

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA  
(Disciplinary Committee)

No. IBBI/DC/17/2020  
26<sup>th</sup> February, 2020

**Order**

In the matter of Ms. Kavitha Surana, Insolvency Professional (IP) 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 (Code).

**Appearance at Hearing**

For Noticee	Ms. Kavitha Surana, Self
For Board	Mr. Umesh Kumar Sharma, CGM Mr. Animesh Khandelwal, RA (Law)

**1. Background**

- 1.1 This Order disposes of the Show Cause Notice (SCN) dated 4<sup>th</sup> December 2019 issued to Ms. Kavitha Surana, SUS Bhawan, No. 2, Vimala Street, Ayyavoo Colony, Aminjikarai, Chennai- 600029, who is a Professional Member of the ICSI Institute of Insolvency Professionals and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board) with Registration No. IBBI/IPA- 002/IP-N00166/2017-2018/10435.
- 1.2 In exercise of its power under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017, the Board vide Order dated 8<sup>th</sup> July 2019 appointed an Inspecting Authority (IA) to conduct an inspection of Ms. Kavitha Surana, on having reasonable grounds to believe that the IP had contravened provisions of the Code, Regulations, and directions issued thereunder.
- 1.3 The Board on 4<sup>th</sup> December 2019 had issued the SCN to Ms. Kavitha Surana, based on findings of an inspection in respect of her role as an interim resolution professional (IRP) and / or resolution professional (RP) in corporate insolvency resolution process (CIRP) of M/s Shri Veerganapathi Steels Private Limited (Corporate Debtor). The SCN alleged contraventions of several provisions of the Code, the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and the Code of Conduct under regulation 7(2) thereof, the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (CIRP Regulations) and Circular No. IBBI/IP/013/2018 on 'Fee and other Expenses incurred for CIRP' dated 12<sup>th</sup> June 2018. Ms. Kavitha Surana replied to the SCN vide letter dated 24<sup>th</sup> December 2019.
- 1.4 The Board referred the SCN, response of Ms. Kavitha Surana 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. Ms. Kavitha Surana availed an opportunity of personal hearing before the DC on 16<sup>th</sup> January 2020 when she reiterated the submissions made in her written reply and made a few additional submissions. Thereafter, the IP submitted some additional documents vide email dated 21<sup>st</sup> January 2020 in support of her submissions made during the course of personal hearing.

## 2. Consideration of SCN

The DC has considered the SCN, the reply to SCN, oral submissions of Ms. Kavitha Surana during the course of personal hearing, additional documents, other material available on record and proceeds to dispose of the SCN.

## 3. Alleged Contraventions, Submissions, Analysis and Findings

A summary of contraventions alleged in the SCN, Ms. Kavitha Surana's written and oral submissions thereon and their analysis with findings of the DC are as under:

- 3.1 **Contravention:** Pursuant to regulation 27 of the CIRP Regulations, it is the duty of the IP to appoint registered valuers to determine the fair value and liquidation value of the Corporate Debtor. It has been observed from the appointment letter(s) of the valuers that the RP directed the valuers to conduct valuation of three properties of guarantors along with the properties of the Corporate Debtor. Further, not only were properties of guarantors valued but the cost for the same was also included in the insolvency resolution process costs (IRPC).

**Submission:** RP submits that the Bank of India, being sole member of the Committee of Creditors (CoC) had communicated by letter dated 3<sup>rd</sup> May 2018, their intention to get valuation done for all properties of the Corporate Debtor including that of the guarantors, as those properties had been provided as security to them for the term loan. Since the Bank of India wished to consider value of all properties together in order to take a decision regarding either a resolution plan or a compromise arrangement, the same was done at the instructions of the CoC. By the time it was realized that assets of the personal guarantor are not to be valued, the valuation was done and cost incurred was added to the IRPC as the same was approved by the CoC and was construed as directly related to the CIRP.

During the personal hearing on 16<sup>th</sup> January 2020, it was informed by the RP that the entire cost of valuation of the Corporate Debtor along with properties of the personal guarantor was borne by the Bank of India. The RP has provided various documents vide e mail dated 21<sup>st</sup> January 2020. These include letter dated 20<sup>th</sup> January 2020 issued by the sole CoC member, Bank of India, the personal account statement of the RP with entries for the period of 11<sup>th</sup> to 17<sup>th</sup> July 2018 and copies of cheques dated 11<sup>th</sup> July 2018 issued by the RP to the two valuers, M/s Hi-Tech Valuers Private Limited and Mr. V Selvaraj. The RP has clarified that at the 2<sup>nd</sup> meeting of the CoC held on 6<sup>th</sup> July 2018, the CoC had approved and agreed to reimburse some expenses including the payments to the two valuers. As the bills of the valuers were raised in the name of the RP, the Bank of India made payments into the personal account of the RP, after which the requisite cheques were issued to the two valuers by the RP.

**Analysis:** Section 18 (1) (f) of the Code provides:

*“The interim resolution professional shall perform the following duties, namely: -*

*(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”*

Regulation 27 of the CIRP Regulations provides:

*“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.”*

The RP appointed two valuers, M/s Hi-Tech Valuers Private Limited and Mr. V Selvaraj, and directed them to value the assets of the Corporate Debtor along with the assets of the personal guarantor, Mrs. Rajashree Maheshwari. Admittedly, this was done at the instructions of the CoC in accordance with the letter dated 3<sup>rd</sup> May 2018 from the sole CoC member, Bank of India to the RP.

Clause 5 of the Code of Conduct as given in the First Schedule of IP Regulations provides:

*“5. An insolvency professional must maintain complete independence in his professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences.”*

The responsibilities of CoC and IP are clearly demarcated by the Code. The CoC must not encroach upon the role of IP and must not allow the IP to encroach upon its role. Similarly, the IP must not compromise his independence in favour of the CoC.

Section 5 (13) of the Code defines the term ‘Insolvency Resolution Process Costs’ (IRPC) in the following words -

*"insolvency resolution process costs" means—*

- (a) the amount of any interim finance and the costs incurred in raising such finance;*
- (b) the fees payable to any person acting as a resolution professional;*
- (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;*
- (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and*
- (e) any other costs as may be specified by the Board.*

Regulation 31 of CIRP Regulations provides:

*““Insolvency Resolution Process Costs” under Section 5(13)(e) shall mean –*

- (a) amounts due to suppliers of essential goods and services under Regulation 32;*
- (aa) fee payable to authorised representative under [sub-regulation (8)] of regulation 16A;*
- (ab) Out of pocket expenses of authorised representative for discharge of his functions under [Section 25A];*
- (b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);*
- (c) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;*
- (d) expenses incurred on or by the interim resolution professional fixed under Regulation 34; and*
- (e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.”*

It is trite to mention that the IRPC is an added financial stress on a Corporate Debtor. Therefore, it becomes crucial to monitor the expenses incurred by the RP to ensure that a Corporate Debtor, who is already entangled in a web of unsustainable liabilities is not further over-burdened with exorbitantly high IRPC. The payment made for the valuation of the properties of the Corporate Debtor along with the properties of the personal guarantor have been included in the IRPC by the RP.

The RP has submitted that, although it has not been recorded in the minutes of the CoC meetings, she had verbally appraised the CoC that such costs should not be included in the IRPC and there has been no financial burden on the Corporate Debtor. However, it is evident from the documents provided by the RP that the route of payments to the two valuers has been through:

- (1) Payment made by the sole CoC member, Bank of India to the personal account of the RP as reimbursement of IRP expenses; and
- (2) Payment made by the RP, personally, to the two valuers by way of issuance of cheques.

It is observed that the payments have not been directly made by the CoC but through the personal account of the RP. Thus, there is reason to believe that the RP has acted on the directions of the CoC, thereby compromising her independence in favour of the CoC. This is in violation of Clause 5 of the Code of Conduct.

**Findings:** There has been a procedural lapse on the part of the RP by directing the valuation of the properties of the personal guarantor which were not under the control and custody of the RP as well as including the cost of the same into the IRPC. Although, it has been submitted that there has been no burden on the Corporate Debtor, it can be observed from the documents that the RP has not acted independently. The payments made to the two valuers were reimbursed into the personal account of the RP by Bank of India and thereafter, cheques were issued to the two valuers. This is in contravention of Section 208 (2) (a) of the Code and Regulation 7 (2) (a), (h) & (i) of IP Regulations read with clause(s) 5, 10 & 14 of the Code of Conduct as given in the First Schedule of the IP Regulations

and Regulation 31 of the CIRP Regulations. Further, the CoC has also acted beyond the provisions of the Code by directing the RP to get valuation done of properties of the personal guarantors along with properties of the Corporate Debtor.

Ideally, such expenditure (which is not part of the IRPC) should be recovered and deposited into the account of the Corporate Debtor. However, this is a peculiar case where all the expenses relating to the IRPC has already been borne by the Bank of India itself which is sole CoC member and the proceeds of the liquidation will ultimately be deposited into the accounts of the sole CoC member. In such circumstances, since the professional fees paid to the valuers has been paid by the Bank of India itself which is the sole CoC member and not from the account of the Corporate Debtor, recovering the amount and depositing it into the account of the Corporate Debtor would be superfluous. Further, in initial days there was lack of clarity whether property of personal guarantors would be covered under moratorium till the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (effective 6<sup>th</sup> June, 2018) where section 14 (3) was amended to provide that moratorium shall not apply to a surety in a contract of guarantee to a corporate debtor.

- 3.2 **Contravention:** Pursuant to regulation 34 of the CIRP Regulations all expenses borne by the IP during the CIRP must be approved by the CoC. The RP appointed M/s Kaliannan & Associates, Chartered Accountants, to conduct the audit of the Corporate Debtor. However, RP failed to get their fee approved by the CoC.

**Submission:** The RP submits that in the CoC meeting held on 28<sup>th</sup> September 2018 (Third meeting), the CoC had delegated responsibility to the RP to take care of all related procedures regarding appointment of an auditor. The RP further submits that, there is email confirmation from sole CoC member, Bank of India dated 18<sup>th</sup> December 2018 approving the appointment and fees of M/s Kaliannan & Associates, Chartered Accountants.

During the personal hearing, it was submitted that post the Third meeting, the RP received a quote from M/s Kaliannan & Associates vide letter dated 23<sup>rd</sup> November 2018 and a letter of intimation of appointment was sent to them on 18<sup>th</sup> December 2018, post email approval of the appointment (along with the fees) from the sole CoC member. Further, no fee has been paid so far to them and there has been no burden on the Corporate Debtor due to their appointment.

**Analysis:** Regulation 34 of the CIRP Regulations provides:

*“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.”*

The minutes of the CoC meetings do not demonstrate the fixing of the fees of M/s Kaliannan & Associates, Chartered Accountants, although the same has been approved by the sole CoC member, Bank of India vide email dated 18<sup>th</sup> December 2018. The minutes

of the CoC meeting held on 5<sup>th</sup> January 2019 (Fourth meeting) record that:

**“8. TO TAKE NOTE ON THE STATUS OF STATUTORY AUDIT CARRIED OUT BY M/S. KALIANNAN & ASSOCIATES, CHARTERED ACCOUNTANTS, CHENNAI**

*The Chairman informed the Committee...*

*Mr. A Kaliannan, Chartered Accountant, has sought clarifications...*

*The same was noted and taken on record.”*

It is pertinent to note that even after email approval of the fees of M/s. Kaliannan & Associates, Chartered Accountants, no fees has been paid to them as of date. Therefore, there has been no burden on the Corporate Debtor.

**Findings:** RP did not get the fees of M/s. Kaliannan & Associates, Chartered Accountants fixed by the CoC (in the meeting of the CoC). However, since the CoC consists of the sole member bank (who gave approval on email), there seems to be no mens rea. Hence, keeping in mind the fact that Bank of India is the sole CoC member and it has approved the expenses vide email dated 18<sup>th</sup> December 2018, a lenient view may be taken as the Code is new and one learns by experience.

#### **4. Conclusion:**

- 4.1 The role of IP is vital to the efficient operation of the insolvency and bankruptcy resolution process. A well-functioning system of resolution driven by a competent IP plays a significant role in cementing together the interests of the Corporate Debtor with those of the creditors. It is for this reason that the need of specialized professionals to complete the resolution processes has been unequivocally emphasized. The UNCITRAL Legislative Guide on Insolvency Law recognizes the role of an IP in the following words: *“However appointed, the insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially. Accordingly, it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime.”*

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 Code also requires an IP to play a catalytic role in CIRP which requires a right combination of experts acting under the overall supervision of the IP. He is the backbone of the resolution process under the Code and success thereof hinges on the conduct and competence demonstrated by him. Also, a corporate debtor undergoing CIRP is a representation of interests of several stakeholders who pin their hopes on the outcome of CIRP. During CIRP, it is the utmost responsibility of an IP to run the company of corporate debtor as a going concern and conduct the entire CIRP in a transparent manner without creating additional insolvency resolution process costs.
- 4.3 In this matter, the DC observes that
- (a) Admittedly, the RP has got done the valuation of the properties of personal guarantor and has acted on the directions of the CoC by directing valuation of properties of the personal guarantor along with the properties of the Corporate Debtor and including the same within the IRPC.
  - (b) The RP has not been independent from the CoC by receiving payments into her personal account and making payments to the valuers from the same.
  - (c) The fee of Rs. 1,76,820/- paid to the valuers (out of which Rs. 96, 360/- paid for valuation of properties of personal guarantor) has been included in the IRPC. Thus, the RP has not acted in an independent manner.

## **5. Order**

- 5.1 The DC is conscious of the fact that the insolvency regime in India is at its infancy. Also, the insolvency profession is new and emerging. Further, it is also recognised that the role of an IP in India is significantly different as compared to other matured jurisdictions. These facts may call for some leniency as long as these are not mala fide.
- 5.2 In view of the above, the DC, in exercise of the powers conferred under Regulation 13 (3) of the IBBI (Inspection and Investigation) Regulations, 2017 and Section 220 (2) of the Code read with sub-regulations (7) and (8) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, disposes of the SCN with the following directions:
- 5.2.1 Keeping in view the circumstances of the CIRP of the Corporate Debtor, the RP is warned to be extremely careful, diligent, strictly act as per law and similar action should not be repeated.
- 5.3 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Ms. Kavitha Surana is enrolled as a member.
- 5.4 A copy of this Order shall also be forwarded to the Registrar of the Chennai Bench of the National Company Law Tribunal, for information.
- 5.5 Accordingly, the show cause notice is disposed of.

Sd/-

(Dr. Navrang Saini)  
Whole Time Member, IBBI

Dated: 26<sup>th</sup> February 2020  
Place: New Delhi