

**INSTITUTE OF INSOLVENCY PROFESSIONALS OF
ICAI (DISCIPLINARY COMMITTEE)**

DC No – IIIPI/DC/01/2018-19

ORDER

(Under Clause 15(1) of the Disciplinary Policy of IIIPI read with Clause 24(1)(c) of IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016)

In the matter of Insolvency Professional, Mr. Susil Kumar Gupta was a professional member enrolled with Indian Institute of Insolvency Professionals of ICAI (IIIPI of ICAI), and registered [under Regulation 7 read with Regulation 9 of the IBBI (Insolvency Professionals) Regulations, 2016] as an Insolvency Professional (IP) with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/PA-001/IP-00469/2016-17/1624 for a limited period upto 30/06/2017.

A reference was received from the Grievance Redressal Committee (GRC) pertaining to Mr. Susil Kumar Gupta, Office No. 1A, Ground floor, Ramchandra Niwas, Plot No. 21-22, Sector 12A, Opp. Kalash Koparkhairane, Navi Mumbai- 400709, in the matter of a complaint made by Sh. Rohit Prem Chhabra wherein the Grievance Redressal committee observed that there was no specific provision in IBC 2016, regarding disclosure of personal assets of the Directors (100% shareholders) of the CD in the IM even where the Directors have made themselves personally liable i.e. by execution of personal guarantee. The GRC in its order stated that there is an existence of material grievance in the matter and hence decided to refer the matter to DC for further proceedings and adjudication.

The facts of the case are as under:

- a. In terms of Section 14 of the IBC, 2016 (Code), the NCLT, Mumbai Bench had passed the order of Moratorium in the CIRP of the CD on 12/04/2017. The order of moratorium carries effect from the date of such order till the completion of the corporate insolvency resolution process (CIRP).
- b. The two Directors of the CD were 100% owners of the Company and had extended personal guarantee to Bank of India (major financial creditor), which had 92.63% of the voting share in Committee of Creditors. It was alleged that the Mr. Gupta had shared the details of personal assets of the Director such as jewellery (Stri Dhan) and other individual assets in the Information Memorandum (IM) of CD.
- c. There were no Resolution Applicants in the present case.

The Disciplinary Committee, on consideration of the material received from GRC decided to issue a 'Show Cause Notice' (SCN) to Mr. Gupta for alleged contravention of the following Section:

1. Section 29(2)(a) of the Insolvency & Bankruptcy Code 2016 requires that the resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes to comply with the

provisions of law for the time being in force relating to confidentiality and insider trading.

2. Section 29(2)(c) of the Insolvency & Bankruptcy Code 2016 which requires an IP not to share relevant information with the third parties unless clauses (a) and (b) of this sub-section are complied with.

Accordingly a Show Cause Notice (SCN) dated 22.11.2018 was issued to Mr. Susil Kumar Gupta. The SCN arises from the alleged conduct of Mr. Gupta as Interim Resolution Professional (IRP) in Corporate Insolvency Resolution Processes (CIRP) of Corporate Debtor (CD), namely, M/s Magna Opus Hospitality Private Limited.

Mr. Gupta submitted his response dated 26.11.2018 to the Show Cause Notice dated 22.11.18. Mr. Gupta also relied upon various judgments referred to in his response. Mr. Gupta inter-alia contended that:

“I am really surprised to receive the Show Cause Notice for the matter of inclusion of assets of directors who have extended personal guarantee to lenders. The law was at very initial stage in 2016/17 and there was a lot of ambiguity for valuation of personal assets of guarantors, where personal guarantee’s has been extended by Directors/Promoters.

How a show-cause notice can be issued for a position which is not settled in law and subject different interpretations by different NCLT’s. The position is settled now by ruling of Hon’ble Supreme Court in the month of August 2018 on the petition of State Bank of India. In a significant ruling having widespread ramifications, the Hon’ble Supreme Court (Court) on 14 August 2018 pronounced its judgment in the case of State of Bank of India v V. Ramakrishnan & Anr (Civil Appeal No. 3595 of 2018). The Court held that the period of moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 (Code) would not apply to the personal guarantors of a corporate debtor.

So, it was my interpretation of law / rules in the light of information available information / judgments in public domain for interpretation of liquidation value / preparation of Information memorandum in May 2017, which now got support by aforesaid Judgment of Supreme Court. In the case of Magna Opus Hospitality Private Limited, both the directors are 100% owners of Company and has extended personal guarantee to Bank of India [Major Financial Creditor], who had 92.63% of voting share in Committee of Creditors. So, the personal assets of guarantors were also required to be valued to understand the liquidation value / realizable value of assets.

Hence, in the light of Judgment of Hon’ble Apex Court position is settled that the recovery from personal assets of Guarantors can be proceeded simultaneously.”

Further Mr. Gupta had given his clarification on the provisions which are mentioned in the SCN. The clarifications are as follows:

a. Clause 29 (2) (a)

“The above clause states that the Resolution Professional shall provide access to all relevant information *provided* resolution applicant undertakes to comply with provisions of law.

Originally the expression resolution applicant has been defined under Section 5 (25) of the code as “*any person who submits resolution plan to the resolution professional.*” The Insolvency & Bankruptcy Code (Amendment) Act, 2018 substituted the definition of resolution applicant w.e.f. 23.11.2017 as “*a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to invitation made under 25 (2) (h) of the code.*”

So, as per provisions of law, the said above clause is applicable, only if resolution professional

provide access to information to any resolution applicant without obtaining undertaking for compliance of law.

In the case of Magna Opus Hospitality Private Limited, I have never received any application from any resolution applicant for access of relevant information, hence I have never provided any such information to any third party. So, there is no question of any such non-compliance.”

b. Clause 29 (2)(c)

“As per the provisions of law, to attract the clause first condition to be satisfied is i) sharing of information with third party and second condition is ii) compliance of clause (a) and (b).

As stated in above clause that there is no application received from any of the resolution applicant for access of information. As, no application for access of information is received, hence no access is provided to any of third party. This is very clear that I have never shared copy of Information memorandum with any third party, so no question arises for contravention of clause (a) and (c).”

Findings:-

The DC in its meeting held on 25.03.2019 considered the entire material available on record including the complaint, documents, SCN, response received from Mr. Gupta and various judgments. It is not in dispute that Mr. Susil Kumar Gupta had prepared the IM wherein he had disclosed the personal assets of the Directors of the CD and that an objection was raised by the MD of the CD in that regard. It is also not in dispute that the matter pertains to the year 2017. Main contention raised by Mr. Gupta is that at the relevant time the law was not quite clear on the inclusion or non-inclusion of the assets of the personal guarantors and that NCLT, NCLAT and various High courts had taken divergent views in that regard.

In the given below case NCLT/NCLAT held the view that Moratorium period is applicable to the personal guarantors of the Corporate Debtor (CD):-

1. **V. Ramakrishnan v. Vecons Energy Systems (P.) Ltd**, order passed by **NCLT** vide its order dated 18.09.2017 and **NCLAT** in its impugned order dated 28.02.2018

In some other cases the judgments held the view that Moratorium period is not applicable to the personal guarantors of the Corporate Debtor:-

1. **Alpha & Omega Diagnostics (India) Ltd. v. Asset Reconstruction Company of India Ltd. & Ors.** 3, vide **NCLT** order dated 10.07.2017 and **NCLAT** order dated 31.07.2017
2. **Schweitzer Systemtek India Pvt. Ltd. v. Pheonix ARC Pvt. Ltd. & Ors.** 4, vide **NCLAT** order dated 09.08.2017
3. **M/s. Sicom Investments and Finance Ltd. v. Rajesh Kumar Drolia and Anr**, vide **Bombay High Court** order dated 28.11.2017

On appeal made, the Supreme Court in *State of Bank of India v. V. Ramakrishnan & Anr* (Civil Appeal No. 3595 of 2018) on 14 August 2018, held that “the period of moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 (Code) would not apply to the personal guarantors of a corporate debtor.”

From the above the DC observed that at the relevant time, there was no clarity on the inclusion of details of personal assets of the personal guarantors in the IM.

In the light of the aforesaid findings, the DC is of the view that at the relevant time when M/s Magna Opus Hospitality Private Limited went into the process of CIRP, the inclusion of details of personal assets of the personal guarantors in the IM was still a grey area. Further, though the IM was prepared, as there was no Resolution Applicant the details of the personal assets were not made available to any third party.

Keeping in view, the facts and correspondence on record, the disclosure made is not bringing out any malafide intention on the part of the Mr. Gupta, nor can any grave misconduct be attributed to him.

Order:

In view of the above the Disciplinary Committee, in exercise of its powers conferred under Clause 24(1) (c) of IBBI (Model Bye Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, has held Mr. Susil Kumar Gupta as not guilty. Accordingly, the case is disposed off.

This order shall come into force immediately from the date of its issue. A copy of this order shall be forwarded to IBBI.

Date: 6th June, 2019

Place: Delhi

CERTIFIED TRUE COPY

Sd/-

Shri Ashok Haldia, Chairman

Dr. S.P. Narang, Member

CA. Nilesh Vikamsey, Member