

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/100/2022
13th May, 2022

Order

In the matter of Mr. Shashi Agarwal, Insolvency Professional (IP) under section 220 of the Insolvency and Bankruptcy Code, 2016 read with regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/MON/2021/232/406/2403 dated 10.09.2021 issued to Mr. Shashi Agarwal, who is a Professional Member of Indian Institute of Insolvency Professionals of ICAI (IIP-ICAI) and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P00470/2017-18/10813.

Background

- 1.1. The Hon'ble NCLT, Kolkata (AA) vide order dated 07.08.2019 admitted the application under section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) for initiating Corporate Insolvency Resolution Process (CIRP) of Incab Industries Limited (CD). The AA appointed Mr. Shashi Agarwal as an Insolvency Resolution Professional (IRP) and who was later confirmed as the Resolution professional (RP).
- 1.2. On application filed by Mr. Shashi Agarwal, AA vide order dated 07.02.2020 passed order of liquidation of CD and appointed Mr. Agarwal as liquidator. The liquidation order dated 07.02.2020 was challenged before National Company Law Appellate Tribunal (NCLAT) in two separate appeals by original applicant before AA by operational creditor and 277 workers represented by authorised representative. Hon'ble NCLAT vide order dated 04.06.2021 quashed the liquidation order and restored the original application under section 9 of the Code and directed to appoint another resolution professional in place of Mr. Shashi Agarwal. It was also directed to send the copy of order to IBBI and take any further action(s) which may be deemed fit, if any, against Mr. Shashi Agarwal.
- 1.3. The IBBI issued the SCN to Mr. Shashi Agarwal on 10.09.2021 after examination of available records in respect of his role as an IRP/RP in the CIRP of CD. The SCN alleged contraventions of sections 18(1)(b), 21(1), first proviso to section 21(2), 25(2)(d), 29 and section 208(2)(a) and (e) of the Code, Regulation 13, 27, 36 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2017 (CIRP Regulations), Regulation 7(2)(a) and (h) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and clauses 3, 5 and 13 of the Code of Conduct under First Schedule of regulation 7(2) thereof. Mr. Shashi Agarwal replied to the SCN vide letter dated 30.09.2021 received vide email dated 01.10.2021.
- 1.4. Hon'ble Supreme Court vide order dated 03.12.2021 permitted the appellant to withdraw the present appeals and dismissed Civil Appeal 2209-2210/2021 as withdrawn. It also observed as follows:

“It will be open to the appellant to raise all pleas and contentions before the IBBI in terms of the directions given in Clause ‘g’ of paragraph 88 of the impugned order dated 4th June, 2021 passed by the National Company Law Appellate Tribunal, Principal Bench, New Delhi. Further, IBBI will not be bound by the observations made in the impugned order and would independently apply its mind.”

- 1.5. In compliance with observation of Hon’ble Supreme Court, the IBBI referred to the SCN, response of Mr. Shashi Agarwal 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. Shashi Agarwal availed an opportunity of virtual personal hearing before the DC on 22.02.2022 and 25.02.2022. Mr. Agarwal was represented by Mr. Joy Saha, Senior Advocate along with Mr. Kuldeep Malik, Advocate, Ishaan Saha, Advocate and Nimisha Agarwal, Advocate and submitted written submissions via email dated 24.02.2022.
- 1.6. Thereafter, due to the completion of the term of Dr. Mukulita Vijayawargiya who constituted earlier Disciplinary Committee, new Disciplinary Committee was constituted to dispose of the aforesaid show cause notice which granted another opportunity of personal hearing to Mr. Agarwal on 22.04.2022 through virtual mode where he was represented by Mr. Joy Saha, Senior Advocate. The DC heard the oral submissions of Mr. Agarwal on 22.04.2022. The DC has considered the SCN, the reply to SCN, oral submissions of Mr. Shashi Agarwal, written notes of arguments, other material available on record and proceeds to dispose of the SCN.

2. Alleged Contraventions, Submissions, Analysis and Findings

- 2.1. A summary of contraventions alleged in the SCN, Mr. Agarwal’s written and oral submissions thereon and their analysis and findings of the DC are as under:

3. Contravention-I

Verification of Claims

- 3.1. Regulation 13 of IBBI CIRP Regulations, *inter-alia*, requires an IP to verify every claim as on insolvency commencement date within seven days from the last date of receipt of the claims. It is observed from the minutes of first, third and fourth Committee of Creditors (CoC) meetings that the amounts claimed by the financial creditors (FCs), operational creditors (OCs), statutory authorities, employees/ workmen were kept under verification and the amount of claims was yet to be determined. It is also observed from the report dated 28.08.2019 certifying constitution of CoC that, amongst others, the claims of FCs were not admitted and were subject to further clarification and verification. In the last meeting conducted by Mr. Agarwal, i.e. fifth CoC meeting, *inter alia*, resolution for liquidation of CD was approved by CoC. Thus, by not verifying the claims throughout CIRP, i.e., from initiation of CIRP till resolution for liquidation was passed, Mr. Agarwal allegedly contravened section 208(2)(a), 208(2)(e) of Code,

regulation 13 of CIRP Regulations, regulation 7(2)(a), 7(2)(h) of IP Regulations and clause 13 of Code of Conduct.

4. Contravention-II

Constitution of CoC without verification of claims

4.1. Section 18(1)(b) of the Code requires an IP to receive and collate all the claims submitted by the creditors. Section 21(1) of Code requires that an IP shall collate all the claims and determine financial position of CD and constitute CoC. To determine the financial position of a CD and constitute CoC as required under section 21(1) of Code, verification of claims is to be conducted by an insolvency professional. It is observed from the report dated 28.08.2019 certifying the constitution of CoC that

(i) the claims of the creditors including FCs were not admitted and were subject to clarification and verification.

(ii) CoC was constituted with three FCs, Pegasus Assets Reconstruction Private Limited (Pegasus), Kamala Mills Limited (Kamala Mills) and Fasqua Investment Private Limited (Fasqua), based on amount claimed by these creditors.

4.2. Thus, by constituting CoC without verification of the claims, Mr. Agarwal allegedly contravened sections 18(1)(b), 21(1), 208(2)(a) of Code.

5. Contravention-III

Assigning vote share to related party in CoC

5.1. Section 21(2) of Code states that a related party of the CD shall not have any right of representation, participation or voting in the meeting of CoC. Section 5(24)(d) of the Code provides that a private company in which a director, partner or manager of the CD is a director and holds along with his relatives, more than two per cent of its share capital, is a related party in relation to CD. Section 5(24)(f) of the Code provides that anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor, is a related party in relation to CD. It is observed from the company master data of CD, that, Mr. Gowani is listed as a director of CD from 11.05.2009 till 20.11.2019. Moreover, it is also observed from the AA's order dated 20.11.2019 on the application filed under section 19(2) by Mr. Agarwal before the AA that he impleaded Mr. Gowani as a respondent in the said application as a suspended director of CD. It is observed from the list of shareholders of Kamala Mills provided by the Mr. Agarwal vide email dated 01.09.2021 that Mr. Gowani is a shareholder as on 20.09.2018 with 99.74% shareholding and on 31.03.2020 with 99.7388% shareholding. Therefore, in terms of section 5(24)(f) of Code, Kamala Mills was a related party to the CD.

5.2. The company master data of company, namely, Fasqua shows that Mr. Gowani is a director therein since 27.11.1992. Additionally, it is observed from the list of shareholders of Fasqua provided by the Mr. Agarwal vide email dated .1.09.2021 that

Mr. Gowani is a shareholder therein as on 19.06.2018, 25.09.2019 and 31.03.2020 with 22.73% shareholding. Therefore, in terms of section 5(24)(d) of Code, Fasqua was a related party to the CD.

- 5.3. The minutes of first CoC meeting dated 06.09.2019 note that Kamala Mills and Fasqua have been assigned vote share of 77.41% and 13.28% respectively. Further, the report dated 21.09.2021 certifying constitution of revised Committee of Creditors notes the revised vote shares of Kamala Mills and Fasqua as 75.23% and 12.90% respectively. The minutes of second CoC meeting dated 26.09.2019 and third CoC meeting dated 18.10.2019 record the presence of Kamala Mills and Fasqua as FCs.
- 5.4. It is noted that the Mr. Agarwal had included Mr. Gowani as respondent in section 19 application in the capacity as suspended director of CD. Thus, till the disposal of said application on 20.11.2019, Mr. Agarwal was of the view that said Mr. Gowani is a suspended director of CD. Therefore, he ought not to have assigned vote share from first CoC dated 06.09.2019 to third CoC meeting dated 18.10.2019 to the related parties namely Kamala Mills where Mr. Gowani was a shareholder and Fasqua where Mr. Gowani was a shareholder and director. Thus, Mr. Agarwal by assigning vote share to the related parties, allegedly contravened first proviso to section 21(2) and section 208(2)(a) of the Code.

6. Submissions

- 6.1. Mr. Agarwal submitted that Hon'ble NCLAT *suo moto* incorrectly arrived at the conclusion that the claims were not accepted, collated, and verified by him. The said issue was neither raised by the respondents before the AA nor before the Hon'ble NCLAT. Hon'ble NCLAT arrived at such conclusion by relying on email dated 11.12.2019 addressed by one of the minority FCs (Pegasus) of the CD to him which requested to defer the e-voting till the issue addressed with regards to verification of voting percentage is addressed. The reliance upon the said email is incorrect since the said email, seeking to defer e-voting in fifth meeting of COC, is dated 11.12.2019 however the fifth CoC meeting had already taken place on 05.12.2019, i.e., 6 days prior to the said email. The notice for convening the said fifth CoC meeting was sent by him to the said Pegasus on 29.11.2019. Further, Hon'ble NCLAT ignored the reply given by him to Pegasus email dated 11.12.2019. Further in fifth COC meeting, the said Pegasus was represented both online and offline and they never objected to the inclusion of Kamala and Fasqua as COC members in the fifth COC meeting. Further apart from Pegasus, other COC members (excluding Kamala Mills & Fasqua) present in the fifth COC meeting were ICICI Bank Limited, Oriental Insurance Company Limited (OICL), National Insurance Company Limited.
- 6.2. Mr. Agarwal submitted that reliance upon the said e-mail is further misplaced since the minutes of the fifth meeting of CoC dated 05.12.2019 would further reveal that the following four FC of the CD out of a total of 13 CoC members were physically present in addition to Fasqua and Kamala Mills: (a) ICICI Bank Ltd. (b) Pegasus (c) Oriental Insurance Company (d) National Insurance Company. Any decision taken in the said CoC was open to being challenged by the said members of the CoC before the AA.

Pegasus preferred an application for stay of operation of resolution passed in the fifth CoC Meeting dated 05.12.2019 however the said applications were withdrawn and/or not pressed by Pegasus. Hence, in terms of the doctrine of constructive res judicata and estoppel, the said issues could not have been raised. It is also stated that no members of CoC were aggrieved of any action and decision taken by Mr. Agarwal during CIRP. Also, claim and/or relief once agitated by one of the FCs and a member of the CoC could not have been *sou moto* decided by the Hon'ble NCLAT since the same was never agitated by the workmen before the Hon'ble NCLAT and also because the workmen, who are appellants before the Hon'ble NCLAT, were at best OCs of the CD and hence had no locus to challenge the decision taken by the majority of CoC more so when the said respondents were not even a part of the CoC. Further, the reason for ignoring the reply given by him to Pegasus to its electronic mail dated 11.12.2020 annexed to the liquidation application filed under section 33 being part of appeal was ignored by Hon'ble NCLAT and also stated in the application marked as annexure "G" in the said application under section 33(2) of IBC.

6.3. Mr. Agarwal submitted that all the claims were duly received, accepted, collated, and verified to the extent possible from the available records of the CD. It is stated that no question relating to the settlement of the claims was argued from this angle as otherwise it could have been explained. However, it is stated that Punjab National Bank (PNB) filed a claim as a financial creditor amounting to INR 83,753,958,75 whereas claim of INR 7,93,19,958.75 was allowed by him, i.e., claim of INR 4,434,000 was not allowed and the OICL filed a claim as financial creditor amounting to INR 302,085,312.32 whereas the claim of INR 300,725,312.32 was allowed by me, i.e, claim of INR 13,60,000/- was not allowed. Further in case of a claim filed by Life Insurance Corporation of India (LIC) email was sent to them on 11.09.2019 for further clarification. Accordingly, the finding of Hon'ble NCLAT was incorrect. In terms of the said regulations, owing to the fact that the documents of the CD were not available, made the best estimate of the claims received and revised the same which is further reflected from the fact that in the fifth CoC meeting under point 5, claim were updated by him.

6.4. Mr. Agarwal submitted that limited information and/or statutory records of the CD were available with him. The said fact was bought to the knowledge of the CoC right from the first CoC meeting till the last, i.e., the fifth CoC meeting. Despite the best efforts made by him including filing an application under section 19(2) of the Code, the necessary information and/or records of the CD could not be procured by him. Hence, in terms of regulation 14 of the said Regulations, best estimate of the claim was made based on the documents received. Further in terms of sub regulation (2) of regulation 14, amounts of claims received were revised which is further evident from the following facts:

- (a) In the first meeting of the CoC held on 06.09.2019, he informed the CoC that three claims were received from various FCs, one from the OC and employees and workmen,
- (b) In the third meeting of CoC held on 18.10.2019, he informed the CoC that he had received claims in Form 'C' from four FCs (i.e. an additional FC). Further two claims from OCs were received and one claim from statutory authority was received and

updated. A number of claims were also received from employees and workmen.

(c) In the fourth meeting of CoC held on 11.11.2019, he informed the COC that a total of 12 (as juxtaposed to 4 received in the third COC) claims were received from the FCs of the CD, 3 from OCs, one from statutory authority and from employees and workmen.

(d) In the fifth meeting of CoC, the total claims by FCs received by him were revised to 13. Furthermore, the claim of PNB was again verified and was reduced.

(e) Further the difference in the amount claimed by PNB and OICL and percentage of voting, it will be clear finding of Hon'ble NCLAT is incorrect.

6.5. Mr. Agarwal submitted that the above-stated facts reflect that the claims were regularly being updated by him in terms of the Code and the regulations. However, the Hon'ble NCLAT in the impugned judgment and order came to the conclusion that he never verified and/or collated the claims and on the other hand stated that regulation 14 is not applicable in case of the FCs in the following words:

“74. Regulation 14 deals with the situation where the amount claimed by a creditor is not precise, then, in that case, Regulation authorises the IRP/RP to make the best estimate of the amount of the claim. But this Regulation cannot apply to the Financial Creditor because Regulation 12 (3) specifically provides that where the creditor fails to submit a claim with proof within the stipulated time, such financial creditor shall be included in the creditors committee from the date of admission of such claim...”

6.6. The rationale applied by the Hon'ble NCLAT is erroneous owing to the following two broad reasons.

Firstly, because if the logic and interpretation relied upon by the Hon'ble NCLAT is applied to the facts and circumstances of a case like the instant one where no information and/or statutory records are available with the RP so as to collate a particular claim of a FC received by the RP, there would be no enabling provision in the Code or the regulation that would allow the RP to verify the said claim in case the document of the CD is made after acceptance of the claim by the RP.

Secondly, because regulation 12(3) which provides for the inclusion of a FC as a member of CoC only after acceptance of its claim has been relied upon by the Hon'ble NCLAT to come to the conclusion that regulation 14 is not applicable to the FCs however, the said regulation 12(3) has been included only because even otherwise, OCs are not to be included as a part of CoC.

Thirdly the difference in the amount claimed / considered and percentage of voting decided on claim considered by me, in cases of PNB and OICL as stated above, this point was never raised and argued as otherwise if the opportunity was given then I would have clarified.

Fourth, it has been observed by Hon'ble NCLAT and in the SCN that collation as per Law Dictionary 10th edition defined ‘collation’ as the comparison of a copy with its origin to ascertain its correctness. It is again reiterated that no records and books of accounts was available. Accounts were audited upto 31stDecember,1999, Hence claim filed by the creditors cannot be compared as no records& documents (including audited accounts) was available and the said is also recorded in the COC minutes. But it can

be observed that the claim of PNB and OICL were not allowed to the full amount submitted. Hence, the observation made by Hon'ble NCLAT is not correct and it has been recorded by Hon'ble NCLAT *sou moto* without providing him any opportunity of clarifying the same.

- 6.7. Mr. Agarwal submitted that the claim of workers could not be verified at all since no records were available in this regard. Further workers themselves could not produce the any documents in support of their claim before the provident fund authorities. The Provident Fund Department has filed a submission in a proceeding under section 7A of the Act before the provident fund authorities which inter alia provide as follows:
“F. Moreover, it is also brought to the notice of the concerned parties that the documents as mentioned below were required to be furnished as stated during the proceedings on 22/07/2014 but sadly they could not be furnished yet by the concerned parties in this ongoing proceeding in spite of having afforded numerous opportunities.”
Trial balance of Jamshedpur Unit of CD together with its cash books and related records i.e., attendance, wages, returns etc. For the entire period under consideration. Despite giving reasonable opportunities to the concerned parties none of the documents were produced/presented in the ongoing proceedings. As such the Department representatives propose its submission that the dues may be finalized on the basis of the submitted documents, relevant facts rather than prolonging the proceedings in the light of the interest of the poor workers for providing social security safeguard as envisaged therein the different provisions of EPF & MP Act., 1952.”
- 6.8. In any event it is stated that the workers are not financial creditors and as such their claim is of no relevance in deciding the constitution of the Committee of Creditors.
- 6.9. Mr. Agarwal submitted that the Hon'ble NCLAT held that he included/allowed Kamala Mills and Fasqua to be a part of the CoC despite the fact that one Mr. Gowani who was a shareholder and director of the said Kamala Mills and Fasqua was also a Director of the CD from 2009 to 2019 and as such, in terms of section 5(24)(a) and proviso to Section 21 of the IBC, Kamala Mills and Fasqua could not have been included to be a part of the CoC. However, in doing so, the Hon'ble NCLAT lost sight of the fact that in light of the limited documents available initially and based on High Court, Delhi order dated 29.04.2013 he allowed said Kamala Mills and Fasqua were to be a part of the CoC & and were called for the First, Second, and Third CoC meetings. It is stated that Pegasus Assets Reconstruction Private Limited (Pegasus) was a member of CoC from the date of initiation of CIRP. Pegasus has also attended all CoC meetings and Pegasus was fully aware of the said fact. Pegasus also submitted Scheme for the revival of CD before BIFR.
- 6.10. Mr. Agarwal submitted that in the third CoC meeting held on 18.10.2019, Pegasus raised the issue with regards to the said Kamala Mills and Fasqua being related parties to the CD which was discussed, and the letter received from Pegasus intimating about Kamala Mills Ltd. and Fasqua being related parties were also circulated with all the members of the CoC. It is stated that the said related party observation was raised by Pegasus for the first time in spite of the fact that Pegasus was a member of the CoC

from the first CoC meeting. Representative of Kamala Mills and Fasqua submitted that they will give a reply why the objection raised by Pegasus is not maintainable. As no reply was received from Kamala and Fasqua, emails dated 05.11.2019 was sent to both the said CoC member i.e. Kamala Mills and Fasqua, the said email is being reproduced here under:

“Please take notice that in the claim filed it has declared by you that you are not a related party. Further, it is known that statutory records, minutes etc. of the corporate debtor are not available. On inspection of the website of Ministry of Corporate Affairs, wherein it has been observed that Mr Ramesh Gowani is a Director in Incab Industries Limited since 11/05/2009 and is also a director in Fasqua Investment Private Limited since 27/11/1992.

Hence, pursuant to Section 5(24) and other applicable provisions of IBC, in future, you will be treated as Related party. This is for your information and records.”

6.11. Accordingly, the said Kamala Mills and Fasqua were not invited for the fourth CoC meeting which is further evident from the list of participants of the said meeting, and no representation was received from Kamala and Fasqua. In fourth CoC meeting held on 11.11.2019, Kamala and Fasqua were removed from the CoC.

6.12. Mr. Agarwal submitted that Mr. Gowani was not Director based on order dated 29.04.2013 by Hon'ble High Court of Delhi. An application was filed under Section 19(2) of Code wherein Mr. Gowani was also made respondent as no records and audited accounts were available. As per the MCA portal, Mr. Gowani was appointed as a Director, however his appointment was ordered to be null and void vide said order of High Court of Delhi. But he was director from 11.05.2009 to 29.04.2013, the date on which Hon'ble High Court, Delhi order dated 29.04.2013 ordered inter alia that he was not a director. Accordingly, as per provisions of Section 19 of IBC Mr. Gowani was also made a respondent as he acted as a director from 11.05.2009 to 29.09.2013. As no accounts & records, audited account since 01.04.2000, statutory register was available hence Mr. Gowani was also made respondent so that he can provide information.

6.13. Mr. Agarwal further submitted that in application under section 19(2), facts as per Ministry of Corporate Affairs was stated and Mr. Gowani was made respondent, as otherwise his action of treating Fasqua and Kamla Mill as related party after third COC meeting based on Pegasus objection and no reply from Kamal Mills/ Fasqua would have been treated as illegal/ null & void. However, the Adjudicating Authority vide an order dated 20.11.2019 passed in C.A.(IB) No. 1453 of 2019 held the follows:

“...three directors namely (a) Mr. Mahendra Shah (b) Mr. Y. R. Kori(C) Kersi Amaria have been appointed as additional directors of the Corporate Debtor, In the said tele-fax, the representative of Kamala Mills Ltd. has also been appointed as a nominee director. The said tele-fax has been set aside, hence, this respondent cannot be said to remain a Director or to have been appointed as a Director and/or continued as such. Accordingly, we hold that Mr, Ramesh Ghamandiram Gowani is not a director of the Corporate Company and he should not be impleaded as respondent in the said Petition

filed under section 19(3).”

6.14. Mr. Agarwal submitted that he was required to abide two judicial order as otherwise Contempt of Court may have been initiated against him i.e. (i) order passed by the AA which in its order dated 20.11.2019 held that Mr. Gowani is not a director of the CD and (ii) Hon'ble High Court, Delhi order dated 29/04/2013 wherein it was ordered that Mr. Gowani is not a director of the CD. Further he had allowed the said Kamala Mills and Fasqua to be included as a part of the CoC in the fifth CoC meeting held on 05.12.2019. In the 5th CoC meeting no FCs (5 COC member's were present excluding Kamala & Fasqua) including Pegasus objected to the presence of Kamala Mills and Fasqua.

6.15. Mr. Agarwal further pointed out that the said Mr. Gowani was appointed as a director of the CD in terms of the tele-fax order dated 04.05.2009 passed by BIFR in case no. 390 of 1999 relevant portion of which reads as under:

“A Representative of Kamala Mills Ltd (Who has large stake in the company as a secured creditor be nominated as a director in the board of the directors of the company.”

6.16. However, the Hon'ble High Court of Delhi vide an order dated 29.04,2013 passed in WP(C) No. 3358/2012 petition filed by Incab Industries Employees Association &Ors. was pleased to set aside the said tele-fax order passed by BIFR while holding that the position as existing prior to the said order passed by BIFR is restored.

6.17. Mr. Agarwal filed application being I.A. No. 335/KB/2021 after the impugned order of Hon'ble NCLAT wherein in synopsis and list of dates it has stated interalia as follows:

Extract of Synopsis:

That it is also an admitted fact that Mr. Gowani, owner, promoter and director of three entities M/s Kamala Mills Ltd., M/s R R Keibel P Ltd. and M/S Fasqua Investment P Ltd. was also appointed in an unprecedented manner as an additional director of the CD by the BIFR vide its fax dated 04.05.2009 to purportedly safe guard for its amount invested in purchasing 85% of the secured loans of the CD by its Company M/s R R Keibel P Ltd which was set aside by the Hon'ble Delhi high Court vide its Order dated 29.04.2013.

Extract of List of Dates:

04/05/2009 -- Illegal Appointment of Mr. Gowani as an additional director of the CD by the BIFR vide its fax dated 04.05.2009 to purportedly safe guard for its amount invested in purchasing 85% of the secured loans of the CD by its Company M/s R R Keibel P Ltd

29/04/2013 -- Hon'ble Delhi High Court Order setting aside the four directors of the CD appointed on 04.05.2009 by the BIFR namely Mr.Gowani, Yadappa Ramappa Kori, Mahendra Bakthawar Shah and Kesri Nariman Amaria.

- 6.18. Mr. Agarwal submitted that the order dated 20.11.2019 passed in C.A.(IB) No. 1453 of 2019 passed by the AA was never challenged by anyone including the workmen despite the fact that the workmen were aware of the said order which is evident from the letter dated 29.11.2019 addressed by the advocate for the said workmen on behalf of the workmen. However, the Hon'ble NCLAT in the instant case, substantially sat in appeal over an earlier order passed by the AA which was never challenged and held that the AA travelled beyond the scope of section 19(2) of the Code. Even if it is assumed that AA travelled beyond the scope of section 19 (2) of the IBC, then also the insolvency professionals are duty-bound to accept and act in accordance with the order of AA and order of Hon'ble High Court Delhi dated 29.04.2013.
- 6.19. Mr. Agarwal submitted that Hon'ble NCLAT further relied upon various documents which have been reproduced in the impugned judgment to show that the said Mr. Gowani was exercising his control over the CD. However, the said documents are before the said order dated 29.04.2013 passed by the Hon'ble High Court of Delhi in W.P.(C) No. 3358/2012. Hence there were of no relevance after the order dated 29.04.2013 by Hon'ble High Court, Delhi. Mr. Agarwal submitted that he was required by law to follow the directions of the Hon'ble High Court, Delhi, and Hon'ble Adjudicating Authority and thus allowed Kamala Mills and Fasqua to be a part of CoC and as such, no malice and/or reflecting undue favor can be attributed specifically in view of the fact that very limited documents of the CD were available.
- 6.20. Mr. Agarwal submitted that Hon'ble NCLAT in para 39 of the impugned Judgment and order dated 04.06.2021 places its reliance upon the following documents to conclude that the Appointment of Mr. Gowani was based upon the proposed Resolution of the AGM held in 1999:
- (a) 81st Annual Report of CD, but ignored the fact that the said AGM was never held as it was adjourned. Further the Hon'ble NCLAT ignored the fact that the proposed resolution is effective only when said resolution is voted and approved by the shareholders. Hence when said AGM was adjourned and never held, the proposed resolution without the approval of the shareholders has no legality and is not effective.
 - (b) The disclosure about the proposed director Mr. Gowani.
 - (c) Letters sent by the board of CD seeking police assistance during the AGM proposed after 18 odd years.
- 6.21. Based upon the discussion of the above-stated documents, the Hon'ble NCLAT concluded that the said Mr. Gowani was appointed based upon the proposed resolution of the AGM of the CD to be held in the year 2018, however the said AGM was adjourned. However, it is most respectfully submitted that such an inference is unreasonable since the said AGM for the period ended 31.12.1999 was proposed to be held in the year 2018 and the said AGM was postponed indefinitely. The said documents do not anywhere reflect that the said Mr. Gowani was appointed as an additional director of the CD before the order dated 04.05.2009 by BIFR. The said letters were addressed as abundant caution to the police authorities to avoid any untoward situation during the AGM which was supposed to be held after 18 years. But

the said AGM was never held, hence the proposed resolution has no legality as the same was never resolved and approved by the shareholders.

6.22. Mr. Agarwal submitted that Hon'ble NCLAT relied on another fact regarding the appointment of Mr. Gowani as a director of the CD that even though the Ld. BIFR in its tele-fax order dated 04.05.2009 has passed a direction for the appointment of a representative of Kamala Mills and Fasqua as an additional director of the CD however, the name of Mr. Gowani had not been specifically mentioned by the BIFR. The said justification of the Ld. NCLAT is erroneous on the following counts:

Firstly, because of the appointment of Mr. Gowani in pursuance of the order dated 04.05.2009 of the Ld. BIFR was never in dispute. In fact, the said fact has been accepted and pleaded by the workmen in the appeal filed under section 61 of the Code before the Hon'ble NCLAT.

Secondly, because by no sense of imagination the Ld. BIFR in an order passed for the appointment of an authorized representative of Kamala Mills and Fasqua could have guessed the name of a person who would be authorised by Kamala Mills and Fasqua.

Thirdly, appointment of the said Mr. Gowani was appointed as a director of the CD in terms of the tele-fax order dated 04.05.2009 passed by BIFR in case no 390 of 1999 relevant portion of which reads as under:

"A Representative of Kamala Mills Ltd (Who has large stake in the company as a secured creditor be nominated as a director in the board of the directors of the company"

7. Analysis & Findings

7.1. As per section 18 of the Code, it is duty of IRP to receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15. Further as per section 21 of the Code, the IRP shall after collation of all claims received against the CD and determination of the financial position of the corporate debtor, constitute a committee of creditors. Regulation 13 of CIRP Regulation provides that IRP or RP, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims.

7.2. The list of financial creditors who submitted claims in Form C and their date of admission in CoC by Mr. Agarwal is tabulated as below:

SR	Name of FC	Date of Submission of Claim	CoC in which claim was admitted.
1	Pegasus Assets Reconstruction Private Limited	20.08.2019	All claims were under verification till 4 th CoC dated 11.11.2019 and admitted on 04.12.2019, i.e., before 5 th CoC meeting.
2	Kamala Mills Limited	20.08.2019	
3	Fasqua Investment Private Limited	20.08.2019	

4	Life Insurance Corporation of India	06.09.2019	
5	National Insurance Company Limited	16.10.2019	
6	Punjab National Bank Limited	25.10.2019	
7	United India Insurance Company Limited	31.10.2019	
8	Sunita Sethia and Tarun Sethia	31.10.2019	
9	Atul Sethia	31.10.2019	
10	Tarun Sethia & Sunita Sethia	31.10.2019	
11	Dungri Devi Sethia and Sunita Sethia	31.10.2019	
12	ICICI Bank Limited	02.11.2019	
13	Oriental Insurance Company Limited	04.11.2019	

- 7.3. The DC notes that above table clarifies that Mr. Agarwal kept the claims pending verification till 4th CoC meeting and large number of claims received from workers/employees on 21.08.2019 were still kept pending verification on 5th CoC meeting.
- 7.4. The DC notes that CoC was constituted within three financial creditors, Pegasus Assets Reconstruction Private Limited, Kamala Mills and Fasqua, based on amount claimed by these creditors i.e. claims submitted by the said financial creditors but not verified and admitted. Mr. Agarwal assigned them voting share without verifying the claims stating that voting percentage may change after verification is complete.
- 7.5. The DC finds that Mr. Agarwal has not verified the claims with seven days of the receipt of same as provided in regulation 13(1) of CIRP Regulations. He admitted creditors into CoC without admitting the claims which is not in consonance with Regulation 12 of CIRP Regulations. Mr. Agarwal formed the CoC without the verification and collation of claims. Hence, Mr. Agarwal is in violation of section 18(1)(b), 21(1), 208(2) (a) and (e) of the Code, regulation 13 of CIRP Regulations, regulation 7(2)(a), 7(2)(h) of IP Regulations and clause 13 of Code of Conduct.
- 7.6. Section 5(24)(d) and (f) of the Code provides related party, in relation to a corporate debtor, means a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two percent of its share capital and anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the CD. Further proviso to section 21(2) of the Code provides that related party shall not have any right of representation, participation or voting in a meeting of the CoC.

7.7. The DC notes that from the list of shareholders of Kamala Mills provided by Mr. Agarwal shows that Mr. Gowani is a shareholder as on 20.09.2018 with 99.74% shareholding and 31.03.2020 with 99.7388% shareholding. Further, the company master data of Fasqua shows that Mr. Gowani is a director therein since 27.11.1992 and from the list of shareholders of Fasqua provided by Mr. Agarwal that Mr. Gowani is a shareholder therein as on 19.06.2018, 25.09.2019 and 31.03.2020 with 22.73% shareholding. Therefore, Mr. Gowani is a shareholder of Kamala Mills. He is a director and shareholder of Fasqua. Under minutes of first CoC meeting dated 06.09.2019, Kamala Mills and Fasqua had been assigned vote share of 77.41% and 13.28% respectively.

7.8. Now the question arises whether the Mr. Gowani is also a director in the CD. The CD was admitted in to CIRP on 07.08.2019. The DC notes that as per master data of CD, Mr. Gowani was director of the CD from 11.05.2009 to 20.11.2019, as shown below:

Company Master Data

CIN	U27108WB1920PLC003641
Company Name	INCAB INDUSTRIES LTD.
ROC Code	RoC-Kolkata
Registration Number	003641
Company Category	Company limited by Shares
Company SubCategory	Non-govt company
Class of Company	Public
Authorised Capital(Rs)	300000000
Paid up Capital(Rs)	150000000
Number of Members(Applicable in case of company without Share Capital)	0
Date of Incorporation	12/02/1920
Registered Address	9 HARE ST KOLKATA WB 700001 IN
Address other than R/o where all or any books of account and papers are maintained	-
Email Id	incab_industries@rediffmail.com
Whether Listed or not	Unlisted
ACTIVE compliance	
Companies Present filing status (defaulted in filing its statutory returns for the last two years i.e. 16-17 and 17-18)	INACTIVE
Suspended at stock exchange	-
Date of last AGM	-
Date of Balance Sheet	-
Company Status(for e filing)	Active
Status under CIRP(if applicable)	Under Corporate Insolvency Resolution Process

Charges

Charge Id	Assets under charge	Charge Amount	Date of Creation	Date of Modification	Status
	Book debts; Movable property (not being pledge)	100000000	03/12/1998	-	OPEN
	Movable property (not being pledge)	3000000	15/05/1980	-	OPEN
	Book debts; Movable property (not being pledge)	2000000	21/01/1980	-	OPEN
	Movable property (not being pledge)	6000000	28/04/1982	-	OPEN
	Book debts; Movable property (not being pledge)	153500000	18/05/1998	-	OPEN
	Book debts; Movable property (not being pledge)	100000000	10/08/1998	-	OPEN
	Movable property (not being pledge)	19771575	16/06/1999	-	OPEN
	Book debts; Movable property (not being pledge)	680000000	01/09/1997	-	OPEN
	Book debts; Movable property (not being pledge)	200000000	23/09/1998	-	OPEN
	Movable property (not being pledge)	10000000	29/07/1998	-	OPEN
	Book debts; Movable property (not being pledge)	2500000	01/08/1985	-	OPEN
	Movable property (not being pledge)	10250000	02/11/1979	-	OPEN
	Book debts; Movable property (not being pledge)	5344709	30/12/1998	-	OPEN
	Immovable property or any interest therein; Movable property (not being pledge)	10000000	28/05/1993	20/04/1999	OPEN
	Movable property (not being pledge)	10674430	30/12/1998	-	OPEN
	Book debts; Movable property (not being pledge)	14268952	30/12/1998	-	OPEN
	Immovable property or any interest therein	63250000	16/03/1991	-	OPEN
	Movable property (not being pledge)	10000000	09/09/1988	-	OPEN
	Movable property (not being pledge)	17600000	09/09/1988	-	OPEN

Directors/Signatory Details

DIN/PAN	Name	Begin date	End date	Surrendered DIN
00005676	RAMESH GHAMANDIRAM GOWANI	11/05/2009	20/11/2019	
00191221	YADAPPA RAMAPPA KORI	02/09/2008	01/11/2018	
02048915	MAHENDRA BAKTHAWAR SHAH	02/09/2008	-	
02363331	TED LIUK KON	23/03/1997	-	

- 7.9. The DC further notes that Mr. Agarwal impleaded Mr. Gowani as respondent in application under section 19(2) of the Code in the capacity as director of the suspended board of CD, as shown below:

CA(IB) No.1453/KB/2019
CP(IB) No.1684/KB/2018

IN THE MATTER OF
An application Under Section 19 of the Insolvency and Bankruptcy Code, 2016 .
And
IN THE MATTER OF
Jayanta Banerjee, having its address for correspondence Ambika Mukherjee Road, Natagarh, Ghola, North 24 Parganas, Pin- 700 113.
.....Operational Creditor

Versus

IN THE MATTER OF
Incab Industries Limited, having its registered office at 9, Hare Street, Kolkata-700001 , CIN : U27108WB1920PLC003641
.....Corporate Debtor

And

IN THE MATTER OF
Shashi Agarwal, the Resolution Professional of Incab Industries Limited.
.... Applicant

Versus

IN THE MATTER OF
1. Ramesh Ghamandiram Gowani, suspended Director of Incab Industries Limited, residing at Flat No. 601, Chandrasagar Apa, Worli, Hill Road, Worli Tekdi, Opposite Shastri Garden Mumbai-400018.

- 7.10. The DC also notes submission of Mr. Agarwal that on objection raised by Pegasus with regards to the Kamala Mills and Fasqua being related parties to the CD, Mr. Agarwal addressed emails dated 05.11.2019 to Kamala Mills and Fasqua. The extract of emails provided by Mr. Agarwal is reproduced as under:

“Please note that in the claim filed, it has declared by you that you are not a related party. Further, it is known that statutory records, minutes etc. of the corporate debtor are not available. On inspection of the website of Ministry of Corporate Affairs, wherein it has been observed that Mr. Ramesh Gowani is a Director of Incab Industries Limited since 11/05/2009 and is also a director in Fasqua Investment Private Limited”

“Please note that in the claim filed, it has declared by you that you are not a related party. Further, it is known that statutory records, minutes etc. of the corporate debtor are not available. On inspection of the website of Ministry of Corporate Affairs, wherein it has been observed that Mr.

Ramesh Gowani is a Director of Incab Industries Limited since 11/05/2009 and Mr. Ramesh Gowani holds approx. 98% of the issued and subscribed capital of Kamala Mills Limited.”

7.11. The DC finds that in terms of section 5(24)(d) and (f) of Code, Kamala Mills and Fasqua are related parties to the CD and were not entitled to represent, participate and vote in the CoC of the CD. Hence the DC finds that Mr. Agarwal contravened first proviso to section 21(2) and section 208(2)(a) of the Code.

8. Contravention -IV

Non-preparation of Information Memorandum

8.1. Section 29 of the Code read with regulation 36 of the CIRP Regulations requires an IP to prepare Information Memorandum (IM) within 54 days of insolvency commencement date (ICD). Section 208(2)(e) of Code requires an IP to perform his functions in such manner and subject to such conditions as may be specified. Regulation 7(2)(a) of IP Regulations mandates an IP to abide by, *inter-alia*, the Code, regulations. Regulation 7(2)(h) of IP Regulations requires an IP to abide by the Code of Conduct specified in the First Schedule. Clause 13 of Code of Conduct of IP Regulations requires an IP to adhere to the time limits prescribed in the Code and the rules, regulations and guidelines thereunder for insolvency resolution, liquidation or bankruptcy process, as the case may be, and must carefully plan his actions, and promptly communicate with all stakeholders involved for the timely discharge of his duties.

8.2. The minutes of fourth CoC meeting dated 11.11.2019 notes that IM will be ready by 22.11.2019 and submitted to CoC after receiving confidentiality undertaking. However, minutes of fifth CoC meeting dated 05.12.2019, *inter-alia*, record that due to non-availability of information, IM cannot be prepared. It is also noted that Mr. Agarwal in his communication dated 05.07.2021 to Board had, *inter-alia*, stated that he was not required to prepare IM. ICD of the CD is 07.08.2019 and Mr. Agarwal should have prepared the IM by fifty-four days from ICD i.e., 30.09.2019. Thus, by not preparing IM, Mr. Agarwal allegedly contravened section 29, 208(2)(a), 208(2)(e) of Code read with regulation 36 of CIRP Regulations, regulation 7(2)(a), 7(2)(h) of IP Regulations and clause 13 of Code of Conduct.

Submissions

8.3. Mr. Agarwal submitted that the Hon'ble NCLAT at several occasions in the impugned judgment and order has stated that he has grossly failed in discharging his duties as the RP of the CD by failing to prepare the IM in terms of the Code. However, it is most respectfully submitted that in solely placing reliance upon regulation 36 of CIRP Regulations, the Hon'ble NCLAT lost sight of Section 33 (2) of the Code and its explanation which provides that CoC may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum. The explanation to section 33(2) was inserted in the Code

keeping in view the situation where the IM of the CD cannot be prepared due to unavailability of relevant documents.

8.4. Mr. Agarwal submitted that it has been his case throughout which is further reflected from various CoC meetings that no books of accounts and records of the CD were available at its registered office. Staff/Employees of the CD also informed that they don't have any statutory records. He expressed his helplessness in preparing the IM at every CoC due to the fact that the requisite information was not available. It is stated that IM preparation was under progress but it could not be completed due to non-availability of mandatory information/documents as required under Regulation 36(2)(c) of the CIRP Regulation as accounts of the CD were audited upto 31.12.1999.

8.5. Mr. Agarwal submitted that Hon'ble NCLAT has not considered the minutes of fourth COC meeting wherein it is stated as follows:-

“The Chairman informed the Committee of Creditors that the Information Memorandum as specified under Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and other applicable regulations will be ready by 22/11/2019 and will be submitted to the Committee of Creditors after receiving an undertaking from a member of the committee of creditors to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29 and other applicable regulations of the Insolvency and Bankruptcy Code, 2016.”

8.6. Mr. Agarwal submitted that in the fifth meeting of CoC, the CoC, in terms of Section 33 of the Code, *suo-moto* took the decision to liquidate the CD with a majority of 80% due to the following reasons:

- a. No business operation since many years.*
- b. Plants and machineries were in bad condition.*
- c. Technology is outdated.*
- d. Last audited accounts updated till the year 1999.*
- e. No books of accounts being maintained and available.*
- f. The lease of land at Jameshpur has expired as per letter given by TISCO,*
- g. Application filed by around 200 workers relating to Jamshedpur land with a prayer that the land belongs to the Govt. or Jharkhand.*
- h. The CD is not a going concern for a long time.*
- i. The directors of the suspended board are not available to corporate in CIRP.*
- j. The CD was a sick company for a very long time.”*

8.7. Even in 31.03.2015, trail balance, accounts, details of workers were not produced before the Provident Fund department for ongoing proceeding.

8.8. Mr. Agarwal submitted that IM was prepared by him to the extent the documents were available. However, the same was not as per the regulation due to non-availability of accounts, details, audited accounts of latest last 2 years (as mandatory required to be attached) etc. Since a decision was taken *suo-moto* by the CoC to liquidate the CD, in

terms of Section 33(2), hence thereafter no updation in the IM was done, hence the same was recorded in the fifth COC minutes as follows:

“TO DELIBERATE, DECIDE ABOUT THE STATUS OF INFORMATION MEMORANDUM

The member of COC discussed that non-availability of books of accounts, records and accounts audited 31st December,1999. The chairman informed that already application was filed u/s 19(2) of IBC. There is non-cooperation from the suspended director of corporate debtor. Due to non-availability of information, information memorandum cannot be prepared. Further as decided by COC to liquidate the corporate debtor, decision was taken that there is no need to prepare information memorandum.”

- 8.9. Mr. Agarwal submitted that the IM was prepared to the extent information available and said was submitted with IBBI in August,2020 and submitted with Hon'ble NCLAT much prior to the order of Hon'ble NCLAT order.

Analysis& Findings

- 8.10. Section 29 of the Code read with regulation 36 of the CIRP Regulations mandates RP to prepare Information Memorandum (IM) within 54 days of insolvency commencement date (ICD). The DC notes that ICD of the CD is 07.08.2019 and Mr. Agarwal should have prepared the IM by fifty-four days from ICD i.e., 30.09.2019. The DC is not inclined to accept the submission of Mr. Agarwal that initially IM was not prepared due non-availability of documents. In such a case, Mr. Agarwal should have filed an application under section 19(2) of the Code before AA. However, the application was not filed in time. It was filed much later i.e. after 18.10.2019. Time is an essence in the Code and objectives can be achieved only if activities prescribed under the Code are accomplished in a time bound manner. Hence, the DC finds that the Mr. Agarwal has contravened section 29, 208(2)(a), 208(2)(e) of Code read with regulation 36 of CIRP Regulations, regulation 7(2)(a), 7(2)(h) of IP Regulations and clause 13 of Code of Conduct

9. Contravention-V

Non-appointment of registered valuers and abdication of duty of appointment on CoC

- 9.1. Section 25(2)(d) of Code states that an IP shall appoint accountants, legal or other professionals in the manner as specified by Board. Regulation 27 of CIRP Regulations requires an IP to appoint two registered valuers within 47 days of ICD. Clause 3 of Code of Conduct of IP Regulations, *inter-alia*, requires an IP to ensure that his decisions are made without the presence of any bias, conflict of interest, coercion, or undue influence of any party. Clause 5 of Code of Conduct of IP Regulations requires an IP to maintain complete independence in his professional relationships and conduct the processes independent of external influences. Clause 13 of Code of Conduct of IP Regulations requires an IP to adhere to the prescribed time limits

9.2. Minutes of second and third CoC meeting notes discussion on appointment of registered valuers and it is recorded that CoC decided to deliberate on it and deferred the matter. The minutes of fourth CoC meeting note that IP circulated the quotations received from three registered valuers and CoC deliberated on same and decided that they will confirm the name of valuation professionals. Thus, by not appointing registered valuers within 47 days of ICD and putting the onus of appointment of registered valuers on the CoC, Mr. Agarwal allegedly contravened section 25(2)(d), 208(2)(a), 208(2)(e) of Code read with regulation 27 of CIRP Regulations, regulation 7(2)(a), 7(2)(h) of IP Regulations and Clauses 3, 5 and 13 of Code of Conduct.

Submissions

9.3. Mr. Agarwal submitted that Hon'ble NCLAT in para 75 of the impugned common judgment and order dated 04.06.2021 has held that he is liable and guilty for failure to appoint a registered valuer in terms of the Code and Regulations thereof specifically Regulations 27 and 35 of the CIRP Regulations, 2016. However, in doing so, the Hon'ble NCLAT lost sight of the fact that he has put the issue of appointment of Valuers before the CoC on the following instances:

(i) In the second CoC meeting held on 26.09.2019 wherein it was informed by him that in terms of regulation 35 and other applicable regulations of the CIRP Regulations, he proposed the appointment of two registered valuers as applicable who will determine the fair value and liquidation value in terms of the regulations. However, it was decided by the CoC that the decision with regards to the same shall be taken after 15-20 days.

(ii) In the third CoC meeting held on 18.10.2019, the said issue was further deferred by the CoC.

(iii) In the fourth CoC meeting held on 11.11.2019, he suggested the name of the following valuers:

- Resolute Valuers & Consultants Private Limited (IBBI/RV- E/01/2019/111),
- ANVI Technical Advisors India Private Limited (IBBI/RV-E/02/2019/101) and
- Corporate Professionals Valuation Services Pvt Ltd. (IBBI/RV-E/02/2019/106).

9.4. However, the COC decided that they will confirm the name of the Valuers after having consultation amongst themselves within two days. Mr. Agarwal submitted that in such a situation wherein on numerous occasions, approval of the CoC was sought for appointment of valuers but the said issue was always deferred by the CoC, Mr Agarwal submitted that he cannot be held liable, who made the best efforts for the appointment of valuers.

9.5. Mr. Agarwal submitted that no audited accounts, statutory register were available and there was no co-operation either from management or workers. The CD was not carrying any business activities. He had shortlisted valuer and appointment letter was to be issued to the selected valuer. On appointment, immediately all information should have been provided to the said valuers. Further as in all COC meeting the status/condition of the CD was informed and discussed in the COC meetings, the said proposed appointment was also placed as the aggregate remuneration of all valuers to be appointed was in lakhs and respective COC members had to reimburse the same.

Further, he submitted that if he would have appointed valuers without any possessional knowledge of accounts/statutory register then the next question could have arisen what the necessity of immediate appointment of valuers without any possession/knowledge of accounts/statutory register was/fixed assets register and non-availability of audited accounts for the period starting from 01.04.2000.

Analysis & Findings

- 9.6. Regulation 27 of CIRP Regulations mandates the RP to appoint two registered valuers within 47 days of ICD. With regards to the issue of non-appointment of registered valuers and abdication of duty of appointment on CoC, Mr. Agarwal had proposed the appointment of two registered valuers as applicable who will determine the fair value and liquidation value in terms of the regulations in the second CoC meeting. However, it was decided by the CoC that the decision with regards to the same shall be taken after 15-20 days once list of assets at different location is ascertained. In the third CoC meeting held on 18.10.2019, the said issue was further deferred by the CoC till date of next CoC. In the fourth CoC meeting held on 11.11.2019, he suggested the name of valuer. However, the COC decided that they will confirm the name of the valuers after having consultation amongst themselves within two days. Although the appointment of registered valuers as said by Mr. Agarwal was discussed with and deferred by the CoC, however, the DC observes that CoC was constituted (based on claim submission and without verification of such claims) not as per the provisions of the Code.
- 9.7. The Code empowers the RP to appoint valuers. It does not envisage the appointment to be confirmed by the CoC. Only the fees is to be approved by the CoC. If the CoC is not approving the fees, it is open to the RP to approach the AA. However, Mr. Agarwal did not do so. Hence, he had not acted as per provisions of the Code. However, since RP had sought approval from CoC on several occasions, he is not entirely to be blamed. Hence, DC gives him benefit of doubt on this contravention.

10. Order

- 10.1. In view of the above, the DC finds that the Mr. Agarwal did not verify the claims received within prescribed time. He conducted the four meetings of the CoC on 06.09.2019, 26.09.2019, 18.10.2019 and 11.11.2019 without verification of claims. The CoC was constituted based on claim submission and not on claim verified by Mr. Agarwal as IRP/RP. Further, two FCs namely Kamala Mills and Fasqua, which are related parties to the CD, became the members of the CoC with majority. The Constitution of the CoC is in violation of proviso to section 21(2) of the Code. The constitution of the CoC would have been entirely different if Mr. Agarwal had verified the claims based on documents on records and Mr. Agarwal may not have even been appointed as RP.
- 10.2. The DC further notes that the CIRP of the CD was admitted by AA on 07.08.2019 and decision was taken by the CoC in its fifth meeting held on 05.12.2019 to liquidate the CD. Further, no IM was issued, no registered valuers were appointed, no Expression of Interest was invited and thus, there seems to be no intention to resolve the CD as per

the Code. The decision of liquidation was taken without following the true spirit of the resolving the CD as a going concern which is a heart and soul of the Code. Moreover, it seems that this entire process was conducted in a manner to ensure that no opportunity is given for resolution and the process ends in the liquidation of the CD. The DC, in exercise of the powers conferred under section 220 (2) of the Code read with sub-regulations (7) and (8) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, hereby cancels the registration of Mr. Shashi Agarwal having Registration No. IBBI/IPA-001/IP-P00470/2017- 18/10813

- 10.3. This Order shall come into force on expiry of 30 days from the date of its issue.
- 10.4. A copy of this order shall be sent to the CoCs of all the Corporate Debtors in which Mr. Agarwal is providing his services. The CoC may decide whether to continue his services or not. In case, CoCs' decide to discontinue his services, an appropriate application may be filed before AA.
- 10.5. A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where he is enrolled as a member.
- 10.6. A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, for information.
- 10.7. Accordingly, the show cause notice is disposed of.

-sd-
(Ravi Mital)
Chairperson, IBBI

Dated: 13th May, 2022
Place: New Delhi