

**APPELLATE PANEL OF ICSI INSTITUTE OF INSOLVENCY**

**PROFESSIONALS**

Appeal No. 2 of 2021

(Date of virtual hearing: 12<sup>th</sup> April 2021)

(Arising from the Order of Disciplinary Committee of ICSI IIP, dated 23<sup>rd</sup> February 2021 in ICSI IIP/DC/04/2021)

Parties Present:

Mr. Jitesh Gupta

Appellant: In Person

**For ICSI IIP:-**

Dr. Binoy J. Kattadiyil

MD, ICSI IIP

CS Poonam Shukla

Deputy Director

CS Radhika

Assistant Director

Ms. Ankita Agarwal

Executive

1. This appeal has been filed by the appellant Mr. Jitesh Gupta (Appellant) against order dated 23<sup>rd</sup> February, 2021 passed by the Disciplinary Committee (DC) of the ICSI IIP, extracts of which is appended herein,:-

*“3.1 A Corporate Insolvency Resolution Process rests on the shoulders of an IP. He is duty bound to preserve and protect the assets of the CD as well as run the CD as a going concern. The list of duties and responsibilities of an IP in a CIRP has been exhaustive in the Code and Regulations made thereunder. IP has failed to adapt the best practices under the Code and regulations.*

*3.2 After giving an opportunity of being heard, perusal of documents and based upon the information available on record, the Disciplinary Committee is of the view that Mr. Jitesh Gupta has displayed misunderstandings of the provisions mentioned under the Code.*

*3.3 Disciplinary Committee in its power conferred under Part III 4 (e) of the Disciplinary Policy of ICSI IIP issue reprimand and directs Mr. Jitesh Gupta to undergo 50 hours Pre-registration Educational Course before taking any new assignment.*

2. The background of this case is that in exercise of its powers under Part III of the Disciplinary Policy of ICSI IIP, a complaint was received by ICSI IIP against Mr. Jitesh Gupta in the CIRP of Homestead Infrastructure Development Private Limited filed by various homebuyers. The respective complaint was forwarded to Mr. Jitesh Gupta vide email dated 3rd August, 2020. On the basis of the complaint received and other documents available on record, the matter was placed before the Grievance Redressal Committee (GRC). The Grievance Redressal Committee referred the complaint to the Disciplinary Committee of ICSI IIP on 10th September, 2020 stating that the allegations leveled by the Complainant are serious in nature.
3. The Disciplinary Committee at its meeting held on 18th September, 2020 based on the complaint received against Mr. Jitesh Gupta, his reply and other documents available on record, in exercise of its powers under Part III of the Disciplinary Policy of ICSI IIP directed the Secretariat to issue Show Cause Notice. Secretariat issued show cause notice on 08<sup>th</sup> October 2020 asking him to show cause as to why appropriate disciplinary action should not be taken against him for alleged violation of the provisions of contravened Section 208(2)(a) and Section 208(2)(e) of the Code and clause (1), (2), (11) and (1a) of the Code of Conduct as mentioned in First Schedule under Regulation 7(2) (h) of IBBI (Insolvency Professionals) Regulations, 2016.
4. The Appellant had submitted his detailed response to the show cause notice issued on 21<sup>st</sup> October 2020 giving a point wise reply to contend that he had not acted in contravention of any provisions whose violations were alleged.
5. After giving the Appellant an opportunity of e-hearing before the DC on 19<sup>th</sup> January, 2021, the DC considered his submissions and based on the documents available on record was of the view that Mr. Jitesh Gupta has displayed misunderstandings of the provisions mentioned under the Code. Disciplinary Committee in its power conferred under Part III 4 (e) of the Disciplinary Policy of ICSI IIP issued order dated 23<sup>rd</sup> February, 2021 and directed Mr. Jitesh Gupta the following i.e. reprimand and to undergo 50 hours Pre-registration Educational Course (PREC) before taking any new assignment.

6. Mr. Jitesh Gupta complied with the order dated 23th February 2021 and has attended the 41<sup>st</sup> Batch of PREC held from 2<sup>nd</sup> to 8<sup>th</sup> March, 2021. Further, the Appellant had applied for Authorization for Assignment (AFA) on 9<sup>th</sup> March, 2021 which was duly approved on 17<sup>th</sup> March, 2021.
7. Appeal was filed by Mr. Jitesh Gupta on 25<sup>th</sup> March 2021 against DC order dated 23<sup>rd</sup> February, 2021 which was duly received by him on 26<sup>th</sup> February, 2021. The Appellant has assailed the impugned order on the following grounds:
  - a. That the RP was aware of a huge transfer of funds ranging from Rs. 90 Lakhs to 3 Crores through various transactions from the Bank Account of the CD to its subsidiary or group companies and no application under Section 66 was filed or forensic auditor appointed. The DC also took note that application u/s 66 of IBC has been filed by Mr. Jitesh Gupta on 20th October, 2020, after the issuance of show cause notice dated 08th October, 2020, Mr. Jitesh Gupta in the appeal stated that that several attempts were made to communicate with suspended board of Directors for seeking records and information of the CD. Further, data available on the MCA portal was available up to the Financial Year 2016 only. A section 19 application was also filed in this regard. RP submitted that appointment of Forensic auditor was also declined by CoC in its 1<sup>st</sup> CoC minutes due to paucity of funds. Appellant submitted that the application u/s 66 has been filed before NCLT on 20<sup>th</sup> October, 2020.
  - b. That the DC had alleged that the fees of Registered Valuers were not approved from Committee of Creditors (COC). In his appeal the Appellant has stated that Regulation 34 of CIRP Regulations can be interpreted to mean that the CIRP Costs are to be elaborated to the COC and if no objection is received for the same then it is considered to be fixed/ratified. The Appellant also mentioned that the fee of Valuers was intimated to COC and no objection was raised by them. Therefore, it was deemed to be approved.

8. The Appellant also submitted additional submissions on 08<sup>th</sup> April 2021 countering the allegations.
9. An opportunity of e-hearing was given to Mr. Jitesh Gupta by Appellate Panel on 12<sup>th</sup> April, 2021. We heard the oral submissions of the Appellant and representative of ICSI IIP.
10. Before detailing the submissions of the parties, since the provisions of Regulation 34 and 35A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is at the core of the issues discussed, the Panel considers it appropriate to extract the said Regulation.

**34. Resolution professional costs.**

*The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.*

*Explanation. - For the purposes of this regulation, “expenses” include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional.*

**35A. Preferential and other transactions.**

*(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66.*

*(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board.*

*(3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date.*

11. At the outset, the Panel pointed out that the submissions be restricted to the points of appeal as mentioned in the Appeal.
12. Representative of ICSI IIP submitted that as per the documents available on record, it is clear that the Appellant had formed an opinion about said fraudulent transaction(s) on or before first COC meeting, as the COC had been apprised of the same. Section 25 of the Insolvency and Bankruptcy Code (IBC) enumerating the duties of Resolution Professional states that it is the duty of the resolution professional to “(d) *appoint accountants, legal or other professionals in the manner as specified by Board;*”. Drawing reference to Section 35A of IBBI (CIRP) Regulations, 2016, it was also contended that the application was not filed within the prescribed timeline of 135 days from the commencement but rather on 20<sup>th</sup> October 2020 after the issuance of show cause notice amounting to delay of more than 365 days from the date of commencement of insolvency process.
13. It was also submitted by the Representative of ICSI IIP that as per the explanation to Regulation 34 of IBBI (CIRP) Regulations, 2016 the fee of the Registered Valuer will form part of the Insolvency Resolution Process Costs and as per language and intent of the Regulation, the same would need to be ‘fixed’ by the COC and not just informed to. It was submitted that neither the appointments of these professionals nor their fees was ratified by the COC. Mr. Jitesh Gupta stated that per month cost has been placed before COC and no objection was raised for it. It has been observed from the voting results of COC meetings, that no such item was there for voting and hence, no approval was obtained for the same.
14. The Appellant in his submissions stated that even though he was aware of some suspicious activities in the account of the CD, since he did not have the complete documents available to him and due to the National Lockdown, he could not file an application for Section 66 of IBC. He also submitted that a Section 19 application (non-cooperation by the management of CD) was filed by him in this regard to make the necessary documents available to him. As regards the appointment of forensic auditor, the Appellant placed on record the minutes of the first COC meeting wherein the COC refused to appoint a forensic auditor due to paucity of funds. Therefore the Appellant submitted that the delay in filing of application under Section 66 was due to

unavailability of necessary documents, lack of complete information and due to lockdown situation.

- 15.** He further submitted that the issue with regard to fee of Registered Valuer would not stand as no objection was raised by any member of COC in the meeting when the matter was placed before them and that would be considered as their deemed approval.
- 16.** He further relied on the Order No. IBBI/DC/68/2021 of IBBI dated 5<sup>th</sup> March 2021 where a similar issue was discussed and the order stated that,  
*“7.3.4 The DC notes the submission of Mr. Venkatesan that as per regulation 25 of the CIRP Regulations, fixing the cost as provided under Regulation 34 is not mandatory voting item in the CoC meetings under section 28(1) of the Code. The DC notes from the appointment letter of EY/ engagement terms and conditions dated 16.09.2017 entered between Mr. Venkatesan and EY for rendering its professional services that it provides for fee being charged by EY for its professional services. Even though the minutes do not specifically mention the fee paid to EY, as its appointment has been approved by CoC, the terms of engagement letter including fee stand approved. Therefore, no contravention is made out as alleged.”*
- 17.** Summing up his submissions, the Appellant prayed for the Order of the DC to be set aside even though he had already complied with the order by attending the PREC.
- 18.** In view of submissions made by both the parties, the Tribunal is of the considered view that the Appellant has exercised the due diligence of reporting the said transaction(s) to COC and filing of application under section 66 of Insolvency and Bankruptcy Code, 2016 was delayed due to reasons beyond the control of Insolvency Professional, as he was not getting co-operation from management of Corporate Debtor. Further, appointment of forensic auditors was also refused by COC due to constrain of funds.

**19.** In regard to approval of fees of registered Valuer, the reliance placed by appellant on the Order No. IBBI/DC/68/2021 of IBBI dated 5<sup>th</sup> March 2021 in the matter of *Mr. Venkatesan*, clearly establish that fixing the cost as provided under Regulation 34 is not mandatory voting item in the CoC meetings under section 28(1) of the Code. Further, it also made clear that it is not necessary that minutes specifically mentions the fee paid to Registered Valuer, as its appointment has been approved by CoC, the terms of engagement letter including fee stand approved. Therefore, no contravention is made out as alleged.

**20.** Accordingly, this Panel sets aside the order of the DC dated 23<sup>rd</sup> February, 2021.

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Sd/-  
(S.Balasubramanian)  
Chairperson

Sd/-  
(Ranjeet Pandey)  
Member

Dated:04<sup>th</sup> May, 2021  
Place: New Delhi