

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 24566 of 2022**

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SUNILKUMAR AGARWAL S/O. KISHAN LAL AGARWAL
Versus

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (IBBI)

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Appearance:

MR. PERCY C. KAVINA, SENIOR COUNSEL WITH MR. VISHAL J
DAVE(6515) for the Petitioner(s) No. 1
NIPUN SINGHVI(9653) for the Petitioner(s) No. 1
for the Respondent(s) No. 1

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CORAM: HONOURABLE MR. JUSTICE BIREN VAISHNAV

Date : 02/12/2022
ORAL ORDER

1 Heard Mr. Percy Kavina, learned Senior Counsel with Mr. Vishal Dave, learned advocate with Mr. Nipun Singhvi, learned counsel for the petitioner.

2 Challenge in this petition is to the order dated 21.11.2022 passed by the Insolvency & Bankruptcy Board of India (Disciplinary Committee). The petitioner, in his capacity as an Interim Resolution Professional, in the process of corporate insolvency resolution on Brain Master's Classes Private Limited and Eagle Corporation Private Limited was issued certain show cause notices for

failing to discharge his duties. The Disciplinary Committee has found the petitioner of having committed a lapse in the conduct of C.I.R.P in the matter of Brain Master's Classes Private Limited. According to the Board, it was incumbent upon the petitioner to have filed a necessary application either for approving the resolution plan or the liquidation of the corporate letter to Brain Master's Classes Private Limited. In the opinion of the Board, in accordance with Sec.12 of the I.B.C, the CIRP has to be completed within a period of 180 days from the date of admission of the application to initiate such process. Since the period for the process in the case of Brain Master's Classes Private Limited expired on 10.03.2020, in the opinion of the Board, the petitioner should have filed a necessary application for extension of approving the resolution or liquidation which he did not.

2.1 Mr.Kavina, learned Senior Counsel, would draw the Court's attention to sub-section 2 of Sec.12 of the I.B.C Code which provides that a resolution professional shall file an application to the adjudicating authority to extend

the period of corporate insolvency resolution process beyond 180 days, if instructed to do so by a resolution passed by a meeting of the Committee of Creditors (C.O.C) by a vote of 66% of the voting shares.

2.2 According to Mr.Kavina, learned Senior Counsel, therefore, the primary responsibility of calling for a meeting of the C.O.C's would not be that of the petitioner for making an application for extension unless they are authorized by the C.O.C through a meeting in accordance with the provisions of Sub-section 2 of Section 12.

3 Reading the relevant portions of the order indicates that after recording the submissions of the petitioner which indicate that though he had all the intentions to conduct the C.O.C Meeting and had prepared the draft agendas, even after having initially made request on 31.01.2020 i.e. before the period expired on 10.03.2020, it is evident from the E-mail communications between the team members that a meeting of the C.O.C members could not be held due to lockdown. Finally, when the

meeting was conducted on 10.09.2020, it was categorically observed in the order that such meetings were being conducted and there was no allegation on the present petitioner who was the then Resolution Professional who was replaced by one Ms.Bhavi Shah. In fact, as is evident from reading para 3.2.6 of the order, which quotes the observations of the adjudicating authority, it was C.O.C which has not taken efficient measures to complete the C.I.R.P of the Corporate Debtor Company. Even in the summary findings where the order of the adjudicating authority is quoted, it is made out that it was not the case that the C.O.C had raised any dissatisfaction with regard to the conduct of the petitioner or that there had been a lapse on his part.

4 Despite these findings, the order impugned herein which only implicates the petitioner in context of contravention (I) in the case of Brain Master's Classes Private Limited to issue directions imposing the penalty of Rs.2 lakhs on the petitioner and in addition thereto held that the petitioner will work as a probationer for four

months with other experienced I.P.

5 Prima facie, having read the provisions of Sec.12 (2) of the I.B.C and the contents of the order under challenge which extensively quoted the observations of the adjudicating authority, it is evident that there cannot be any negligence attributed to the petitioner who was to follow the provisions of Sub-sec.2 of Sec.12 of I.B.C.

6 On this count, on a condition that the petitioner deposits Rs.2 lakhs as envisaged under the order by way of a penalty in the registry, on or before 09.12.2022, issue notice to the respondents, returnable on 17.01.2023. There shall be ad-interim relief in terms of para 49(c), till then. Direct service is permitted.

BIMAL

(BIREN VAISHNAV, J)

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/141/2022

21st November, 2022

ORDER

This Order disposes the Show Cause Notice (SCN) No. IBBI/IP/INSP/2022/148/4149 dated 10.10.2022 issued to Mr. Sunil Kumar Agarwal, Insolvency Professional under section 220 of the Insolvency and Bankruptcy Code, 2016 (Code) read with regulation 13 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017 (Inspection Regulations). Mr. Sunil Kumar Agarwal is a Professional Member of Insolvency Professional Agency of the Indian Institute of Insolvency Professionals of ICAI (IIP-ICAI) and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board/IBBI) with registration No. IBBI/IPA-001/IP-P01390/2018-19/12178.

1. Developments in relation to resolution/liquidation of the CDs

- 1.1. The Hon'ble NCLT, Ahmedabad Bench (AA) *vide* order dated 14.06.2019 admitted the application under section 9 of the Code for initiating Corporate Insolvency Resolution Process (CIRP) of Brain Master's Classes Private Limited (CD-1) and Mr. Sunil Kumar Agarwal was appointed as the Interim Resolution professional (IRP) who was later confirmed as Resolution Professional (RP). Mr. Sunil Kumar Agarwal was replaced by Ms. Bhavi Shreyans Shah as RP *vide* order of Hon'ble NCLT, Indore Bench (AA) dated 08.01.2021. On application filed by Ms. Bhavi Shreyans Shah for exclusion of 538 days from CIRP, AA observed that such exclusion cannot be allowed and directed liquidation of CD-1 and appointed Mr. Navin Khandelwal as Liquidator on 23.04.2021. With the consent of Stakeholders Consultation Committee (SCC), the Liquidator filed an application for dissolution of CD-1 on 03.05.2022, consideration of which is pending before AA.
- 1.2. The Hon'ble NCLT, Ahmedabad Bench (AA) *vide* order dated 15.10.2019 admitted the application under section 9 of the Code for initiating CIRP of Eagle Corporation Private Limited (CD-2) and Mr. Sunil Kumar Agarwal was appointed as the IRP who was later confirmed as RP. Mr. Sunil Kumar Agarwal was replaced by Mr. Dhaval Jitendrakumar Mistry as RP *vide* order of AA dated 08.09.2020. The Committee of Creditors (CoC) in its commercial wisdom decided to take the CD-2 into liquidation and subsequently AA ordered CD-2 into liquidation on 30.03.2022 and appointed on Mr. Dhaval Jitendrakumar Mistry as Liquidator. As per 2nd progress report dated 11.10.2022, the SCC decided to sell the CD-2 as going concern but no bid was received. Thereafter, SCC in its meeting dated 03.10.2022 decided to sell vehicles being passenger buses through public auction.

2. Issuance of Show Cause Notice (SCN) and hearing before DC

- 2.1. The Board, in exercise of the powers conferred to it under section 218 of the Code read with the Inspection Regulations, appointed an Inspecting Authority (IA) to conduct the Inspection of Mr. Sunil Kumar Agarwal. In compliance with regulation 6(1) of Inspection Regulations, IA shared the Draft Inspection Report (DIR) with Mr. Sunil Kumar Agarwal on 30.6.2022 to which response was received on 18.07.2022. Thereafter, IA submitted the Inspection Report (IR) to the Board on 20.07.2022 in accordance with regulation 6(4) of the Inspection Regulations.
- 2.2. Based on the material available on record including the Inspection Report, the Board issued the SCN to Mr. Sunil Kumar Agarwal on 10.10.2022. The SCN alleged contravention of section 12, 25(2)(f), 208(2)(a) and 208(2)(e) of the Code, regulation 34 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), regulation 7(2)(a) and 7(2)(h) of IBBI (Insolvency Professional) Regulations, 2017 (IP Regulations) read with clauses 1, 2, 13, 14 and 16 of the Code of Conduct. Mr. Sunil Kumar Agarwal replied to the SCN on 17.10.2022.
- 2.3. The Board referred the SCN and written submissions of Mr. Sunil Kumar Agarwal, 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.
- 2.4. Mr. Sunil Kumar Agarwal availed an opportunity of personal hearing before DC on 09.11.2022 through virtual mode where he was represented by Mr. Nipun Singhvi, Advocate. During the personal hearing, Mr. Sunil Kumar Agarwal requested to submit additional written submissions which was allowed by DC and additional written submission was received *vide* email dated 11.11.2022.

3. Alleged contraventions and submissions of the IP

Contraventions alleged in the SCN and Mr. Sunil Kumar Agarwal's submissions thereof are summarized below:

Contravention-I

In the matter of Brain Master's Classes Private Limited

3.1. Lapses in the conduct of CIRP

- 3.1.1. Section 12 of Code provides that the CIRP shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process. The RP shall file an application to the AA to extend the period of the CIRP beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the CoC by a vote of sixty-six per cent of the voting shares.

3.1.2. The Board noted that CIRP of the CD-1 was initiated vide order dated 14.06.2019 of AA in an application filed under section 9 of the code and Mr. Sunil Kumar Agarwal were appointed as an IRP.

3.1.3. The Board further observed that the CIRP period expired on 10.03.2020, However, Mr. Sunil Kumar Agarwal failed to file necessary application either for approving resolution plan or Liquidation of the CD-1. Mr. Sunil Kumar Agarwal even did not file application for extension of time for CIRP. The Board also observed that Mr. Sunil Kumar Agarwal failed to conduct any CoC meetings for the period from the January 2020 to September 2020.

3.1.4. The Board also been noted that AA in its order dated 23.04.2021 has taken cognizance of Mr. Sunil Kumar Agarwal's casual approach in conducting the CIRP of the CD-1 and made certain serious observation on his conduct, extract of which is as under:

.....In view of that, CIRP period of 270 days was expired on 10.03.2020, i.e., before imposing nationwide Lockdown (started from 23.03.2020 to 31.05.2020) by the Government, due to Covid-19 Pandemic. Thereafter, so far, no application was filed for further extension on any ground.....

.....Hence, RP was supposed to file an application either for approving Resolution Plan or Liquidation application for the liquidation of the corporate debtor company. However, the erstwhile RP and CoC totally failed to do so...

.....in this matter there is/are no such exceptional circumstance(s), in as much as, CoC as well as erstwhile RP acted in a very casual manner, taking everything as granted and after completion of more than 485 days of CIRP period, CoC filed an application for replacement of RP and, thereafter, the instant application for exclusion of 538 days.....

3.1.5. In view of the above, the Board held the *prima facie* view that by not conducting CoC meetings either in physical or virtual form for more than 9 months and not filing necessary application before AA, Mr. Sunil Kumar Agarwal has *inter alia* violated section 12, 25(2)(f), 208(2)(a) of the Code, regulation 7(2)(a) and 7(2)(h) of IP Regulations read with clauses 1, 2, 13 and 14 of the Code of Conduct as specified in the First Schedule of IP Regulations (Code of Conduct).

3.2. Submissions made by the IP

3.2.1. Mr. Sunil Kumar Agarwal submitted that CoC members avoided to attend CoC meeting to refrain from CIRP Cost

Date	Event
31.01.2020	Mr. Agarwal sent an email to CoC to meet
24.02.2020	Non-availability of main CoC Member-HDFC

25.03.2020 to 31.05.2020	Lockdown imposed by the Government
05.06.2020	Application filed for non-cooperation and non-payment of CIRP cost by Mr. Agarwal
06.06.2020	Proposed agenda drafted and circulated amongst the team members for the meeting dated 10.06.2020
10.07.2020	Notice issued to CoC in IA 76 of 2020
11.07.2020	Staff found Covid-19 Positive-Office sealed by AMC
17.07.2020	CoC appeared before Hon'ble NCLT in IA 76 of 2020
10.08.2020	Office shifted to remote location
10.09.2020	6 th CoC meeting conducted and CoC replaced Mr. Agarwal
23.04.2021	AA observed misconduct of CoC in IA 27 of 2021 filed for extension of CoC period

3.2.2. Mr. Sunil Kumar Agarwal submitted that on 31.01.2020, he requested all CoC members through email and several phone calls to meet. However, CoC members were refusing to meet and also arguing that since there were no assets in CD-1 and no recovery was expected, they are not interested to consume time and incur cost of CIRP. As the CoC members kept silent till Mr. Agarwal was forced to file an application on 05.06.2020 for payment of CIRP costs bearing IA No. 76 of 2020.

3.2.3. Mr. Agarwal further submitted that he had all intentions to conduct CoC and hence had prepared draft Agenda for the 6th CoC which is evident through email Communication between the team members dated 06.06.2020 scheduling the CoC for 10.06.2020 which was again deferred by the CoC members on the telephone stating that Indore, Madhya Pradesh and Mumbai was still under Lockdown.

3.2.4. Finally, when on 10.09.2020 CoC meeting was conducted, he put an agenda to discuss for liquidation or exclusion as CIRP is already expired. However, CoC deferred all the agendas and to avoid the payment of CIRP cost CoC members replaced him as an RP. Even AA in its order dated 23.04.2021 in IA 27 (MP) 2021 observed that *“on perusal of the record it is found that, CoC meetings are being conducted from time to time without any allegation upon the erstwhile RP”*. Therefore, it is clear that only because he filed an application for payment of CIRP costs bearing IA No. 76 of 2020, CoC member in its next meeting replaced him and deferred all other agendas including to discuss on liquidation.

3.2.5. Mr. Agarwal further submitted that as per section 12(2) of the Code RP has to file an application if instructed by CoC members through a resolution passed with a sixty-six

percent vote hence as the CoC members were avoided to attend CoC meeting and all the resolutions were deferred by CoC as IA for replacement of RP was pending, the CIRP was sabotaged and the RP had no right and authority to file extension /liquidation application with AA. Section 12(2) is reproduced for reference

“(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of sixty-six percent. of the voting shares”

3.2.6. The fact that CoC seems to be deliberately not taken any steps conducting CoC meeting and not being vigilant during CIRP and now at belated stage alleging RP is also observed by AA in its order dated 23.04.2021 in IA 27 (MP) 2021 as below:

“On going through the record, it appears that the CoC has not taken any efficient measures to complete the CIRP of the Corporate Debtor Company. Rather suppressing all the facts, the CoC has filed an IA, under Section 27 of the Insolvency and Bankruptcy Code, 2016 on 09.11.2020 bearing IA 68 of 2020 for replacement of the erstwhile RP namely Mr. Sunil Kumar Agrawal, that too after expiry of 270 days on 10.03.2020.”

Moreover, his activeness during the subject period is evident and hence there was no reason for us not to conduct meeting if COC members were willing to attend all this time.

3.2.7. Mr. Agarwal submitted that following remarks were made by AA in order dated 23.04.2021 in IA 27 (MP) 2021 filed by the new RP for exclusion. As mentioned in the order itself, the petitioner (Ms. Bhavi Shreyans Shah) blamed the erstwhile RP (Mr. Sunil Kumar Agarwal) on the basis of the statements she received from CoC members who themselves are accused of negligence in the same order as recorded at several places. AA also observed that he conducted CoC in a manner as prescribed under the Code:

“On perusal of the pleadings it is found that the applicant (Mrs. Bhavi Shah) has given total allegation on the erstwhile RP with regard to his deficiency in discharge of his duty. On the other hand, on perusal of the record it is found that, CoC meetings are being conducted from time to time without any allegation upon the erstwhile RP.”

3.2.8. Mr. Agarwal submitted that AA in para 12 of the same order observed suppression of fact by CoC members of not having taken extension of time beyond March 10.10.2020 in IA 168/2020 but replaced RP which reflects their conduct and further observed that it was CoC who was not vigilant relevant para is reproduced herein for reference:

“It is a serious lapse on the part of CoC, now after lapse of one year when CIRP period is expired on 10.03.2020 itself, CoC has passed resolution for extension of time showing the negligence on the part of the erstwhile RP. That itself shows that CoC was not vigilant at the time of CIR process of the Corporate Debtor Company and now at a belated stage,

they have woke-up and alleging, inter alia, that due to lapse on the part of the erstwhile RP, CIRP of the Corporate Debtor company could not be concluded.”

3.2.9. Mr. Agarwal submitted that AA also recorded in para 13 of same order that CoC meetings were time to time convened but CoC members never raised any dissatisfaction with regard to the conduct of erstwhile RP or had there been lapse on his part, in that event why the CoC was tight lipped. The allegations were made by CoC and applicant RP i.e., Ms. Bhavi Shah against him and he was not made a party in the application bearing IA no. 27 of 2021 neither was given an opportunity to defend against the alleged allegations/lapses made by the petitioner RP. AA rejected the said application passing strictures against applicant Ms. Bhavi Shah and clearly pointed out the conduct of members of CoC. The intentions in drafting application of exclusion as signed by Mrs. Bhavi Shah are *mala fide* as she along with CoC blamed him (not party to the application) on the basis of statements made by CoC members to camouflage the ignorant conduct of CoC. All the CIRP expenses including payment to advocate for initial 90 days extension were incurred from his pocket ensuring smooth running of process even during Covid-19 (sought PUFF transaction and got identified fraudulent transfer of brand and sale value taken by director in his personal bank account).

3.3. Summary Findings

3.3.1. The DC takes note of the efforts taken by Mr. Agarwal in conducting meeting of CoC after 5th meeting held on 02.01.2020 by sending email on 31.01.2020 to all members of CoC and drafting agenda to conduct meeting on 10.06.2020. However, the draft agenda is silent about seeking extension of CIRP. In 6th CoC meeting held on 12.09.2020, the agenda for filing liquidation application was deferred. Further in IA 27(MP) 2021 filed by newly appointed RP Ms. Bhavi Shreyans Shah seeking exclusion of 538 days from CIRP period, AA made following observations while disposing of the application through order dated 23.04.2021 and ordering CD-1 into liquidation:

5.It is also to be mentioned herein that, if at all, the RP was not performing his duties in accordance with the provisions of the IB Code, as alleged by the present applicant/ RP, in that event, CoC could have filed an application before expiry of 270 days, i.e. on or before 10.03.2020, for replacing the erstwhile RP. It seems that the members of the CoC deliberately not taken any steps, so as, to replace the erstwhile RP, if at all, they are not satisfied. It is pertinent to mention herein that an application for replacement of RP was filed after expiry of more than seven months of CIRP period of 270 days, when as per provision there was no CoC, in view of completion of 270 days and / or any steps taken for extension of further time, before moving an application for replacement of erstwhile RP.

6. On going through the record, it appears that the CoC has not taken any efficient measures to complete the CIRP of the Corporate Debtor Company. Rather suppressing all the facts, the CoC has filed an IA, under Section 27 of the Insolvency and Bankruptcy

Code, 2016, on 09.11.2020, bearing No. IA 168 of 2020, for replacement of the erstwhile RP, namely, Mr. Sunil Kumar Agrawal, that too after expiry of 270 days on 10.03.2020.

7. It is to be mentioned herein that, when 270 days of CIRP was expired on 10.03.2020 itself, the CoC on 09.11.2020 realised that RP is required to be replaced when there is no CoC due to want of any further extension of time beyond 270 days. It is a serious lapse on the part of CoC, now after lapse of one year, when CIRP period is expired on 10.03.2020 itself, CoC has passed resolution for extension of time showing the negligence on the part of the erstwhile RP. That itself shows that CoC was not vigilant at the time of CIR process of the corporate debtor company and, now at a stage, they have woke-up and alleging, inter alia, that due to lapse on the part of the erstwhile RP, CIRP of the corporate debtor company could not be concluded.

8. On perusal of the pleadings, it is found that the applicant has given total allegation on the erstwhile RP with regard to his deficiency in discharge of his duties. On the other hand, on perusal of the record it is found that, CoC meetings are being conducted from time to time without any allegation(s) upon the erstwhile RP. Further, on perusal of the pleadings, the applicant has given sequence of the meetings and, that apart, admittedly, the erstwhile RP on 06.12.2019 filed report with this Bench, certifying the reconstitution of CoC.

9. On perusal of the application, it is found that the applicant has taken the plea of Lockdown, that apart, in paragraph-15 of the application, it is specifically stated that, "due to outbreak of the Covid-19 pandemic, Central Government imposed unprecedented lockdown in the country from 24.03.2020 to 31.05.2020. Further, Hon'ble NCALT was also pleased to issue a direction for exclusion of period of Lockdown announced by the Central Government, for the purpose of calculation of the period of Corporate Insolvency Resolution Process". Admittedly, there was Lockdown from 24.03.2020 to 31.05.2020, but in the instant matter CIRP was expired on 10.03.2020 itself, i.e. much prior to Lockdown. However, the CoC never filed any application for replacement of erstwhile RP, if the RP was not working / performing his duty properly. The CoC not even approached this Bench for extension of time beyond 270 days at any point of time after 10.03.2020, when CIRP was expired. Even after, 68 days of Lockdown is excluded, then even the CoC is supposed to file application for replacement of RP immediately after 31st May 2020, which has not done by the CoC.

...

*11. Admittedly, the CoC has replaced the erstwhile RP with the applicant/ RP after completion of 574 days of the CIRP period. It is needless to mention herein that the IB Code provides that in any case the CIRP period cannot be exceeded beyond the outer limit of 330 days. However, the Hon'ble Supreme Court has extended in some matter, but those are under exceptional circumstances, whereas, **in this matter there is/are no such exceptional circumstance(s), in as much as, CoC as well as erstwhile RP acted in a very casual manner, taking everything as granted** and after completion of more than 485 days*

of CIRP period, CoC filed an application for replacement of RP and, thereafter, the instant application for exclusion of 538 days.

...

13. On perusal of the record, it is found that, though the allegation has been given upon the erstwhile RP, it appears that CoC time to time convened its meetings and have never raised any dissatisfaction with regard to the conduct of the erstwhile RP or has been given upon the erstwhile RP, it appears that CoC time to had there been lapse on the part of the erstwhile RP, in that event, why CoC is tight lipped, so long, when the time is sacrosanct of the IB Code and has to be completed within the stipulated time not beyond the outer limit of 330 days as provided in Section 12 (3) of IB Code, as also observed by the Hon'ble Apex Court on a number of occasions.

...

14. More so, there is no whisper by the CoC or the applicant that there is any possibility of getting viable Resolution Plan. Further, if the prayer made in the instant application is allowed, i.e. exclusion of period of 538 days, in that event, it is nothing more than restarting of CIRP process, which is not permissible in the Code.

15. On perusal of the record, it appears that due to the negligence on the part of CoC as well as RP, the corporate debtor is pushed into liquidation.

3.3.2. The above observations points to negligence more on part of CoC of CD-1 rather than erstwhile RP ie. Mr. Sunil Kumar Agarwal. Further section 12(2) of the Code provides that RP has to file application for extension of CIRP if instructed to do so by resolution passed at a meeting of CoC by sixty-six percent of voting share. However, observations of AA that ‘...erstwhile RP and CoC totally failed’ in filling an application within a stipulated time does not absolve Mr. Sunil Kumar Agarwal on charges of laxity on one count or the other. If CoC was not cooperating as per the statutory requirements under the Code, nothing prohibits him in approaching the AA to apprise them about the alleged non-cooperation of the CoC. Hence the DC finds that Mr. Sunil Kumar Agarwal has violated section 208(2)(a) of the Code, regulation 7(2)(a) and 7(2)(h) of IP Regulations read with clauses 1, 2, 13 and 14 of the Code of Conduct.

Contravention-II

In the matter of Eagle Corporation Private Limited

4.1. Non-approval of CIRP Cost

4.1.1. Regulation 34 of the CIRP Regulations which deals with resolution professional cost provides that the CoC shall fix the expenses to be incurred on or by the RP and the expenses shall constitute insolvency resolution process costs (IRPC).

4.1.2. The Board observed from the minutes of 2nd meeting of the CoC dated 10.12.2019 that one of the agendas discussed in the meeting was to ratify the IRPC incurred during CIRP of

the CD. The minutes further state that CoC members decided not to put on e-voting in order to save the cost and to send details of CIRP cost by e-mail for seeking internal approval and convey the same accordingly.

4.1.3. The Board however observed that the minutes of the subsequent CoC meetings do not mention or even indicate approval of the said CIRP cost by the CoC.

4.1.4. In view of the above, the Board held the *prima facie* view that Mr. Sunil Kumar Agarwal has *inter alia* violated section 208(2)(a) of the Code, regulation 34 of the CIRP Regulations, regulation 7(2)(a) and 7(2)(h) of IP Regulations read with clauses 1, 2, 14 and 16 of the Code of Conduct.

4.2. Submissions made by the IP

4.2.1. Mr. Sunil Kumar Agarwal submitted that he placed the data of expenses in 1st CoC meeting aggregating Rs. 1,66,550/- (One Lakh Sixty-Six Thousand Five Hundred Fifty). The same was duly ratified by CoC in physical meeting since HDFC was sole CoC member. HDFC Bank was the sole CoC member till the time of the 2nd CoC meeting dated 10.12.2019 where he placed the details of expenses till date and recurring in nature thereafter. CoC decided not to put e-voting to save cost of conducting e-voting and decided to send the same through mail after taking internal approvals.

4.2.2. Lead/sole CoC member provided specific approvals on email (for RP fee) and other costs including recurring in nature on letter head of HDFC bank duly signed by official who attended the CoC meeting. IP fees was approved by HDFC Bank vide email dated 14.11.2019. The appointment of forensic auditor was done by issuing/emailing letter on 21.11.2019 by RP in consultation with sole CoC member i.e. HDFC which was specifically ratified *vide* their physical letter thereafter. Further, claim was received from ICICI Bank on 20.12.2019 and therefore CoC was reconstituted.

4.2.3. Mr. Sunil Kumar Agarwal further submitted that for disbursement/ payment of the pending amounts detailed deliberations took place in all forthcoming CoC meetings however, other CoC members who were inducted in CoC later, never challenged these approvals of CIRP cost of previous CoC meetings in forthcoming CoC meetings however, delayed the payment may be for one or the other reasons which is on record. Mr. Sunil Kumar Agarwal submitted that all the CIRP expenses approximately Rs. 38,52,090 (after adjusting Rs. 8,25,084 recovered in CD-2 bank account) were incurred from his pocket ensuring smooth running of process even during Covid-19 (sought PUFEE transaction and got transaction reversed by court order) and CoC members miserably failed to fund CIRP cost till AA ordered recently. He had to run from post to pillar to get back CIRP cost from CoC members however, till date not able to recover full amount.

4.2.4. Mr. Sunil Kumar Agarwal submitted that it is HDFC bank (CoC member) who requested Mr. Agarwal to send proposal for ratification of bills for expenses as CIRP cost through

email for taking internal approvals and by doing so it has violated circulars/guidelines of IBBI that *individual member coming to CoC meetings should have full powers to decide on the spot and not defer decisions proposed to be taken in the CoC meeting as IBC is time bound process*. The matter of non-payment of CIRP expenses in IA no 885 of 2021 filed in NCLT was decided by AA and CoC already paid over Rs. 21 lakhs however only a part is still balance with the CoC for which matter is yet to be decided.

4.3. Summary Findings

- 4.3.1. The DC notes that approval of expenses placed for approval in first CoC meeting was approved by HDFC Bank who was sole CoC member during that time. Further HDFC Bank, sole CoC member during second CoC meeting, also gave approval for appointment of forensic auditor and other appointments as deemed necessary to Mr. Sunil Kumar Agarwal. However, the expenses like travelling, lodging & boarding & conveyance expenses of RP and team, professional accounting firm fee, forensic auditor fee, meeting hall charges and security expenses were not accorded specific approval by HDFC Bank, sole CoC member during or after second CoC meeting.
- 4.3.2. The DC notes that CoC has ratified fees and expenses of Mr. Sunil Kumar Agarwal after deliberation other than those which are not substantiated with proper information/document such as above. The DC observes that HDFC has passed resolution for appointment of forensic auditors and authorized Mr. Sunil Kumar Agarwal to appoint other professional. Further, the expenses were deliberated by CoC and not approved for lack of substantiation. The issue is pending before AA for final adjudication. The DC notes that Mr. Sunil Kumar Agarwal has referred expenses to CoC for ratification Hence DC found that contravention reported is more of a procedural nature and it is no body's case that it has been done with any *mala fide* intent.

5. Order

- 5.1. The Code is structured around timebound resolution of the corporate debtor. Any stakeholder does not have liberty to interpret the provisions which are contrary to the intent on the grounds that in his or her understanding explicit provisions do not warrant a particular action. Seeking extension of time on expiry of deadline is essential requirement and in normal course, RP is in position to nudge the CoC to take appropriate decision as per stipulations of the Code. Even if CoC is not cooperating, the RP has the responsibility to approach to AA for seeking directions for moving the case for liquidation or not as CoC in a particular case is not cooperating in making its mandate available.
- 5.2. In respect of CD-1, as per facts available, a meeting of CoC was convened by Mr. Sunil Kumar Agarwal, however perusal of draft Agenda indicates that, item related to seeking extension of time beyond 270 days was not included. This is indicative of the fact that RP was no way interested to push the Agenda for extension of time. It is immaterial whether this scheduled meeting held or not.

- 5.3. Timelines for the process as enshrined in the code needed to be followed. The value maximization maxim mandates that all efforts are required to be put in place for resolution; failing which liquidation can be pursued. This is rather bad example that both RP and CoC worked towards pushing the CD to liquidation on technical grounds.
- 5.4. In view of the above, the Disciplinary Committee, in exercise of the powers conferred under Section 220 of the Code read with regulation 11 of the IP Regulations and regulation 13 of Inspection Regulations issues the following directions:-
- (i) Mr. Sunil Kumar Agarwal shall pay penalty of Rs. 2,00,000/- (Rupees Two Lakhs only) and deposit the penalty amount directly to the Consolidated Fund of India (CFI) under the head of “penalty imposed by IBBI” on <https://bharatkosh.gov.in> within 45 days from the date of issue of this order and submit a copy of the transaction receipt to the Insolvency and Bankruptcy Board of India.
 - (ii) In addition, he will be working as probationer for four months with other experienced IP so nominated by her IPA under which he is registered. Till completion of this probation, the Authorisation for assignment (AFA) of Mr. Sunil Kumar Agarwal will remain in suspended animation and he will not take any fresh assignment or service under the Code in the capacity of Insolvency Professional.
 - (iii) Mr. Sunil Kumar Agarwal is directed to be more careful and cautions while dealing with assignments under the Code and Regulations made thereunder.
- 5.5. The CoC has been enabled under the Code, like the board of directors, to take the decisions in respect of the CD, during the CIRP. The most important duty casted upon the CoC is to assess the viability and feasibility of the resolution plan with objective to continue CD as a going concern, maximize the value of the assets of the CD and that the interests of all stakeholders including operational creditors are being taken care of. Hon'ble Supreme Court in matter of K. Sashidhar v. Indian Overseas Bank and Ors. held that the legislature, while enacting the Code, has consciously ensured that no ground is available to question the ‘commercial wisdom’ of the individual financial creditors or the collective decision of the CoC before the AA, in approving or rejecting a resolution plan and such commercial considerations are outside the scope of judicial review. The Apex Court further observed that AA cannot interfere on merits with the commercial decision taken by the CoC and limited judicial review available to AA. Considering such responsibility and accountability endowed with CoC, therefore onus of responsibility to put sincere efforts in place to prioritize the resolution as going concern.
- 5.6. In respect of CD-1, it is evident from the order of AA dated 23.04.2021 that efforts of CoC were rather detrimental to get the solution through CIRP thereby CD-1 was pushed towards liquidation. This order along with copy of the AA’s order shall be forwarded to the respective corporate offices of the CoC members for taking note of AA’s observations and place corrective mechanism accordingly.
- 5.7. The Order shall come into force with immediate effect, in view of para 5.4.

- 5.8. A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Sunil Kumar Agarwal is enrolled as a member.
- 5.9. 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.
- 5.10. Accordingly, the show cause notice is disposed of.

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(Sudhaker Shukla)
Whole Time Member, IBBI

Date: 21st November 2022
Place: New Delhi