

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/15/2019-20
14th November 2019

Order

In the matter of Mr. Mahender Kumar Khandelwal, Insolvency Professional (IP) under Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 read with Section 220 of the Insolvency and Bankruptcy Code, 2016 (Code).

1. Background

- 1.1 This Order disposes of the Show Cause Notice (SCN) dated 7th October 2019 issued to Mr. Mahender Kumar Khandelwal, B2A, Sunny Valley CGHS, Plot No. 27, Sector 12, Dwarka, New Delhi- 110078, who is a Professional Member of the Indian Institute of Insolvency Professionals of ICAI and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board) with Registration No. IBBI/IPA-001/IP-P00033/2016-2017/10086.
- 1.2 In exercise of its power under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017, the Board vide Order dated 21st June 2018 appointed a Inspecting Authority (IA) to conduct an inspection of Mr. Mahender Kumar Khandelwal, on having reasonable grounds to believe that the IP had contravened provisions of the Code, Regulations, and directions issued thereunder.
- 1.3 The Board on 7th October 2019 had issued the SCN to Mr. Mahender Kumar Khandelwal, based on findings of an inspection in respect of his role as an interim resolution professional (IRP) and / or resolution professional (RP) in corporate insolvency resolution process (CIRP) of Bhushan Power and Steel Ltd. The SCN alleged contraventions of several provisions of the Insolvency and Bankruptcy Code, 2016 (Code), the IBBI (Insolvency Professionals) Regulations, 2016 and the Code of Conduct under regulation 7(2) thereof, the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016, Circular No. IP/004/2018 on 'Fees payable to an insolvency professional and to other professionals appointed by an insolvency professional' dated 16th January 2018, Circular No. IP/005/2018 on 'Disclosure by Insolvency Professionals and other Professionals appointed by Insolvency Professionals conducting Resolution Processes' dated 16th January 2018 and Circular No. IBBI/IP/013/2018 on 'Fee and other Expenses incurred for CIRP' dated 12th June 2018. Mr. Mahender Kumar Khandelwal replied to the SCN vide letter dated 22nd October 2019.
- 1.4 The Board referred the SCN, response of Mr. Mahender Kumar Khandelwal 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. Mahender Kumar Khandelwal availed an opportunity of personal hearing before the DC on 30th October 2019 when he reiterated the submissions made in his written reply and made a few additional submissions. Thereafter, the IP submitted the Addendum on 30th October 2019.

2. **Consideration of SCN**

The DC has considered the SCN, the reply to SCN, oral submissions of Mr. Mahender Kumar Khandelwal, his counsel Mr. Anoop Rawat during the course of personal hearing, addendum to reply of SCN, other material available on record and proceeds to dispose of the SCN.

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

A summary of contraventions alleged in the SCN, Mr. Mahender Kumar Khandelwal's written and oral submissions thereon and their analysis with findings of the DC are as under:

- 3.1 **Contravention:** Pursuant to Section 25(2)(j), it is the duty of RP to file application for avoidance of transactions in accordance with Chapter III of the Code. Thus, a duty is imposed on the RP to file such an application immediately with National Company Law Tribunal (NCLT) upon receipt of report to preserve and protect the assets of Corporate Debtor (CD). However, the RP abdicated his authority in favour of the Committee of Creditors (CoC) and allowed the CoC to usurp his authority. Even after direction of CoC to file application there was a delay of two months (in filing the application). This indicates RP's casualness in performing the duty as an RP and misunderstanding of the law.

Submission: RP submits that he had filed an application (C.A No. 330 of 2018) before NCLT on 19th March 2018 under Section 45 of the Code for avoidance of suspect undervalued transactions prior to the application filed on 13th June 2018 after the 11th CoC meeting. Further, in 11th CoC meeting RP simply brought to the notice of CoC of the avoidance transactions and did not seek approval for filing application. The RP also submits that after receiving transaction review report from BDO India LLP, but owing to the size of the CD, the same had to be deliberated at length by legal counsel of RP and several meetings were required with key managerial persons and employees of CD, to determine contraventions under Section 43-66 of the Code. The RP states that he has made every endeavour to comply with requirements and no prescribed timelines with respect of avoidance transaction are applicable to CIRP of CD as Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 is effective to CIRP commencing on or before 3rd July 2018. Further, the RP states that BDO India LLP report on specific queries by SBI was also filed by RP on 4th February 2019 which he was not obligated under the provisions of law.

During the personal hearing on 30th October 2019, it was submitted that there was no guidelines or indication given as to the timeline for filing avoidance transactions application and that even though the forensic audit was not conducted by the RP (but by the lenders) still the RP had filed the application based on forensic audit report. Further, it was stated that for a CD with such large-scale operations, they wanted time for proper deliberation and there was no intentional delay.

Analysis: Section 25(2) of the Code provides:

“For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -

(j) file application for avoidance of transactions in accordance with Chapter III, if any.”

Further, Section 45 of the Code provides that –

“45. (1) If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) of Section 43 determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.

(2) A transaction shall be considered undervalued where the corporate debtor—

(a) makes a gift to a person; or

(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor;

and such transaction has not taken place in the ordinary course of business of the corporate debtor.”

As per the application filed on 19th March 2018 before the Hon’ble NCLT Principal Bench in CP No (IB) 202 (PB) of 2017 in para 8, the purchaser of the Chennai land i.e. Aarti Tubes has been disclosed to be a related party of the CD in the audited financial statement for the financial year 2016-17 of the CD by virtue of the fact that all three Directors of Aarti Tubes are Key Managerial Persons of the CD.

The application for initiating CIRP was filed on 7th July 2017 by Punjab National Bank in its capacity as CD’s Financial Creditor and the said application was admitted by the Hon’ble NCLT on 26th July 2017. The application under section 45 read with section 49 of the Code was filed by the RP on 19th March 2018 for avoidance of undervalued transactions entered into by the CD. Thus, the application for avoidance of undervalued transaction was filed after 236 days from the date of commencement of CIRP.

In ordinary course, the CIRP is to be completed within 180 days from the date of its commencement i.e. 26th July 2017 in the present case. IRP/RP has the highest professional responsibility during CIRP. His conduct and performance have a substantial bearing on the survival of an ailing entity. He, therefore, is expected to function with a strong sense of urgency and with utmost care and diligence. He should endeavour to fast track the process, whenever the situation demands. He is expected to carefully study and analyse the financial statements of the CD.

The basis for filing the application dated 19th March 2018 in NCLT was related party transactions which were clearly disclosed in the financial statements of immediately preceding financial year 2016-17. Despite being aware of the same, the valuers were not expeditiously appointed by him and even after their appointment and consequent submission of valuation reports in January 2018, the application for avoidance of transactions was filed belatedly after two months on 19th March 2018.

Findings: Prior to Third Amendment to IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016, no time was prescribed for filing an application before Adjudicating Authority for seeking appropriate relief. The provision on model timeline for CIRP prescribing a period of 135 days for filing such an application has been inserted vide Third Amendment w.e.f. 3rd July 2018 which shall apply to CIRP commencing on or after 3rd July 2018. Though it is not fair and regular, but it is difficult to hold him liable in absence of explicit provision in law. However, the DC does not agree with the submission of RP (in reply to SCN) that he has taken prudent steps to expeditiously notify the NCLT in relation to the avoidance transactions as he took 236 days in filing the application, the subject matter of which was disclosed in the financial statements of the financial year 2016-17.

Further, taking the matter before CoC for review at two instances (in 2nd and 11th Meeting) and filing the application after approximately two months of receipt of valuation report shows the casual approach of the RP towards compliance of law.

- 3.2 **Contravention:** Pursuant to Circular on ‘Disclosure by Insolvency Professionals and other Professionals appointed by Insolvency Professionals conducting Resolution Processes’ dated 16th January 2018, an obligation has been imposed on IPs to make disclosures for ongoing CIRP to the respective Insolvency Professional Agency (IPA) by 31st January 2018 and within 3 days in respect of all subsequent resolution processes. However, IP failed to make disclosures with respect to the appointments within the stipulated time. The disclosure was made only on 11th August 2018. Moreover, IP has failed to make disclosure in this respect for BDO Restructuring Advisory India LLP (IPE) and to mislead the Board, contradictory statements were made by the IP in the reply made to IA. At one instance, it was stated that IPE was not appointed under a separate mandate and hence disclosure in terms of said circular were not required whereas at another instance, it was stated that payment was made to IPE in their individual capacity. Further, the consent terms between IP and IPE were also stated which provides for IPE to raise an invoice of Rs. 1,05,50,000/- (Rs. 1,24,49,000/- including GST).

Submission: The RP submits that as per Circular No. IP/005/2018 dated 16th January 2018, RP is required to disclose ‘relationship’ if any with the parties prescribed and since the appointment did not fall under the definition of ‘relationship’ he was not required to submit any disclosure to IPA. Nevertheless, the IP had complied with the Circular by sending e-mail dated 31st March 2018. The IP submits that the reply made to IA was inadvertent and unintentional and not with view to mislead the Board. The RP clarifies that BDO Restructuring Advisory India LLP was acting in capacity of an IPE and the fee was shared as per the consent terms under commercial arbitration petition No. 262 of 2018 approved by Bombay High Court vide order dated 28th March 2018. IPA was intimated on 26th September 2019, once it was found out that inadvertently it was missed out on informing the IPA.

During the personal hearing, it was submitted that the approval of CoC for appointment of IPE was unanimous and was done along with the appointment of IP. Further, there

was no clarity as to how and to whom fee has to be paid for professional services rendered by IP. The Board has clarified this issue later on vide circular dated 16th January 2018 regarding fees payable to an IP and to other professionals appointed by an IP. Further, the Hon'ble High Court of Bombay insisted upon the parties to enter into consent terms for sharing the fee in case of dispute between IP and BDO Restructuring Advisory LLP.

Analysis:

CIRP under the Code is a non-adversarial resolution process where the defaulting CD cedes control to an IP, who is responsible for managing the affairs of the company as a going concern and preserving its value. While the market is evolving, the Code attempts to ensure transparency in the functioning and performance of IPs to ensure that the resolution process is concluded within the timelines prescribed.

Section 20 of the Code authorises the RP to appoint accountants, legal or other professionals as may be necessary. Further, Circular No IP/005/2018 dated 16th January 2018 obligated IPs to make disclosures to their respective IPAs with respect to their relationship with the professionals engaged in ongoing CIRPs by 31st January 2018, however the RP failed to make such disclosures within the time period so prescribed. Admittedly, he has sent an email to Indian Institute of Insolvency Professional of ICAI dated 31st March 2018 to the effect that the appointment of every other professional has been made at arms' length relationship without clearly specifying his relationship with BDO Restructuring Advisory India LLP. Further, the RP, in his reply to Inspection Report, had admitted that disclosure for Mr. Ranade, M/s Ashok Shyam & Associates, Ernst & Young LLP were not done since they were not required as per the IBBI Circular dated 16th January, 2018 and that they were made on 11th August 2018 only after the receipt of the draft Inspection Report. The same argument has also been reiterated by the RP, in his reply to SCN. A pertinent question that arises for consideration is that, if such disclosures were not required to be made then why the RP made the same (regarding relationships with other professionals) after enquiries were received from the Board. The RP in reply to the SCN has stated that *"Upon realisation that the specific disclosure of appointment of BDO Restructuring Advisory LLP as IPE in terms of the said IBBI circular, has not been made, the undersigned immediately provided the same to the IPA on September 26, 2019."*

Findings:

Since the RP has not been able to provide any satisfactory justification for not acting in adherence to the provisions of the Code and the Circular, his act of non-disclosure to his IPA about taking services from BDO Restructuring Advisory India LLP (of which RP was a partner) is in violation of Section 208(2)(a) of the Code and Regulation 7(2)(a) and 7(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016, read with clause 12, 13 and 14 of the Code of Conduct as given in the First Schedule of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016.

- 3.3 **Contravention:** Section 5(13) of the Code read with Regulation 31 of the IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2016 defines 'Insolvency

Resolution Process Cost (IRPC)' which does not include fee paid to lender's legal counsel since they are incurred directly by members of CoC. However, RP included the fee payable to lender's legal counsel - Cyril Amarchand Mangaldas (CAM) while calculating IRPC.

Submission: It is submitted that CoC, in its 3rd meeting on 31st October 2017, discussed the fees of CAM and it was clarified by representative of CAM that the fee of legal counsel of CoC can be charged to CD as a general practice. At that time, there was no specific provision on this point neither any clarity. Subsequently, when the Board issued Circular on 'Fee and other Expenses incurred for CIRP' on 12th June 2018, RP cited his reservation on the aspect of fees of lender's legal counsel in 18th CoC meeting forming part of IRPC but CoC decided to route appointment of and payment to CAM through RP and on receipt of resolution plan, fees payable to lender's legal counsel may be negotiated with resolution applicant. It was further decided that if the Board does not allow this arrangement, then the fee amount will be recovered on pro rata basis from upfront cash recovery amount to be paid to lenders and CoC may negotiate with resolution applicant to pay the fee amount out of their cash flows. Further, in the 19th CoC meeting held on 10th October 2018, the members passed a resolution to that effect.

During the personal hearing, it was submitted that Regulation 31(e) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 provides that '*other costs directly relating to the corporate insolvency resolution process and approved by the committee*' shall be included in IRPC. It was believed that as long as the cost is incurred for maximisation of the value of assets, the cost can be included in IRPC costs. The fee paid to lender's legal counsel was incurred for rendering advise on CIRP and thus, the same was included as a part of IRPC costs with an undertaking from the members of CoC that if the same is not approved by the Board, the members shall reimburse the same.

Analysis:

It is trite to mention that the IRPC is an added financial stress on a CD. Therefore, it becomes crucial to monitor the expenses incurred by the RP to ensure that a CD, who is already entangled in a web of unsustainable liabilities is not further over-burdened with exorbitantly high IRPC.

An IP is obliged under section 208(2)(a) of the Code to take reasonable care and diligence while performing his duties, including incurring expenses. He must, therefore, ensure that not only fee payable to him is reasonable, but also other expenses incurred by him are reasonable.

Clause 3 of the Code of Conduct as given in the First Schedule of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 provides that an insolvency professional must act with objectivity in his professional dealings by ensuring that his decisions are made without the presence of any bias, conflict of interest, coercion, or undue influence of any party, whether directly connected to the insolvency proceedings or not.

Clause 5 provides that an insolvency professional must maintain complete independence in his professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences.

Section 5 (13) of the Code defines the term ‘Insolvency Resolution Process Costs’ (IRPC) in the following words -

"insolvency resolution process costs" means—

- (a) the amount of any interim finance and the costs incurred in raising such finance;*
- (b) the fees payable to any person acting as a resolution professional;*
- (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;*
- (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and*
- (e) any other costs as may be specified by the Board.*

As per Regulation 31 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016:

“Insolvency Resolution Process Costs” under Section 5(13)(e) shall mean –

- (a) amounts due to suppliers of essential goods and services under Regulation 32;*
- (aa) fee payable to authorised representative under [sub-regulation (8)] of regulation 16A;*
- (ab) Out of pocket expenses of authorised representative for discharge of his functions under [Section 25A];*
- (b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);*
- (c) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;*
- (d) expenses incurred on or by the interim resolution professional fixed under Regulation 34; and*
- (e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.*

The responsibilities of CoC and IP are clearly demarcated by the Code. The CoC must not encroach upon the role of IP and must not allow the IP to encroach upon its role. Similarly, the IP must not compromise his independence in favour of the CoC.

It is important to note that the CoC or its members do not own the assets of the company rather they hold the assets as trustees for the benefit of all stakeholders. The gain or pain emanating from the resolution, therefore, need to be shared by the stakeholders within a framework of fairness and equity. Further, the CoC has a statutory role. It discharges a public function. It must, therefore, apply the highest standards of duty of care. It must not only follow the due process, but also be fair towards all stakeholders and transparent in discharge of its responsibilities for maximising the value of the assets of the company.

The provisions of the Code as well as IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 does not provide for inclusion of fee paid to the lender's legal counsel in the IRPC. The RP, during the personal hearing, admitted of having charged the fee of lender's legal counsel to CD and also, in Addendum dated 30th October, 2019 provided details of the fees paid to lender's legal counsel in relation to the services rendered by them prior to the issuance of Circular on 'Fee and other Expenses incurred for CIRP' dated 12th June 2018. According to the IRPC details furnished by RP vide e-mail dated 11th November 2019, a sum of Rs. 12,09,90,185/- paid to legal counsel of CoC forms part of IRPC. Further, out of above, an amount of Rs. 147,89,315/- has been paid to lender's legal counsel for bills raised on 06.10.2017, 09.01.2018 and 07.03.2018 during CIRP but prior to the issue of the Circular. As per the Addendum dated 30th October 2019, the payment of Rs. 55,62,833/- made on 17th October 2017 relates to service period 17th June 2017 to 31st August 2017. Thus, part of the payment relates to the services rendered by the lender's legal counsel for period prior to the insolvency commencement date i.e. 26th July 2017 from the tagging account.

The RP, in spite of the Circular dated 12th June, 2018 clearly and unequivocally stating under para 8 clause (f) that the IRPC shall not include any expense incurred by a member of CoC or a professional engaged by the CoC, agreed with the CoC members, though conditionally, for payment of the fee of lender's legal counsel which shows his disregard to the Circular issued by the Board. An IP is appointed to manage the stressed CD. It is not understood, how he can appoint legal counsel for lenders that are independent bodies (creditors). The conditional inclusion of the fee also indicates that the CoC members were not sure of inclusion of the same as part of IRPC cost. Further, the draft inspection report issued by the Board dated 2nd August 2018 had also pointed out that fees of the lender's counsel should not be part of the IRPC. However, in the 19th CoC meeting dated 10th October 2018, the RP who is also the Chairman of the CoC meeting, despite being pointed out as a contravention by the Board, acceded to the proposal of CoC on the pretext that if the Board objects then the legal cost will be reimbursed by the lenders on a pro-rata basis. This shows that there is understanding between CoC and RP to contravene a law and willingness to remedy the situation only if they are caught. Thus, the RP has deliberately compromised his independence.

The RP has further contended, through his counsel, that clause (e) to Regulation 31 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 provides '*other costs directly relating to the corporate insolvency resolution process and approved by the committee*' can also form part of IRPC

However, the contention of RP about including the fee of legal counsel of CoC in other costs of IRPC cannot be accepted as the fee paid to legal counsel of CoC, that are independent bodies, cannot be said to be directly related to the CIRP. Minutes of 3rd CoC meeting dated 31st October 2017 clearly states under the para 8 '*...The representative of CAM explained the members that in case the same (the fee of lender's legal counsel) was to be borne by the lenders they in turn would file additional claims against the Company and the said would eventually be charged to the Company...*'. About filing of additional claims, it is pertinent to mention that claim amount is as on the CIRP commencement

date (though lender's counsel fee cannot be a part of claim). Expenditure incurred during CIRP by an RP cannot be claim amount. Thus, the RP permitted something unlawful because he was indemnified by parties who were interested in that unlawful action and the RP did this deliberately.

Findings:

In view of admission by RP of having charged lender's legal counsel (CAM) fee of Rs. 12,09,90,185/- from IRPC and specifically for the services rendered prior to the Insolvency Commencement date (i.e. period from 17th June 2017 to 25th July 2017) of CD, RP has contravened Section 208 (2) (a) of the Code and also Regulation 7(2)(a) and 7(2)(h) of the IBBI (Insolvency Professionals) Regulations, 2016 read with Clause 3 and 5 of the Code of Conduct as given in the First Schedule of the IBBI (Insolvency Professionals) Regulations, 2016.

- 3.4 **Contravention:** PwC was appointed as a valuer to determine the liquidation value of CD on 31st July 2017. During the CIRP, the IP resigned from BDO India LLP and joined PwC as a partner. Thereafter, PwC was again appointed to perform due diligence in relation to Section 29A of the Code. Thus, the IP gave an assignment to PwC, then joined them as a partner and thereafter again engaged PwC to perform due diligence. Thus, IP used his position to derive some benefits to the firm in which he was a partner establishing a clear case of conflict of interest since his position as an IP is in conflict with his position as a partner of PwC.

Submission: IP submitted that the appointment of Price Waterhouse & Co. LLP (PWC) as a registered valuer was made in a fair and transparent manner based on competitive bidding process in accordance with Regulation 27 and 35 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016. The IP called for quotations/ proposals from various valuers having adequate capacity and competence. The quotations received were assessed and evaluated by a committee consisting of Mr Mahender Kumar Khandelwal, two other IPs and technical advisor. Based upon the assessment, PWC and Duff & Phelps India Pvt. Ltd. were appointed as registered valuers. Further, PWC was appointed as the registered valuer on 31st July 2017 while IP joined PWC Professionals Services LLP (PPS) on 23rd April 2018 which are distinct entities. Moreover, between the two dates there is a gap of more than eight months. It is further submitted that a comprehensive and competitive process was followed in order to select the agencies for conducting due diligence under Section 29A. Bids were invited from six agencies/entities for checking eligibility of Resolution Applicants (Tata Steel Limited, JSW Steel Limited and Liberty House Group Pte Ltd.) in terms of Section 29A of the Code while responses were received only from five agencies. Thereafter the average cost per entity was calculated based on bids received, internal discussions on cost effectiveness and timelines to be adhered according to the selection note. As per the selection criteria, PricewaterhouseCoopers Private Limited (PPL) was selected to conduct due diligence in respect of JSW Steel Limited and Liberty House Group Pte Ltd., and Ernst & Young LLP for Tata Steel Limited.

It was further submitted, during the personal hearing, that PWC and PPS are two different professionally owned and managed entities, and they function independently without any influence in the working of each other. The appointment of PPL for conducting due diligence in the present matter was a conscious decision of the members of CoC since PPL already possessed the experience of conducting due diligence for Liberty Group Pte Ltd in another insolvency matter.

Analysis: CIRP of CD commenced on 26th July 2017 and Mr. Mahender Kumar Khandelwal was appointed as IRP and subsequently he was confirmed as RP. He appointed PWC as the registered valuer on 31st July 2017 and PPL for performing due diligence in relation to Section 29A of the Code on 21st May 2018.

The RP joined PPS in the capacity of a partner with effect from 23rd April 2018. PWC, PPL and PPS are not a same entity rather they are three distinct entities.

Further, the appointment of PPL for carrying out due diligence under Section 29A of the Code in respect of JSW Steel Limited and Liberty House Group Pte Ltd, and to Ernst & Young LLP in respect of Tata Steel Limited has been made on the basis of a competitive bidding process by inviting bids from prospective agencies for checking the eligibility of Resolution Applicants.

From the Company Master Data available on the website of Ministry of Corporate Affairs, it has been observed that Mr Narumanchi Venkata Sivakumar is a common partner between PPL and PPS. However, when PPL was appointed to conduct due diligence (i.e. on 21st May 2018), Mr Narumanchi Venkata Sivakumar was not a partner with RP in PPS. As per the current master data available on the website of Ministry of Corporate Affairs, he joined PPS on 1st October 2018 only.

Findings:

It is observed that IP appointed PWC as a registered valuer on 31st July 2017 while joined a distinct entity, PPS with effect from 23rd April 2018 i.e. approximately after eight months. Thereafter, he appointed PPL for conducting due diligence. However, on the date of appointment of PPL to conduct due diligence, no partner of PPS was a common partner in PPL. Thus, the RP cannot be said to be directly related to PPL on relevant dates.

- 3.5 **Contravention:** Pursuant to Circular No IP/004/2018 dated 16th January 2018, an IP shall render services for a fee which is a reasonable reflection of his work, raise bills/ invoices in his name towards such fees, and such fees shall be paid to his bank account. Any payment of fees for the services of an IP to any person other than the IP shall not form part of the IRPC. The appointment as IP was approved by CoC for a monthly remuneration of Rs. 1,20,00,000/- excluding out of pocket expenses and applicable taxes. However, in 10th CoC meeting held on 14th March 2018, IP informed that he has requested BDO Restructuring Advisory India LLP to enter into an agreement for sharing of fees between IP and BDO Restructuring Advisory India LLP to which BDO Restructuring Advisory India LLP did not agree. The IP expressed concerns over

receiving the full amount in his individual capacity on the ground that he will not be able to justify the same in his Income Tax Return. Further, the invoices submitted by IP clearly reflect that fee of RP was taken by BDO Restructuring Advisory India LLP and not by the IP in his account.

Submission: It is submitted by the IP that pursuant to the issue of the Circular No IP/004/2018 dated 16th January, no fees due to IP has been received by BDO Restructuring Advisory India LLP and no fees due to BDO Restructuring Advisory India LLP has been paid to or received by the IP. Further, the fees paid to BDO Restructuring Advisory India LLP was strictly confined to services rendered by them in their capacity as IPE. Further, the consent terms between IP and BDO Restructuring Advisory India LLP were filed in Bombay HC as below:

'The parties agree that if CIRP mandate of BPSL is extended or any reason beyond April 2018, then every month during which the CIRP mandate subsists, the Respondent (RP) shall raise an invoice of Rs 14,50,000/- (Rupees 17,11,000/- including GST) and Petitioner No. 2 (BDO) shall raise an invoice of Rs. 1,05,50,000/- (Rupees 1,24,49,000/- including GST) on the Corporate Debtor and the same will be paid to Respondent and Petitioner No. 2 respectively.'

These consent terms were approved by Bombay High Court vide order dated 28th March 2018. Thereafter, the invoices were raised to the tune of Rs 14,50,000/- in the name of IP and Rs. 1,05,50,000/- in the name of BDO Restructuring Advisory India LLP in the capacity as IPE. Thus, it is submitted that fee of IP has been raised and received by him in his individual capacity only.

During the personal hearing, the IP reiterated that before the Circular No IP/004/2018 dated 16th January 2018 was issued, the mistake committed by IP was *bona fide* and of technical nature while after the issue of circular, the consent terms filed before the Hon'ble HC of Bombay were followed and invoices were accordingly raised. Further, all actions were duly approved by the members of CoC.

Analysis:

The IP assumes a pivotal role in CIRP under the Code. He shall befittingly perform a wide array of responsibilities and duties which are bestowed upon him in the process. Hence, success of resolution of insolvency of a CD depends mainly on the professionalism demonstrated by the IP in discharging his functions under the Code as well as the Regulations made thereunder.

The IP, either as an IRP or as RP exercises powers of the Board of Directors of the corporate debtor undergoing CIRP. The specific duties and responsibilities of an IP during CIRP are detailed under Section 25 and 28 of the Code and Regulations made thereunder.

Section 206 of the Code clearly provides that **only individual (person) can render services as an IP**. Section 5 (13) defines the term 'Insolvency Resolution Process Costs' and includes in clause (b) **'the fees payable to any person** acting as a resolution professional'. Regulation 33 of the IBBI (Insolvency Resolution Process for Corporate

Persons) Regulations, 2016 contains provision regarding reimbursement of expenses to the extent ratified by the committee as 'Insolvency Resolution Process Cost'. The Explanation to this Regulation provides, “‘expenses’ include the fee to be paid to the interim resolution professional ...”.

Mr. Mahender Kumar Khandelwal was appointed as RP in his individual capacity and not as partner of LLP. The CoC in its first meeting held on 1st September 2017 passed the following resolutions:

Item No. 11

APPROVAL AND RATIFICATION OF FEES OF THE INTEIM RESOLUTION PROFESSIONAL (IRP):

“Mr. Prem Gupta read the resolution to be voted upon.

“RESOLVED THAT pursuant to Regulation 33 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and other applicable provisions, if any, of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulations made there under, remuneration of INR 1,20,00,000/- (Rupees One Crore Twenty Lakhs only) excluding out of pocket expenses and applicable taxes for payment to the Interim Resolution Professional for a period of 30 days immediately, be and is hereby approved and ratified.”

There were no comments on the same by the members ad accordingly the resolution was put to vote without any modifications.

The Chairman asked the members to vote on the above resolution through e-voting facility as per the instructions for e-voting provided in the Notice of the meeting.”

Item No. 12

APPOINTMENT OF RESOLUTION PROFESSIONAL AND FINALISE HIS FEES:

“Mr. Prem Gupta read the resolution to be voted upon.

“RESOLVED THAT pursuant to Section 22(2) Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulations made thereunder, approval is hereby accorded for appointment of Mr Mahender Kumar Khandelwal, an Insolvency Professional (Registration No. IBBI/IPA-001/IP-P00033/ 2016-17/10086) as Resolution Professional in the matter of Corporate Insolvency Resolution Process of Bhushan Power & Steel Limited.”

RESOLVED FURTHER THAT approval is hereby accorded for fees of INR 1,20,00,000/- (Rupees One Crore Twenty Lakhs only) per month excluding out of pocket expenses and applicable taxes to be paid to the Resolution Professional.

There were no comments on the same by the members ad accordingly the resolution was put to vote without any modifications.

The Chairman asked the members to vote on the above resolution through e-voting facility as per the instructions for e-voting provided in the Notice of the meeting.”

From the above resolutions of the CoC, it is amply clear that CoC has accorded its approval by item no. 11 for the remuneration of INR 1,20,00,000/- (Rupees One Crore Twenty Lakhs only) excluding out of pocket expenses and applicable taxes for payment to the Interim Resolution Professional for a period of 30 days and by item no. 12 for appointment of Mr Mahender Kumar Khandelwal, an Insolvency Professional (Registration No. IBBI/IPA-001/IP-P00033/2016-17/10086) as Resolution Professional in the matter of Corporate Insolvency Resolution Process of Bhushan Power & Steel Limited.

However, as per the material available on record, the IP has shared his fee for rendering professional services with BDO Restructuring Advisory India LLP up to December 2017. From January 2018 onwards, the fee has been shared between IP and BDO Restructuring Advisory India LLP in consonance with the consent terms filed and approved by the Hon'ble High Court of Bombay vide order dated 28th March 2018. Thereafter, the invoices were raised to the tune of Rs 14,50,000/- in the name of IP and Rs. 1,05,50,000/- in the name of BDO Restructuring Advisory India LLP in his capacity as IPE.

During the personal hearing, the counsel appearing on behalf of the IP was given an opportunity to substantiate the fee sharing agreement entered into between the IP and BDO Restructuring Advisory India LLP in the light of the provisions of the Code and the regulations made thereunder. However, the counsel could not produce any document which can justify the arrangement entered between the IP and BDO Restructuring Advisory India LLP. The IP, through his counsel further pleaded *bona fide* mistake on his part (which is of technical nature) with regard to sharing of fee from the date of commencement of CIRP i.e. 26th July 2017 to 31st December 2017.

Findings:

Since the IP has not been able to clarify as under which provision the fee payable to IRP / RP has been shared with BDO Restructuring Advisory India LLP, such sort of arrangement is against the provisions of the Code / Regulation and in violation of Section 5 (13) and Section 208 (2) (a) of the Code, and also Regulation 33 and 34 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016.

- 3.6 **Contravention:** The invitation of Expression of Interest (EOI) for Resolution Plans was made vide publication dated 21st September 2017 and the last date of submission of EOI was 6th October 2017. However, in the 4th CoC meeting dated 17th November 2017, the last date was extended allowing resolution plans submitted after the expiry of last date of submission of EOI (6th October 2017) if they meet the eligibility criteria. Thus, EOI of some companies were accepted without officially extending the date of submission of EOI. Had the last date been officially extended, some other interested parties could have also submitted the EOI. This reflects that the IP conducted the whole exercise arbitrarily and in a non-transparent manner with a *mala fide* intention to prefer some of the resolution applicants.

Submission: IP submitted that in 3rd CoC meeting held on 31st October 2017, SBI Caps informed the member that they have received a call from Liberty House Group expressing their intention to submit EOI post the last date of submission i.e. 6th October 2017. Upon discussion and deliberations, it was noted by CoC that any interested party may submit their resolution plan till the 150th or 240th day i.e. 30 days before the expiry of conclusion of CIRP period in accordance with the erstwhile provisions of Regulation 39(1) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016. Thereafter, RP accepted EOI received from Liberty House and Arcelor Mittal after the last date of submission of EOI since both the parties qualified in terms of eligibility criteria. The EOI was then placed on record in 4th CoC meeting held on 17th November 2017 wherein it was decided that timeline for submission of EOI shall not be extended but RP was obliged to accept resolution plans up to 150th day of CIRP in accordance with Regulation 39(1) of the unamended IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016. Further, RP accepted EOI from Liberty House Group based on decisions taken by CoC which provided that Liberty Group cannot be debarred from submitting resolution plan if the same is submitted before 150th day of CIRP. It was also clarified by the RP that other interested parties were not restricted in any manner and they also had the opportunity to submit their resolution plans within the prescribed timeline under Regulation 39(1) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016. Additionally, all communications made by RP were guided by the directives issued by CoC. Further, during the personal hearing, the IP stated that when the CIRP in the matter commenced, there was lack of clarity about the entire process. Further, the intention of the IP has always been to run a transparent process without any *mala fide* intention.

Analysis:

Regulation 39(1) of the erstwhile IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 provides that:

“A resolution applicant shall endeavour to submit a resolution plan prepared in accordance with the Code and these Regulations to the resolution professional, thirty days before expiry of the maximum period permitted under section 12 for the completion of the corporate insolvency resolution process.”

Section 12 of the Code on time-limit for completion of insolvency resolution process provides:

“(1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

(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 seventy-five per cent. of the voting shares.

(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.”

The IP, in his reply to SCN dated 22nd October 2018 admitted having accepted EOI of Liberty House Group Pte Ltd and Arcelor Mittal after the last date of submission of EOI since both the parties qualified in terms of eligibility criteria. When the RP placed the EOIs before CoC in 4th CoC meeting dated 17th November 2017, it was decided that timeline for submission of EOI shall not be extended but RP was obliged to accept resolution plans up to 150th day of CIRP in accordance with erstwhile Regulation 39(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016.

In this regard, the DC has observed that a specific provision on ‘Invitation of Resolution Plans’ was inserted by Amendment to IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 with effect from 6th February 2018 only. Further, in this matter, the DC has also considered the view taken by Hon’ble NCLT, Principal Bench vide its order dated 23rd April 2018 *‘that the IBC does not permit the division of process firstly by inviting ‘expression of interest’ and then by asking to file the resolution plans. If speed is the essence of the whole process, then it must be remembered that one consolidated process is better suited to CIR process than splitting the process in various parts.’*

Findings:

Therefore, it is observed that even though, the RP accepted EOIs from two applicants post the last date of submission of EOI, he has accepted the resolution plans in accordance with the directions issued in the CoC meetings, the provisions of the Code and the Regulations made thereunder. For accepting the EOI after the last date, the DC cannot hold the IP liable in the absence of any specific provision in the erstwhile IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which were applicable to CIRP in this matter.

4. Conclusion:

- 4.1 The role of IP is vital to the efficient operation of the insolvency and bankruptcy resolution process. A well-functioning system of resolution driven by a competent IP plays a significant role in cementing together the interests of the CD with those of the creditors. It is for this reason that the need of specialized professionals to complete the resolution processes has been unequivocally emphasized. The UNCITRAL Legislative Guide on Insolvency Law recognizes the role of an IP in the following words: *“However appointed, the insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially. Accordingly, it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime.”*

The BLRC, the recommendations of which has led to the enactment of the Code, in its Final Report, has also laid emphasis on the role of an IP as follows: *“The Insolvency Professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution*

process. ... In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. The latter include the identification of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings if it is an enterprise, preparation of the resolution proposal, implementation of the solution for individual resolution, the construction, negotiation and mediation of deals as well as distribution of the realisation proceeds under bankruptcy resolution. In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IPs to carry out these tasks in an efficient and professional manner... This creates Role of Resolution Professionals in CIRP the positive externality of better utilisation of judicial time.”

- 4.2 The Code also requires an IP to play a catalytic role in CIRP which requires a right combination of experts acting under the overall supervision of the IP. He is the backbone of the resolution process under the Code and success thereof hinges on the conduct and competence demonstrated by him. Also, a CD undergoing CIRP is a representation of interests of several stakeholders who pin their hopes on the outcome of CIRP. During CIRP, it is the utmost responsibility of an IP to run the company of CD as a going concern and conduct the entire CIRP in a transparent manner without creating additional insolvency resolution process costs.
- 4.3 In this matter, the DC observes that Mr. Mahender Kumar Khandelwal displayed a negligent approach during the conduct of CIRP which can be elaborated as below:
- i. An IP, while rendering his services must take reasonable care and diligence while performing his duties. In the present matter, Mr. Mahender Kumar Khandelwal failed to make disclosures with respect to appointment of BDO Restructuring Advisory India LLP (in which he was a partner) as an IPE contravening the directions under the Circular (as abovementioned) issued by the Board.
 - ii. The Code shifts the control of a CD, when it is admitted into CIRP on its failure to service a debt, to creditors represented by a CoC for resolving its insolvency. The CoC holds the key to the fate of the CD and its stakeholders. Several actions under the Code require approval of the CoC. An IP and the CoC have defined roles. IP's duty is to preserve and protect the value of CD. Mr. Mahender Kumar Khandelwal, in the present matter, allowed charging fee of Rs. 12,09,90,185/- payable to lender's legal counsel as an IRPC and abdicated his authority in favour of CoC. Paying for expenses of third party from CD and including in IRPC is amounting to looting the CD and making the CD bleed. The RP did something unlawful because he was indemnified by a party who was interested in that unlawful action and he did this deliberately. Thus, in defiance of statutory duty to preserve and protect the value of CD, he deliberately in connivance with some stakeholders squandered the assets (money) for unlawful purpose. RP's job is to conduct CIRP. That job does not include hiring legal services of Financial Creditors and definitely does not include paying for legal services.

iii. An IP, at all times, shall comply with the provisions of the Code and Regulations made there under. In the present matter, Mr. Mahender Kumar Khandelwal has shared the fee, which can be paid only to an individual acting as an IP, with BDO Restructuring Advisory India LLP against the provisions of the Code and the Regulations.

4.4 Thus, Mr Mahender Kumar Khandelwal has displayed utter misunderstanding of the provisions of the Code and Regulations made thereunder. He has, therefore, contravened provisions of:

- i. Sections 5(13) and 208(2)(a) of the Code,
- ii. Regulation 33 and 34 of IBBI (Insolvency Resolution process for Corporate Persons) Regulations, 2016; and
- iii. Regulation 7(2)(a) and 7(2)(h) of the IBBI (Insolvency Professionals) Regulations, 2016 read with clauses 3, 5, 12, 13 and 14 of the Code of Conduct under the said Regulations.

5. Order

5.1 The DC is conscious of the fact that the insolvency regime in India is at its infancy. Also, the insolvency profession is new and emerging. During the personal hearing, the counsel on behalf of Mr. Mahender Kumar Khandelwal submitted that the errors committed by IP during CIRP are unintentional and of a technical nature. Further, it is also recognised that the role of an IP in India is significantly different as compared to other matured jurisdictions. These facts may call for some leniency as long as these are not *mala fide*.

5.2 In view of the above, 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, issues the following directions:

5.2.1 The DC hereby imposes on Mr Mahender Kumar Khandelwal a monetary penalty of Rs. 29,24,167/- (Twenty Nine Lacs Twenty Four Thousand One Hundred and Sixty Seven only) [which is ten percent of the RP Fee (Rs. 2,92,41,667 X 10 percent) forming part of IRPC] and directs him to deposit the penalty amount by a crossed demand draft payable in favour of the 'Insolvency and Bankruptcy Board of India' within 30 days of the issue of this Order. The Board in turn shall deposit the penalty amount in the Consolidated Fund of India.

5.2.2 From the minutes of the meeting of the 19th CoC held on 10th October, 2018 it is clear that Mr. Mahender Kumar Khandelwal, RP and the members of the CoC were well aware that the expenses incurred by financial creditors on legal assistance are not part of IRPC. That is why they reached an understanding that if the Board objects to inclusion of such expenses in IRPC, this amount would be reimbursed to CD by the FCs in proportion to their voting share. They knew that the Board does not scrutinise every record of every CIRP to notice inclusion of such expenses and, therefore, the possibility of the Board noticing, and objecting is remote. Even if that remote possibility materialises, they will make it good from the common property, that is, resolution plan. It is incidental that the Board conducted an inspection and came across this unlawful loss to the CD. Otherwise,

the RP and the members of the CoC would have succeeded in their design. In the process, they included a sum of Rs. 12,09,90,185/- (Twelve Crores Nine Lacs Ninety Thousand One Hundred and Eighty Five only) in the IRPC causing loss of this amount to the CD, reached a conspiracy for an unlawful act and attempted to deprive stakeholders to the extent of Rs. 12,09,90,185/- from resolution plan, in blatant disregard of the law. Thus, irrespective of the understanding between the parties, it is a fact that the CD has unduly suffered, the Creditors has been unduly benefitted and the RP has deliberately allowed such unlawful gain and loss (i.e. payment of Rs. 12,09,90,185/- to legal counsel of CoC forming part of IRPC) in contravention of the provisions of the Code and Regulations. Therefore, the DC directs the RP to make good the loss by securing reimbursement as minuted in the minutes of 19th Meeting of CoC (Resolution No. 7) held on 10th October, 2018 and produce evidence to the Board of deposit of amount of Rs. 12,09,90,185/- in the account of CD within 30 days of issue of this order.

5.2.3 Mr Mahender Kumar Khandelwal shall not accept any new assignment either as IRP or RP till:

- i. he deposits the monetary penalty of Rs. 29,24,167/- (Twenty Nine Lacs Twenty Four Thousand One Hundred and Sixty Seven only) with the Board; and
- ii. produces evidence to the Board of deposit of Rs. 12,09,90,185/- (Twelve Crores Nine Lacs Ninety Thousand One Hundred and Eighty Five only) in CD's Account.

5.2.4 The Board shall examine the role of the CoC in this context and take any action permissible under the law.

5.3 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Mahender Kumar Khandelwal is enrolled as a member.

5.4 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.

5.5 Accordingly, the show cause notice is disposed of.

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(Dr. Navrang Saini)
Whole Time Member, IBBI

Dated: 14th November 2019

Place: New Delhi