through Managing Director/Chairman or other authorised officer, to furnish an undertaking within four weeks, to make payment of arrears as per the order.

(*v*) The existing bank guarantees that have been submitted regarding the spectrum shall be kept alive by TSPs. until the payment is made.

(*vi*) In the event of any default in making payment of annual instalments, interest would become payable as per the agreement along with penalty and interest on penalty automatically without reference to Court. Besides, it would be punishable for contempt of Court.

(*vii*) Let compliance of order be reported by all TSPs. and DoT every year by 7th April of each succeeding year.

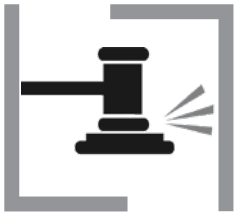
38. Resultantly, we issue following directions:

In the *Suo Motu* Contempt Petition, in view of the reply filed and compliance reported, and an unconditional apology tendered, which we accept, we discharge notice issued to Shri Mandar Deshpande and drop the proceedings.

Before parting with the proceedings, we place on record our appreciation for the fair and able assistance provided by Shri Tushar Mehta, Solicitor General, and the respective senior counsel appearing on behalf of respective parties.

Accordingly, the pending interlocutory applications are disposed of in terms of the aforesaid order/directions.

All the previous orders stand modified accordingly.



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INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Avishek Gupta, *In re*

DR. MUKULITA VIJAYAWARGIYA, WHOLE TIME MEMBER, IBBI

NO. IBBI/DC/28/2020

SEPTEMBER 4, 2020

Section 208 of the Insolvency and Bankruptcy Code, 2016, read with regulation 7 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 - Insolvency professionals - Functions and obligations of - IBBI issued show-cause notice (SCN) to 'A', based on material available on record in respect of his role as a Insolvency Professional (IP) in Corporate Insolvency Resolution Process (CIRP) of corporate debtor - IP had appointed RK which was not registered with IBBI as one of valuers in CIRP and, therefore, IBBI was of prima facie view that IP had violated section 208 - Whether appointment of RK which was not a registered valuer as a valuer for valuation of assets of corporate debtor was in contravention of section 208(2) and regulation 7(2) of IP Regulations - Held, yes - Whether IP also did not comply with IBBI Circular No. IBBI/RV/019/2018, dated 17-10-2018 which provided that no Insolvency Professional shall appoint a person other than a registered valuer to conduct any valuation under Code - Held, yes - Whether Disciplinary Committee was justified in directing that IP would not seek or accept any process or assignment or render any services under Code for a period of two months from date of coming into force of order - Held, yes (Paras 7 and 9)

Circulars and Notifications: IBBI Circular No. IBBI/RV/019/2018, dated 17-10-2018

ORDER

In the matter of Mr. Avishek Gupta, Insolvency Professional under Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 read with Section 220 of the Insolvency and Bankruptcy Code, 2016.

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

Background

2. The Insolvency and Bankruptcy Board of India (IBBI) issued the Show-Cause Notice

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

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

2.2 The IBBI referred the SCN, response of Mr. Avishek Gupta to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder. The IP availed an opportunity of e-hearing before the DC on 14th August, 2020 wherein he was represented by Mr Sanwal Tibrewal, Advocate. Thereafter, Mr Gupta submitted some additional documents vide email dated 15th August, 2020 in support of his submissions made during the course of e-hearing.

3. *Show-Cause Notice*

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

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

Submissions by Mr. Gupta

4. Mr. Gupta submitted vide reply dated 18th June, 2020 that the CIRP of the CD

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

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

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

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

Analysis and findings

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

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

> "27. Appointment of registered valuers.
>
> The resolution professional shall within seven days of his appointment, but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35:
>
> **Provided** that the following persons shall not be appointed as registered valuers, namely: (*a*) a relative of the resolution professional; (*b*) a related party of the corporate debtor; (*c*) an auditor of the corporate debtor at any time during the five years preceding the insolvency commencement date; or (*d*) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director."

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

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

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

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

> "208. Functions and obligations of insolvency professionals.—

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

(*a*) to take reasonable care and diligence while performing his duties;

(*b*) to comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member;

(*c*) to allow the insolvency professional agency to inspect his records;

(*d*) to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and

(*e*) to perform his functions in such manner and subject to such conditions as may be specified."

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

"7. Certificate of registration.

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

(*a*) at all times abide by the Code, rules, regulations, and guidelines thereunder and the bye-laws of the insolvency professional agency with which he is enrolled;

(*h*) abide by the Code of Conduct specified in the First Schedule to these Regulations; and

(*i*) abide by such other conditions as may be imposed by the Board."

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

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

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

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

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

"The Insolvency Professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process. … In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. The latter include the identification of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings if it is an enterprise, preparation of the resolution proposal, implementation of the solution for individual resolution, the construction, negotiation and mediation of deals as well as distribution of the realisation proceeds under bankruptcy resolution. In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IPs to carry out these tasks in an efficient and professional manner… This creates Role of Resolution Professionals in CIRP the positive externality of better utilisation of judicial time."

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

6. In the present matter, the DC notes from the records available that in the matter

of CIRP of the CD, the RP Mr. Gupta, for the purpose of valuation, issued two engagement letters dated 12th April, 2019, one to R.K. Associates Valuers & Techno Engineering Consultants Private Limited (RK Associates) and other to Adroit Technical Services Pvt. Ltd. (Adroit Services). There were three RVs under the umbrella of R. K Associates which is an unregistered entity and three RVs under the umbrella of Adroit Services which is a registered valuer entity. As per the records of minutes of 3rd CoC meeting, dated 2nd May, 2019, the fee for six valuers engaged by these two entities was ratified by CoC.

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

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

6.3 The contention of Mr. Gupta that the appointment letter issued to R. K. Associates was issued on the advice of the three individual RVs who were supposedly working under the umbrella of R K Associates for communication purpose only, is untenable as the valuation reports have been issued under the name and letterhead of R. K. Associates along with file number. The DC also finds that the disclaimer in the valuation reports is also in the name of R. K. Associates. There is a lack of due diligence on part of Mr Gupta while appointing R. K. Associates as a valuer in the CIRP. The valuation by an unregistered valuer may adversely affect the credibility of whole CIRP and the resolution based on such valuation. In the instant matter, there is a lapse or negligence on the part of Mr. Gupta in not taking due diligence while appointing a valuer not having registration certificate. Thus, there has been a clear violation of section 208 of the Code, clauses (*a*), (*h*) and (*i*) of regulation7(2) of IP Regulations, regulation 27 of the CIRP regulations, provisions of the said Circulars and clauses 10 and 14 of the Code of Conduct to IP Regulations.

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

6.5 Further, Mr. Gupta contended that he understood later that the communication made to R. K. Associates in the form of the engagement letter was not suitable.

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

ORDER

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

I. (*a*) clauses (*a*) and (*e*) of 208(2) of the Code;

(*b*) clauses (*a*), (*h*) and (*i*) of regulation 7(2) of the IP Regulations read with clauses 10 and 14 of the Code of Conduct contained in the First Schedule of the IP Regulations;

(*c*) Regulation 27 of the CIRP Regulations.

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

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

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

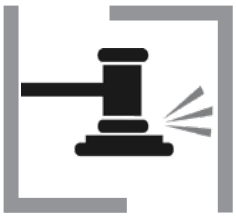
(*i*) Mr. Gupta shall not seek or accept any process or assignment or render any services under the Code for a period of two months from the date of coming into force of this Order. He shall, however, continue to conduct and complete the assignments/processes he has in hand as on date of this order.

(*ii*) This Order shall come into force on expiry of 30 days from the date of its issue.

(*iii*) A copy of this order shall be forwarded to the Insolvency Professional Agency of the Institute of Cost Accountants of India where Mr. Avishek Gupta is enrolled as its member.

(*iv*) A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, for information.

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



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INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Dinesh Sood, *In re*

DR. MUKULITA VIJAYAWARGIYA, WHOLE TIME MEMBER, IBBI

NO. IBBI/DC/30/2020

SEPTEMBER 18, 2020

Section 208 of the Insolvency and Bankruptcy Code, 2016, read with regulation 7 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 - Insolvency professionals - Functions and obligations of - IBBI had issued show-cause notice (SCN) to 'D' based on material available on record in respect of his role as resolution professional (RP) in appointing an unregistered valuer in corporate insolvency resolution process (CIRP) of corporate debtor - SCN alleged contravention of section 208(2)(a) & (e) - SCN alleged that RP had appointed 'C' as one of valuers for valuation of assets in matter of corporate debtors and that 'C' was not registered with IBBI and, therefore, IBBI prima facie held view that RP had violated section 208(2)(a) & (e) and regulation 7(2) of IP Regulations - Whether conduct of RP in appointing 'C', a company which was not a registered valuer, as a valuer for valuation of assets of corporate debtors, was in contravention of section 208(2), and regulation 7(2) of IP Regulations - Held, yes - Whether Disciplinary Committee, in exercise of powers conferred under regulation 11 of IBBI (Insolvency Professionals) Regulations, 2016, directed that RP would not seek or accept any process or assignment or render any services under Code for a period

three months from date of coming into force of order - Held, yes (Paras 5 & 5.1)

Circulars and Notifications : IBBI Circular No. IBBI/RV/-19/2018, dated 17-10-2018

ORDER

In the matter of Mr. Dinesh Sood, Insolvency Professional (IP) under Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016.

1. This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/SCN/2020/03 dated 21st May, 2020 issued to Mr. Dinesh Sood, B 1001, Media Society, Plot 18A, Sector 7, Dwarka, New Delhi - 110075, who is a Professional Member of the ICSI Institute of Insolvency Professionals and an IP registered with the Insolvency and Bankruptcy Board of India (Board/IBBI) with Registration No. IBBI/IPA-002/IP-N00046/2016-2017/10091.

Background

1.1 The Board had issued on 21st May, 2020, the SCN to Mr. Dinesh Sood, based on material available on record in respect of his role as the resolution professional (RP) in appointing M/s Crest Capital Group Pvt. Ltd., an unregistered valuer in the corporate insolvency resolution process (CIRP) of M/s BRYS International Pvt. Ltd., Neo Infrastructure Pvt. Ltd. and Ujala Pumps Pvt. Ltd. The SCN alleged contraventions of section 208(2)(*a*) & (*e*) of the Insolvency and Bankruptcy Code, 2016 (Code), regulation 7(2)(*a*), (*h*) and (*i*) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clauses 10 and 14 of the Code of Conduct contained in the First Schedule of the IP Regulations, regulation 27 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) and IBBI Circular No. IBBI/RV/019/2018 dated 17th October, 2018. Mr. Dinesh Sood replied to the SCN *vide* letter dated 10th June, 2020.

1.2 The Board referred the SCN, response of Mr. Sood to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder. The IP availed an opportunity of personal hearing before the DC on 10th September, 2020 wherein he was represented by Mr. Inder Paul Singh Oberoi, Advocate.

Show Cause Notice

2. The contraventions alleged in the SCN are summarized as follows:

Mr. Sood has appointed M/s Crest Capital Group Pvt. Ltd. as one of the valuers for valuation of assets in the matter of M/s BRYS International Pvt. Ltd. and Neo Infrastructure Pvt. Ltd. on 12-3-2019 and in the matter of Ujala Pumps Pvt. Ltd. on 26-2-2019. M/s Crest Capital Group Pvt. Ltd. is not registered with the IBBI. Therefore, the IBBI *prima facie* held the view that Mr. Sood has violated section 208(2)(*a*) & (*e*) of the Code and Regulation 7(2)(*a*), (*h*) & (*i*) of the IP Regulations, read with clauses 10 and 14 of the Code of Conduct as contained in the First Schedule of the IP Regulations and regulation 27 of the CIRP Regulations along with IBBI Circular No. IBBI/RV/019/2018, dated 17th October 2018.

Submissions by Mr. Dinesh Sood

3. Mr. Sood *vide* reply dated 10th June,

2020 had submitted that the underlying intent of the Circular No. IBBI/RV/019/2018 is that the assignment of carrying out valuation of assets of CD should be carried out only by 'registered valuers' and not by any other valuer who is not registered with IBBI. The pith and substance of the direction is on valuation to be conducted, and appointment of valuers is only a procedural aspect.

3.1 Mr. Sood submitted that in the instant matter, it is a matter of fact and record that the valuations have been conducted by registered valuers only and not by any valuer who was not registered with IBBI. The valuation reports duly bear the signatures of the registered valuers who had conducted the valuations. The valuation for M/s Brys International Pvt. Ltd. and Neo Infrastructure Pvt. Ltd. was conducted by Mr. Vijay Vinod Bhatia, registered valuer having IBBI registration No. IBBI/RV/05/2019/11309, even though the appointment letter for valuation dated 12-3-2019 was addressed to M/s Crest Capital Group Pvt. Ltd. Similarly, valuation for M/s Ujala Pumps Pvt. Ltd. was conducted by Mr. Lakshya Malhotra, registered valuer having IBBI registration number IBBI/RV/05/2019/11553, and by Ms. Alpna Harjai, registered valuer having IBBI registration number IBBI/RV/02/2019/11077, even though the appointment letter for valuation dated 26-2-2019 was addressed to M/s Crest Capital Group Pvt Ltd. These three registered valuers are the constituents of M/s Crest Capital Group Pvt. Ltd. and had conducted valuations on its behalf.

3.2 Mr. Sood submitted that M/s Crest Capital Group Pvt. Ltd. was appointed as valuers, as it was manned, amongst others, by these three persons registered with IBBI as valuers. Since, M/s Crest Capital Group Pvt. Ltd., which was appointed for carrying out the valuations, were and are manned by registered valuers, it can be said that registered valuers were appointed for valuation work through M/s Crest Capital Group Pvt. Ltd.

3.3 Mr. Sood admitted that the appointment of valuers should have been made in the names of three individual valuers who are registered with the IBBI but the same was done in the name of the organization, M/s Crest Capital Group Pvt. Ltd. for ease of convenience. He also apologized the inconvenience/embarrassment caused because of his inadvertent and unintentional action, which he said is a technical aberration and has not led to any discrepancy in the CIRP process.

3.4 Mr. Sood further submitted that even though there may appear to be a contravention of regulation 27 of CIRP Regulations by the manner in which the appointments were made for carrying out the valuation assignment, yet the same can be said to be of technical nature only and there is no violation of the intent and purpose of the said regulation. The violation of the circular is only in semantics and cannot be said to be violation in reality or in intent. Between form and content, it is content that matters.

3.5 Mr. Sood further submitted that valuations conducted by the three registered valuers cannot be faulted merely because the appointment letters were issued to M/s Crest Capital Group Pvt. Ltd. as the valuation reports have been submitted under the signatures of the three registered valuers. The underlying objective of the Code for

maximisation of the value of assets of CD and consequently value for its stakeholders has been achieved by transparent and credible determination of value of the assets to facilitate comparison and informed decision making on the basis of valuations conducted by the three registered valuers.

3.6 Mr. Sood also submitted that no loss has been caused or is likely to be caused to any person and also no unlawful gain has been made on account of the aforesaid technical aberration and unintentional/ inconsequential contravention of the circular/regulations in appointment of valuers.

3.7 During the personal hearing held on 10-9-2020, Mr. Sood and Inder Paul Singh Oberoi, the counsel on behalf of Mr. Sood appeared before the DC. Mr. Sunil Kumar (DGM), IBBI and Ms. Rashi Gupta (RA), IBBI were also present during the hearing. Mr. Oberoi reiterated the submissions made by Mr. Sood in his written reply to SCN. He further prayed for some leniency since no prejudice has been caused to the process or any stakeholders due to the technical violation committed by the Mr. Sood.

Analysis and finding

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

4.1 An IP plays a vital role in the resolution process and forms a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the resolution process. The BLRC, the recommendations of which has led to the enactment of the Code, in its Final Report, has also laid emphasis on the role of an IP as follows:

"The Insolvency Professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process. In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. The latter include the identification of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings if it is an enterprise, preparation of the resolution proposal, implementation of the solution for individual resolution, the construction, negotiation and mediation of deals as well as distribution of the realisation proceeds under bankruptcy resolution. In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IPs to carry out these tasks in an efficient and professional manner... This creates Role of Resolution Professionals in CIRP the positive externality of better utilisation of judicial time."

4.2 The provisions of the Code and regulations are spelt out in a plain and simple language. There appears to be no ambiguity in understanding the provisions. Section 25(2)(*d*) of the Code provides that the resolution professional (RP) shall appoint accountants, legal or other professional in the manner as specified by the Board. Regulation 27 of the CIRP Regulations provides as follows:

"27. Appointment of registered valuers.

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

Provided that the following persons shall not be appointed as registered valuers, namely:—

(*a*) a relative of the resolution professional;

(*b*) a related party of the corporate debtor;

(*c*) an auditor of the corporate debtor at any time during the five years preceding the insolvency commencement date; or

(*d*) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director."

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

"Every valuation required under the Code or any of the regulations made thereunder is required to be conducted by a `registered valuer', that is, a valuer registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017. It is hereby directed that with effect from 1st February, 2019, no insolvency professional shall appoint a person other than a registered valuer to conduct any valuation under the Code or any of the regulations made thereunder."

Thus, the IBBI further clarified by issuing the said Circular that the IP shall only appoint registered valuers to conduct any valuation under the provisions of the Code or any of the regulations.

4.4 There are various obligations which the IP needs to perform under the Code. Section 208(2) provides that every insolvency professional shall abide by the Code of conduct. It reads as follows:

"208. Functions and obligations of insolvency professionals.

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

(*a*) to take reasonable care and diligence while performing his duties;

(*b*) to comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member;

(*c*) to allow the insolvency professional agency to inspect his records;

(*d*) to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the

insolvency professional agency of which he is a member; and

(*e*) to perform his functions in such manner and subject to such conditions as may be specified."

4.5 Further, Regulations made under the Code require an IP to follow, at all times, the provisions of the Code and Regulations and the bye-laws of Agency of which the IP is a member. Regulation 7(2)(*a*), (*h*) and (*i*) of the IP Regulations provide as follows:

"7. Certificate of registration.

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

4.6 The DC further notes that it is the responsibility of the RP, registered valuers:

(*a*) at all times abide by the Code, rules, regulations, and guidelines thereunder and the bye-laws of the insolvency professional agency with which he is enrolled;

(*h*) abide by the Code of Conduct specified in the First Schedule to these Regulations; and

(*i*) abide by such other conditions as may be imposed by the Board."

and the members of the CoC to maintain the confidentiality of the fair value and liquidation value under regulation 35 of the CIRP Regulations. Sub-regulations (2) & (3) of regulation 35 clearly provides as follows:

"(2) After the receipt of resolution plans in accordance with the Code and these regulations, the resolution professional shall provide the fair value and the liquidation value to every member of the committee in electronic form, on receiving an undertaking from the member to the effect that such member shall maintain confidentiality of the fair value and the liquidation value and shall not use such values to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29.

(3) The resolution professional and registered valuers shall maintain confidentiality of the fair value and the liquidation value."

Thus, confidentiality of the fair value and liquidation value is of utmost importance in the whole CIRP to establish its credibility and to prevent unfair market practices.

4.7 In the instant matter, Mr. Sood appointed M/s Crest Capital Group Pvt. Ltd., a company which is not registered as a valuer with the IBBI, to conduct valuation in the matter of M/s BRYS International Pvt. Ltd. and Neo Infrastructure Pvt. Ltd. *vide* appointment letter dated 12-3-2019, and in the matter of Ujala Pumps Pvt. Ltd. vide appointment letter dated 26-2-2019. Thus, in appointing an unregistered valuer, Mr. Sood has contravened regulation 27 of CIRP Regulations and the Circular dated 17th October, 2018.

4.8 As regards the submission of Mr. Sood that the valuation reports submitted on behalf of M/s Crest Capital Group Pvt. Ltd. were signed by the valuers who are

registered with IBBI as valuers, the DC notes that the valuation report in the matter of M/s BRYS International Pvt. Ltd. and Neo Infrastructure Pvt. Ltd. which was submitted in response to appointment letter dated 12-3-2019 was signed by the following two individuals:—

(*i*) Mr. Gagan Ghai, who is not registered with IBBI as a valuer; and

(*ii*) Mr. Vijay Vinod Bhatia, whose registration as a valuer with IBBI is effective from 15-4-2019.

Thus, as on the date when appointment letter was issued to M/s Crest Capital Group Pvt. Ltd. *i.e.,* 12-3-2019, Mr. Bhatia was not a registered valuer with the IBBI.

4.9 The DC also notes that the valuation report in the matter of Ujala Pumps Pvt. Ltd. which was submitted in response to appointment letter dated 26-2-2019 was signed by the following three individuals: —

(*i*) Mr. Gagan Ghai, who is not registered with IBBI as a valuer;

(*ii*) Mr. Lakshay Malhotra, whose registration as a valuer with IBBI is effective from 15-5-2019.

Thus, as on the date when appointment letter was issued to M/s Crest Capital Group Pvt. Ltd, . *i.e.,* 26-2-2019, Mr. Malhotra was not a registered valuer with the IBBI.

(*iii*) Ms. Alpna Harjai, whose registration as a valuer with IBBI is effective from 27-3-2019.

Thus, as on the date when appointment letter was issued to M/s Crest Capital Group Pvt Ltd., *i.e.,* 26-2-2019, Mrs. Harjai was not a registered valuer with the IBBI.

4.10 As regards the submission of Mr. Sood that no prejudice has been caused to the process or any stakeholders due to the technical violation committed by him cannot be accepted as the same is in express violation of regulations 27 and 35 (3) of CIRP Regulations. Mr. Sood did not take due diligence prior to appointment of Crest Capital Pvt. Ltd. as a valuer during the CIRP and also for maintaining confidentiality of the valuation reports. Even if valuers signing the report on behalf of Crest Capital Pvt. Ltd. are registered with the IBBI, but the report reflects the name of Crest Capital Pvt. Ltd. on right side of top of every page of the valuation report and all the reports were also signed by one Mr. Gagan Ghai who is not a registered valuer. In consequence, obligation of registered valuers for maintaining of strict confidentiality which was also mentioned in the appointment letter dated 12-3-2019 and 26-2-2019 issued by Mr. Sood was not observed and it merely became a formality.

4.11 The responsibilities of the IRP/RP under the Code require highest level of standing, calibre and integrity which inspire confidence and trust of the stakeholders and the society. A professional is said to act professionally when he follows the code of conduct laid down by the authority with which he is registered and thereby establishes the credibility of the process. For that purpose, the Code provides for certain duties, obligations as well as Code

of Conduct for taking due diligence in the conduct of process read with integrity, objectivity and professional competence as discussed in the foregoing paragraphs. Mr. Sood himself is a registered professional and very well aware of the sanctity of registration certificate. Registration carries with it numerous responsibilities. He himself has been appointed as an IRP/RP only after his registration with the Board. The IPs are required to observe the code of conduct provided under section 208 (2) (*a*) & (*e*) of the Code and regulation 7(2)(*a*), (*h*) & (*i*) of the IP Regulations read with Code of Conduct contained in Schedule 1 of the IP Regulations.

4.12 In this matter, Mr. Sood appointed Crest Capital Pvt. Ltd. which was not a registered valuer. Hence, there is lapse or negligence on the part of Mr. Sood in not taking due diligence while appointing a valuer not having registration certificate. Therefore, he has contravened section 208 (2)(*a*) and (*e*) of the Code, regulation 7 (2)(*a*), (*h*) & (*i*) of the IP Regulations and clauses 10 and 14 of the Code of Conduct under Schedule 1 of the IP Regulations and also regulations 27 and 35(3) of the CIRP regulations.

ORDER

5. In view of the above, this DC finds that Mr. Dinesh Sood, the RP, has appointed M/s Crest Capital Group Pvt. Ltd., a company which was not a registered valuer, as a valuer for valuation of assets of three CDs, namely M/s BRYS International Pvt. Ltd., Neo Infrastructure Pvt. Ltd. and Ujala Pumps Pvt. Ltd. This conduct of Mr. Sood is in contravention of the following provisions of the Code and Regulations: —

(*i*) section 208(2)(*a*) & (*e*) of the Code;

(*ii*) Regulation 7(2)(*a*), (*h*) & (*i*) of the IP Regulations read with clauses 10 and 14 of the Code of Conduct contained in the First Schedule of the IP Regulations;

(*iii*) Regulations 27 and 35(3) of the CIRP Regulations.

Further, Mr. Sood also did not follow the guidance provided under para 6 of the IBBI Circular IBBI/RV/019/2018 dated 17th October 2018.

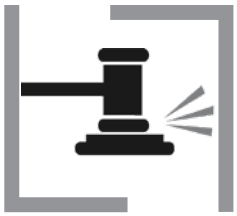
5.1 Accordingly, the Disciplinary Committee, in exercise of the powers conferred under Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, disposes of the SCN with the following directions:

Mr. Dinesh Sood shall not seek or accept any process or assignment or render any services under the Code for a period of three months from the date of coming into force of this Order. He shall, however, continue to conduct and complete the assignments/processes he has in hand as on date of this order.

5.2 This Order shall come into force on expiry of 30 days from the date of its issue.

5.3 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Dinesh Sood is enrolled as a member.

5.4 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, for information.



(2020) 120 taxmann.com 192 (IBBI)

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Abhishek Ahuja, In re

DR. MUKULITA VIJAYAWARGIYA, WHOLE TIME MEMBER, IBBI

NO. IBBI/VALUATION/DISC./1/2020

SEPTEMBER 4, 2020

Section 208 of the Insolvency and Bankruptcy Code, 2016, read with rules 15, 16 and 17 of the Companies (Registered Valuers and Valuation) Rules, 2017 - Insolvency professionals - Functions and obligations of - Whether a valuer to be registered with IBBI, has to first enroll himself/herself with a Registered Valuer Organization ('RVO') recognized by IBBI and complete 50 hours mandatory educational programme and subsequently, has to clear valuation examination conducted by IBBI and thereafter he may register with IBBI - Held, yes - Show cause notice (SCN) was issued by IBBI to AA (Noticee) alleging that prior to his being registered as valuer with IBBI he undertook valuation assignment in CIRP of AIIPL and also submitted valuation report without being eligible or registered to do so - Noticee submitted that his mistake was not intentional and was made due to a lack of clarity as to procedural issues - It was found that Noticee undertook assignment, despite IBBI Circular dated 17-10-2018 clearly stating that no person other than a registered valuer will be appointed to conduct valuation under Code - Whether noticee despite having mandatory training and qualifying valuers examination, had displayed his lack of understanding of provisions of Rules and standards of valuation profession, allowed resolution professional to engage him as registered valuer in a CIRP even though he was not registered as a valuer and also submitted valuation report; hence, his conduct was in violation of Companies (Registered Valuers and Valuation) Rules, 2017 - Held, yes - Whether however, in view of fact that he had refunded amount of fee charged for valuation services and had cleared valuation examination at time of his engagement in CIRP, he was to be warned not to accept any assignment for valuation until he had again under gone 50 Hours educational programme with IOV Registered Valuers Foundation where he was enrolled as a member - Held, yes (Paras 6, 6.1 and 6.2)

CASES REFERRED TO

Cushman and Wakefield India (P.) Ltd. v. Union of India (2019) 102 taxmann.com 102/152 SCL 516 (Delhi) (para 5.3).

ORDER

In the matter of Mr. Abhishek Ahuja, Registered Valuer under rule 17 read with rule 15 of the Companies (Registered Valuers & Valuation) Rules, 2017

This Order disposes of the Show Cause Notice (SCN) dated 14th May, 2020 issued to Mr. Abhishek Ahuja, who is a member of the IOV Registered Valuers Foundation (IOVRVF) and registered with the Insolvency and Bankruptcy Board of India (IBBI) as a valuer in the asset class of Land and Building with the registration number IBBI/RV/02/2019/11958 and in the asset class of Plant and Machinery with the registration number IBBI/RV/02/2019/12302.

Background

2. The IBBI has been delegated by the Central Government to perform the functions as the Authority under the Companies (Registered Valuers and Valuation) Rules, 2017 (Rules). Mr. Abhishek Ahuja, who is a member of the IOVRVF was registered with the IBBI as valuer in the asset class of Land and Building with the registration number IBBI/RV/02/2019/11958 on 12th July, 2019 and in the asset class of Plant and Machinery with the registration number IBBI/RV/02/2019/12302 on 20th September, 2019.

2.1 It has come to the notice of the IBBI that Mr. Abhishek Ahuja before being registered as valuer under the Rules took valuation assignment in the Corporate Insolvency Resolution Process (CIRP) of M/s. Arjun Ispat India Private Limited. The engagement letter dated 2nd March, 2019 issued by the resolution professional, Mr. Rajneesh Singhvi, was accepted by Mr. Ahuja and the valuation report dated 5th April, 2019 was also submitted by him prior his to being registered as valuer with IBBI.

2.2 Upon consideration of the material available on record, the Authorised Officer (AO) of IBBI was of the *prima facie* opinion that sufficient cause existed to take actions under the rule 17 of the Rules and accordingly issued a SCN dated 14th May, 2020 to Mr. Abhishek Ahuja, seeking his written reply and offering him an opportunity of seeking a personal hearing for disposal of the same in accordance with the said Rules.

2.3 Mr. Abhishek Ahuja responded to the SCN *vide* his reply dated 12th June, 2020 and availed personal hearing which was scheduled on 15th July, 2020.

3. Show Cause Notice

The alleged contraventions in the SCN are as follows:

(*a*) The IBBI, acting as the Authority under the Rules, has granted Mr. Abhishek Ahuja the registration as a valuer under the Rules, in the asset class of Land and Building with the registration number IBBI/RV/02/2019/11958 on 12th July, 2019 and in the asset class of Plant and Machinery with the registration number IBBI/RV/02/2019/12302 on 20th September, 2019.

(*b*) As per IBBI Circular No. IBBI/RV/019/2018 dated 17th October, 2018 read with rule 11 of the Rules, every valuation required under the Insolvency and Bankruptcy Code, 2016 (Code) or any of the regulations made thereunder is required to be conducted by a registered valuer, that is, a valuer registered with the IBBI under the Rules.

(*c*) It has come to the notice of IBBI that before being registered as valuer

under the Rules, Mr. Abhishek Ahuja took valuation assignment in the CIRP of M/s. Arjun Ispat India Pvt. Ltd. *vide* engagement letter dated 2nd March 2019. Subsequently, the valuation report dated 5th April, 2019 was submitted.

(*d*) Therefore, based on materials available on record, it is observed that Mr. Abhishek Ahuja accepted and undertook the valuation assignment in the said CIRP while he was not registered as a valuer clearly establishing violation of the above stated circular of IBBI. This act casts serious as persions on Mr. Abhishek Ahuja's integrity as a professional and adversely impacts the reputation of valuers registered under the Rules.

(*e*) In view of the foregoing, Mr. Abhishek Ahuja has contravened the following provisions of the Rules by his act-

i. Rule 3(1)(*k*) of the Rules prescribe that a person shall be eligible to be a registered valuer if he is a fit and proper person. For determining whether an individual is a fit and proper person under the Rules, the authority may take account of any relevant consideration, *inter alia* including integrity, reputation and character.

ii. Clause 1 of the Model Code of Conduct for Registered Valuers stipulates under Annexure - I of the Valuer Rules that - "A valuer shall, in the conduct of his/its business, follow high standards of integrity and fairness in all his/its dealings with his/its clients and other valuers."

iii. Clause 2 of the Model Code of Conduct for Registered Valuers stipulates under Annexure - I of the Valuer Rules that - "A valuer shall maintain integrity by being honest, straightforward, and forthright in all professional relationships."

iv. Clause 4 of the Model Code of Conduct for Registered Valuers stipulates under Annexure - I of the Rules that - "A valuer shall refrain from being involved in any action that would bring disrepute to the profession."

v. Rule 7(*a*) of the Rules which prescribes that the registration of the valuer is subject to the condition that the valuer shall at all times possess the eligibility and qualification and experience criteria as specified under rule 3 and rule 4.

vi. Rule 7(*b*) of the Rules prescribe that the registration of the valuer is subject to the condition that the valuer shall at all times comply with the provisions of the Act, the Rules and the Bye-laws or internal regulations, as the case may

be, of the respective registered valuers organisation.

vii. Rule 7(*g*) of the Rules prescribe that the registration of the valuer is subject to the condition that the valuer shall comply with the Code of Conduct (as per Annexure-I of the Rules) of the registered valuers organization of which he is a member.

Submissions by Mr. Abhishek Ahuja

4. Written submissions made by Mr. Abhishek Ahuja in reply dated 12th June, 2020 and oral submissions made on 15th July, 2020 are summarized as follows:

4.1 Mr. Ahuja submitted that at the time of undertaking the valuation assignment in the CIRP of M/s. Arjun Ispat India Pvt. Ltd., he was under the *bona fide* belief that he could undertake work under the ambit of the Code as he had completed the 50 hour mandatory training with IOVRVF and passed the valuation examination on 4th November, 2018.

4.2 Further, he has stated that when he found out about the error on his part, he immediately set out to correct the procedural irregularity and filed the online application for enrolment with IBBI which was finally confirmed on 12th July, 2019. He also did not undertake any other assignment under the ambit of the Code until his registration was confirmed on 12th July, 2019.

4.3 Furthermore, Mr. Ahuja, on receiving the notice *vide* email dated 21st August, 2019 from the resolution professional, Mr. Rajneesh Singhvi, refunded the entire fee of Rs. 15, 000/-.

4.4 Mr. Ahuja has concluded his written submissions by stating that during the initial days of the new regulations, this procedural irregularity committed by him was a *bona fide* error and not intentional at all. There was no malice intended on his part. He, therefore, requested to consider his case sympathetically and take a lenient view of the matter as it is not a reflection of his professional and ethical behaviour.

4.5 During the personal hearing dated 15th July, 2020, Mr. Ahuja admitted that he has committed a mistake in not completing his registration process before taking a valuation assignment and that the error was inadvertent and unintended. In view of the same he requested the Authority to take a lenient view. He further submitted that as the valuation profession was still at an emerging stage, his mistake was not intentional and was a made due to a lack of clarity as to the procedural issues.

5. Analysis and Findings

5.1 In all CIRPs, the resolution professional has to appoint a valuer registered with the Authority under the Rules *i.e.* the IBBI. A valuer to be registered with the IBBI, has to first enroll himself/herself with a Registered Valuer Organization (`RVO') recognized by the IBBI and complete the 50 Hours mandatory educational programme. Subsequently, the valuer has to clear the valuation examination conducted by the IBBI and thereafter he may register with IBBI.

5.2 The Code envisages conducting valuation in a CIRP to estimate the fair

value and liquidation value of the assets of the corporate debtor to enable the Committee of Creditors (CoC) and the prospective resolution applicants to make an informed decision regarding the fate of corporate debtor. It is the objective of the Code to maximize the value of assets of the corporate debtor and the same may be ensured by adopting uniform valuation standards. Based on the information supplied in the valuation report, the CoC takes the crucial decision-whether to continue with the resolution process or resolve to liquidate. Further, it also facilitates the resolution professional to invite prospective resolution plans. Therefore, to establish the credibility of the process and generate confidence among the stakeholders, the Code as well as the Rules require resolution professionals to engage registered valuers for the purpose of the CIRP.

5.3 The Hon'ble Delhi High Court in the matter of *Cushman and Wakefield India (P.) Ltd.* v. *UOI* (2019) 102 taxmann.com 102/152 SCL 516, had held that, "The endeavour of the Rules is to introduce a class of professionals where the focus is on the professionals skills of the individuals rather than a business venture. Professionalism is introduced into the profession of valuation, which involves sophisticated skills and a high degree of integrity, impartiality and ethics for the purposes of the Companies Act and IBC, through Valuation Rules which can regulate this area and make valuers more accountable and professionally trained."

5.4 The IBBI Circular dated 17th October 2018 on "Valuation under the Insolvency and Bankruptcy Code, 2016" provides that:

> "6. In view of the above, every valuation required under the Code or any of the regulations made thereunder is required to be conducted by a `registered valuer', that is, a valuer registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017. It is hereby directed that with effect from 1st February, 2019, no insolvency professional shall appoint a person other than a registered valuer to conduct any valuation under the Code or any of the regulations made thereunder."

5.5 It is found that Mr. Abhishek Ahuja undertook the assignment of valuation of Land and Building in the CIRP of M/s. Arjun Ispat India Private Limited for the fees of Rs. 15, 000/- *vide* engagement letter dated 2nd March, 2019 issued by the resolution professional, despite the IBBI Circular dated 17th October, 2018 clearly stating that no person other than a registered valuer will be appointed to conduct valuation under the Code which came into effect from 1st February, 2019. A valuation report dated 5th April, 2019 was also submitted by Mr. Ahuja. Therefore, SCN No. IBBI/IP/SCN/2020/04 dated 21st May, 2020 was also issued to Mr. Rajneesh Singhvi, resolution professional, to engage an unregistered valuer in the instant matter. Mr. Singhvi in his reply dated 4th June, 2020, informed the IBBI that the Valuation Report of Mr. Ahuja was also considered by the CoC, which is a serious transgression and may raise question on the integrity of the CIRP itself.

5.6 Further, it has been admitted by Mr. Abhishek Ahuja in his written reply as well as his oral submissions that he was under

the mistaken impression that his registration with IBBI was complete on finishing the 50 hours mandatory training with IOVRVF and on passing the valuation examination on 4th November, 2018. Subsequently, on becoming aware of the irregularity in undertaking the assignment in the instant case, he got registered with IBBI on 12th July, 2019 for asset class Land and Building with the registration number IBBI/RV/02/2019/11958 and for asset class of Plant and Machinery he was registered on 20th September, 2019 with registration number IBBI/RV/02/2019/12302.

5.7 By virtue of being a professional it is expected of a valuer to be updated with the law governing his profession, particularly, when the candidate has undergone mandatory training programme and qualified the valuers examination. Mr. Ahuja has by his conduct shown negligence towards his professional obligations. Mr. Ahuja accepted valuation assignment even though he did not have proper credentials with the regulatory authority. His previous actions even while being unregistered does raises the question of integrity, competence and bringing disrepute to valuation profession on his subsequent registration. Therefore, the submissions of Mr. Ahuja are not tenable.

5.8 It is further observed that the resolution professional *vide* letter dated 6th June, 2020 acknowledged the refund of fees of Rs. 15, 000/- charged for valuation exercise. However, it is noted that Mr. Ahuja knew that he had contravened the provision of the Circular dated 17th October, 2018 and the Rules hence, he admittedly offered the resolution professional to refund the fees charged by him for his services.

5.9 Moreover, merely because the amount has been refunded back, it does not mean that there is no violation of the provisions. An unauthorized person not registered with the regulatory authority and unbound by the Rules and Code of Conduct submitting valuation report could raise serious issues on the credibility of the CIRP, which may be prone to be challenged before the Court of Law.

Order

6. Mr. Abhishek Ahuja, despite having mandatory training and qualifying the valuers examination, has displayed his lack of understanding of the provisions of the Rules and standards of valuation profession. He allowed the resolution professional to engage him as the registered valuer in a CIRP even though he was not registered as a valuer and also submitted valuation report. As a valuation professional, it is expected to be aware of the registration process and code of conduct of the profession to inspire confidence of the stakeholders and not to bring disrepute to the profession. The conduct of Mr. Abhishek Ahuja is found to be in violation of rule 3(1)(*k*), 7(*a*), 7(*b*) and 7(*g*) of the Companies (Registered Valuers and Valuation) Rules, 2017 and clauses 1, 2 and 4 of the Model Code of Conduct for Registered Valuers under Annexure-I of the Rules.

6.1 Mr. Abhishek Ahuja undertook valuation assignment under mistaken belief and conducted valuation in the CIRP of M/s. Arjun Ispat India Private Limited and even submitted valuation report without being eligible or registered to do so. The fact that he has refunded the amount of fee

charged for valuation services and had cleared the valuation examination at the time of his engagement in the CIRP may call for a lenient view.

6.2 In view of the above, the Authority, in exercise of powers conferred under section 458 of the Companies Act, 2013 read with rule 15 and rule 17 of the Companies (Registered Valuers and Valuation) Rules, 2017, hereby, issues the following directions:

(*i*) Mr. Abhishek Ahuja is hereby warned not to accept any assignment for valuation until he again undergoes the 50 Hours educational programme with IOV Registered Valuers Foundation where Mr. Abhishek Ahuja is enrolled as a member.

(*ii*) In accordance with provisions of Rule 17(8) of the Rules, the directions of this order shall come into force on expiry of 30 days from the date of its issue.

(*iii*) A copy of this order shall be forwarded to IOV Registered Valuers Foundation where Mr. Abhishek Ahuja is enrolled as a member.

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

Practical Questions

Q.1. Can a party seek condonation of delay on the ground that after the impugned order was reserved, it did not regularly check for the orders, and thus the delay?

Ans. No.

(NCLAT order dt. 4th Sep 2020 passed in the matter of *Kuntal Construction (P) Ltd. v. Bharat Hotels Ltd.*, (2020) 121 taxmann.com 267)

Q.2. Can an NCLT quash a pending civil suit instituted by a person claiming to be user of CD's property which is auctioned by the Liquidator appointed vis-à-vis CD's property?

Ans. No.

(NCLAT judgment dt. 1st September 2020 passed in *E.C. John v. Jitender Kumar Jain* (2020) 120 taxmann.com 199)

Q.3. Can it be held that the IBC necessarily provides that the value given by Resolution Applicant should match the fair value or the liquidation value?

Ans. No.

(NCLAT judgment dt. 14th September 2020 passed in *Naresh Kumar Sharma v. Shekhar Resorts Ltd.*(2020) 120 taxmann.com 201)

Q.4. In case the AA allows invitation of new resolution plans, can the entire CIRP be held to have reopened?

Ans. No.

(NCLAT judgment dt. 16th September 2020 passed in *Kind Special Steels (India) (P.) Ltd. v. Amtek Auto Ltd.* (2020) 120 taxmann.com 196)

Q.5. Is there any express rule of review provided under the NCLAT rules, 2016.

Ans. No.

(NCLAT judgment dt. 17th September 2020 passed in *Deepakk Kumar v. Phoenix ARC (P.) Ltd.* (2020) 120 taxmann.com 204)

Learning Curves

- **It is the duty of the Corporate Debtor to access his emails and can not take excuse that the same is not in use.**

(NCL-AT Order dt. 1st, September 2020 in the matter of *Girish Baduni v. Punjab National Bank* (2020) 120 taxmann.com 195)

- **The Limitation Act, 1963 vide Section 238A of the I&B Code will be applicable to all NPA cases provided they meet the criteria of Article 137 of the Schedule to The Limitation Act, 1963.**

(NCL-AT Order dt. 2nd, September 2020, in the matter of *Jagdish Prasad Sarada v. Allahabad Bank* (2020) 119 taxmann.com 244)

- **Supreme Court quashes NCLAT order rejecting resolution plan basis 'misconceived' ground**

(NCL-AT Order dt. 8th September 2020, in the matter of *Karad Urban Cooperative Bank Ltd. v. Swwapnil Bhingardevay* (2020) 119 taxmann.com 46)

- **NCLT has no power to quash Civil Suit or direct Police to arrest any person obstructing Liquidator under IBC**

(NCL-AT Order dt. 9th, September 2020, in the matter of *E.C. John v. Jitender Kumar Jain* (2020) 120 taxmann.com 199)

- **On failure of the Resolution Applicant to implement the terms of the resolution plan, liquidation has to follow; A 'Timely Liquidation' is preferred over endless 'Resolution process'/**

NCL-AT Order dt. 10 September 2020 in the matter of *Kridhan Infrastructure Pvt. Ltd. v. Venkatesan Sankaranarayan* (2020) 120 taxmann.com 197 (NCL-AT)

INSOLVENCY AND BANKRUPTCY (APPLICATION TO ADJUDICATING AUTHORITY) (AMENDMENT) RULES, 2020 - AMENDMENT IN RULES 4, 6, 7, FORM 1, FORM 2, FORM 5 AND FORM 6; INSERTION OF FORM 5A

NOTIFICATION NO. G.S.R. 583(E) (F. NO. 30/20/2018-INSOLVENCY SECTION), DATED 24-9-2020

In exercise of the powers conferred by clauses (*c*), (*d*), (*e*) and (*f*) of sub-section (2) of section 239 read with sections 7, 8, 9 and 10 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby makes the following rules further to amend the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, namely:—

1. (1) These rules may be called the Insolvency and Bankruptcy (Application to Adjudicating Authority) (Amendment) Rules, 2020.

(2) These rules shall come into force from the date of their publication in the Official Gazette.

2. In the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, —

(*i*) in rule 4, for sub-rule (3), the following sub-rule shall be substituted, namely:—

"(3) The applicant shall serve a copy of the application to the

registered office of the corporate debtor and to the Board, by registered post or speed post or by hand or by electronic means, before filing with the Adjudicating Authority.";

(*ii*) in rule 6, for sub-rule (2), the following sub-rule shall be substituted, namely:—

"(2) The applicant under sub-rule (1) shall serve a copy of the application to the registered office of the corporate debtor and to the Board, by registered post or speed post or by hand or by electronic means, before filing with the Adjudicating Authority.";

(*iii*) in rule 7, for sub-rule (2), the following sub-rule shall be substituted, namely:—

"(2) the applicant under sub-rule (1) shall serve a copy of the application to the Board by registered post or speed post or by hand or by electronic means, before filing with the Adjudicating Authority.";

(*iv*) in FORM 1:

(*a*) after Part - V, for the words, "(Name of the financial creditor) has paid the requisite fee for this application through (state means of payment) on (date)", the following shall be substituted, namely:—

"(Name of the financial creditor) has paid the requisite fee for this application through (state means of payment) on (date) and served a copy of this application by registered post/speed post/by hand/ electronic means to the registered office of the corporate debtor and to the Board.";

(*b*) under the 'Instructions', after 'Annex IV', the following shall be inserted, namely:—

"Annex V Proofs of serving a copy of the application (*a*) to the corporate debtor, and (*b*) to the Board."

(*v*) in FORM 2, for the serial number (*iii*), the following shall be substituted, namely:—

"(*iii*) disclose that I am currently having the following assignments in hand:

Sl. No.	*Assignment as*	*Number of assignment(s)*	*No.*	*Name of corporate debtor*	*Date of commencement of process*	*Expected date of closure of process*
			Corporate Processes			
1	IRP		1			
			2			
			3			
2	RP		1			
			2			
			3			
3	Liquidator (including voluntary liquidations)		1			
			2			
			3			
4	Authorised Representative		1			
			2			
			3			
			Individual Processes			
5	Resolution Professional					
6	Bankruptcy Trustee					
7	Any other".					

(*vi*) in FORM 5, after Part - V:—

(*a*) for the words "(Name of the operational creditor) has paid the requisite fee for this application through (state means of payment) on (date)", the following shall be substituted, namely:—

"(Name of the operational creditor) has paid the requisite fee for this application through (state means of payment) on (date) and a copy of this application has been served by registered post/speed post/by hand/electronic means to the registered office of the corporate debtor and to the Board";

(*b*) under the 'Instructions', —

(I) for the portion beginning with "Annex III Copy of the relevant accounts" and ending with "operational debtor, if

available.", the following shall be substituted, namely:—

"Annex III Form 5A, if available, from the banks/financial institutions that maintains relevant accounts of the operational creditor.";

(II) after "Annex VI", the following shall be inserted, namely:—

"Annex VII Proofs of serving a copy of the application (*a*) to the corporate debtor, and (*b*) to the Board."

(*vii*) after Form 5, the following Form shall be inserted, namely:—

"FORM 5A

(Under section 9(3)(*c*) of the Code)

(To be issued on the letter head of the Bank/Financial Institution)

To whomsoever it may concern

Based on a request of .....(name and address of person), having an account(*s*) bearing No..... at .... branch of bank/ financial institution, it is certified that the following amounts have been credited in the last three years to this account on behalf of corporate debtor (name and address of the corporate debtor from whom the amount is supposed to be credited).

Date of credit	*Amount of credit (Rs.)*

(Signature and Name of issuing authority)

Date :

Place :"

(*viii*) in Form 6, after Part III, —

(*a*) for the words, "(Name of the corporate applicant) has paid the requisite fee for this application through (state means of payment) on (date)", the following shall be substituted, namely:—

"(Name of the corporate applicant) has paid the requisite fee for this application through (state means of payment) on (date) and a copy of this application has been served by registered post/speed post/by hand/electronic means to the Board."

(*b*) under the 'Instructions', after 'Annex IX', the following shall be inserted, namely:—

"Annex X Proof that a copy of the application has been served to the Board."

●●●

SECTION 10A OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 - SUSPENSION OF INITIATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS - EXTENSION OF PERIOD OF SUSPENSION OF INSOLVENCY PROCEEDINGS

NOTIFICATION NO. S.O. 3265(E) (F. NO. 30/33/2020-INSOLVENCY), DATED 24-9-2020

In exercise of the powers conferred by section 10A of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) (as inserted by section 2 of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 (17 of 2020), the Central Government hereby notifies further period of three months from the 25th September, 2020 for the purposes of the said section.

Insolvency and Bankruptcy Code (Second Amendment) Act, 2020

ACT NO. 17 OF 2020, DATED 23-9-2020

1. Short title and commencement

(1) This Act may be called the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020.

(2) It shall be deemed to have come into force on the 5th day of June, 2020.

2. Insertion of new section 10A.

After section 10 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) (hereinafter referred to as the principal Act), the following section shall be inserted, namely:—

"10A. *Suspension of initiation of corporate insolvency resolution process.*- Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:.

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation.—For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.".

3. Amendment of section 66.

In section 66 of the principal Act, after sub-section (*2*), the following sub-section shall be inserted, namely:—

"(*3*) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (*2*), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.".

4. Repeal and savings.

(*1*) The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 (Ord. 9 of 2020) is hereby repealed.

(*2*) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under this Act.

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