

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/112/2022

13th July, 2022

ORDER

This Order disposes the Show Cause Notice (SCN) No. IBBI/IP/INSP/2021/105/511/3456 dated 13th April 2022 issued to Mr. Mahender Kumar Khandelwal, Insolvency Professional under section 220 of the Insolvency and Bankruptcy Code, 2016 read with regulation 13 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017 (Inspection Regulations) and regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations 2016 (IP Regulations). Mr. Mahender Kumar Khandelwal is a Professional Member of Indian Institute of Insolvency Professionals of ICAI (IIP-ICAI) and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board/IBBI) with Registration No. IBBI/IPA-001/IP-00033/2016-2017/10086.

1. Developments in relation to resolution of the CD

1.1. The Hon'ble NCLT, Principal Bench (AA) *vide* its order dated 26.07.2017 admitted the application filed by Punjab National Bank under section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) for initiating Corporate Insolvency Resolution Process (CIRP) against Bhushan Power and Steel Limited (CD) and appointed Mr. Mahender Kumar Khandelwal as an Interim Resolution Professional who was later confirmed as the Resolution Professional.

1.2. Mr. Mahender Kumar Khandelwal issued an advertisement and invited prospective resolution applicant to put forward their resolution plans in respect of the CD. In response to the publication, 13 potential resolution applicants expressed their interest to submit the resolution plans to the CD. Eventually, the Resolution plan of JSW Steel Limited-H1 was approved by the COC which was later accepted by Hon'ble AA *vide* its order dated 05-09-2019.

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

2.1. The Board, in exercise of its powers under section 218 of the Code read with the IBBI Inspection Regulations, appointed an Inspecting Authority (IA) to conduct the inspection *vide* order dated 22.11.2021 on having reasonable grounds to believe that Mr. Mahender Kumar Khandelwal had contravened provisions of the Code and Regulations made thereunder. The IA under sub-regulation (1) of Regulation 6 of the Inspection Regulations

shared the Draft Inspection Report (DIR) with Mr. Mahender Kumar Khandelwal vide email dated 13.02.2022, to which Mr. Mahender Kumar Khandelwal submitted reply vide email dated 28.02.2022. The IA submitted the Inspection Report to the Board on 07.04.2022.

- 2.2. Based on the material available on record including the Inspection Report, the Board issued SCN to Mr. Mahender Kumar Khandelwal on 13.04.2022. The SCN alleged contravention of Section 14(1)(b), 18(1)(f), 28(1)(f), 208(2)(a) and 208(2)(e) of the Code, Regulation 13 of CIRP Regulations, Regulation 7(2)(a) and 7(2)(h) of IP Regulations read with Clause 2, 3, 5, 14 and 23A of Code of Conduct as specified under IP Regulations. Mr. Mahender Kumar Khandelwal replied to the SCN vide email dated 17.05.2022.
- 2.3. The Board referred the SCN, response of Mr. Mahender Kumar Khandelwal to the SCN and the material available on record, to the DC for disposal of the SCN in accordance with the Code and Regulations made thereunder. Mr. Mahender Kumar Khandelwal was given opportunity of virtual personal hearing before DC on 13.06.2022, which he availed and was accompanied by advocate, Mr. G. P. Madaan. Mr. Mahender Kumar Khandelwal submitted his written submissions along with additional documents via email dated 29.06.2022.

3. Alleged contraventions and submissions of the IP

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

3.1. Contravention with regard to the claim of Jaldhi Overseas Private Limited

- 3.1.1. Jaldhi Overseas Private Limited (JOPL) filed its claim form for an amount Rs.151,90,87,933.05/- in Form B as an operational creditor (OC). In the Information Memorandum (IM) prepared by Mr. Mahender Kumar Khandelwal, the amount claimed by JOPL was considered as Rs. 1,51,90,87,933.05/- and admitted amount was Rs. 1,51,37,57,761.65/- and categorized the same as operational debt. However, in the reply of a Civil Appeal filed by JOPL before Hon'ble SC, Mr. Mahender Kumar Khandelwal mentioned that he has duly evaluated the claim of the JOPL upon receipt in Form B and admitted an amount of Rs.151,90,87,933/- Therefore, there is discrepancy between the amount admitted as per IM and the amount stated in filing before Hon'ble SC.

- 3.1.2. It has been further observed that, Mr. Mahender Kumar Khandelwal has categorized JOPL as OC. However, JSW, the successful resolution applicant (SRA) in its resolution plan classified the debt of JOPL as a contingent creditor. RP is duty bound to examine and confirm that the plan is in conformity with section 30(2) of the Code read with sub-regulation (2) of regulation 39 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations). As Mr. Mahender Kumar Khandelwal agreed with the treatment of JOPL as contingent creditor and got approval of CoC and AA on the resolution plan, it shows that claim admission and preparation of IM was not done appropriately. This shows that he was dealing with his responsibilities of claim admission, preparation of IM in a casual manner and he was also reporting the facts before the Supreme Court in a casual manner.
- 3.1.3. In view of the above, the Board is of the prima facie view that Mr. Mahender Kumar Khandelwal inter-alia violated section 208(2)(a), 208(2)(e) of Code, regulation 13 of CIRP Regulations, regulation 7(2)(a) and 7(2)(h) of IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clause clauses 2 and 14 of Code of Conduct.

3.2. Submissions of Mr. Mahender Kumar Khandelwal

- 3.2.1. Mr. Mahender Kumar Khandelwal submitted that he had received a claim from JOPL in Form B as an "operational creditor" for an amount of INR 151,90,87,933/- and he duly evaluated and verified JOPL's claim on the basis of the documents submitted. Accordingly, Mr. Mahender Kumar Khandelwal admitted an amount of INR 151,37,57,761.65/- as an operational creditor and reduced an amount of INR 53,30,171.35/- against the above claim on account of the exchange rate difference as explained hereinbelow:
- (a) JOPL took an exchange rate of 1.212298SGD/USD against the actual exchange rate as on 26 July 2017 (i.e., the insolvency commencement date), which was 1.3559SGD/USD resulting in an overclaimed liability of USD 53,785 (in INR 34,64,872.72, as per the exchange rate of INR 64.4208).
 - (b) Forex rates as per RBI reference rate on 26 July 2017 was INR 64.4208, but for the purpose of conversion of liability of USD 23,551,750.9 from USD to INR,

rates claimed were INR 64.5 resulting overclaimed liability of INR 18,65,299/-. Thus, the overclaimed liability by JOPL under its Form B was INR 53,30,171.35, which was not admitted by Mr. Mahender Kumar Khandelwal.

- 3.2.2. Mr. Mahender Kumar Khandelwal submitted that the IM also correctly reflects that the said reduced amount of INR 151,37,57,761.65/- has been admitted, as an operational debt, in respect of JOPL. However, as regards the discrepancy in the submissions made before the Supreme Court, he submitted that the same was an inadvertent error and steps had been taken to rectify the same and bring the correct factual position before the Hon'ble Supreme Court. He further submitted that on 14 March 2022, he had filed an affidavit vide diary number 39327/2022 before the Hon'ble Supreme Court clarifying the inadvertent error with respect to JOPL's claim.
- 3.2.3. In so far as the categorization of JOPL's claim as contingent creditor by JSW, Mr. Mahender Kumar Khandelwal submitted that JOPL's claim was based on an arbitral award. The enforceability and validity of the said award was subject to the objections raised by the CD before the Hon'ble High Court of Calcutta, the said objections had been filed by the CD prior to initiation of CIRP and in fact were pending adjudication at the time when JSW had submitted its Resolution Plan. It is pertinent to mention that JOPL on 4th January 2022 withdrew its execution petition EC no.434 of 2016, which was for the enforceability of the afore-stated award. The CD was showing JOPL's debt as contingent liability in the annual report since 2013-14 (pre — CIRP date) and continued to appear as contingent creditor till the implementation of JSW resolution plan i.e. till March 2021. Accordingly, the books of accounts of the CD itself treated JOPL as a contingent creditor. It was in light of this background JSW classified JOPL as a contingent creditor.
- 3.2.4. Mr. Mahender Kumar Khandelwal submitted that the issue of categorization of JOPL's claims as 'contingent' was also raised before the NCLT and NCLAT and the same was dismissed by both the forums. He placed reliance on Resolution Plan Approval Order dated 5 September 2019 whereby the NCLT in para 120 held that *"...Therefore, we are of the considered view that there is no violation of any law or hostile treatment given to the contingent creditors which constitute a category distinct from the operational creditors."* Mr. Mahender Kumar Khandelwal further submitted that in a scenario when there exists no dispute with respect to categorization of claim of

JOPL, the allegation with respect to treatment of claim of JOPL by JSW as a contingent creditor does not survive.

- 3.2.5. Mr. Mahender Kumar Khandelwal submitted that JOPL itself has been diabolical with respect to its status as a creditor on multiple occasions and it has been changing its stance with respect to its status as a creditor, with a *malafide* intent as per its own convenience. Mr. Mahender Kumar Khandelwal stated that JOPL filed multiple proceedings before various judicial forums raising similar issues in relation to its status and classification as a creditor, including but not limited to complaints to initiate investigations by the Serious Fraud Investigation Office; however, no adverse conclusions have been arrived at by any of the investigative authorities against him. Mr. Mahender Kumar Khandelwal thus, submitted that the present complaint filed by JOPL in pursuance of which the instant SCN had been issued, was nothing but another attempt by JOPL to harass him and cast aspersions on the CIR Process of the Corporate Debtor, which has been successfully concluded post the implementation of the Approved Resolution Plan.
- 3.2.6. Mr. Mahender Kumar Khandelwal stated that while considering a resolution plan, the role of a resolution professional is limited to ensuring compliance with Section 30 of the Code and the regulations made thereunder. In the present case, Mr. Mahender Kumar Khandelwal duly evaluated the Resolution Plan submitted by JSW and found the same to be in compliance with the statutory requirements prescribed under Section 30(2) of the Code. Accordingly, after being satisfied of the necessary compliances, Mr. Mahender Kumar Khandelwal presented the Resolution Plan to the COC for their consideration under Section 30(4) of the Code. No prejudice is caused to JOPL as Other Creditor.
- 3.2.7. In light of the submissions made above, Mr. Mahender Kumar Khandelwal submitted that he adhered to his duties and acted diligently not just while admitting the claim of JOPL but also at all times during the CIR Process of the CD.

3.3. Summary Findings

- 3.3.1. It is pertinent to note that Mr. Mahender Kumar Khandelwal considered the amount claimed by JOPL as Rs. 1,51,90,87,933.05/- and admitted the amount as Rs. 1,51,37,57,761.65/- and categorized the same as operational debt. However,

the DC noted that in reply of a Civil Appeal filed by JOPL before Hon'ble SC, Mr. Mahender Kumar Khandelwal mentioned that he has duly evaluated the claim of the JOPL and admitted an amount of Rs.151,90,87,933/- Therefore, there is a discrepancy in the pleadings filed before the Supreme Court and the Information Memorandum with respect to admitted claim amount of JOPL. The DC also notes the submission of Mr. Mahender Kumar Khandelwal wherein he submitted that the same was an inadvertent error and steps were taken by him to rectify the same and bring the correct factual position before the Hon'ble Supreme Court. That he, on 14 March 2022, had filed an affidavit vide diary number 39327/2022 before the Hon'ble Supreme Court clarifying the inadvertent error with respect to JOPL's claim. In view of the same, the DC takes a lenient view.

- 3.3.2. Further. the DC found that the issue of categorization of JOPL's claims as - contingent was also raised before the NCLT and NCLAT and the same was dismissed by both the forums. The Hon'ble NCLT inter-alia observed in para 120 that *"Therefore, we are of the considered view that there is no violation of any law or hostile treatment given to the contingent creditors which constitute a category distinct from the Operational Creditors"*
- 3.3.3. Hon'ble NCLAT while upholding the said order of the NCLT, in its order dated 17th February 2020, on the issue raised by Jaldi Overseas Pte Ltd., observed that, *"93. In the present case as the Appellant has been categorized as 'contingent creditor', we hold that the Appellant who claims to be 'Operational Creditor' but his claim has not been crystalized which made him 'contingent creditor' and as such cannot claim equitable treatment with all other Creditors."*
- 3.3.4. It is brought to my notice that the issue is under consideration of Hon'ble Supreme Court and in all fairness, any comment needed to be avoided. However, fact remains that sense of professionalism demanded that resolution profession should have been more careful in classification of claims which has been his prime responsibility. As being maintained in books of the CD, particular claims were classified as contingent. With due diligence, Mr. Mahender Kumar Khandelwal could have provided the appropriate category to the admitted claims to begin with and thereby prevented agitation of same issue in different legal forums.

3.4. Contravention No. II with regard to related party transaction with Aarti Strips Private Limited without CoC approval

3.4.1. (i) Aarti Strips Private Limited (ASPL) is a related party to the CD. ASPL had submitted claim of Rs. 114.60 crore. Out of the said claim, an amount of Rs. 100.61 crore was towards the advance given by ASPL to the CD for supplies to be made in future and an amount of Rs. 13.99 crore was towards claim arising out of transactions, wherein ASPL had supplied some material to the CD.

(ii) Against the aforesaid advance of Rs. 100.61 crore, CD had partly supplied the goods prior to the insolvency commencement date (ICD) and the balance goods were supplied during the CIRP period. Accordingly, ASPL revised its claim by adjusting the aforesaid advance amount towards the material supplied and filed its revised claim for an amount of Rs.13.99 crore. As per section 28(1) (f) of the Code, Mr. Mahender Kumar Khandelwal should have obtained prior approval of CoC for the said transaction. However, Mr. Mahender Kumar Khandelwal failed to take prior approval of CoC for supply of goods to ASPL post initiation of CIRP.

3.4.2. In view of the above, the Board is of the prima facie view that Mr. Mahender Kumar Khandelwal inter-alia violated section 28(1)(f), 208(2)(a), 208(2)(e) of Code regulation 7(2)(a) and 7(2)(h) of IP Regulations read with clause 14 of Code of Conduct.

3.5. Submissions of Mr. Mahender Kumar Khandelwal

3.5.1. Mr. Mahender Kumar Khandelwal highlighted the factual scenario leading up to the alleged related party transactions:

- a. ASPL, while a related party, was both a buyer and seller to the Corporate Debtor. It had lodged its claim for an amount of INR 114.60 crores partly towards supplies made to the Corporate Debtor and partly towards advance payment made to the Corporate Debtor. Out of the said claim, an amount of INR 100.61 crore was towards the advance given by ASPL to the Corporate Debtor for supplies to be made in future (i.e., during the CIR Process Period) and an amount of INR 13.99 crore was towards claims arising out of transactions whereby ASPL supplied materials to the Corporate Debtor.
- b. ASPL supplies to the Corporate Debtor were at arm's length and were giving higher margin than domestic supplies. It is to be noted that before the commencement of CIRP, certain quantity of CRFH was at the work in progress stage therefore after the completion of the work, the same were dispatched to

ASPL after the commencement of the insolvency resolution process. Notably, these advances reflect 100% value of the goods supplied and the same were also found to be on arm's length basis. Accordingly, ASPL revised its claim by adjusting the aforesaid advance amount towards the material supplied and filed its revised claim for an amount of INR 13.99 crore.

- c. Immediately upon the knowledge, it is maintained that the matter was placed before the CoC for their information and/ or approval as necessary on multiple occasions. Initially, it was decided that the entire amount will be recovered from ASPL. However, after a resolution was put for vote for a post facto approval of this transaction, the COC concluded that since the supplies against the *pre-CIRP advance* was made by the Corporate Debtor *without the knowledge of the RP*, thus, it was not a related party transaction undertaken by Mr. Mahender Kumar Khandelwal as such. Accordingly, the said item was dropped from voting and therefore did not require the permission as stipulated under Section 28(1)(k) of the Code.
- d. Further, for the sake of comprehensiveness, Mr. Mahender Kumar Khandelwal brought forward the relevant discussions pertaining to transactions with ASPL. He submitted that at the 10th meeting of the CoC, a resolution was put for a post-facto approval of the transaction by which the Corporate Debtor supplied finished goods to ASPL against the advance given by ASPL prior to initiation of the CIR Process. The legal counsel for the COC expressed an opinion that the above resolution cannot be put to vote since the supplies against the pre-CIR Process advance was made by the Corporate Debtor without the knowledge of Mr. Mahender Kumar Khandelwal and thus, it was not a related party transaction undertaken by him as such. The relevant extract of the said minutes are reproduced hereinbelow for ease of reference:

“The Legal counsel of members gave his view that the above item is not a voting item since the company went entered into transactions with Aarti Strips (P) Ltd., Nepal, a related party of the corporate debtor and RP was not aware of the same. Hence, the COC is supposed to evaluate things only when the RP has done something which required the approval of COC, however, in current situation, the officials of the company have done transaction for which RP has to determine whether it requires further

investigation or take it up before Hon'ble NCLT and therefore in a situation where RP has no role in a transaction then COC cannot evaluate and get into the same.”

Accordingly, the said item was dropped from voting.

- e. Thus, it is evident that Mr. Mahender Kumar Khandelwal had kept the members of the COC informed regarding the transactions with ASPL at all times and the members of the COC themselves were of the opinion that the same could not be said to be a related party transaction undertaken after the insolvency commencement date since the supplies were against an advance received pre-CIR Process.
- f. It is in this light that the approval for the transaction with ASPL could not be obtained. This is not something for which the resolution professional can be held to be at fault. Mr. Mahender Kumar Khandelwal stated that he, in fact, made multiple efforts to secure the approval however since the transaction was not considered to be one which required approval in the opinion of the COC, the approval was not forthcoming.
- g. Mr. Mahender Kumar Khandelwal submitted that the prima facie opinion formed by the SCN regarding purported violation of Section 28(1)(f) is incorrect. For the said provision to be attracted, the related party transaction ought to have taken place after the ICD. In this regard, it is relevant to highlight that the transaction with ASPL, though a related party transaction, was for an amount deposited with the Corporate Debtor prior to the ICD and thus, does not fall within the ambit of Section 28(1)(f).

3.6. Summary Findings

3.6.1. The DC notes that Mr. Mahender Kumar Khandelwal continued to transact with ASPL which was a related party of the CD without the approval of the COC. The DC noted that as the supply of goods worth INR 100 crores to ASPL were done post the initiation of CIRP which is admittedly a related party, the same required approval of COC under section 28(1)(f) of the Code.

3.6.2. Under the guise of legal opinion, Mr. Mahender Kumar Khandelwal tried to defend his

action of related party transaction. If related party transaction was done by CD, after ICD, Mr. Mahender Kumar Khandelwal should have taken steps to bring back the value to the account of CD by appropriate measures and proposed action against errant management under section 74 of the Code.

3.7. Contravention No. III with regard to payments of pre-CIRP dues

- 3.7.1. Mr. Mahender Kumar Khandelwal appointed an audit firm *i.e.*, M/s Saxena & Saxena to conduct the Audit of operational creditors' claims submitted during CIRP. It has been observed from the audit report that certain pre-CIRP payments were made by Mr. Mahender Kumar Khandelwal during the CIRP. Mr. Mahender Kumar Khandelwal in the reply of draft inspection report mentioned that the Code does not bar payments to such critical operational creditors identified on the basis of commercial exigencies.
- 3.7.2. Further, Mr. Mahender Kumar Khandelwal, in his reply of the draft inspection report, admitted the fact that he had permitted payments of Post-Dated Cheques (PDCs) of OCs after initiation of CIRP. Mr. Mahender Kumar Khandelwal also submitted that he had made payments to certain OCs for their pre-CIRP dues, for an aggregate amount of Rs.16,95,25,612/- on account of the fact that the goods and services provided by them were critical and indispensable for the continued business operations of the CD. However, section 14 specifically prohibits of transferring, encumbering or disposing off any of the assets of CD.
- 3.7.3. In view of the above, the Board is of the prima facie view that Mr. Mahender Kumar Khandelwal inter-alia violated section 14, 208(2)(a), 208(2)(e) of Code, regulation 7(2)(a) and 7(2)(h) of IP Regulations read with clause clauses 3, 5 and 14 of Code of Conduct.

3.8. Submissions of Mr. Mahender Kumar Khandelwal

- 3.8.1. Mr. Mahender Kumar Khandelwal submitted that immediately upon his appointment and upon taking over the custody and control of the assets of the Corporate Debtor, he had conducted meetings with the officials of the Corporate Debtor at its plant in Chandigarh on 1 and 2 August 2017, Jharsuguda (Odisha) on 8 and 9 August 2017 and Kolkata (West Bengal) on 10 and 11 August 2017, wherein he apprised the erstwhile

management and officials of the Corporate Debtor about the scheme and provisions of the Code and the requisite compliances in accordance with its provisions as well as the regulations framed thereunder for the purposes of ensuring continued operations of the Corporate Debtor. It was also clarified that none of the payments were authorized towards the pre-CIR Process dues, unless it was specifically decided so by Mr. Mahender Kumar Khandelwal keeping in mind the existing commercial exigencies. Ordinarily, payments to the operational creditors were required to be, and were cleared, on the basis of inter-office memos/requests sent by the officials of the Corporate Debtor to the members of the team assisting Mr. Mahender Kumar Khandelwal. However, a large number of critical trade/operational creditors refused to provide goods and services unless their pre-CIR Process dues were paid. Thereafter, in consultation with its Technical Advisor, it was concluded that in order to ensure that the Corporate Debtor is managed as a going concern during the CIRP, it was urgent, critical and unavoidable to pay few critical operational creditors, amounts towards their pre-CIRP dues.

- 3.8.2. During the CIR Process of the Corporate Debtor, Mr. Mahender Kumar Khandelwal, on the basis of the advice of the Technical Advisor, identified certain critical trade/operational creditors, both service providers and suppliers, without whom it would not have been possible at all to keep the Corporate Debtor as a going concern. Their continued participation and cooperation were critical to the running of the business of the Corporate Debtor. However, these creditors, in view of the commencement of the CIR Process and perhaps realizing the said situation, did not wish to continue any further with the Corporate Debtor unless their previous dues were cleared.
- 3.8.3. Accordingly, in such circumstances, Mr. Mahender Kumar Khandelwal submitted that he was left with no choice other than to enter into arrangements with the respective service providers and suppliers to the extent that part-payment made during the CIRP period would be adjusted towards the pre-CIRP dues, so as to ensure that such operational creditors continued to provide their services to the Corporate Debtor which ensured the management of the Corporate Debtor as a going concern. He stated that such operational creditors were identified based on the criticality of services provided by them to the Corporate Debtor and the necessity of the same to run the Corporate Debtor as a going concern during the CIRP. In this regard, Mr. Mahender Kumar Khandelwal submitted that the following group of operational creditors of the Corporate Debtor inter alia were identified as critical suppliers of the Corporate Debtor for the purpose of

payment of pre-CIRP dues:

- a. Coal Transporters
- b. Iron Ore Transporters
- c. Refractory materials

3.8.4. Mr. Mahender Kumar Khandelwal submitted further that in terms of Section 20(2)(e) and Section 25(1) of the Code, resolution professional is empowered to keep corporate debtor as a going concern. He submitted that it was only in March 2020 that there was a prohibition brought in under the code, against suspension/interruption of critical supplies for a Corporate Debtor vide the amendment to Section 14. However, section 14(2A) of the Code was added in the Code only by Act No. 1 of 2020 and the said provision came into effect from 28.12.2019, prior to which Mr. Mahender Kumar Khandelwal had no recourse but to make the valid payments to the suppliers of critical services to maintain the CD as a going concern.

3.8.5. Further, in so far as the allegation regarding clearance of post-dated cheques (“PDCs”) by Mr. Mahender Kumar Khandelwal after the commencement of CIRP is concerned, he submitted that these PDCs were issued as security by the erstwhile management of the Corporate Debtor under various contracts executed with its operational creditors, prior to the initiation of the CIRP of the Corporate Debtor. Such PDCs were nearing maturity at the time when Mr. Mahender Kumar Khandelwal took over the management of the Corporate Debtor. Mr. Mahender Kumar Khandelwal stated that he did not stop payment towards the PDCs in order to avoid any criminal liability that could arise under the provisions of the Negotiable Instruments Act, 1881 ("NI Act") upon him and/or the Corporate Debtor. The said clearance was made in view of the understanding that the moratorium imposed under Section 14 would not absolve the Corporate Debtor or the Mr. Mahender Kumar Khandelwal from criminal liability arising under the NI Act and proceedings under Section 138 and 141 of the NI Act.

3.8.6. Mr. Mahender Kumar Khandelwal maintained that he had approved the payments towards the PDCs on the basis of position of law existing at the relevant time. He also clarified, that in terms of the provisions of the Code, the resolution professional has a duty to be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor. Therefore, as per the law applicable at

the relevant time, institution, or continuation of a proceedings under Section 138 of the NI Act were not barred under Section 14 of the Code. In light of this understanding, Mr. Mahender Kumar Khandelwal cleared the PDCs only after due verification of the genuineness of the payment made under the said PDCs being towards discharge of the then existing obligations of the Corporate Debtor; establishing the veracity of the amounts due; and after verifying that the PDC holders were not related parties of the Corporate Debtor.

3.9. Summary Findings

- 3.9.1. The DC notes that Mr. Mahender Kumar Khandelwal had allowed the payment of PDC issued prior to ICD. It is to be understood that the proceedings under section 138 of NI Act do not fall within the moratorium under section 14 of the NI Act. Besides, if Mr. Mahender Kumar Khandelwal was unsure of the interpretation of section 14 vis-à-vis liability under section 138 of the Code, he should have approached NCLT for appropriate directions. Instead, Mr. Mahender Kumar Khandelwal permitted payments of PDC's of OCs which is violative of section 14 of the Code. This act of Mr. Mahender Kumar Khandelwal cannot be justified merely because Mr. Mahender Kumar Khandelwal feared prosecution under section 138 of the NI Act as the same amounts to transferring/alienating/disposing of the assets of the CD by IP during moratorium.

3.10. Contravention No. IV with regard to payment made by the erstwhile management during CIRP

- 3.10.1. It was observed that there were certain OC's who did not file their claims but were paid some amounts from the account of CD. Mr. Mahender Kumar Khandelwal in his reply to the draft inspection report submitted that certain outstanding payments of the OC were made by the erstwhile management of the CD in the ordinary course of business between the ICD and the date of the RP taking over the operations of the CD. Such payments included payments of Rs. 74,45,464/- to those creditors who did not file their claims. The above-mentioned payments were made by the suspended management after the ICD. As per section 18(1)(f) of the Code, it is the duty of RP to take control and custody of assets of the CD. However, Mr. Mahender Kumar Khandelwal neither took control of the assets of the CD after the ICD nor had he taken the appropriate action against the

suspended management for making the said payments after ICD in violation of section 14 of the Code.

- 3.10.2. In view of the above, the Board is of the prima facie view that Mr. Mahender Kumar Khandelwal inter-alia violated section 14, 18(1)(f), 208(2)(a), 208(2)(e) of Code, regulation 7(2)(a) and 7(2)(h) of IP Regulations read with clause clauses 3, 5 and 14 of Code of Conduct.

3.11. Submissions of Mr. Mahender Kumar Khandelwal

- 3.11.1. Mr. Mahender Kumar Khandelwal submitted that in light of the complexity and scale of operations of the Corporate Debtor, he, after his appointment on 26 July 2017, took time to mobilize resources and deploying personnel across the plants of the CD. As a result, whereof, Mr. Mahender Kumar Khandelwal effectively took over the plant of the Corporate Debtor at Jharsugda only on 9 and 10 August 2017. (This interim period between his appointment and the effective takeover of the plan of the Corporate Debtor at Jharsugda is hereinafter referred to as the "Interim Period").
- 3.11.2. In respect of the issue under consideration, he stated that certain outstanding payments of the operational creditors were made by the erstwhile management of the Corporate Debtor in the ordinary course of business during this Interim Period. Such payments included payments of INR 74,45,464/- to those creditors which did not file their claims.
- 3.11.3. Mr. Mahender Kumar Khandelwal stated that the scale of operations of the Corporate Debtor and its business and market is huge and extends beyond the territorial boundaries of India. It was impossible to take over the control of the assets of the Corporate Debtor immediately upon appointment and the alleged transaction had been entered into during the Interim Period, thus, the same cannot be attributed to the negligence or *malafide* of Mr. Mahender Kumar Khandelwal. Further, he stated that the alleged transactions had been entered into during the Interim Period by the erstwhile management of the Corporate Debtor and, thus, the violation of Section 14 of the Code cannot be attributed to him. It was owing to human limitations that Mr. Mahender Kumar Khandelwal took time to gain control over the affairs of the plant of the Corporate Debtor at Jharsugda.

3.12. Summary Findings

- 3.12.1. The DC notes that payments of Rs. 74,45,464/- were made by the suspended management after the ICD to some creditors who subsequently did not file their claims. RP is duty bound under section 18(1)(f) of the Code to take control and custody of assets of the CD. However, the DC found that Mr. Mahender Kumar Khandelwal neither took control of the assets of the CD after the ICD nor he had taken the appropriate action against the suspended management for making the said payments after ICD in violation of section 14 and section 17 of the Code.
- 3.12.2. The DC also notes the submission made by Mr. Mahender Kumar Khandelwal that certain outstanding payments of the OC were made by the erstwhile management of the CD in the ordinary course of business between the ICD and the date of the RP taking over the operations of the CD. The DC opines that Mr. Mahender Kumar Khandelwal should have taken over the control over the assets of the CD in time. Mr. Mahender Kumar Khandelwal should have initiated appropriate proceedings for violation of section 14 section 17 of the Code against the suspended directors. In view of the observations made hereinabove, the DC notes that this conduct of Mr. Mahender Kumar Khandelwal shows negligence and disregard of the provisions of the Code and regulations thereof which makes him liable for violation of section 14 and 18(1)(f) of the Code.

3.13. Contravention No. V with respect to payment of Pre-CIRP dues of Motherwell Bridge Limited

- 3.13.1. An OC, i.e. Motherwell Bridge Limited filed a claim which was admitted initially by Mr. Mahender Kumar Khandelwal for GBP 43,500. It has been further observed that Mr. Mahender Kumar Khandelwal had made a payment to Motherwell Bridge Limited for their said pre-CIRP dues. Mr. Mahender Kumar Khandelwal vide his letter dated 04th February 2019 submitted to the Board that payment of amount admitted as claim had to be made under extra-ordinary and compulsive requirement. The said payment made to Motherwell is a violation of section 14 of the Code.
- 3.13.2. In view of the above, the Board is of the prima facie view that Mr. Mahender Kumar Khandelwal has, inter-alia, violated section 14, 208(2)(a), 208(2)(e) of Code, regulation

7(2)(a) and 7(2)(h) of IP Regulations read with clause clauses 3, 5 and 14 of Code of Conduct.

3.14. Submissions of Mr. Mahender Kumar Khandelwal

- 3.14.1. Mr. Mahender Kumar Khandelwal submitted that Motherwell filed its claim with him for an amount of GBP 43,500/- and the same was admitted by him. However, under extraordinary and compelling conditions, certain payments were made to Motherwell towards its pre-CIR Process dues.
- 3.14.2. He submitted that Motherwell is a critical vendor to the Corporate Debtor which commissions gas holding and stores the gas and burns it as a fuel to avoid bleeding of gas and poisoning of atmosphere. The coke oven gas which gets released into the atmosphere without such commissioning is likely to cause grave danger to the inhabitants around the Plant. The Corporate Debtor is legally bound as per pollution control norms to ensure that this gas is not released into the atmosphere thereby making the services of Motherwell extremely critical.
- 3.14.3. He further submitted that it was not only legally imperative that commissioning of gas holder was ensured, but also for the benefit of the public at large that Motherwell continues to commission the gas holders. However, post the initiation of CIR Process against the Corporate Debtor, Motherwell refused to commission the gas holder without payment of balance outstanding amounts. In light of this exigent situation, Mr. Mahender Kumar Khandelwal had to make payment towards pre-CIR Process dues of Motherwell.
- 3.14.4. In fact, during the 16th meeting of the COC held on 16 July 2018, members of the COC were sufficiently informed of these critical payments and it was further clarified that Motherwell was not a related party of the Corporate Debtor. The relevant extracts of the said meeting has been reproduced herein below for ease of reference:

"The representative of BoM further questioned whether the Motherwell Bridge Lid, was a related party of BPSL, to which the RP categorially stated that it was not".

3.15. Summary Findings

3.15.1. The DC notes that Mr. Mahender Kumar Khandelwal had made a payment to the OC-Motherwell Bridge Limited for their pre-CIRP dues. The DC notes the circumstances under which the said payments were released by Mr. Mahender Kumar Khandelwal. The DC notes that Mr. Mahender Kumar Khandelwal was under a statutory obligation to maintain the Corporate Debtor as a going concern and to achieve that it was necessary to ensure that the commissioning of gas holder continues. At the same time, Mr. Mahender Kumar Khandelwal was also legally bound to ensure that the gas was not released into the atmosphere. Under the scheme of the Code, AA is the authority to deal with any question of priorities specific to this case. He should have gone to AA to seek appropriate directions.

3.16. Contravention No. VI

- 3.16.1. Mr. Mahender Kumar Khandelwal continued to run the affairs of the CD in the capacity of the Monitoring Professional after approval of resolution plan. The Code of Conduct specified in First Schedule of IP Regulations inter alia provide that an IP should maintain confidentiality and avoid conflict of interests. This is done with an intent to enhance the credibility of the ecosystem under the Code. Further, to ensure that direct or indirect interest of an IP must not compromise the interests of the stakeholders, Clause 23A of the said Code of Conduct prohibits an IP from rendering professional services to stakeholders, 'other than services under the Code', till expiry of one year from cessation of the CIRP handled by an IP. Thus, within the said restraint period the IP can accept only those activities that are permitted under section 208 of the Code and clause 23A of the Code of Conduct. Mr. Mahender Kumar Khandelwal had become part of the Monitoring Committee and failed to abide by the said Code of Conduct under Clause.
- 3.16.2. In view of the above, the Board is of the prima facie view that Mr. Mahender Kumar Khandelwal inter-alia violated section 208(2)(a), 208(2)(c) of Code, regulation 7(2)(a) and 7(2)(h) of IP Regulations read with clause clauses 2, 14 and 23A of the Code of Conduct.

3.17. Submissions of Mr. Mahender Kumar Khandelwal

- 3.17.1. Mr. Mahender Kumar Khandelwal submitted that he continued to run the affairs of the Corporate Debtor in the capacity of the Monitoring Professional in terms of Section 2(a) of Part A of the Resolution Plan, which inter alia envisages that in the interim till the implementation completed, the person acting as the erstwhile resolution professional shall be appointed as a monitoring professional ("Monitoring Professional") who shall continue to perform the duties as were discharged by the resolution professional during the CIR Process period (subject to decisions of the reconstituted board, in accordance with the applicable law).
- 3.17.2. Thus, the appointment of the Resolution Professional as the Monitoring Professional and member of the Steering Committee was envisaged in terms of the Resolution Plan for the Corporate Debtor, which was approved by the Hon'ble NCLT in terms of Section 31 of the Code and was binding on all stakeholders. Mr. Mahender Kumar Khandelwal submitted that his appointment as part of the Monitoring Professional was envisaged under the Resolution Plan solely for the purpose of facilitating the implementation of the resolution plan and ensuring smooth takeover by the successful resolution applicant. Such continuation of appointment as a Monitoring Professional to facilitate implementation is not barred under the provisions of the Code and has in fact, been the general practice under various resolution plans at the time of their implementation post approval by the Ld. NCLT.
- 3.17.3. In fact, the implementation of the Resolution Plan was successfully completed on 26 March 2021, pursuant thereafter, Mr. Mahender Kumar Khandelwal had no association whatsoever with the Corporate Debtor or JSW.

3.18. Summary Findings

- 3.18.1. The DC notes that Mr. Mahender Kumar Khandelwal had become part of the Monitoring Committee and failed to abide by Clause 23A of the said Code of Conduct which prohibits an IP from rendering professional services to stakeholders, 'other than services under the Code till expiry of one year from cessation of the CIRP handled by an IP. The DC further notes the submission of Mr. Mahender Kumar Khandelwal that his appointment as part of the Monitoring Professional and member of the Steering

Committee was envisaged in terms of the Resolution Plan for the Corporate Debtor, which was approved by the Hon'ble NCLT. However, fact remains evaluation of plan was rested with CoC headed by him. There is no documentary evidence to suggest that he, at any point of time, apprised the CoC about this condition as included in the resolution plan of the SRA, being violative of the provision of the Code. It was his duty under section 30 of the Code to ensure that the resolution plan does not contravene any provision of the Law. His failure to do so casts doubt on his intentions when seen in conjunction with the fact that he was the beneficiary of such omission.

4. Order

4.1. In view of the submission made by Mr. Mahender Kumar Khandelwal, and materials available on record, DC notes that Mr. Mahender Kumar Khandelwal has contravened, as observed hereinabove, with respect to lack of due diligence during the claim collation, transactions with related party, not taking control of assets of the CD immediately which allowed the CD to make some pre-CIRP payments and being part of the monitoring Committee.

4.2. With respect to the claim collation, Section 18 (b) provides that IRP receives and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15. Further Section 25 (2) (e) makes RP responsible to maintain an updated list of claims. On the issue of substantiation of claims, Regulation 10 of CIRP regulations provides that the interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim. On the subject of verification of claim provisions of CIRP Regulations are quoted below:

“13. Verification of claims.

(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

(2) The list of creditors shall be –

(a) available for inspection by the persons who submitted proofs of claim;

(b) available for inspection by members, partners, directors and guarantors of the corporate debtor 36 [or their authorised representatives];

(c) displayed on the website, if any, of the corporate debtor;

(ca) filed on the electronic platform of the Board for dissemination on its website: Provided that this clause shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020;

(d) filed with the Adjudicating Authority; and

(e) presented at the first meeting of the committee.

14. Determination of amount of claim.

(1) Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him.

(2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision.”

- 4.3. The IP has the option of calling for other evidence or clarifications for substantiating any claim. If there occurred at any point in time during the process, a need for clarification as to the nature of the claim, the IP could have called for such clarification from the claimant itself, instead of relying on information received from a third party to restrict the right of the claimant. The claimant should have been provided an opportunity to substantiate the nature of the additional information. In this case, the actions of the IP are suspect as he is relying on the material provided by the said third party, who as a resolution applicant has a vested interest in declaring the claim as a contingent claim. The IP was also required to disclose the change in claims as laid down in CIRP Regulation 13 and 14 which were not adhered to after the status of the claimant was

changed.

- 4.4. In relation to transactions made by the promoters of the CD after ICD but before RP taking control of CD, and that too with related parties of the CD, the Code has several provisions to take actions against promoter and the erring directors. Even if it is presumed by Mr. Mahender Kumar Khandelwal that it is a grey area, then also he was duty bound to approach AA to get the suitable directions for retrieval of such transactions. He cannot shift away his duties to the CoC, as it is his primary duty to preserve the assets of the CD. Not voting by CoC on this crucial agenda on the basis of some legal opinion, does not, in anyway absolve the RP from his responsibility. Further decision to withhold the voting on the issue, members requested RP to clarify whether the RP will be taking the said matter to NCLT under section 43 to 66 and after quoting the discussions with SBI and legal counsel, it is minuted that “RP has to exercise his discretion and see whether it should be taken up with NCLT or not.” On this count it is to clarify that under the statute no such discretion is available with RP for refraining from filling an application which CoC member had requested. In the instant case, before him taking over the affairs of the CD after ICD, several transactions have been made by the promoters which needed urgent action for retrieving back to the CD. To preserve the assets of the CD during moratorium is among the primary duties of the RP and even if he could take possession of the assets of the CD with a delay, it does not bar him from taking corrective action and approaching AA for that.
- 4.5. Hence, the DC hereby suspends registration of Mr. Mahender Kumar Khandelwal for a period of two years.
- 4.6. The Order shall come into force on expiry of 30 days from the date of its issue.
- 4.7. A copy of this order shall be sent to the CoC of all the Corporate Debtors in which Mr. Mahender Kumar Khandelwal is providing his services, if any. The CoC may decide whether to continue his services or not. In case, CoC decide to discontinue his services, CoC may file an appropriate application before AA.

- 4.8. 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.
- 4.9. A copy of this order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, New Delhi, for information.

Accordingly, the show cause notice is disposed of.

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(Sudhaker Shukla)

Whole Time Member, IBBI

Dated: 13th July, 2022

Place: New Delhi