

# III. THE CURIOUS CASE OF RESOLUTION PROFESSIONAL AS AN OFFICER OF THE COURT

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## ABSTRACT

In 2016, India's insolvency law underwent a complete overhaul with the enactment of the Insolvency and Bankruptcy Code. Under this new Code, a pivotal role was given to the Resolution Professional to conduct the insolvency resolution process. However, even after 5 years of the enactment of the Code, there is still no clarity vis-a-vis the role and position of the Resolution Professional in the insolvency regime. This has resulted in contradictory judgments and palpable ambiguity, that has to some extent also hampered the smooth conduct of the insolvency process. This paper attempts to address this research gap by undertaking a comprehensive doctrinal enquiry and examining the relationship of the Resolution Professional with various stakeholders including the court, IBBI, corporate debtor, committee of creditors, employer of the resolution professional etc. Occasional references are also made to UK law to distinguish the role of a resolution professional in India vis-a-vis UK. Finally, this paper concludes that the scheme of the Code and a holistic view of the resolution professional's duties indicate that the Resolution Professional is indeed an officer of the court whose only duty is to act in an independent and professional manner.

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## I. INTRODUCTION

A Resolution Professional (“RP”) plays a pivotal role in the insolvency proceedings. However, the nature of the office of the RP is a perplexing question. Depending upon his functions and powers, he can be viewed as a facilitator of the insolvency proceedings or even as an officer of the court. Apart from this, since the RP is appointed by the Committee of Creditors (“CoC”),<sup>1</sup> he can also be viewed as an agent of the creditors. Another point of view could be that the RP be viewed as an agent or trustee of the corporate debtor since the RP manages the corporate debtor during the corporate insolvency resolution process (“CIRP”). The answer to this question assumes importance as it helps to delineate RP’s powers and the scope of his authority along with his corresponding duties. Given that numerous stakeholders are involved in the insolvency process, a true picture of RP’s position could be useful in determining his allegiance to a particular stakeholder, if any, and can also help to understand the insolvency process better.<sup>2</sup>

This paper aims to analyse each of the aforementioned positions and concludes by arguing that the RP is an officer of the court whose functions and duties are limited by the statute to the extent which effectively enables him to act as a facilitator of the CIRP. In this way, the RP can be called a *sui generis* officer of the court whose only duty is to act in an impartial and professional manner. For these purposes, this paper is divided into four sections. Section I of the paper identifies the research problem and briefly

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<sup>1</sup> Insolvency & Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India), § 22.

<sup>2</sup> See e.g. *Transcript of the XI Annual National Law School of India Review Symposium on the Insolvency & Bankruptcy Code*, 30 NATIONAL LAW SCHOOL OF INDIA REVIEW 136, 165-66 (2018) [while discussing position of RP for the purposes of UK insolvency law].

expounds the relevant provisions of the applicable law. Section II of the paper examines the role of the RP from a functionalist perspective and examines the provisions of law and contemporary precedents to establish that the RP is indeed an officer of the Court. Section III of the paper examines other possible views by examining the relationship of the RP with other stakeholders and demolishes any counter-opinions by making reference to the current statutory framework and judicial precedents. Part IV concludes and summarises the findings of this paper. Moreover, occasional references are also made to the United Kingdom's ("UK") insolvency law throughout the paper, as arguably, UK insolvency law and Indian insolvency law are similar in many aspects and hence, a limited comparison with UK law can further clarify the role of an RP.

#### **A. Brief overview of the Indian statutory framework**

The Insolvency and Bankruptcy Code, 2016 ("**Code**")<sup>3</sup> governs the insolvency law in India. Under the Code, a financial creditor may file for insolvency of a corporate debtor under Section ("**Sec.**") 7 of the Code and an operational creditor can file for insolvency under Sec. 9 of the Code. Under Sec. 16 of the Code, an interim resolution professional ("**IRP**") is appointed on the insolvency commencement date. The IRP can either be appointed as proposed by the creditor or by the Insolvency and Bankruptcy Board of India ("**IBBI**"), as the case may be.

Once the IRP has been appointed, the complete management of the corporate debtor vests with the resolution professional as per Sec. 17 of the Code and he is empowered to take all decisions on behalf of the corporate

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<sup>3</sup> Insolvency & Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India), § 233.

debtor. Similarly, as per Sec. 18(f) of the Code, the IRP takes over the custody of assets of the corporate debtor. Under Sec. 18(b) of the Code, the IRP is to invite and collate claims from all prospective creditors and constitutently form the CoC.

Once the CoC has been constituted, the CoC either confirms the IRP as the RP; or it may apply to the Adjudicating Authority to replace the IRP as per Sec. 22(2) of the Code. A noteworthy point to be mentioned here is that the RP is a professional who is subject to the general control of the IBBI.<sup>4</sup> He is required to pass certain examinations and possess minimum qualification criteria in order to qualify as an insolvency professional that is eligible to be appointed as an RP.

Subsequent to his appointment, the RP performs multitude of functions including management of the Corporate Debtor during the CIRP,<sup>5</sup> preserving the value of assets of Corporate Debtor during the CIRP,<sup>6</sup> perform any other functions as prescribed by the IBBI<sup>7</sup> etc. These diverse functions involve various stakeholders in a CIRP process which has given rise to various views regarding the nature of the office of the RP. It is also important to mention here that in case the CIRP fails and the corporate debtor goes into liquidation then the RP steps into the shoes of the liquidator under Sec. 34(1) of the Code. Therefore, the scope of this paper is only limited to examining the role of an RP as long as the CIRP subsists simply because once an RP enters into the shoes of the liquidator, he undoubtedly becomes an officer of the court.

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<sup>4</sup> *Id.*, § 196.

<sup>5</sup> *Id.*, § 23(1).

<sup>6</sup> *Id.*, §§ 23(2), 20(1).

<sup>7</sup> *Id.*, §§ 23(2), 18(g).

## II. CLEARING THE AIR: ANALYSIS OF THE POWERS AND FUNCTIONS OF THE RP

### A. RP as a Facilitator

A conjoint reading of Secs. 17, 18, 20(1) and 25 of the Code indicates that the RP is responsible for the day-to-day management of the corporate debtor during the CIRP. Furthermore, as per Sec. 23 of the Code, the RP is responsible for the smooth conduct of the entire insolvency process. Lastly, Secs. 29 and 30 of the Code mandate that the RP prepares the information memorandum and gives his prima facie opinion on the various resolution plans submitted by various resolution applicants. Once, the resolution plan is approved by the CoC, he is required to submit the same before the adjudicating authority.

The Supreme Court in *Swiss Ribbons Pvt. Ltd. v. Union of India*,<sup>8</sup> while interpreting the above provisions has held that the role of the RP is merely of a facilitator of the insolvency process.<sup>9</sup> This position of law has been generally accepted and there is no contemporary counter-argument against the same. Hence, it can be said that from a functionalist perspective, the RP is a facilitator of the CIRP.

### B. RP as a Judicial Officer

The Bankruptcy Law Reforms Committee report (“**BLRC report**”) notes that an effective resolution professional enables the adjudicating authority to delegate more and more functions to such professionals, saving

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<sup>8</sup> 2019 S.C.C. Online S.C. 73.

<sup>9</sup> *Id.*, ¶ 61.

valuable judicial time and money.<sup>10</sup> Such an observation clearly implies that a resolution professional is not only an officer of court but in fact is a substitute for judicial authority. Since a judicial authority would obviously not have the time and the resources to monitor each and every insolvency case minutely; such a function is delegated to the RP.

In *ARC (India) Pvt. Ltd v. Shivam Water Treaters Pvt. Ltd.*,<sup>11</sup> it has been held that the IRP is an officer of the court and non-compliance of his orders would amount to contempt of court. In this respect, it is imperative to clarify here that the RP cannot be placed on an equal footing with a judicial authority. This is because in the landmark case of *Arcelor Mittal (India) (P) Ltd v. Satish Kumar Gupta (“Arcelor Mittal”)*,<sup>12</sup> after examining the Code and the regulations, the Supreme Court held that the RP’s only function is to examine various facts and not give a conclusive opinion on the same as it lies in the sole domain of the Adjudicating Authority.

In this respect, one issue that has contributed to the confusion is that under Sec. 25 of the Code, the RP is required to maintain an updated list of claims and hence, this raises the question as to whether the RP is the final authority to determine the quantum of disputed claims. NCLAT in the case of *M/s Prasad Gempex v. Star Agro Marine Exports Pvt. Ltd. (“Gempex”)*<sup>13</sup> had held that the RP has no adjudication powers and hence, any creditor may make an application under Sec. 60(5) of the Code before the NCLT.<sup>14</sup> However, subsequently, the NCLAT in *DIPCO Pvt. Ltd. v. Jayesh*

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<sup>10</sup> Report of the Bankruptcy Law Reforms Committee, IBBI (Nov., 2015), [https://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](https://ibbi.gov.in/BLRCReportVol1_04112015.pdf) [hereinafter *BLRC report*].

<sup>11</sup> [2019] 108 Taxmann.com 64 (NCLT-Mum.).

<sup>12</sup> (2019) 2 S.C.C. 1, ¶ 77.

<sup>13</sup> 2019 S.C.C. Online NCLAT 721.

*Sanghrajka* (“**DIPCO**”) has held that the determination made by the RP is judicial in nature over which the NCLT cannot sit over as a court of appeal.<sup>15</sup>

In a nutshell, it appears that the controversy is centred on the judicial sanctity attached to the actions of an RP. On one hand, it is imperative that some judicial sanctity (in the form of punitive actions like contempt) is accorded to the actions of the RP so as to ensure compliance. However, on the other hand, the RP cannot act as a complete substitute for a judicial authority as that might lead to misuse of his powers. Though a detailed discussion on this controversy would be outside the ambit of this paper, it is amply clear that the DIPCO case is violative of the dictum laid down by the Supreme Court in *Arcelor Mittal* as the RP does not have, and cannot exercise any judicial powers. On the other hand, *Gempex* lays down the correct law that a creditor may approach the NCLT under Sec. 60(5) of the Code for fair determination of claim. However, once the resolution plan is approved and it comes into effect, such creditor does not have any remedy to enforce his claim. This is because the Supreme Court has held in *Ghanshyam Mishra & Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.*<sup>16</sup> that approval of the resolution plan has a clean slate effect and the resolution applicant is not required to pay any sum over and above than the amount described under the resolution plan. Therefore, *Gempex* reinforces the position that the RP is not an adjudicatory authority and merely a facilitator of the CIRP.

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<sup>14</sup> See also *S. Rajendran v. Jonathan Muralidarane*, 2019 S.C.C. Online NCLAT 758.

<sup>15</sup> 2020 S.C.C. Online NCLAT 513, ¶¶ 8-10.

<sup>16</sup> 2021 S.C.C. Online S.C. 313.

The above discussion until this point has made it amply clear that the RP is an officer of the court. However, the judgments and the BLRC report do not give any basis or rationale for such an opinion. Although this paper agrees with such an opinion, nevertheless it would be a fruitful course of enquiry to trace the rationale for this observation.

The logical starting point to this enquiry would be to comment upon the meaning of “officer of the court”. Historically, the Calcutta High Court in *Beni Madhab Sukul v. Deb Narayan Sukul*,<sup>17</sup> has laid down the following test to determine whether an officer is an officer of the court or not:

- He is appointed by a judicial authority and can be removed by that judicial authority,
- He is subject to the control of judicial authority, and
- His salary and remuneration is determined by the appointing judicial authority

With regards to (i), the RP is appointed and removed/replaced under the authority of the court.<sup>18</sup> As regards to (ii), the RP is subject to limited control of CoC<sup>19</sup> and IBBI.<sup>20</sup> Finally, as regards to (iii), Reg. 34 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that fee of the RP is fixed by the CoC. Therefore, as per this test, one may opine that the RP is not an officer of the court. However, it is noteworthy to mention here that this test is not a perfect test as even the court

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<sup>17</sup> A.I.R. 1920 Cal. 575.

<sup>18</sup> Insolvency & Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India), § 16(1), 22(3).

<sup>19</sup> *Id.*, § 28.



in this case ultimately referred to the nature of relationship of the manager with the court. Therefore, it can be stated that the only factor to be considered while considering the role of RP as an officer of the court is to look at the nature of his relationship with the court. In this respect, the BLRC report notes that the RP is an agent of the adjudicator.<sup>21</sup> Therefore, the RP is to act in a fair and transparent manner to fulfil its statutory duties that it performs in the court's stead. Moreover, agreeing with this position the NCLAT<sup>22</sup> and the NCLT Mumbai Bench<sup>23</sup> have expressly held that the RP is an officer of the court.

At this point, it is important to point out that the position of the RP as an officer of the court can be best understood by comparing him with an advocate. In contrast to RP, an advocate is not appointed by the court; he is only subject to the control of Bar Council and also has full autonomy in fixing his fees.<sup>24</sup> Yet Indian courts have adopted a duty based approach and repeatedly held that an advocate is an officer of the court in the sense that he owes the first duty to the court and he is an integral part of the justice administration machinery.<sup>25</sup> In this respect, it is important to point out that Sec. 25(2)(j) of the Code confers express duties on the RP to report avoidance transactions to the Court which strongly indicates that he is an officer of the court.

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<sup>20</sup> *Id.*, § 196.

<sup>21</sup> BLRC report, *supra* note 10, at 64.

<sup>22</sup> *Canara Bank v. Mamta Binani*, RP of *Aristo Texcon Pvt. Ltd.*, 2022 S.C.C. Online NCLAT 3, ¶ 33.

<sup>23</sup> *Seema K. Nair v. Mather Projects Pvt. Ltd.*, 2019 S.C.C. Online NCLT 21491.

<sup>24</sup> *See generally* Advocates Act, 1961, No. 25, Acts of Parliament, 1961 (India).

<sup>25</sup> *See e.g.* High Court of Karnataka v. *Jai Chaitanaya Dasa*, 2015 S.C.C. Online Kar. 9098.

Another point to be noted here is that as per Sec. 19 of the Code, the RP can seek assistance of the Adjudicating Authority in case of non-cooperation of debtor's personnel. This clearly implies that the RP is an agent or officer of the court with no enforcing powers of his own and for which he has to apply to the Adjudicating Authority.

Another case which affirms this proposition is the case of *SBI v. M/s Metenere Ltd.* (“**Metenere**”).<sup>26</sup> The peculiar question that arose in this case pertained to the independence of the IRP from the creditors. As per the facts of this case, the proposed IRP was an ex-employee of one of the creditors, namely, SBI and was also drawing a pension. Metenere filed an application for substitution of the IRP because of the apprehension that the IRP is affiliated with SBI and hence, he would not conduct the resolution process fairly. This application was allowed by the NCLT and the NCLAT. When the matter reached the Apex Court, the Hon'ble Supreme Court expressed a *prima facie* opinion that such a ruling was not correct. However, no final ratio was laid down by the Court as the matter was settled with the mutual consent of the parties.

The issue raised in Metenere is of vital importance as an officer of the court must act independently of all the stakeholders in a resolution process. On the other hand, in the absence of any express statutory provision prohibiting a related party of a creditor to act as an RP implies that such a scenario is plausible and permissible. Moreover, if such a scenario is permitted then it further strengthens the proposition that the RP is an agent of the creditors. Interestingly, item 8 and 8A of the first schedule of the Insolvency and Bankruptcy Board of India (Insolvency Professionals)

Regulations, 2016 (“**Code of Conduct**”) provides that an RP is required to disclose existence of any pecuniary or personal relationship or past employment with any of the stakeholders entitled to distribution under Sec. 53 or 178 of the Code. Furthermore, under Reg.7(2)(a) of these regulations, a certificate of registration is only granted if the RP agrees to abide by the Code of Conduct. Theoretically, a breach of Code of Conduct may render an RP liable to a disciplinary proceeding under Reg. 11 which may consequently lead to cancellation of his registration as an insolvency professional. Now, Sec. 16(1) of the Code provides that an IRP proposed by the financial creditor in a Sec. 7 application under the Code is to be appointed unless there is no disciplinary proceeding pending against him. However, in the *Metenere* case, the fact of the IRP being an ex-employee was not brought to the knowledge of IBBI under Sec. 217 of the Code. As already noted, IBBI could have initiated a disciplinary proceeding for the breach of code of conduct. Thus, in absence of any disciplinary proceeding, the Court was right in dismissing the objection of the corporate debtor. Furthermore, in any case, the CoC has the power to replace the RP under Sec. 22(3)(b) of the Code.

This discussion reveals that the RP is not a judicial or quasi-judicial authority as it does not have any adjudicatory powers and it has been given limited powers and judicial sanctity for the sole purpose of ensuring the smooth conduct of the CIRP. However, he may be viewed as a judicial officer as he is to be independent and exercise his functions in a fair manner. This is evident from a bare reading of the BLRC Report which states that the first mandate for an Insolvency Professional (who is a RP) is to act “...

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<sup>26</sup> (2021) 1 S.C.C. 191.

independently, objectively and with impartiality.”<sup>27</sup> Moreover, it is because of his role as a judicial officer that his actions performed in good faith are immune from challenge under the Code.<sup>28</sup> An interesting observation which may be noteworthy here is that the UK Insolvency Act expressly states that in all cases, the administrator of the insolvency proceedings is an officer of the court.<sup>29</sup> Though the Hon’ble Apex Court has seemed to endorse this view impliedly,<sup>30</sup> however, it would be beneficial if this position is clarified in Indian law by means of an amendment or by express judicial interpretation.

### III. DUTY TOWARDS OTHER STAKEHOLDERS

The role of RP vis-à-vis the corporate debtor and the CoC becomes a crucial question. This is because once the RP has been established as an officer of the court; he is expected to act impartially as discussed in the previous section. Any duty owed to any particular stakeholder may compromise this impartiality requirement. This section of the paper argues that no duty is owed by the RP to any other stakeholder under the Code except to act in an impartial and professional manner.

#### A. Relationship with the Corporate Debtor

It is to be noted that the UK Insolvency Act, 1986 provides that the administrator acts as an agent of the company while exercising his functions.<sup>31</sup> This implies that the administrator actually steps into the shoes of a director of an insolvent company. This is the reason why administrators

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<sup>27</sup> BLRC report, *supra* note 10, at Box 4.17.

<sup>28</sup> Insolvency & Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India), § 233.

<sup>29</sup> U.K. Insolvency Act, 1986, sch. B1, ¶ 5.

<sup>30</sup> Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India) Ltd., 2021 S.C.C. Online S.C. 160, ¶ 3.

in U.K. enter to express agreements with third parties to exclude their personal liabilities while exercising their functions.

In contrast to this position, though the RP exercises the powers and functions of the suspended board of directors, however, he is not bound by the duties of the directors prescribed under the Indian Companies Act, 2013.<sup>32</sup> Moreover, the RP only performs his duties as specified under Sec. 18 and 20(1) of the Code which imply that his role is merely of a facilitator of the CIRP and he is not to act as an agent of the distressed corporate debtor. In this respect, a comprehensive enquiry was undertaken by the NCLT Mumbai Bench in *Deccan Value Investors L.P. v. Deutsche Bank AG State Bank of India*<sup>33</sup> wherein it was held that it is the RP's duty to collate all relevant and updated information to facilitate the negotiations between the CoC and the Corporate Debtor and that while doing so it acts as a manager of negotiations between the Creditor and the Debtor.<sup>34</sup> Moreover whilst such negotiations are underway the RP takes over the assets of the Corporate Debtor to preserve its value.

Another factor which contributes to this confusion is that as per Sec. 25(1) of the Code, the RP is to preserve and protect the assets of the corporate debtor and ensure continued business operations. Thus, the question arises whether such a duty implies that a certain fiduciary duty is owed to the company by the RP. The answer to this question has to be in the negative. This is because the objective of such a provision is to maximize the value of the assets of the debtor which lost its value due to the actions of the

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<sup>31</sup> U.K. Insolvency Act, 1986, sch. B1, ¶ 69.

<sup>32</sup> Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India), § 166.

<sup>33</sup> 2019 S.C.C. Online NCLT 12786.

<sup>34</sup> *Id.* at ¶ 59-61.

suspended management.<sup>35</sup> Any further erosion in the value of the distressed entity would be detrimental to the interests of all the stakeholders. Therefore, this duty is the result of a shift of management from an incompetent management to the professional management of the RP.

Secondly, in contrast to the director's duties under Sec. 166(2) of the Indian Companies Act, 2013, the Code does not prescribe any express duty owed by the RP to any particular stakeholder.

Lastly, even though the management and custody of assets is vested in the RP, the ownership still remains with the corporate debtor and only the management remains suspended during the moratorium under Sec. 14 of the Code. Hence, the RP also does not hold the assets in trust and as such does not owe any fiduciary duty to the debtor.

Thus, it can be easily seen that none of the duties owed by the RP to the corporate debtor compromises his role as an officer of the court. In fact, it can be stated that all his duties to the corporate debtor flows from his position as an expert professional who is adept in handling distressed entities.

## **B. Relationship with the CoC**

Sec. 28(1) of the Code mandates that prior approval of CoC is required before the RP takes certain actions. This strongly suggests that the RP is subject to certain control and checks exercised by the creditors.

A preliminary observation which is noteworthy to mention here that the UK insolvency law expressly provides that the administrator is to act in a

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<sup>35</sup> BLRC report, *supra* note 10, at 83.

manner which is in the interests of the creditors as a whole.<sup>36</sup> On the other hand, the Code is bereft of any such express stipulation. This absence is prima facie indicative of the fact that the RP owes no duty to the CoC in general. However, merely absence of an express stipulation does not explain the exact nature of the relationship between the CoC and the RP which warrants further discussion.

It is noteworthy to examine the ambit of Sec. 28(1) of the Code to examine the relationship between CoC and the RP. Sec. 28(1) enumerates transactions that are in the nature of changing the capital structure of the corporate debtor or may create an encumbrance on the assets of the corporate debtor. These decisions require expertise and commercial wisdom of the CoC, whose interest is directly at stake during the insolvency process. Furthermore, it has been held that these decisions require commercial wisdom and commercial judgment of the CoC without any judicial intervention.<sup>37</sup> Now, it has already been established that at the very least the RP is an officer of the court and exercises limited delegated functions of the Adjudicating Authority. Therefore, since no judicial intervention is required here, the role of RP becomes non-existent with respect to such decisions. In other words, a careful analysis of Sec. 28(1) of the Code reveals that the RP is not a puppet in the hands of the CoC rather he is a facilitator who has no role when any decision enumerated under Sec. 28(1) of the Code is brought before the CoC for deliberation.

Another issue which requires analysis is the power of the CoC to replace the RP with another RP under Sec. 27 of the Code. This strongly

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<sup>36</sup> U.K. Insolvency Act, 1986, sch. B1, ¶ 3(2).

<sup>37</sup> K. Sashidhar v. Indian Overseas Bank, (2019) 12 S.C.C. 150, ¶ 52.

implies that an RP would be inclined in respecting the wishes of the CoC so that he is not replaced by the CoC in the middle of the resolution process. In this respect, it has already been noted that the RP is to exercise his functions in an impartial and independent manner to avoid any disciplinary proceeding. Furthermore, no adjudicatory powers have been bestowed upon the RP and important decisions have been reserved for the deliberation of the CoC under Sec. 28 of the Code or the Adjudicating Authority. Therefore, as long as the RP efficiently exercises his functions of facilitating the resolution process effectively, there is no cause of action why he would be replaced by the CoC. As a matter of fact, the power under Sec. 27 of the Code has been exercised by the CoC only when there is a breach of code of conduct or when the RP acts in an unprofessional manner i.e. he should perform his duties in a diligent manner, act as a facilitator of CIRP negotiations instead of creating discord etc.<sup>38</sup> In other words, the power to replace the RP is a statutory device to keep a check on the authority of the RP and can in no way imply that he is an agent of the CoC.

### **C. Relationship with the Employer**

It may be possible that the RP is a partner or an employee of a partnership firm or a company (“**employee**”). Although there is no bar to such a person being appointed as an RP, Sections 206 and 207 of the Code provide that only an individual can be appointed as an RP and not firms. In such circumstances, such an employee may engage the services of his employer as support services which may directly or indirectly entitle such an

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<sup>38</sup> See e.g. M.L. Ganesh v. CA V. Venkata Siva Kumar, 2020 S.C.C. Online Mad. 2732, ¶ 6; *See also* ASHISH MAKHIJA, *INSOLVENCY & BANKRUPTCY CODE OF INDIA* § 27.3(1) (1<sup>st</sup> ed., 2018).



employer to a share of the RP's fees. A point to be noted here is that in such a case, requisite disclosure under the Code of Conduct needs to be made by the RP.<sup>39</sup> However, the relevant question here is that after the disclosure, whether a claim on RP's fee by the employer is recognized and enforceable under Indian law or not.

Under U.K. law, it is settled law that ordinarily an employee is liable to share the fee with the employer except in case he is able to show that his appointment as a liquidator/administrator was not a result of his employment.<sup>40</sup> Furthermore, a balance has been brought out between personal liability of the liquidator and his duty to the employer. It has been held that the liquidator has personal ownership of the documents pertaining to the debtor and the employer has no claim over the same.<sup>41</sup>

In India, a stricter interpretation of law has been adopted. In 2018, a circular was issued by the IBBI mandating that all bills have to be raised in the name of the RP and all payments have to be made in the account of the RP.<sup>42</sup> Prior to issuance of this circular, the IBBI had allowed issuance of invoices by employer on behalf of the employee acting as an RP.<sup>43</sup> However, the law is clear now and it has been held that a LLP cannot raise a bill and receive fee on behalf of the RP even if such RP is a partner of the firm.<sup>44</sup> This is because such an employee acts in his personal capacity, and not in his

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<sup>39</sup> Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Gazette of India, pt. III sec. 4 (Dec. 1, 2016), Reg. 3(2).

<sup>40</sup> Casson Beckman & Partners v. John William Papi, [1991] B.C.L.C. 299.

<sup>41</sup> *Id.*

<sup>42</sup> IBBI, Fees Payable to an Insolvency Professional & to Other Professionals Appointed by an Insolvency Professional, IP/004/2018 (Issued on January 16, 2018).

<sup>43</sup> Re: Anil Goel, [2021] 125 Taxmann.com 14 (IBBI).

<sup>44</sup> Re: Dinkar T. Venkatasubramanian (No. IBBI/DC/08/2018, decided on 23.08.2018, IBBI).

capacity as a partner of a LLP. At the first blush, it appears that such a decision may be in contrast to the decision by the U.K. courts. However, the crucial factor here is the manner in which the bill is raised by the RP for its services. It is amply clear that the employer or the partnership firm cannot raise a bill for the services of the RP. Therefore, the ideal scenario in such circumstances would be that the RP raises the bill and then remits the requisite amount to his firm. Such an interpretation fulfils both the requirements of the Code as well as private obligations in a partnership/employment agreement. Nevertheless, this strict interpretation further justifies the proposition that the RP is placed on a higher pedestal to act impartially as an officer of the court.

#### IV. CONCLUSION

A comparison with UK insolvency regime has revealed that an administrator wears different hats during the insolvency process similar to the RP under the Indian law. However, the UK law clearly lays down the nature of the administrator's duties as compared with the Indian insolvency regime.

From the above discussion it can be seen that an RP wears various hats and assumes multitude of roles during the corporate insolvency process. The RP is indeed an officer of the court whose function is to facilitate and ensure that the CIRP completes smoothly. The mere fact that at various stages, the RP may be subject to control of the CoC or the IBBI does not mean that his allegiance shifts to such stakeholder. Any such check fits into the scheme of the Code and comes into action only in cases where judicial intervention is not required. Furthermore, no duty is owed to any stakeholder

except to act in an impartial and professional manner. However, it has been suggested that there is a need for legislative amendment to expressly clarify the position of the RP as an officer of the court.

Finally, it was seen that while determining the nature of RP's role, certain contemporary issues have also been touched and answered. In this respect, this paper has opined that the position of law in DIPCO is incorrect and the RP has no adjudicatory powers. Secondly, there is nothing in the Code to prohibit appointment of an ex-employee of a creditor from being appointed as IRP. Next, this paper opined that any duty owed to the Corporate Debtor or the CoC flows from the RP's position as an officer of the court. Lastly, this paper proposed that to maintain a balance between the independence of the RP and his duty to share his gains with his employer, the RP may raise his service bills in his own name and remit the requisite share of such fee to his employer. These tangential findings are themselves proof of the fact that a clear understanding of RP's role in CIRP can settle many present and future controversies.