

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/186/2023

2nd August, 2023

Order

In the matter of Mr. Sutanu Sinha, Insolvency Professional (IP) under section 220 of the Insolvency and Bankruptcy Code, 2016 read with regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017.

This order disposes of the Show Cause Notice (SCN) No. IBBI/IP/INSP/2022/117 dated 25.11.2022 issued to Mr. Sutanu Sinha, an Insolvency Professional, who is a Professional Member of the Insolvency Professional Agency of Institute of Cost Accountants Of India and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board) with Registration No. IBBI/IPA-003/IP-N00020/2017-2018/10167 and resident of Floor 4, Duckback House 41, Shakespeare Sarani, Kolkata- 700017.

1. Background

- 1.1. The Hon'ble NCLT, Hyderabad Bench (AA) *vide* order dated 23.02.2018 admitted the application under section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) filed by the State Bank of India for initiating the Corporate Insolvency Resolution Process (CIRP) against M/s IVRCL Limited (CD) and appointed Mr. Sutanu Sinha as Interim Resolution Professional (IRP) and later on he was appointed as an Resolution Professional (RP). Further, the AA *vide* order dated 26.07.2019 appointed Mr. Sutanu Sinha as Liquidator.
- 1.2. The IBBI, in the exercise of its powers under section 218(1) of the Code read with regulations 3(2) and 3(3) of the IBBI (Inspection and Investigation) Regulations, 2017 (Inspection Regulations) appointed an Inspecting Authority (IA) to conduct the inspection of records pertaining to liquidation of IVRCL Ltd. wherein Mr. Sutanu Sinha was liquidator. In compliance with regulation 6(1) of the Inspection Regulations, IA shared the Draft Inspection Report (DIR) with Mr. Sutanu Sinha *vide* email dated 27.06.2022 to which a response was received on 12.07.2022. Thereafter, IA submitted the Inspection Report (IR) on 29.07.2022 to the Board, in accordance with regulation 6(4) of the Inspection Regulations.
- 1.3. The Board issued the SCN to Mr. Sutanu Sinha on 25.11.2022, based on the findings in the inspection report in respect of his role as a Liquidator to the CD. Mr. Sutanu Sinha submitted his reply dated 09.12.2022 to the SCN.
- 1.4. The Board referred the SCN, the response of Mr. Sutanu Sinha 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. Mr. Sutanu Sinha availed an opportunity for a personal hearing through virtual mode before the DC on 19.05.2023 wherein advocate Ms. Shiwani Sinha also appeared with Mr. Sutanu Sinha.
- 1.5. The DC has considered the SCN, the reply to the SCN, oral and written submissions of Mr. Sutanu Sinha, and other material available on record and proceeds to dispose of the SCN.

2. **Alleged Contraventions, Submissions, Analysis, and Findings**

The contraventions alleged in the SCN and Mr. Sutanu Sinha's written and additional written submissions and oral submissions thereof are summarized as follows.

Contravention

3. **Prescribing Non-refundable Participation Fees**

- 3.1. It was observed by the Board that the Liquidator Mr. Sutanu Sinha had prescribed a non-refundable participation fee of Rs.25 lakh in addition to the Earnest Money Deposit (EMD) of Rs.5 crore in the e-auction process held on 04.10.2019 during the liquidation. In the e-auction dated 21.07.2021 too, Mr. Sutanu Sinha prescribed the non-refundable participation fee of Rs.25 lakh, in addition to the EMD of Rs.50 crore.
- 3.2. The Board further observed from the minutes of the 11th Stakeholders Consultation Committee ("SCC") meeting held on 24.08.2021 that out of 23 prospective bidders who had shown interest in the second auction as on the date of the 11th SCC meeting, only two prospective bidders had submitted requisite participation fee.
- 3.3. The Minutes of the 13th SCC meeting held on 07.10.2021 further revealed that only three prospective bidders had put forward their Expression of Interest (EOI) in the second e-auction process and deposited the process participation fee of Rs. 25 lakh, but none of them had deposited the EMD thereby leading to cancellation of the second e-auction process.
- 3.4. The lack of adequate participation in the EOI process indicates that the attaching condition of depositing a non-refundable participation fee from the prospective bidders was an unreasonable and restrictive condition and had acted as an impediment for the prospective bidders in the bidding process. Such restrictive condition defeats the spirit of the Code and one of the objectives, maximization of the value of assets of the CD.
- 3.5. The Board had also observed that failure of the first two e-auction processes due to the requirement of depositing a non-refundable participation fee of Rs.25 lakh must also have led to the lowering of reserve price, resulting in lower recovery and thereby contributing to reducing realization, which is against the spirit of the Code and regulations.
- 3.6. In view of the above, the Board was, of the *prima facie* view that Mr. Sutanu Sinha had, *inter alia*, violated Clauses 1, 2, 5, 13, and 14 of the Code of Conduct as specified in the First Schedule of IP Regulations (Code of Conduct).

Submissions of Mr. Sutanu Sinha

- 3.7. Mr. Sutanu Sinha submitted that the SCN seeks to penalize him for a breach of law (Liquidation Regulations) that was not in existence at the time of his action.
- 3.8. Mr. Sinha submitted that the AA vide order dated 26.07.2019 and 31.07.2019 and 21.10.2019 passed orders to liquidate the CD as a going concern only. In compliance with the direction of the AA, Mr. Sinha published the Bid Process Documents on 05.09.2019 for the first e-auction to liquidate the CD as a going concern wherein the depositing the non-refundable process participation fee of Rs. 25 lakh by the prospective

bidders was one of the conditions amongst the other conditions.

- 3.9. Mr. Sinha further submitted that the provision for the non-refundable process participation fee was included as a pre-bid qualification in the First Process Document pursuant to Schedule I (1), (3) of the Liquidation Regulations as it stood on the date of publication of the First Process Document, which reads as under -:
“(3) The liquidator shall prepare terms and conditions of sale, including reserve price, earnest money deposit as well as pre-bid qualifications, if any.”
- 3.10. The prescription of the said non-refundable process participation fee was based on the rationale that although it was a meagre amount compared to the reserve price (Rs.1,654.47 crore) as per the first bid process documents) of the CD in the first e-auction, to ensure that the only serious bidders who were financially capable of acquiring the CD as a going concern would participate. Accordingly, the decision to provide for process participation fees was taken on commercial principles, in consultation with SCC, in good faith, and in the best interest of the CD. Mr. Sinha further stated that he took note of the prevailing situation at that time and issued first addendum dated 04.10.2019 to the main advertisement dated 05.09.2019 through public advertisement in “The Economic Times”, “Business Standard” and “Eenadu” wherein it was clearly stated that the non-refundable Process Participation Fees of Rs. 25 lakh (plus GST@ 18%) stands waived.
- 3.11. Mr. Sinha stated that the first e-auction process resulted in the identification and declaration of GABS Megcorp Limited (“GABS”) as the successful bidder on 27.02.2020. Accordingly, GABS had deposited the earnest money amount of Rs.5 crore (Rupees five crore only) , however, the first e-auction had to be cancelled because GABS as a successful bidder had failed to pay the balance bid price/ sale consideration as per the timeline specified in the Liquidation Regulations and consequently, pursuant to the order dated 16.04.2021 passed by the AA, the entire bid process was cancelled.
- 3.12. Thereafter, Mr. Sinha conducted the 9th SCC meeting on 07.06.2021 wherein the SCC had advised that the Liquidator shall conduct a second round of auction for the sale of the CD as a going concern and the SCC also advised the Liquidator to include the non-refundable process participation fee of Rs. 25 lakh (Rupees twenty five lakh only) as a pre-bid qualification for participation in the second e-auction. On the advice of the SCC, Mr. Sinha published the e-auction process documents on 16.06.2021 for the second auction process of the CD including the non-refundable process participation fee of Rs. 25 lakh.
- 3.13. Mr. Sinha also submitted that pursuant to the publication of e-auction process documents, three prospective bidders had put forward their expression of interest in acquiring the CD as a going concern in the second e-auction process and deposited the process participation fees of Rs. 25 lakh(Rupees twenty five lakh only) . However, in view of the non-depositing of EMD by any of the prospective bidders, the entire bid process during the second e-auction was cancelled.
- 3.14. Mr. Sinha further submitted that the 13th SCC meeting was convened on 07.10.2021 to discuss the future course of action as per the Liquidation Regulations wherein he informed the SCC about the change in legal position pursuant to IBBI notification dated 30.09.2021 bearing number IBBI/2021-22/GN/REGO079 (effective from 30.09.2021) (“IBBI Notification”) which introduced the new proviso to Schedule I(1) (3) of the Liquidation Regulations that prohibits the prescription of a non-refundable process participation fee in the e-auction process. In view of the above notification, Mr. Sinha

published the process document dated 20.11.2021 (third process document) for the third e-auction process, inviting interested applicants to submit a bid for the CD as going concern wherein no stipulation of a non-refundable process participation fees was given.

- 3.15. In terms of the aforesaid, Mr. Sinha submitted that he always acted in compliance with the applicable Liquidation Regulations. The prescription of the non-refundable process participation fee in the first process document and the second process document had been done prior to the introduction of the IBBI Notification and its effective date, and hence the IBBI Notification (along with the amended paragraph 3 to Schedule I (1) of the Liquidation Regulations) was not applicable to e-auction conducted under the first process document and the second process document.
- 3.16. Mr. Sinha further submitted that there was no embargo in the Liquidation Regulations against prescribing a non-refundable process participation fee in the auction process for the sale of CD as a going concern under liquidation. Mr. Sinha also submitted that the process participation fee of Rs. 25 lakh (Rupees twenty five lakh only) contemplated herein during the first e-auction was 0.01511% and during second e-auction was 0.015625 % of the reserve price, which is negligible compared to the reserve price and under no circumstances can be found to be unreasonable or have the effect of discouraging a potential applicant having serious intent and financially capable of purchasing the CD on a going concern basis at a price of over Rs.1,654.47 crore being reserve price during first e-auction and Rs. 1,600 crore being reserve price during second e-auction respectively.
- 3.17. Mr. Sinha further submitted that there is no material on record or evidence to suggest that because of a prescription of non-refundable participation fees, the auction could not fructify. The failure of the auctions was due to economic considerations and not as a result of the imposition of participation fees, which in any event was a minuscule fraction of the reserve price, and which had not only been prescribed in consultation with the SCC, but was perfectly in consonance with the law as it prevailed at the relevant time.
- 3.18. In view of the above, it is humbly submitted that there has been no violation of clauses 1, 2, 5, 13, and 14 of the Code of Conduct as specified in the First Schedule of IP Regulations.

Analysis and Findings

- 3.19. The Code empowers the liquidator to hold the liquidation estate as a fiduciary for the benefit of all the stakeholders and thus for value maximisation. The basic tenet of auction is maximum engagement of prospective bidders. It is an admitted position that Mr. Sutanu Sinha in the first two e-auction process documents, put the non-refundable participation fee of Rs. 25 lakh (Rupees twenty-five lakh only) for the bidder to participate in the bid process. Mr. Sinha published process documents for the first e-auction on 05.09.2019 as per which bidders were required to submit a non-refundable process participation fee of Rs. 25 lakh. However, Mr. Sinha had removed the condition for the pre-bid participation fee by publishing an addendum dated 04.10.2019 to the main advertisement dated 05.09.2019 in The Economic Times, Business Standard and Eenadu. but no concrete reason was given by Mr. Sinha for withdrawing the condition of depositing non-refundable participation fee. However, Mr. Sinha in his submissions has stated that he took note of the prevailing situation at that time. But no factors/conditions have been provided for the prevailing situation.

- 3.20. The DC further notes that the process document was published on 16.06.2021 for the second e-auction, wherein the submission of a non-refundable process participation fee of Rs. 25 lakh (Rupees twenty five lakh only) was again prescribed for participation in the e-auction. The liquidator had prescribed the non-refundable participation fee of Rs.25 Lakh in addition to the EMD of Rs.50 crore for second e-auction for selling the CD as a going concern at a reserve price of Rs.1,600 crore. The fact that out of the 23 prospective bidders only three deposited the non-refundable participation fee of Rs.25 lakh, indicates that requirement of depositing Rs.25 lakh as non-refundable participation fee, acted as a deterrent for the prospective bidders, which resulted in only a few prospective bidders depositing the participation fee and kept the other 20 prospective bidders, out of the process. In the instant case, the act of Mr. Sinha in prescribing the condition of depositing participation fee of Rs.25 lakh for participating in the liquidation process, then removing this condition, incurring additional expenditure on publishing amendment in conditions and then again prescribing such condition in the next auction, cannot be termed as rational by any means. The DC finds that the conduct of Mr. Sinha in the auctioning of the assets of the CD inconsistent, unfair and not acceptable. Thus, Mr. Sinha has failed to act as per clauses 1, 2, 5, 13, and 14 of the Code of Conduct as specified in the First Schedule of IP Regulations.

4. Delayed Valuation during the Liquidation Process

- 4.1. The Board had observed that the liquidation order was passed 26.07.2019, by the AA read with order dated 31.07.2019. However, Mr. Sinha had appointed valuers namely M/s RNC Valuecon LLP and Protocol Valuers Private Limited for the purposes of conducting the valuation of the CD vide engagement letters dated 17.11.2021, i.e. after more than two years of the liquidation commencement date. Regulation 35(1) of the IBBI (Liquidation Process) Regulations, 2016 (Liquidation Regulations) provides that the Liquidator shall consider the valuation conducted during the CIRP. Further Regulation 35(2) of Liquidation Regulations provides that for cases not covered under sub-regulation (1) or where the liquidator is of the opinion that fresh valuation is required under the circumstances, he shall within seven days of the liquidation commencement date appoint two registered valuers to determine the realizable value of the assets or businesses of the CD.
- 4.2. In view of the above, the Board was of the *prima facie* view that Mr. Sinha had, *inter alia*, violated Regulation 35(2) of Liquidation Regulations, Clauses 13 and 14 of the Code of Conduct.

Submission of Mr. Sutanu Sinha

- 4.3. Mr. Sutanu Sinha submitted that as per Regulation 35(1) of the Liquidation Regulations, for the purposes of valuation of assets intended to be sold during the liquidation process of the CD, he had considered the average of the estimates of the values arrived at, as per valuation under Regulation 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“CIRP Regulations”) and based on such values, Mr. Sinha arrived at the reserve price. This was duly informed to the SCC in the 1st SCC meeting held on 04.12.2019. Mr. Sutanu Sinha further submitted that the valuation reports under CIRP were received in November 2018 whereas the liquidation order of the CD was passed on 26.07.2019 i.e. only within 09 months. Therefore, Mr. Sinha deemed it appropriate not to incur further costs in relation to the fresh valuation of the CD on the liquidation commencement date.

- 4.4. The above CIRP valuation was considered for determining the reserve price for all e-auction processes. However, during the third e-auction process i.e., after more than 3 years from receipt of valuation reports under CIRP, the SCC advised Mr. Sinha to get a fresh valuation conducted to ascertain the actual value or near actual value whilst 3rd e-auction process was being carried out and the same has been noted in the minutes of the meeting of the 13th and 14th SCC.
- 4.5. Mr. Sutanu Sinha submitted that where the liquidator is of the opinion that a fresh valuation may be required in facts and circumstances of the liquidation process, he may appoint two registered valuers to determine the realizable value of the assets or businesses of the Corporate Debtor in terms of Regulation 35(2) of the Liquidation Regulations. Thus, the Liquidation Regulations clearly provide that the liquidator has power to conduct a fresh valuation, if required during the liquidation process, albeit within a timeline of 7 days from the liquidation commencement date. The time-line prescribed in the regulations is directory not mandatory. Mr. Sutanu Sinha submitted that the intention and spirit behind Regulation 35(2) of the Liquidation Regulations can be deciphered from the fact that the determination of the reserve price is linked to the realizable value of the CD. Thus, if for any reason, the realizable value utilized by the liquidator to set the reserve price for the auction (i) is not contemporaneous; or (ii) does not take into account the change in circumstances due to lapse of time in the liquidation process, including utilization of goods/assets which changes the valuation of the corporate debtor (such as in the present case), it may result in the vast difference between the actual/current realizable value of the CD.
- 4.6. Mr. Sutanu Sinha submitted that in the current factual scenario, the realisable value available with him in terms of Regulation 35(1) of the Liquidation Regulations was determined as on the insolvency commencement date (23.02.2018). When two auctions had failed at the reserve price set on the basis this realisable value (which had become historical data at the time of auction in 2021), it was commercially thought fit by Mr. Sinha, on the advice of the SCC, to consider a fresh contemporaneous valuation of the CD in terms of Regulation 35 of the Liquidation Regulations. Accordingly, in the 13th SCC meeting held on 07.10.2021, the SCC advised Mr. Sinha as follows:
- “While the Third E-Auction Process is being carried out, a valuation of IVRCL as a going concern may also be conducted to understand actual or near actual value of the Company.”*
- Mr. Sutanu Sinha also stated that since the facts of the present case are very similar to the IBBI order in the matter of IP Mr. Dinkar Tiruvannadapuram Venkatasubramanian as (i) the older valuation reflected the realizable value of the CD (around 3 years back); (ii) the new valuation has been conducted based on the advice and the approval by the SCC; (iii) the valuation is to ensure that the SCC/liquidator can make an informed decision on the bids being placed; and (iv) the lack of the updated valuation could affect the assessment while considering the bids for the sale of CD as a going concern, hence, the similar view be taken by the Board in the present case.
- 4.7. Mr. Sutanu Sinha also submitted that this valuation was to be done simultaneously with the third e-auction pursuant to the third process document to ensure that any delay due to the valuation exercise does not impact the value of the CD. Further, taking into consideration the nature of operations of the CD, there had been a change in circumstances from the insolvency commencement date by virtue of the fact that several assets of the CD had been utilized for the execution/completion of projects undertaken by the CD, which had resulted in the release of bank guarantees worth approximately Rs.300 crore (Rupees three hundred crore) as indirect recoveries to the lenders of the

CD. This utilization of the assets and the consequent completion of the projects would have hugely impacted the valuation of the CD in the intervening period of the last three years. In view of the above, Mr. Sinha submitted that there had been no violation of Regulation 35(2) of Liquidation Regulations, Clauses 13 and 14 of the Code of Conduct.

Analysis and Findings

- 4.8. Regulation 35(1) of the Liquidation Regulations mandates the liquidator to consider the valuation conducted during CIRP. However, Regulation 35(2) of the Liquidation Regulation permits the liquidator to conduct fresh valuation of the assets of the CD within seven days of the liquidation commencement date, if cases not covered under aforesaid provision or liquidator is of the opinion that fresh valuation is required under the circumstances. It is to be noted that Schedule I under Liquidation Regulations allows liquidator to reduce the reserve price of the assets of the CD in a phased manner on the failure of the previous auction. Thereby, the Code read with Liquidations Regulations does not envisage the need for new valuation during the liquidation process after the completion of a period of seven days from the liquidation commencement date. Further, valuation provided by registered valuer acts as a guiding factor while the auction process provides the platform for better price discovery through market forces. Conducting the new valuation post commencement of auction of the assets of the CD further burdened the already stressed CD and being a professional, Mr. Sinha should have guided SCC correctly about the provision of the Code and Regulations framed thereunder. Further in terms of Liquidation Regulations, for the third e-auction, the reserve price can be reduced upto ten percent only, whereas Mr. Sinha reduced the reserve price for the third e-auction by twenty five percent. Had Mr. Sinha followed the Liquidation Regulations correctly, the asset of the CD could have been put to auction at a reserve price of Rs.1,440 crore. The act of Mr. Sinha in putting the asset of the CD to auction at the reserve price of Rs.1,200 crore for the third auction, had significant financial implication to the stakeholders. The DC finds that Mr. Sinha as liquidator has failed to act as per Regulation 35(2) of Liquidation Regulations read with Clauses 13 and 14 of the Code of Conduct.

5. Fees of BDO Restructuring Advisory LLP

- 5.1. Regulation 7(1) of Liquidation Regulations provides that a liquidator may appoint professionals to assist him in the discharge of his duties, obligations, and functions for reasonable remuneration and such remuneration shall form part of the liquidation cost. The Board had observed that Mr. Sutanu Sinha appointed BDO Restructuring Advisory LLP (BDO), where Mr. Sinha is a partner, for providing support services in the liquidation process of the CD. As per the engagement letter, the fees to be paid to BDO were as under:

S. N	Details of Fees payable	Amount per month (in Rs.)
1	Professional fees for IPE services	
	A. 01 st August 2019 to 31 st October 2019- As per Regulation 31A of IBBI (Liquidation Process) Regulation, 2016 – for first 90 days, same fees will be charged.	55,00,000
	B. Since the Corporate Debtor is being liquidated as a going concern, if the liquidation process gets completed by 31.03.2020 (Read A above)	55,00,000

	C. After 01 st April 2020 till the completion of liquidation period (50% of B)	27,50,000
2	Out-of-pocket expenses (travel expenses of liquidator and support team or any other expenses)	At actuals

- 5.2. The Board had further observed from the 12th progress reports filed before AA that fee/remuneration due to BDO for the period from August 2019 to March 2022 reflects as Rs. 11,35,20,000 (Rupees eleven crore thirty five lakh twenty thousand only). Considering the fact that Mr. Sutanu Sinha is one of the partners of the BDO, engaging such an entity for rendering support services at such an exorbitant cost not only puts an additional financial burden on the already stressed company but also exhibits lack of objectivity. Enabling provisions in the Code and regulations allowing the appointment of professionals by liquidators are for the purpose of helping him in managing the process of liquidation. The table indicating the percentage of the fee on the amount realized/distributed provided under regulation 4(3) of Liquidation Regulations duly takes into account the role and function of a liquidator in running the liquidation process. Any entity engaged to help a liquidator cannot be expected to be entrusted with responsibilities more than that of a liquidator so as to justify such exorbitant fees to such an entity. Engaging an entity of which liquidator is a partner and paying them such an exorbitant fee for support service is not only unjustified but also malafide. Moreover, liquidator is obliged under section 208(2)(a) of the Code to take reasonable care and diligence while performing his duties, including incurring expenses. The Board Circular dated June 12, 2018 (No. IBBI/IP/013/2018) clearly specifies that not only fee payable to IP is reasonable but also other expenses incurred by him are to be reasonable.
- 5.3. In view of the above, the Board was of the prima facie view that Mr. Sutanu Sinha had, inter alia, violated Regulation 7(1) of Liquidation Regulations, read with Clause 1, 2, 14, and 25 of the Code of Conduct and Board Circular dated June 12, 2018 (No. IBBI/IP/013/2018).

Submission of Mr. Sutanu Sinha

- 5.4. Mr. Sutanu Sinha at the outset has submitted that BDO Restructuring Advisory LLP was appointed as an Insolvency Professional Entity (“IPE”) to provide support services to the Resolution Professional during the CIRP period of the CD for a monthly fee of Rs. 55 lakh. In the 16th meeting of the CoC held on 20.11.2018, the CoC had stated that the services of the resolution professional, IPE, industry expert, legal counsel, and other agencies appointed by the resolution professional/CoC would be required to run the company as a going concern during the interim period i.e. from the end of CIRP period on 27.11.2018 till the liquidation order was passed by the NCLT and such professionals shall continue to provide their services during the said interim period on the existing terms. It was also stated that BDO shall continue to provide its services from the end of the CIRP period till the liquidation order was passed by the NCLT, at a monthly fee of INR 55 lakh.
- 5.5. Mr. Sutanu Sinha further submitted that in the said meeting, the members of the CoC unanimously agreed that the fees of the support services of the Liquidator (including the IPE) shall be decided by the liquidator in terms of the provisions of the IBC. Mr. Sutanu Sinha has also submitted that during the CIRP period, BDO as IPE provided support services continuously in order to maintain the CD as a going concern as well as on other areas of operations in terms of the engagement letter issued to BDO as IPE to RP. There was no change in circumstances in the CD when the CD went into liquidation and accordingly it continued operations as a going concern at the same level of activities as

were carried out during CIRP. BDO having already been deeply involved in the CIRP of the CD with complete knowledge of the affairs and business of the CD and keeping in mind the observations of the CoC in the 16th CoC meeting, Mr. Sinha had engaged BDO vide engagement letter dated 01 August 2019 at the following fees:

Sr. No	Details of fee		Amount per month (Rs.)	Rationale
1.	Professional fee for IPE Services	01 August 2019 to 31 October 2019	55,00,000	As per regulation 32A of Liquidation Regulations for the first 90 days
			55,00,000	Since the Corporate debtor is being liquidated as a going concern, if the liquidation process gets completed by 31 March 2020
		After 31 st March 2020 till completion of the Liquidation period	27,50,000	At the time of the appointment, it was envisaged that liquidation process would be completed within a period of 1 year and 90 days. However, the workload visa-vis apprehended downfall in operations (Company being an infra-Company) if the liquidation process continue further after 31 March 2020, the fee of BDO was negotiated by liquidator at arm's length and accordingly reduced by 50%.
2.	Out of Pocket Expenses		Actual Expenses	

- 5.6. Mr. Sutanu Sinha in his additional submission has mentioned that the fees of the BDO was brought down to 15 lakh per month from December 2022. The fee of Rs. 15 lakh per month to the IPE (BDO) was discussed in the 24th SCC meeting held on 15.11.2022. Mr. Sinha also stated that he regularly apprised the fee of BDO to the SCC but the fee of the BDO were not opposed by the SCC members at any time. Mr. Sutanu Sinha submitted that while Regulation 7 of the Liquidation Regulations prescribes that a reasonable remuneration is to be paid to the professionals appointed by the liquidator, the definition of the word 'reasonable' has not been provided either under the Code or the Liquidation Regulations. Mr. Sutanu Sinha submitted that from the aforesaid, it is amply clear that whether or not a particular act is reasonable or not cannot be decided in a vacuum and depends on the circumstances in a given factual situation. Mr. Sutanu Sinha further submitted that the CD is one of the largest in the country with high value and sizeable assets running into thousands of crore. As noted above, the term "reasonable" is to be looked at from a contextual point given the size of the CD, the complexity of operations, the quantum of work performed, resources deployed, the quality of services rendered, services of similar nature provided by other players/service providers in the market. Mr. Sinha also stated that the CD was among 28 large borrowers on RBI's list of bad loan accounts that was sent to lenders in August 2017, as part of an initiative to clean up the banks' balance sheets.

- 5.7. The fees of BDO are based on the workload and the resources to be deployed for the CD having numerous subsidiaries (27 direct subsidiaries, and 41 indirect subsidiaries across the country) and projects across India, and a presence in the few international locations. BDO has deputed a dedicated team of professionals from diverse fields as resources to the liquidator which consists of professionals that include engineers, chartered accountants, lawyers, management experts, and company secretaries with over 10 years of work experience.
- 5.8. Mr. Sutanu Sinha further submitted that since the CD was executing 197 projects at various stages, the personnel running these projects needed to be continuously communicated with and supervised, and managed for successful running and monitoring of the projects. In this regard, the team of professionals from BDO continuously engaged with the various subsidiaries and department heads of different projects. Additionally, a few pipeline projects were further taken for execution. The BDO team tracked, scrutinized, and monitored the financial transactions in over 100 projects which were undergoing live execution (having revenues of nearly Rs.1,500 crore). Mr. Sutanu Sinha also submitted that there was also a reduction in the technical cost incurred for various projects that were under the control of the CD. In view of the development of the internal technical team by Mr. Sinha (including employees of the CD and the professionals of BDO), the services of industry experts, i.e., Feedback Infra Private Limited were discontinued from November 2019. This led to a reduction in the cost (and accordingly, savings for the Company) of funds equivalent to rupees three lakh per month.
- 5.9. Mr. Sutanu Sinha has submitted that the CD during the commencement of CIRP had around 2,351 employees with a salary outflow of Rs. 7.4 crore per month. As the operations were spread across the country, the resources had to be deployed to connect with employees across India. At the start of the CIRP process, the human resource cost was Rs. 7.4 crore; till the start of the liquidation period, the cost had been brought down to Rs. 4.25 crore and currently, it has been reduced to Rs. 2.83 crore. However, despite monthly reductions (or savings) in cost equivalent to almost Rs. 5 crore, the CD has been successfully maintained as a going concern for the past four years through the support from the professionals of BDO. The CD does not have adequate personnel on its rolls during the liquidation process and the functions of all departments within the CD (admin, legal, HR, IT, etc) are being handled by Mr. Sinha with support from BDO.
- 5.10. Mr. Sutanu Sinha further submitted that in certain situations, some projects had been completed, but required follow-up for total closure with regards to receivables to the Company/lenders, either in cash or in the form of closure of bank guarantees provided for such projects. This roughly led to recoveries equivalent to Rs.311 crore (Rupees three hundred eleven crore) to lenders/companies during this period. Mr. Sutanu Sinha stated that as regards the appointment of IPE (in which the concerned insolvency professional is a partner or director) by an insolvency professional in connection with any work relating to his assignment, the same is expressly permitted in terms of the explanation of clauses 23A to 23C of the Code of Conduct as the Code of Conduct excludes such IPE from the definition of 'related party' of the insolvency professional. Further, an IPE has been recognized to provide support services to the insolvency professionals, who are its partners or directors, and the same is highlighted by the IBBI in its 'Circular on Empanelment of Insolvency Professional Entities' published on 06.07.2018.
- 5.11. Mr. Sutanu Sinha clarified that arithmetically stated, the fee of Rs. 55 lakh paid to BDO as IPE during the liquidation till 31 March 2020 was 0.27% of the reserve price (based on the reserve price of Rs. 1,654.43 crore during the first e-auction process), which is negligible

compared to the reserve price and under no circumstances can be found to be unreasonable or unjust or exorbitant or malafide. Similarly, arithmetically stated, fees of Rs. 27.50 lakh paid to BDO as IPE during the liquidation after 31.03.2020 was 0.25% of the reserve price based on the reserve price of Rs. 1,654.43 crore during first e-auction process); 0.7% of the reserve price based on the reserve price of Rs. 1,600 crore during second e-auction process, and 0.30% of the reserve price (based on the reserve price of Rs. 1,200 crore during third auction process) which is negligible compared to the reserve price and under no circumstances can be found to be unreasonable or unjust or exorbitant or malafide.

- 5.12. In view of the aforesaid, Mr. Sinha submitted that there has been no violation of Regulation 7(1) of Liquidation Regulations, read with Clauses 1, 2, 14, and, 25 of the Code of Conduct and Board Circular dated June 12, 2018 (No. IBBI/1P/013/2018).

Analysis and Findings

- 5.13. With regard to fee of Mr. Sinha and his team during the CIRP process of CD, the DC notes that in the admission order dated 23.02.2018, it is mentioned that *“The Adjudicating Authority sought various clarifications with reference to the substantial fee charged by the IRP, not as individual but as a firm/company and his experience in handling EPC companies. The Learned Counsel could not convince the Adjudicating Authority. However, during the subsequent hearings, Learned Counsel of the Financial Creditor clarified vide Memo wherein fee for IRP in his individual capacity is Rs.5 lakhs per month and the balance amount is towards his team of employees (35-40 nos.). Further the Learned Counsel stated that the fee be paid by the Financial Creditor/CoC. Therefore, insisted to approve the name of IRP.”* Further in para 3.4 of the additional reply to the SCN after the personal hearing, Mr. Sinha submitted that *“the fees of Mr. Sutanu Sinha as the Resolution Professional of the Corporate Debtor at INR 5 Lakhs and fees of his support service provider i.e. BDO at Rs.55 Lakh was approved by the Committee of Creditors ("CoC") in the CIRP of the CD as a going concern.”* The DC further notes that in the 16th CoC meeting dated 20.11.2018, it is recorded that *“With regard to appointment of the liquidator, it was further unanimously agreed by the members of the CoC that RP to continue as a liquidator as discussed in the last CoC meeting and Liquidator's fee and the fees of his support services i.e. IPE, Industry Expert, Legal Counsel, any other agency will be decided by the Liquidator as per IBC and as approved by the NCLT.”* Hence, based on the documents on records, there is underlying inconsistency with regard to payment of fees.
- 5.14. Section 36 of the Code provides that the liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors. Further, Regulation 7(1) of Liquidation Regulations states that a liquidator may appoint professionals to assist him in the discharge of his duties, obligations and functions for a reasonable remuneration and such remuneration shall form part of the liquidation cost. The DC notes that the fee of IPE for the initial 08 months was Rs.55 lakh per month, which was subsequently reduced to Rs.27.50 lakh per month from the ninth month and it was further reduced to Rs.15 lakh per month from December 2022 onwards. It is pertinent to note here that Circular No. IBBI/IP/013/2018 dated 12-06-2018 provides in para 3 thereof that an IP is obliged under section 208(2)(a) of the Code to take reasonable care and diligence while performing his duties, including incurring expenses. He must, therefore, ensure that not only fee payable to him is reasonable, but also other expenses incurred by him are reasonable. What is reasonable is context specific and it is not amenable to a precise definition. Terms and references of the work and the remuneration are needed to be spelt out in every contract clearly to dispel any suspicion on the ground of arbitrariness and unreasonableness.

Reduction in fee of IPE from Rs.55 lakh per month to Rs. 27.50 lakh and then to Rs. 15 lakh with no document on records to detail the objective criteria adopted in the fixation of fee to IPE, is not only unjustified but also indicates that fee for initial 08 months and subsequently upto November 2022 was not reasonable and lack transparency in deciding fee of IPE vis-a vis, work performed by the IPE. Further, it is also noted that the CoC had resolved that fee to the IPE and other supporting agencies would be decided by the Liquidator. But this does not mean, the liquidator has been empowered with unfettered powers to decide the fee of the IPE and other supporting agencies and may fix the same in an arbitrary manner or at an exorbitant rate.

- 5.15. In view of the above, the DC holds the contraventions and finds that Mr. Sutanu Sinha had, inter alia, violated Regulation 7(1) of Liquidation Regulations, read with Clause 1, 2, 14, and 25 of the Code of Conduct and Board Circular dated June 12, 2018 (No. IBBI/IP/013/2018).

6. Order

- 6.1 In view of the forgoing discussion and considering the facts and circumstances of the matter and material available on records, the DC finds that there is inconsistency in conducting the auctions during the liquidation period. Additionally, the valuation was conducted beyond the prescribed timelines and the reserve price for auction was reduced beyond the permissible limits under the Liquidation Regulations. Furthermore, there is lack of objectivity, transparency, justification and reasonableness in fixation of fee of IPE as support services. Hence, the Disciplinary Committee, in exercise of the powers conferred under section 220 (2) of the Code read with Regulation 13 of the Inspection Regulations hereby suspends the registration of Mr. Sutanu Sinha having registration No. IBBI/IPA-003/IP-N00020/2017-2018/10167 for a period of one year.
- 6.2 This Order shall come into force after 30 days from the date of this order.
- 6.3 A copy of this order shall be sent to the CoC of all the Corporate Debtors in which Mr. Sutanu Sinha is providing his services, if any.
- 6.4 A copy of this order shall be forwarded to Insolvency Professional Agency of Institute of Cost Accountants of India where Mr. Sutanu Sinha is enrolled as a member.
- 6.5 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, New Delhi, for information.
- 6.6 Accordingly, the show cause notice is disposed of.

Dated: 2nd August, 2023
Place: New Delhi

Sd/-
(Jayanti Prasad)
Whole Time Member, IBBI