

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/89/2022

8th April 2022

ORDER

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

Background

1. This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/MON/2020/161/404/2303 dated 6th September, 2021, issued to Mr. Mahender Kumar Khandelwal, B-2A, Sunny Valley C.G.H.S., Dwarka, Sector 12, New Delhi, National Capital Territory of Delhi- 110078 who is a Professional Member of the Indian Institute of Insolvency Professional of ICAI and an Insolvency Professional registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P00033/2016-2017/10086.
 - 1.1 Mr. Mahender Kumar Khandelwal was appointed as an interim resolution professional (IRP) for the corporate insolvency resolution process (CIRP) in the matter of M/s KSK Mahanadi Power Company Limited, Corporate Debtor (CD) vide Order of the Hon'ble National Company Law Tribunal, bench at Hyderabad (AA) dated 03.10.2019 which admitted an application for CIRP under Section 7 of the Code. He was however replaced by Mr. Sumit Binani, who was appointed as resolution professional (RP) by AA vide Order dated 16.06.2020.
 - 1.2 The IBBI on 06.09.2021 had issued the SCN to Mr. Mahender Kumar Khandelwal under section 219 of the Code read with regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations), based on material available on record in respect of his role as IRP in the CIRP of M/s KSK Mahanadi Power Company Limited, CD. The IBBI was of the *prima facie* opinion that sufficient cause exists to take action against Mr. Khandelwal in terms of section 220 of the Code read with regulation 11 of the IP Regulations. The SCN alleged the contravention of the provisions of sections 14(1)(b), 25(1) and 208(2)(a) & (e) of the Code, regulations 24(7) and 27 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), regulation 7(2)(a) & (h) of the IP Regulations and clauses 2, 3, 5, 9, 10 and 14 of the Code of Conduct specified in First Schedule of the IP Regulations read with Circular No. IBBI/RV/019/2018 dated 17.10.2018 and Circular No. IBBI/RV/022/2019 dated 13.08.2019. Mr. Khandelwal replied to the SCN vide letter dated 20.09.2021.
 - 1.3 The IBBI referred the SCN, reply of Mr. 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. Khandelwal availed an opportunity of personal virtual hearing before the DC on 18.02.2022 wherein he was

represented by Advocate GP Madaan. The Advocate reiterated the submissions made in the written reply and also made a few additional submissions. Further, Mr. Khandelwal submitted the additional submissions vide e-mail dated 04.03.2022.

2. The contraventions alleged in the SCN and the submissions by Mr. Khandelwal in his reply are summarized as follows.

2.1 **Contravention-I**

2.1.1 It has been observed from the minutes of the 1st CoC meeting dated 7.11.2019 that a payment of pre-CIRP expenses of Rs.109 crores approx. had been made during the moratorium. The said minutes further notes that Mr. Khandelwal sought ratification of the CoC for the payment. As ratification was sought, it is inferred that the said payment had already been made and thereafter CoC was intimated about the said payment.

2.1.2 It has been observed from the information provided by Mr. Khandelwal's email dated 29.07.2021 that the said payment has been made in several tranches between 14.10.2019 and 25.10.2019, *inter-alia*, towards the following:

- (i) transmission and UI charges for the month of August 2019 and September 2019,
- (ii) Statutory payments of CGST, IGST and SGST for month of September 2019,
- (iii) Salaries for month of September 2019,
- (iv) Open market coal,
- (v) O & M payments,
- (vi) Coal transportation,
- (vii) Administrative payments

2.1.3 Furthermore, in Mr. Khandelwal's email dated 6.04.2021, he has, *inter alia*, accepted that said payment was made. Mr. Khandelwal has also stated that the said payment was critical in nature and required to be made to maintain the CD as going concern in his opinion. However, section 14(2A) of Code allows payments during moratorium only for supply of goods or services that are provided during CIRP and considered critical to protect and preserve the value of CD as a going concern. Whereas in the present scenario, Mr. Khandelwal has made payments during moratorium towards supply of goods and services provided before the initiation of CIRP of CD. By making the said payment, Mr. Khandelwal failed to preserve and protect the assets of the CD in terms of section 25(1) of Code.

2.1.4 It is also noted that the said payments have been justified instead of intimating the concerned persons that their dues of pre-CIRP period ought to have been filed as claims as per forms available under the CIRP Regulations.

2.1.5 By seeking ratification of payment of pre-CIRP dues of Rs.109 crores (approx.) during the CIRP, Mr. Khandelwal has allegedly contravened the moratorium ordered by AA and section 14(1)(b), 25(1) and 208(2)(a) of the Code. By not intimating the concerned persons that their dues ought to have been filed as claims, Mr. Khandelwal has allegedly contravened clauses 2, 3, 5, 9, 10 and 14 of Code of Conduct under IP Regulations.

Submissions

- 2.2.1 It has been submitted by Mr. Khandelwal that, in terms of sections 18, 20, and 25 of the Code, the IRP has a duty to run the CD as a going concern and ensure the continued business operations of the CD. In *Sajeve Bhushan Deora vs. Axis Bank Ltd*, the Hon'ble National Company Law Appellate Tribunal (Hon'ble NCLAT) held that the IRP has to ensure the continued business operations of the CD in terms of his duties specified under Section 25 of the Code. Further, in *Tata Consultancy Services Limited vs Vishal Ghisulal Jain*, the Hon'ble NCLAT has also held that section 25 of the Code requires the RP to ensure that the business and activities are carried out and the company is run as a going concern during the CIRP, which is also one of the main objectives of the Code.
- 2.2.2 Mr. Khandelwal informed that the issue regarding the pre-CIRP payment of Rs. 109.18 Crores was made in 129 separate transactions between 14.10.2019 and 25.10.2019, *inter alia*, towards the transmission and UI charges for the month of August 2019 and September 2019, statutory payments of CGST, IGST and SGST for month of September 2019, salaries for month of September 2019, open market coal, O&M payments, coal transportation and administrative payments.
- 2.2.3 Mr. Khandelwal submitted that, he has made the payments which are considered critical in nature, necessary for administrative efficiency and to ensure continuity of business operations of the CD. In light of the fact that non-payment for these critical services may have led to termination of services by the respective vendor, Mr. Khandelwal made these payments to ensure that the going concern status of the CD is not threatened. Thus, the payments were made in the best interest of the CD and in order to avoid any interruptions in the business-as-usual setting of the CD and the outstanding dues of these vendors were only paid by him to ensure that the CD continued to function as a going concern, as part of discharging the duties attributed to him in terms of section 20(2)(e) of the Code and the same do not come in conflict with section 14(1)(b) of the Code.
- 2.2.4 Mr. Khandelwal submitted that he had acted in good faith while discharging his duties under the Code and also sought the approval of the CoC in respect of payment towards these pre-CIRP dues. By paying the outstanding pre-CIRP dues, no harm to the financial position or loss was caused to the CD and on the contrary, this ensured the continuance of going concern.
- 2.2.5 Mr. Khandelwal has also carried out a special audit or review of all the pre-CIRP payments after bringing such payments to the notice of the CoC and having held discussions on the matter in the 1st COC meeting held on 07.11.2019. At this meeting, it was decided that the Transaction Auditor will conduct a review of all such transactions. Accordingly, a Transaction Auditor i.e. Brahmayya and Co. was appointed by Mr. Khandelwal to carry out the Audit and report. The findings of this report are summarized below:

“We have reviewed the transactions stated above and analyzed the justifications provided by the Interim Resolution Professional in relation to Pre -CIRP payments effected by him and we observed that:

- *There are no instances where end utilization varies from stated purpose of the payment.*

- *All the payments are made in compliance with respective Purchase Order's/Work Order's, as applicable.*
- *All statutory payments effected were also in line with the relevant statutory requirements, as applicable.*
- *The justifications provided by the IRP and management are reasonable and such payments are considered critical in order to ensure the continuity of business operations and maintaining going concern status of the CD."*

2.2.6 During the personal hearing Mr. Khandelwal also submitted that he was IRP for a period of three months, and he had fulfilled his duty to preserve and protect the assets of the CD and he had handed over the CD to RP as a going concern. That had he not made these urgent payments to vendors and employees during the CIRP period there was a serious probability of the CD being shut down. Further, exploring and engaging other vendors and professionals would have taken time due to the specialized nature of the sector which would have resulted in loss that could have been more than the payments made. It was also submitted by the RP that no loss resulted due to the payments that were made by him.

3. **Contravention-II**

3.1.1 As per section 22(2) of the Code, the CoC may in first meeting either resolve to appoint the IRP as a RP or to replace the IRP by another RP.

3.1.2 It is observed from Mr. Khandelwal's email dated 15.11.2019 to the CoC members that he had informed about the Disciplinary Committee of IBBI order dated 14.11.2019 passed in the matter of Bhushan Power and Steel Limited and stated that the said order may fetter Mr. Khandelwal's ability to accept the assignment as RP of CD and therefore, the agenda for appointment of RP was deferred.

3.1.3 Therefore, it is noted that Mr. Khandelwal deliberately deferred the agenda for appointment of RP of CD to cover the embargo imposed on Mr. Khandelwal by virtue of the order of Disciplinary Committee of IBBI dated 14.11.2019 to make unlawful gain for himself. By deliberately deferring the agenda for appointment of RP for unlawful gain. Hence, Mr. Khandelwal has allegedly contravened section 208(2)(a), 208(2)(e) of Code read with regulation 7(2)(a) & (h) of IP Regulations and clauses 3 and 9 of Code of Conduct.

3.2 **Submissions**

3.2.1 Mr. Khandelwal has submitted that he was issued SCN dated 7.10.2019 by IBBI in respect of CIRP of Bhushan Power and Steel Ltd. The same was replied by him on 22.10.2019 and addendum to replies providing additional information to the aforesaid SCN on 30.10.2019. Personal hearing for same was accorded to Mr. Khandelwal on 30.10.2019.

3.2.2 Mr. Khandelwal had requested IBBI officials on 06.11.2019 for expeditious disposal of disciplinary proceedings and issuance of order at the earliest in view of proposed CoC of KSK Mahanadi Ltd. for his appointment in continuation from IRP to RP which was scheduled on 07.11.2019. The Mr. Khandelwal had again requested Chairperson, IBBI on

08.11.2019 and the Disciplinary Committee on 11.11.2019 in view of the agenda for appointment as RP being put up in the 1st CoC of KSK Mahanadi and e-voting between 11.11.2019 to 14.11.2019. Finally, the Disciplinary Committee of IBBI had issued order on 14.11.2019 imposing certain restrictions on accepting new assignment as IRP or RP till such time the penalties imposed are duly discharged.

- 3.2.3 Mr. Khandelwal further submitted that he vide e-mail dated 15.11.2019 had deferred the agenda for appointment of RP in view of the Order passed by the DC of IBBI stating as follows,

“Late last evening i.e. on 14th of November 2019 around 11 PM, it has come to my knowledge that Insolvency and Bankruptcy Board of India (IBBI) has issued an order under Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations 2016 read with Section 220 of Insolvency and Bankruptcy Code 2016 (Code).

This order is in connection with the Corporate Insolvency Resolution Process of Bhushan Power & Steel Limited, of which I am Resolution Professional. Although this order is available on the website of the Insolvency and Bankruptcy Board of India, I am enclosing copy of the same with the email. As you would discern from the order, the order has levied certain monetary penalties on me and CoC, and also directed the Committee of Creditors of Bhushan Steel & Power Limited to reimburse certain amounts to Bhushan Power & Steel Limited.

The order also placed certain restrictions on me from accepting new assignments as IRP or RP till such time the aforesaid penalties are duly discharged.

While I continue to explore my legal remedies in relation to the order, it is my duty as the IRP to bring this new development to the notice of the members of Committee of Creditors. It is in discharge of such duty of complete disclosure that I am addressing this email to you. Since the order may fetter my ability to accept the assignment as RP of KSK Mahanadi Power Company Limited, I am for the moment suspending voting for the Resolution number 5 of the resolution proposed to be voting for confirmation of Interim Resolution Professional as the Resolution Professional of KSK Mahanadi Power Company Limited. I will in due course apprise the members of Committee of Creditors on the next steps either by way of conference call or by convening a meeting of Committee of Creditors within one week as may be convenient to all.”

- 3.2.4 Thereafter, at the 2nd CoC meeting dated 29.11.2019, Mr. Khandelwal informed the CoC members that a writ petition was filed by him before the Hon’ble High Court of Delhi against the aforesaid Disciplinary Committee Order. The minutes of the 2nd CoC meeting were recorded as follows:

“In view of the Delhi High Court Order dated 25 November 2019, Mr. Dhruv Dewan (the personal legal counsel to Mr. Khandelwal), explained to the Members the key elements involved in the IBBI Order and the facts of the proceedings and the orders passed by the Delhi High Court in the writ petition filed by Mr. Mahender Kumar Khandelwal, against the IBBI Order. Mr. Dewan also mentioned that there is legally no impediment against Mr. Mahender Kumar Khandelwal at present from accepting or from being confirmed as the resolution professional. He explained that as far as first condition of penalty payment

is there, it is already deposited by Mr Mahender Khandelwal hence there is no legal impediment.”

“The penalty charged in the IBBI Order on Mr Khandelwal had already been fully paid to the Delhi High Court by him and the High Court had also ordered the committee of creditors of Bhushan Power and Steel Limited (and not Mr Khandelwal) to pay the amount paid to the CoC legal counsel out of the funds of Bhushan Power and Steel Limited to the High Court by December 14, 2019. Thus, there is no further action which is required to be undertaken by Mr Khandelwal now in the said matter, which would prevent him from undertaking this assignment as the RP.

Multiple queries with respect to the origin, impact and conclusion of the proceedings were raised by the Members Mr. Dhruv Dewan responded to those queries. After detailed discussion, the CoC members decided to defer the appointment of Mr. Mahender Khandelwal from IRP to RP till 14th December 2019 and till next COC of KSK Mahanadi”

- 3.2.5 At the 3rd CoC meeting held on 26.12.2019, Mr. Khandelwal had given an explanation on the hearing in the matter pending before the Hon’ble Delhi High Court on the matter which is also captured in the 3rd CoC meeting minutes. Thereafter, Mr. Khandelwal has put the matter to vote and his appointment as the RP which was rejected by the CoC and the same was reflected through the voting results of 07.01.2020.
- 3.2.6 Therefore, it can be summarised that the agenda for appointment of RP may not be considered as a deliberate attempt to delay the CIRP but is a result of the facts and circumstances existed at that given point of time.
- 3.2.7 During the personal hearing, Mr. Madaan counsel for Mr. Khandelwal, reiterated the submissions made in the written reply.

4. Contravention-III

- 4.1.1 Regulation 27 of CIRP Regulations read with IBBI’s circulars require appointment of only registered valuers for undertaking valuation of the assets of the CD. IBBI Circular No. IBBI/RV/022/2019 states that the fees or other costs of the unregistered valuer for valuation shall not be included in insolvency resolution process costs (IRPC).
- 4.1.2 It is observed that in the 2nd CoC meeting dated 29.11.2019, Mr. Khandelwal informed CoC about the selection, *inter alia*, of GAA Advisory, Registered Valuer-Entity for valuation and took approval of fees amounting Rs 8.25 lacs for GAA Advisory through e-voting. However, it is noted from the minutes of 3rd CoC meeting dated 26.12.2019 that the attendees were made aware that the registration of GAA Advisory as a valuer was pending. Therefore, despite knowing that GAA Advisory is an unregistered valuer, Mr. Khandelwal got valuation conducted by it.
- 4.1.3 It is further observed that GAA Advisory LLP, which was unregistered at the time of appointment, raised the invoice dated 7.02.2020 for an amount of Rs. 4,86,750/-. By appointing unregistered valuer namely GAA Advisory and including its costs in CIRP costs, Mr. Khandelwal has allegedly contravened regulation 27 of the CIRP Regulation along with IBBI circular no. IBBI/RV/019/2018 dated 17.10.2018 and circular no. IBBI/RV/022/2019 dated 13.08.2019.

4.2 Submission

4.2.1 Mr. Khandelwal submitted that the approval of fee of Rs. 8.25 lacs for valuation exercise carried out by GAA Advisory was taken up in the 2nd CoC meeting. However, as soon as it came to Mr. Khandelwal's notice that registration of GAA Advisory as valuer entity is pending, the matter was taken up with the CoC members and was discussed with them in the 3rd CoC meeting. The extract of the minutes capturing the fact is mentioned below:

“Multiple queries were raised by the CoC members in this regard, the same were duly answered coming to a conclusion that since only the fees for the valuers was approved by the Members, the individual partners of GAA Advisory who are conducting valuation & producing report are registered with the IBBI and work has already been started by them, therefore in the interest of time, the valuation may be continued by them.”

4.2.2 However, instead of cancelling the appointment of the GAA Advisory as it was decided that since the individual partners of GAA advisory who were conducting the valuation were registered with the IBBI, they may be continued in the interest of time, with the consent of the CoC members and the Legal counsel's suggestion, it was decided that, in order to bind the individual partners and GAA Advisory, a support letter in favour of IRP/CoC shall be executed by GAA Advisory wherein GAA Advisory shall indemnify the IRP/RP for any deficiency in conduct of its individual partners in arriving the fair and liquidation value and GAA Advisory to be jointly and severally liable for the actions of its individual partners towards the IRP/ RP /CoC.

4.2.3 Thereafter, it has been informed to the CoC members during CoC meeting held on that “GAA Advisory LLP” has received the registration as a valuer with IBBI on 24.01.2020 and accordingly appointment letter was executed with “GAA Advisory LLP” on 25.01.2020.

4.2.4 During the personal hearing Mr. Khandelwal reiterated the submissions made in the written reply.

5. Contravention-IV

5.1.1 Regulation 24(7) of CIRP Regulations requires an IP to circulate the minutes of CoC meetings within 48 hours of the said meeting.

5.1.2 However, it has been observed that out of the 6 CoC meetings conducted by Mr. Khandelwal, the minutes of 3 CoC meetings have been circulated after the expiry of period of 48 hours. The details of dates are as follows:

| S. No. | Meeting | Date of CoC Meeting | Date on which minutes were circulated |
|--------|-----------------|---------------------|---------------------------------------|
| 1. | 1 st | November 7, 2019 | November 13, 2019 |
| 2. | 2 nd | November 29, 2019 | December 2, 2019 |
| 3. | 3 rd | December 26, 2019 | December 30, 2019 |

5.1.3 By delaying the circulation of CoC minutes beyond 48 hours, Mr. Khandelwal has allegedly contravened regulation 24(7) of the CIRP Regulations.

5.2 Submission

5.2.1 Mr. Khandelwal submitted that the as per regulation 24(7) of the CIRP Regulations, the RP is required to circulate the minutes of the CoC meeting to all participants by electronic means within 48 hours of the said meeting.

5.2.2 The minutes of 1st CoC meeting of KSK Mahanadi Power Company was duly circulated to the CoC Members vide an email dated 11.11.2019 (as 09.11.2019 and 10.11.2019 were public holidays.) Subsequently, the revised minutes was also circulated on 13.11.2019 only to capture the actual discussion carried out during the meeting and ensure that the same is not in violation of Code. Therefore, the delay in circulation of the minutes was unintentional. Further, the minutes of the 2nd and 3rd CoC Meeting were duly circulated on 2.12.2019 and 30.12.2019 and the delay was duly due to public holiday. However, considering that there were public holidays after the meetings, the minutes were circulated within 48 working hours, exclusive of the public holidays.

6. Analysis and findings

6.1 The DC after taking into consideration the SCN, the reply to SCN, the oral and additional written submissions of Mr. Mahender Kumar Khandelwal and also the provisions of the Code, rules and the regulations made thereunder finds as follows.

6.1.1 With regards to the issue of payment of pre-CIRP expenses during moratorium, section 14 (1)(b) of the Code provides as under:

“14. Moratorium. –

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: -

(b) transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;

...

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.”

6.1.2 The moratorium under the Code is a period wherein no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential

contracts can be initiated or continued against the CD. The said provision ensures that there is no devolution of a CD's assets during the CIRP so that the CD can be continued as a going concern and if the assets of the CD are alienated during the pendency of the proceedings it will seriously jeopardize the interest of all the stakeholders.

6.1.3 Further, section 25(1) of the Code also provides as under:

“25. Duties of resolution professional. –

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.”

6.1.4 In the instant matter, the DC observes from the minutes of the 1st CoC meeting dated 7.11.2019 the following was recorded regarding the payment of pre-CIRP expenses:

“CoC Members sought details of amount spent towards procurement of coal, O&M expenses and other pre-CIRP payments. With respect to the payment of pre CIRP expenses of around INR 109 Cr, the IRP sought explanation from the authorized representatives of the suspended BODs of the Corporate Debtor. In response, Mr. Tarun explained difficult circumstances of coal unloading due to labor unrest at the plant during September month that led to the 15 rakes being stranded on Indian Railways network and had to be unloaded at a private siding of Bhatia Energy and Minerals Pvt Ltd.”

6.1.5 Furthermore, the DC takes notes of the email dated 06.04.2021 of Mr. Khandelwal, wherein he had accepted that payment was made and submitted that the said payment were critical in nature and in his opinion were required to be made to maintain the CD as a going concern.

6.1.6 The DC also notes from the e-mail dated 29.07.2021 of Mr. Khandelwal that the pre-CIRP payment of Rs. 109.18 Crores was made in 129 separate transactions between the dates of 14.10.2019 and 25.10.2019, *inter-alia*, towards the transmission and UI charges for the month of August 2019 and September 2019, statutory payments of CGST, IGST and SGST for month of September 2019, salaries for month of September 2019, open market coal, O&M payments, coal transportation and administrative payments.

6.1.7 The DC further notes from the submission of Mr. Khandelwal that the aforesaid payments made were critical in nature and was necessary for administrative efficiency and for continuity of operations of the CD. That the failure to make such would have resulted in the termination of services by the respective vendor. Mr. Khandelwal had also engaged Brahmayya and Co., Transaction Auditor to carry out the Audit for the pre-CIRP expenses. The findings of the transaction auditor states that *“justifications provided by the IRP and management are reasonable and such payments are considered critical in order to ensure the continuity of business operations and maintaining going concern status of the CD.”*

6.1.8 The DC notes from his submission that the IRP was faced with a difficult decision whether to make payment of pre-CIRP expenses to ensure continued supply of of essential goods or services but risk violating provision of the Code or to tightly adhere to the Code and

endanger the prospect of CD as a going concern. The DC also takes note of the submission of Mr. Khandelwal that the vendors and professionals engaged were specialized and dismissing them to explore other service providers would have resulted in loss that would have been more than the payments made by the IRP. That the supply of essential goods and services were critical and would have affected the going concern nature of CD, therefore, Mr. Khandelwal could not terminate or interrupt the supply and employment even during the moratorium period. In view of the observations of the Transaction Auditor the payments made were for critical services without which the continued business operation of the CD was not possible and thereby maintenance of CD as a going concern and also notes from submission of Mr. Khandelwal that without pre-CIRP payment the supply of essential/critical goods and services by specialised vendors/ professional business operation of the CD could not have been managed and continued as a going concern, the DC finds that Mr. Khandelwal made a decision that appears to be in the best interest of all the stakeholders and made the pre-CIRP payments to ensure the going concern status of the CD. The ensuing the survival of the CD allows for continued returns for the creditors, employment of the workers and steady revenue for the government as well. Hence, in these circumstances no contravention could be made out against Mr. Khandelwal.

6.2.1 With regard to the issue of deferring the agenda of appointment of RP, the DC notes the provisions of the section 22(2) of the Code which states as follows:

“22. Appointment of resolution professional. -

(2) The committee of creditors, may, in the first meeting, by a majority vote of not less than sixty-six per cent. of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.”

6.2.2 The DC further notes that it is the duty of the IP to ensure that their conduct would not undermine the stakeholder’s trust in the profession. Therefore, while granting certificate of registration to an IP they are subjected to follow the Code of Conduct specified in the First Schedule to the IP Regulations to ascertain that the IP is a fit and proper individual. In this regard, regulation 7 (2) of the IP Regulations provide as follows:

“7. Certificate of registration.

(2) The registration shall be subject to the conditions that the insolvency professional shall -

(a) at all times abide by the Code, rules, regulations, and guidelines thereunder and the bye-laws of the insolvency professional agency with which he is enrolled;

(h) abide by the Code of Conduct specified in the First Schedule to these Regulations;”

6.2.3 The DC also notes that vide email dated 15.11.2019 Mr. Khandelwal had informed the CoC members about the Disciplinary Committee order dated 14.11.2019 passed in the matter of Bhushan Power and Steel Limited. It was informed that Mr. Khandelwal was exploring the legal remedies in relation to the order since the aforesaid order may fetter

his ability to accept the assignment as RP of the CD and therefore, the agenda for appointment of RP was deferred.

- 6.2.4 The DC further notes from his submission that in the 2nd CoC meeting dated 29.11.2019 the issue for appointment of IRP as RP under section 22 of the Code was discussed in detail wherein the IRP informed about the Order of the DC dated 14.11.2019 had been stayed by the Hon'ble Delhi High Court and the High Court had ordered the CoC of Bhushan Power and Steel Limited to pay the amount paid to CoC's legal counsel to the High Court by 14.12.2019. However, the lenders decided to defer the appointment of Mr. Khandelwal as RP.
- 6.2.5 The DC also notes that in the e-voting of the 3rd CoC meeting dated 26.12.2019 when the resolution for appointment of Mr. Mahender Khandelwal as the RP of the CD and for payment of fees was put to vote, it was rejected with majority.
- 6.2.6 In view of the above, the DC finds that vide e-mail dated 15.11.2019, Mr. Khandelwal had suspended the voting for the confirmation of IRP as the RP of KSK Mahanadi Power Company Limited in view of the DC Order dated 14.11.2019 placed restrictions on accepting of assignments until the imposed penalty amount was deposited. The DC notes that as per the minutes of the 2nd CoC meeting, the members decided to defer the appointment of Mr. Mahender Khandelwal from IRP to RP until the direction of the Hon'ble Delhi High Court was complied with by the CoC of Bhushan Power and Steel Limited. Then in the next CoC meeting they rejected the appointment of Mr. Khandelwal as RP. Therefore, it cannot be said that Mr. Khandelwal made deliberate efforts to defer the voting items for making unlawful gains and hence, no contravention could be made out.

- 6.3.1 With regard to the issue of appointment of unregistered valuers the DC observes that, the regulation 27 of the CIRP Regulations provides that,

“27. Appointment of registered valuers

The resolution professional shall within seven days of his appointment, but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35:”

- 6.3.2 The IBBI Circular dated 17th October 2018 on “Valuation under the Insolvency and Bankruptcy Code, 2016” provides that:

“6. In view of the above, every valuation required under the Code or any of the regulations made thereunder is required to be conducted by a ‘registered valuer’, that is, a valuer registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017. It is hereby directed that with effect from 1st February, 2019, no insolvency professional shall appoint a person other than a registered valuer to conduct any valuation under the Code or any of the regulations made thereunder.”

6.3.3 The IBBI Circular dated 13th August 2019 on “Valuation under the Insolvency and Bankruptcy Code, 2016: Appointment of Registered Valuer” provides that:

“2. It is reiterated that-

(i) appointment of any person, other than a ‘registered valuer’, that is, a valuer registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017, on or after 1st February, 2019, to conduct any valuation required under the Insolvency and Bankruptcy Code, 2016, or any regulations made thereunder, including the Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016, and the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, is illegal and amounts to violation of the Circular aforesaid; and (ii) payment, whether as fee or otherwise, to any person, other than a ‘registered valuer’ for any valuation referred to in paragraph (i), shall not form part of the insolvency resolution process costs or liquidation cost.”

6.3.4 The DC observes that as per the minutes of the 2nd CoC meeting held on 29.11.2019 the fees of the registered valuers was approved by the CoC members as under:

*“While showing the quotes presented in the Meeting, Ms. Vandana Garg from the IRP Team mentioned that additional two quotes were received to conduct the valuation of the Corporate Debtor. Out of the quotes received from all the entities, **GAA Advisory and RBSA Valuation Advisors LLP** have been selected as the two valuers for the project considering both have experience in carrying out valuation on companies under the CIRP as well as their competitive fee quote. As regards appointment of Consultant, IRP informed COC members that due process was followed as per IBC Code.*

The Members discussed amongst themselves as well as with the IRP and the IRP Team and further agreed with the selection made by the IRP.

The following resolution was therefore placed before the Members for approval of fees in terms of Regulation 33/ Regulation 34 of the CIRP Regulations:

"RESOLVED THAT pursuant to Regulation 27 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 thereunder, the professional fee of the following valuers is hereby approved by the members of the Committee of Creditors:

| <i>Sr. No.</i> | <i>Name of Valuer</i> | <i>Quote (exclusive of out-of-pocket expenses up to the maximum limit of 7.5% of aggregated remuneration and applicable taxes)</i> |
|----------------|------------------------------------|--|
| <i>1.</i> | <i>GAA Advisory</i> | <i>INR 8.25 Lacs</i> |
| <i>2.</i> | <i>RBSA Valuation Advisors LLP</i> | <i>INR 14.50 Lacs</i> |

"RESOLVED FURTHER THAT the said professional fees payable to the registered valuers shall form part of the insolvency resolution process cost and may be paid out of the bank accounts of the Corporate Debtor."

- 6.3.5 An engagement letter dated 07.12.2019 was sent to GAA Advisory by Mr. Khandelwal, for confirmation of the terms and condition regarding determination of fair value and liquidation value of the CD and for returning of the agreement duly executed. The engagement offer was acknowledged and accepted on 18.02.2020.
- 6.3.6 The DC notes the following from the minutes of the 3rd CoC meeting dated 26.12.2019: *“With respect to the appointment of GAA Advisory for the fair and liquidation valuation of the Corporate Debtor, Ms. Vandana Garg from PwC Team mentioned that since the two partners of the firm are registered with the Insolvency Bankruptcy Board of India (IBBI) and the registration of the firm is pending, the valuation report will be signed by two partners of GAA Advisory, as per the requirement of the relevant IBBI circular. Multiple queries were raised by the Members in this regard, the same were duly answered coming to a conclusion that since only the fees for the valuers was approved by the Members, the individual partners of GAA Advisory who are conducting valuation & producing report are registered with the IBBI and the work has already been started by them, therefore in the interest of time, the valuation may be continued by them. However, it was suggested by legal counsels for RP that, in order to bind the individual partners and GAA Advisory, a support letter in favour of IRP/ CoC to be executed by GAA Advisory wherein GAA Advisory shall indemnify the IRP/ resolution professional for any deficiency in conduct of its individual partners in arriving the fair and liquidation value and GAA Advisory to be jointly and severally liable for the actions of its individual partners towards the IRP/ resolution professional /CoC. The Coc members further commented that CoC has already voted upon the agenda item related to fee of GAA Advisory. The IRP may take further necessary action as per the Code.”*
- 6.3.7 The DC also observes that GAA Advisory LLP registered with IBBI as Registered Valuer with registration no. IBBI/RV-E/02/2020/114 on 24.01.2020. Further, as per the amended engagement letter dated 25.01.2020 issued post the registration of GAA Advisory again confirmation as valuation advisor was sought. Further, it is observed that an invoice dated 7.02.2020 was also raised by GAA Advisory for an amount of Rs. 4,86,750.
- 6.3.8 In view of the above the DC notes that Mr. Khandelwal had appointed and ratified fees of GAA Advisory in the 2nd CoC Meeting and sent engagement letter dated 07.12.2019 without verifying the status of the Valuer. That Mr. Khandelwal had accepted the quotes of GAA Advisory without confirming its registration with IBBI. However, on finding out that GAA Advisory was unregistered, in the 3rd CoC Meeting a support letter in favour of IRP/ CoC was resolved to be executed by GAA Advisory to indemnify the IRP for any deficiency in conduct of its individual partners in arriving the fair and liquidation value. Also, an amended engagement letter dated 25.01.2020 was re-issued. The DC further notes that as no valuation report was submitted by unregistered valuer and the requirement of registration was rectified and amended engagement letter was issued hence, contravention could not be made out.

6.4.1 With regard to the issue of the delay in circulation of the CoC minutes, the regulation 24(7) of the CIRP Regulation states that:

“24. Conduct of meeting.

(7) The resolution professional shall circulate the minutes of the meeting to all participants by electronic means within forty-eight hours of the said meeting.”

6.4.2 The DC notes the date of the CoC Meeting was held, date of the circulation of the minutes and the submissions made by Mr. Khandelwal for the delays as follows:

| S. No. | CoC Meeting | Date of minutes circulation | Reasons for Delay |
|---------------|------------------------------------|-------------------------------------|---|
| 1. | 1 st CoC, 07.11.2019 | 11.11.2019 Revised on 13.11.2019 | Due to Holiday on Saturday & Sunday (9.11.2019 and 10.11.2019) |
| 2. | 2 nd CoC, 29.11.2019 | 02.12.2019 | Due to Holiday on Saturday & Sunday (30.11.2019 and 01.12.2019) |
| 3. | 3 rd CoC, 26.12.2019 | 30.12.2019 | Due to Holiday on Saturday & Sunday (28.12.2019 and 29.12.2019) |

In view of the above, the DC is of the opinion that the submissions made by Mr. Khandelwal are satisfactory and no contraventions could be made out.

ORDER

- 7 The DC, therefore, in exercise of the powers conferred under Section 220 (2) of the Code read with sub-regulations (7), (8) and (10) of regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, disposes of the SCN without any directions.
- 8 This Order shall come into force immediately from the date of its issue in view of paragraph 7.
- 9 In view of the above Order, a copy of this order shall be forwarded to the Indian Institute of Insolvency Professional of ICAI where Mr. Mahender Kumar Khandelwal is enrolled as a member for their further necessary action.
- 10 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.
- 11 Accordingly, the show cause notice is disposed of.

-Sd-

Dated: 8th April 2022
Place: New Delhi

(Dr. Mukulita Vijayawargiya)
Whole Time Member, IBBI