

**You are Wrong!!! I don't know how. But I will somehow find out...**

Hardly anything can be imagined to be more disastrous to the Rule of Law, than a situation wherein authorities already decide that someone needs to be punished and then they try to figure-out the grounds to justify that punishment. Unfortunately, the order passed against Sh. [Yogesh Kumar Gupta](#) suggests such tendency on the part of IBBI Officials.

A. Referring to Contravention-I, the findings of the DC from Pg. 4 (Para 3.7) reproduced *infra*:

...From the above-referred minutes, it is apparent that RP had decided to remove the names of the CoC members who have not paid their dues towards CIRP cost from the list of CoC and their voting share was also revised. **The DC further notes that Mr. Gupta had decided not to send notices to the CoC members who have been removed from the list of CoC. The Code/Regulations do not envisage removal of any CoC member on non-payment of CIRP cost. This is blatant violation of the provisions of the Code and Regulations made therein. If such kind of action is permitted, then RPs would abuse their powers by removing CoC members.** Hence, DC finds that Mr. Gupta has violated section 21(2) of the Code.

i. It may be true that the Code/Regulation may not have envisaged removal on any non-payment of CIRP Cost, but terming the act of removing as '**blatant violation of the provisions of the Code and Regulations made therein**' is not only unwarranted, but also disregards the law settled by Hon'ble NCLT – Chennai Bench in B.

Parameshwara Udpa V/s DBS Bank India Limited – IA/967/IB/2020 in IBA/1045/2019, wherein it was ruled, excerpts *infra*:

**Para 16:** All the Financial Creditors, other than Related Part, be it secured or unsecured, by the provisions of IBC, 2016 becomes the member of the CoC. Further, ***the Regulation mandates that the Financial Creditors are required to contribute towards the CIRP costs in proportion to their voting share. Thus, it becomes clear that a Financial Creditor so as to continue as the member of the CoC, it is mandatory for them to contribute towards the CIRP costs.*** Further, it is significant to note here that the Financial Creditor is exercising voting right in respect of the Corporate Debtor has also been empowered to decide and vote upon the future state of the Corporate Debtor. Thus, the Financial Creditor cannot shy away from their liability of payment towards the expenditure incurred on account of CIRP in relation to the Corporate Debtor.

The Hon'ble NCLT Chennai Bench, further in Para 18 of the order specifically directed the RP to '**remove**' the members not paying the CIRP cost & to constitute the CoC afresh.

**I wonder, what wrong did Sh. Yogesh Kumar Gupta commit in removing the members from CoC when the position of law in dealing with CoC Members on non-payment of their CIRP cost has been settled by Hon'ble NCLT Chennai. Are officials of IBBI vested with authority to override NCLT ruling!!!**

If Sh. Yogesh Gupta &/or his Advocate did not highlight the Hon'ble NCLT Chennai Bench ruling during the hearing, it does not give any entitlement to the Disciplinary Committee to pass illegal order/s & remain ignorant about the binding precedents/ NCLT orders uploaded on IBBI's website itself (Link: <https://ibbi.gov.in/uploads/order/763bb964917ba6f8137983c88a656618.pdf>).

ii. Another infirmity in the order arises from the finding, '***If such kind of action is permitted, then RPs would abuse their powers by removing CoC members***'. A bare perusal of Para 3.1 of the order suggests that setting a precedent for the possibility of ***RPs abusing their powers*** was never the charge against Sh. Yogesh Kumar Gupta in the Show-Cause notice; thus this finding in the order is not only without jurisdiction but also it cannot be said that Sh. Yogesh Kumar Gupta had a reasonable opportunity to resist the suspension on this ground. In making this contention, reliance is placed on the Hon'ble Supreme Court ruling in UMC Technologies (P) Ltd. V/s Food Corpn. of India, (2021) 2 SCC 551, excerpts *infra*:

**Para 13:** At the outset, it must be noted that it is the first principle of civilised jurisprudence that a person against whom any action is sought to be taken or whose right or interests are being affected should be given a reasonable opportunity to defend himself. ***The basic principle of natural justice is that before adjudication starts, the authority concerned should give to the affected party a notice of the case against him so that he can defend himself.*** Such notice should be adequate and the grounds necessitating action and the penalty/action proposed should be mentioned specifically and unambiguously. ***An order travelling beyond the bounds of notice is impermissible and without jurisdiction to that extent.*** This Court in Nasir Ahmad v. Custodian General, Evacuee Property [Nasir Ahmad v. Custodian General, Evacuee Property, (1980) 3 SCC 1] has held that ***it is essential for the notice to specify the particular grounds on the basis of which an action is proposed to be taken so as to enable the noticee to answer the case against him. If these conditions are not satisfied, the person cannot be said to have been granted any reasonable opportunity of being heard.***

Further, as per the binding precedent of the Hon'ble Supreme Court in Kashinath Dikshita V/s UoI 1986 SCC (L&S) 502 – Para 10, DC also ought to have made available to Sh. Yogesh Kumar Gupta, the copies of the relevant statements and documents basis which this conclusion was arrived upon for suspending him that applying the settled position in law would amount to 'abuse of powers'. In case the officials of IBBI have not done so, then in passing this order, not only the 'Rules of Natural Justice' has been violated, but also the order is in disregard to the binding precedent settled by the Hon'ble Supreme Court in Kashinath Dikshita.

- B. Referring to Contravention-V, the findings of the DC from Pg. 8 (Para 7.5) reproduced *infra*:

**Regulation 34 of the CIRP Regulations states that "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 provided under Regulation 34 of the CIRP Regulations clarifies that "expenses" includes "other expenses to be incurred by the resolution professional." Thus, it is clear that RP has to take approval of the CoC for the expenditure incurred to run the CD as a going concern.** The contention of the Mr. Gupta in the 9th CoC meeting that he as RP is not required to take approval of the CoC for going concern expenses cannot be sustained. If Mr. Gupta's stand is to be accepted, it would lead to RP's spending arbitrary amounts in the name of going concern expenses. The stand taken by Mr. Gupta that he as RP does not need the approval of the CoC, is not only against the provision of Regulation 34 of the CIRP Regulations but also against the spirit of the Code. Hence, the DC finds that Mr. Gupta has violated Regulation 34 of the CIRP Regulations.

- i. To discuss this finding, pertinent to reproduce excerpts from the Disciplinary Committee findings in the matter of [Sh. Anil Goel, Insolvency Professional dt/- 10<sup>th</sup> Feb' 2022 \[No. IBBI/DC/82/2022\]](#) stated *infra*:

**Para 4.10.2** ... Further, as these expenses are in the nature of operational expenditure of the CD, no specific approval of CoC is required. Only expenses incurred by the IP for conducting CoC and SCC, visit the plant site for management of the CD and stay/travel of himself was made part of the CIRP/Liquidation cost. Also, the CoC was duly informed of these expenses by submitting periodic profit and loss account and cost sheet including all these expenditures.

***The DC finds that as the expenses were of operational expenses and no provision of the Code or the Regulations thereof mandates that expenses incurred for day-to-day operations has to be approved by the CoC,*** therefore, there is no lapse on the part of Mr. Goel...

I wonder whether some official/s of IBBI have envisaged Regulation 34 of Insolvency and Bankruptcy Board of India. (Insolvency Resolution Process for Corporate Persons) Regulations [CIRP Regulations] to apply differently depending upon which Insolvency Professional is conducting the CIRP!!! The undersigned harbors no special favor or ill-will for either Sh. Anil Goel or Sh. Yogesh Kumar Gupta. But the afore-stated excerpt suggests *malafide* exercise of powers by some officials of IBBI in applying different yardsticks for the same issue.

- ii. Without adverting further into the subject of differential parameters adopted & the illegalities therein, the findings of DC in the matter of Sh. Yogesh Kumar Gupta suffers from further infirmities for the reasons that the said finding interprets the

ambit of Regulation 34 of CIRP Regulations in a manner that it travels beyond the mandate of the Parent statute i.e. IBC.

Section 28 (1) of IBC i.e. the law governing the '**Approval of committee of creditors for certain actions**' specifically has provided the list of actions for which the approval of CoC is required to be taken. But the finding of DC suggests that approval is required to be taken even for '*expenses which are to be incurred to the run the CD as a going concern*', something which has not been envisaged by the Legislature to be the law under Sec 28(1) of IBC.

In the totality of issues aforementioned, the finding of DC is rendered *ultra-vires* the settled position in law for the reason that it conflicts the ratio of the Hon'ble Supreme Court ruling in Union of India V/s S. Srinivasan (2012) 2 SCC (L&S) 22 – Para 21, wherein it was ruled – '**a rule must be in accord with the parent statute as it cannot travel beyond it**'.

As per the discussions afore-stated, it is prima-facie evident that the purported violations, basis which action has been taken against Sh. Yogesh Kumar Gupta is groundless not only as per the settled position in law, but also as per IBBI's own findings adjudicating a similar issue on an earlier occasion. This makes me wonder that when a complaint is received, do the IBBI officials check the treasure trove featuring IBBI website while forming an opinion as per Regulation 7 (3) of IBBI (Grievance & Complaint Handling Procedure), 2017. If they do not,

**Maybe the need of the hour is to protect Insolvency Professionals from the capricious conduct of IBBI officials...**

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