

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/220/2024

07 June 2024

ORDER

This Order disposes of the Show Cause Notice (SCN) No. COMP-11012/98/2022IBBI dated 27.10.2023 issued to Mr. Mahender Kumar Khandelwal, an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P00033/2016-2017/10086 and a Professional Member of the Indian Institute of Insolvency Professionals of ICAI (IIIP-ICAI) having residential address with IBBI at R/o B-2A, Sunny Valley C.G.H.S., Dwarka, Sector 12, New Delhi, NCT of Delhi- 110078

1. Background

- 1.1 The Hon'ble NCLT, Principal Bench New Delhi (AA) *vide* order dated 26.07.2017 admitted the application filed by Punjab National Bank under section 7 of the Code for initiating Corporate Insolvency Resolution Process (CIRP) in respect of M/s Bhushan Power and Steel Limited (Corporate Debtor/CD) and appointed Mr. Mahender Kumar Khandelwal as an Interim Resolution Professional (IRP) who was later confirmed as the Resolution Professional (RP). 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. The Resolution plan of JSW Steel Limited was approved by the AA *vide* its order dated 05.09.2019.
- 1.2 The Board received a complaint filed by Mr. P.K. Mishra against Mr. Mahender Kumar Khandelwal through Central Bureau of Investigation (CBI) on 25.03.2022. The Board, in exercise of the powers conferred to it under section 218 of the Code read with the Investigation Regulations, appointed an Investigating Authority (IA) to conduct the investigation of Mr. Mahender Kumar Khandelwal on the alleged contraventions in dealing with the matters of M/s Bhushan Power & Steel Limited. Accordingly, a notice under regulation 8(1) of the Investigation Regulations was issued to Mr. Mahender Kumar Khandelwal on 02.09.2022 on which his reply was received on 22.09.2022. Thereafter, the IA submitted the investigation report to the Board on 08.02.2023.
- 1.3 Based on the investigation report, the Board formed a *prima facie* view and issued the SCN to Mr. Mahender Kumar Khandelwal on 27.10.2023. Mr. Mahender Kumar Khandelwal replied to the SCN on 13.12.2023. The Board referred the SCN and reply to the SCN to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the provisions of the Code and Regulations made thereunder. Mr. Mahender Kumar Khandelwal availed opportunity of personal hearing before the DC and in the DC held through virtual mode on

16.05.2024 he was present along with Advocate Mr. G P Madaan. Mr. Mahender Kumar Khandelwal submitted his written submissions *vide* email dated 20.05.2024.

- 1.4 The DC has considered the SCN, the reply to SCN, submissions of Mr. Mahender Kumar Khandelwal, other material available on record and proceeds to dispose of the SCN.

2. Alleged Contraventions, Submissions, Analysis and Findings

The contravention alleged in the SCN and Mr. Mahender Kumar Khandelwal's written and oral submissions thereof are summarized in the succeeding paragraphs.

3. Contravention-I

Non preservation of records related to the CIRP.

A. Failure to justify substantially increased premium.

- 3.1 It was observed that there was a substantial increase in the premium paid for the insurance policy in the years 2018-19 and 2019-20, increasing from Rs.5.47 crores to Rs.9.44 crores and further to Rs. 20.96 crores. In his reply to IA, Mr. Mahender Kumar Khandelwal submitted that quotations were received from United India, National Insurance, Oriental, IFFCO TOKIO, SBI General, Bajaj Allianz and Reliance. However, in response to the request of the IA to share the copies of the said quotations, he did not share all of the said quotations, except for United India and SBI General. He submitted that the quotations for the other insurance companies are with the Successful Resolution Applicant (SRA) (JSW Steels Limited).

B. Records relating to Procurement of Graphite Electrodes.

- 3.2 It was observed that procurement of graphite electrodes was done from Chinese companies, i.e. Fangada and CIMM rather than making procurement from established and known vendors, i.e., Graphite India and HEG Limited. Mr. Mahender Kumar Khandelwal provided to the IA, a comparison of prices indicating that the prices quoted by the overseas suppliers, specifically Fangada China, were significantly lower than the prices quoted by the above mentioned domestic suppliers. However, in response to specific request of IA to provide copies of quotations from Graphite India Ltd. and HEG, Bhopal, he replied that he has requested these documents from the officials of JSW Steels Limited, but they were unable to provide the quotations of HEG Bhopal and Graphite India for the said quotes. It is, thus, noted that Mr. Mahender Kumar Khandelwal did not maintain the records of the quotation/ other documents to substantiate the quotations of HEG, Bhopal, and Graphite India.
- 3.3 Section 208(2)(a) of the Code outlines the duty of an IP to exercise reasonable care and diligence while performing their duties, including incurring expenses. Section 196(1)(h) of

the Code read with Regulation 8(4) of the IBBI (Inspection and Investigation) Regulations, 2017 requires service providers and associated persons to produce records and furnish statements and information relating to their activities upon the request of the Investigation Authority (IA). Regulation 39A of CIRP Regulations, 2016 mandates the preservation of physical and electronic records related to the corporate insolvency resolution process, in accordance with a record retention schedule communicated by the Board in consultation with Insolvency Professional Agencies. Further, IBBI Circular dated 06.01.2021, requires an IP to keep electronic copy of all records (physical and electronic) for a minimum period of 08 years.

- 3.4 In view of the above, the Board held the *prima facie* view that Mr. Mahender Kumar Khandelwal has, *inter alia*, violated section 208(2)(a), 196(1)(h) of the Code read with regulation 8(4) of the Investigation Regulations, regulation 39A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), regulation 7(2)(g) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and clause 14, 19 of the Code of Conduct as specified in the First Schedule of IP Regulations (Code of Conduct).

Submissions by IP

- 3.5 Mr. Mahender Kumar Khandelwal submitted that he was in possession of all the important/necessary documents in relation to the CIRP of CD which is evident from the agreement executed with Securus Records Management Private Limited for carrying record management services for him in relation to the CD. The same is also in compliance of the regulation 39A of the CIRP Regulations. At present there are more than 850 files with documents/agreements kept with the safe custody of Securus Records Management Private Limited. Soft copies of above documents have been stored in a server having 16 TB capacity. He submitted that an IP has to preserve relevant records and not all records. He submitted that due to some technical glitches in the server, he was unable to produce the documents/quotations as sought and alleged in the captioned SCN. He submitted that neither during the investigation nor during clarifications, issue with respect to non-maintenance of records was raised. However, all the documents/quotations were submitted in reply to the SCN.
- 3.6 He submitted that there was no specific mention of any lapse in records maintenance in the investigation report pursuant to which the SCN is purported to be issued. When the IA sought certain documents/records from him during the investigation, he provided all the relevant records pertaining to the CIRP that were maintained by him as per the regulations. The RP is only required to maintain documents related to the CIRP process and not documents necessary for keeping the company as a going concern, such as bills, invoices, contracts, tenders, etc., which are required for the day-to-day operations of the company.

3.7 Regulation 39(A) of the CIRP Regulations requires the RP to maintain records relating only to the CIRP of the CD. He is not obligated to maintain records related to the regular operations, procurement contracts, etc., of the CD after the approval of the resolution plan.. The RP's responsibility is limited to maintaining documents pertaining to the CIRP and not the multitude of records required for running the company's business operations as a going concern. The IA sought information from him regarding the regular business operations and procurement details of the CD post CIRP. Such information and records related to keeping the company as a going concern, including bills, invoices, contracts, tenders, and any corresponding changes, should have been sought from the SRA itself after the change in management pursuant to the approved resolution plan.

A. Failure to justify substantially increased premium.

3.8 Mr. Mahender Kumar Khandelwal placed reference to the GIC Re-Treaty Endorsement dated 12.02.2019 and IIB rate circular dated 28.06.2017, due to which there was a substantial impact in the premium post 01.03.2019. That it was humanly not possible for him to coordinate and negotiate with approximately 20 companies to fetch insurance premiums. Therefore, it was only for brokers, who used to share a comparison chart comparing different insurance premium being awarded by the companies or used to share quotations directly.

3.9 He has placed on record tabulated comparative sheet of different companies in a chronological manner. He submitted that he has taken a calculated decision for obtaining insurance for the CD after taking into considerations all the factors and after scrutinizing 13 companies as options. He mentioned that he has made all the efforts for maximization of benefits to CD and showed reasonable cause to stop the bleeding.

3.10 He submitted that in view of the above, the allegation that he was unable to reproduce the records/ quotations stood infructuous as it was not the allegation for which clarification was sought from him.

B. Records relating to Procurement of Graphite Electrodes.

3.11 Mr. Mahender Kumar Khandelwal submitted that the domestic suppliers namely, Graphite India Ltd. and HEG Ltd. were in a monopolistic way increasing their sale price and supplying material in a rationing manner. Graphite prices were increased by five-fold during 12 months period from June 2018 to June 2019. To overcome the situation, he developed links with the overseas suppliers with the help of technical team.

3.12 He further submitted that in his reply to the investigation submitted that prices quote by the overseas suppliers, specifically Fangda China were significantly low than the prices quote by the other domestic suppliers. However, due to the ongoing technical glitch in the cloud

servers, he was unable to produce all the quotations. He tried to obtain the same from the new management, however, nothing attained finality.

- 3.13 He provided all the quotations/ emails/ documents in relation to the Graphite Electrode in a chronological manner in reply to the SCN and submitted that the Fangda China had given the lowest rates for procurement of graphite electrodes to the CD. He has taken utmost care in view of maximization of value for the CD by putting efforts in order to obtain lowest costs from the suppliers all over the world. Allegations in contrary are completely denied as are baseless and meritless. He has always been precautionary, as he was running one of the humongous and complex CIRP which Nation has seen.

Analysis and Findings.

- 3.14 The DC notes the submission of Mr. Mahender Kumar Khandelwal that it was one of the largest CIRP being handled by the RP, which required storing of humongous data ranging up to 850 files and 60TB data. Also, after approval of resolution plan in 2019, all the documents were already handed over to the SRA. However, on the issue of record retention, regulation 39A CIRP Regulations read with circular dated 06.01.2021, *inter alia*, makes obligatory for the Insolvency Professional to, *inter alia*, preserve the records related to CIRP costs. The initial argument that the records have been handed over to SRA does not hold any ground. Such important documents could have been produced earlier, had Mr. Mahender Kumar Khandelwal pursued for removal of the alleged technical glitch and thereafter diligently could have submitted the required documents to the IA/Board when asked at the relevant time.
- 3.15 The DC observes that Mr. Mahendra Kumar Khandelwal has submitted certain records with substantiating documents. However, the main contravention alleged in the compliant is with regards to (a) substantial increase in insurance premium in 2019-20 as compared to previous years; and (b) procurement issues related to graphite electrodes from overseas suppliers. These issues could not be investigated properly since detailed documents were not made available by Mr. Mahender Kumar Khandelwal to the IA. Since now this information has been made available, these issues need to be investigated in light of the records and documents submitted before the DC. The DC further notes that instead of submitting the required record with reply in response to the SCN.

4. Contravention-II

Issue of unreasonable expenditure on travelling by Charter Planes:

- 4.1 Section 208(2)(a) of the Code outlines the duty of an IP to exercise reasonable care and diligence while performing duties, including incurring expenses. Further, IBBI Circular dated 12.06.2018 (No. IBBI/IP/013/2018) specifies that not only the fee payable to an IP should be reasonable, but also other expenses incurred by the IP should be reasonable.
- 4.2 It was observed that Mr. Mahender Kumar Khandelwal in his reply to IA admitted of using charter plane services on various occasions to travel to CD's plant during CIRP. In his reply to the IA, nowhere he has stated about taking approval or informing the CoC about the use of such charter planes by him or his team. In fact, the reference to 18th CoC meeting in his reply merely mentions about issue of possible unrest in case the employee of the plant not provided annual increment and not about allowing him or his team to use charter plane.
- 4.3 The cost of using charter planes added an additional financial burden on the already distressed CD. The expenses incurred during the CIRP must be reasonable to avoid overburdening the already distressed CD with exorbitantly high Insolvency Resolution Process Costs (IRPC). In view of the above, the Board held the *prima facie* view that the IP, violated clause 27 of the Code of Conduct and the provisions of Board Circular dated 12.06.2018 (No. IBBI/IP/013/2018).

Submissions by IP

- 4.4 Mr. Mahender Kumar Khandelwal submitted that he and his team used the charter plane only thrice during the CIRP tenure, compared to normal practice of ex-management and promoters which included at least 4-5 visits per month, in line to scale the operations of a huge steal plant. Mr. Mahender Kumar Khandelwal has stated following instances or circumstances for using the charter plane:-
- 4.5 **Instance 1:** During the CIRP, when there was a situation of total unrest, the labourers were giving threats to close the plant as the workers dues were pending for more than 3 months and the staff salaries were also in arrears. Workers' morale was too low due to commencement of CIRP, and they wanted to meet the RP at the earliest. At this juncture, it is important to highlight that if the plant was closed even for a half-day (12 hours), this would have amounted to loss of crores of rupees to the CD. The same is evident from the 17th and 18th CoC meeting held on 31.07.2018 and 14.08.2018 respectively, relevant extracts are reproduced below -

"The Chairman further requested Mr. Ranade and Mr. Mahesh Parekh, Technical Advisor and Mr. H.C. Verma, Plant In-charge to apprise about the current status of the plant and serious problems faced by them.

The technical advisor of RP mentioned that they were facing lot of problems in the plant since 15th or 16th July 2018, they mentioned that for the first time, the transporters had gone on strike. Mr. Mahesh Parekh stated that for the first time this problem has come up on 15th July 2018 when a delegation of transporters and contractors came, most of them mainly from the local vicinity of the plant and they have submitted a memorandum which they have already submitted to the Collector of Sambalpur, upon which they were called for a meeting on 14th July 2018, their basic demand was to clear the dues standing as on CIRP commencement date. During the meeting, it has been clarified to them that in accordance with the provisions of the IBC, their demands cannot be fulfilled. Afterwards, one more meeting was held in the presence of a representative of Collector of Sambalpur and 3 police personnel from local police stations, where they explicitly stated that they were happy with the current payments but their main issue was with regard to the payment due as on CIRP commencement date. The Technical Advisor further stated that as committed to the transporters, all their dues of the CIRP period have been cleared on 23rd July 2018, after which they have agreed and started the supply of vehicles, however, after two days, they had again disturbed the supply. The Technical advisor showed his apprehension towards the contradiction of the issues which were raised by the representative of the OCs and the issues raised by the transporters. The representative of OCs had mentioned during the previous CoC meeting that the payments for Pre CIRP period were already made whereas the transporter were demanding the payment of the Pre CIRP period, hence, the technical advisor of RP raised his concern towards such contradiction.

The Chairman further stated that he received a mail from the representative of the Operational Creditor which has been annexed as Annexure- A. The Chairman further stated that after receiving the above quoted mail on Saturday, 28th July 2018, following which the transporter went on strike. Further, Mr. Verma, Plant In-charge was requested to apprise the CoC members about the status of supply of logistics by the transporter, he stated that that the contractual relationship with the transporter was since 2002 and were very amicable and there were no agitation since then, which can be easily identified by the amount which is due as on 26th July i.e, INR 56 Crores, even after the CIRP period we have been paying to the transporters within 4-5 days of submission of the bills.

The Chairman further shared his serious concerns that if transporter issues are not resolved soon then there will be no movement of goods / material in the plants which would lead to the shutdown. As suggested by Mr. Verma, Plant in-charge, Mr. Mahesh Pareekh requested the representative of OCs to guide the transporters in such a manner that they would resume their services and improve the vehicle supply to normalise the situation. He also assured that the current outstanding of CIRP period of the transporters would be paid off at earliest.

The Legal counsel of RP intervened and stated that the best way to resolve these issues was to approach the Hon'ble NCLT and file an application to give directions to these transporters to normalise the situation."

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The RP informed the members that during the 15th meeting of CoC held on July 11, 2018, the matter relating to the annual increments of salary for personnel of Bhushan Power & Steel Limited was discussed. However, the increments could not be implemented as it was proposed only for employees up to manager level only and not for all officers and due to this discrimination, there was unrest amongst the personnel.

As per Section 25(1) of the Code, 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. In light of the above provision, the RP proposed that the increments to all personnel of the Corporate Debtor should be given to avoid disruption in the operation.

The RP requested the representative of the suspended Board to apprise the members with the facts relating to the said matter. The Representative of suspended Board requested the members of CoC to that since inception of the Company, there was no strike in the unit. He also informed the members that since he was deeply involved in the plant, he could foresee that if annual increments in salary is not provided to the personnel of BPSL then there are 100% chances that there shall be unrest amongst the workers/employees and there will be agitation for the first time in history of BPSL. He also informed the CoC that now the personnel were losing patience, and the ongoing process may stop."

4.6 Therefore, the issue of unrest clouded over the sky at that time, which was also in the knowledge of the members of the CoC. However, he was informed by the plant management that since the managers/ other employees were not given the increment/ bonus they were threatening to go on for a strike until their demand is not addressed. Since there was unrest, an immediate decision was taken to visit the plant and to negotiate with the employees/ workers for smooth operations of the plant. Therefore, to take immediate action, he had to use the service of charter plane to visit the plant without any delay. Hence, it is crystal clear that CoC was duly informed of the fact that there are threats of strike and he had to be physically present in order to negotiate with the workers/ labourers. If he would not have travelled immediately, CD would have suffered a loss of more than Rs. 540 crores which was much higher against the cost of charter plane.

4.7 **Instance 2 and 3** - There being an urgency to resolve surging problems between the production and marketing teams caused by regional/ seasonal upsurge in demand, drop in

quality & sudden big export opportunity with the customer visit, making these extra ordinary events urgent visit to plan was required. The marketing executives were spread all over the length and breadth of India and their return to their operating locations in shortest possible time was of utmost important thus necessitating quickest mode of travel was by charter plane, which was in vogue during the tenure of earlier management of ex-directors also. Therefore, Mr. Mahender Kumar Khandelwal & his team travelled along with the marketing and sales team at such instances in order to resolve the persisting issues.

- 4.8 He submitted that during the tenure of earlier management, use of charter plane was far more frequent, mostly up to 2 return flights per week were used by CMD, other directors and top-level executives as they used to ferry capital equipment engineers, financiers and bankers, export customers, technical consultants, project advisors and company guests. Such usage was in fact cut down by him to critical minimum being only 3 times in 3 years based on business urgencies.
- 4.9 He further submitted that, one visit to the Jharsuguda plant via charter plane was to carry 6 people at one point of time. On the other hand, if travel would have been done through any other means of transport, then it would have wasted 2 to 3 days-time of 6 people who were also required, as explained above, to their operating locations at the shortest possible time. Also, there was no direct flight to Jharsuguda. Flights were available to Bhuvneshwar, Raipur, or Ranchi and from there the travelling required journey by car or overnight train to Jharsuguda, passing through Naxalite infected area. Direct flight service started somewhere in 2020. There were 6 people used to travel including technical, marketing and RP and his team. RP team never used exclusively charter flight service.
- 4.10 He submitted that a lot of national and international clients used to visit Jharsuguda plant for important meetings. Given their constrained schedule, charter plane was only feasible option, as neither there was any direct connectivity to the Jharsuguda plant nor comfortable indirect one.
- 4.11 He submitted that he used the services of charter plane only in extreme unforeseen circumstances in order to save CD from incurring huge losses. A total cost of Rs. 16.91 lakhs were incurred by him, marketing team, technical consultant, foreign technicians, project equipment provider & capital equipment provider – as evident from the auditor's report of 2018-19. It is pertinent to mention that out of total travelling expenses of Rs. 16.89 crores incurred during FY 2018-2019; total charter flight cost incurred by company was about Rs. 17 lakhs which represents about 1% of travelling cost. Such expenditure has to be compared with the estimated loss which would have incurred if he and his team would not have travelled to the Jharsuguda plant, which is somewhere more than 10 Crores.

- 4.12 He submitted that all expenses incurred for these chartered flights were duly reported and accounted for before the CoC. The CoC, after due deliberations, approved all the travel expenses incurred by him, including the costs for these chartered flights. None of the 39 members of the CoC raised any objection whatsoever to the use of chartered flights or the costs incurred for them during the entire CIRP period.

Analysis and Findings

- 4.13 The DC notes the submission of Mr. Mahender Kumar Khandelwal that he used the facility of charter plane on three occasions which were undertaken in cases of urgency and to keep the CD as going concern. However, he failed to provide any prior approval or intimation or ratification by the CoC for such travel and circumstances surrounding the travel. The DC notes that with respect to first instance through the situation of unrest was within the knowledge of the CoC as narrated in 17th and 18th meeting even in the said meetings, CoC was not informed about the travel through charter plane. Considering the expenses of charter flight, Mr. Mahender Kumar Khandelwal, should have informed CoC about travel by charter flight.
- 4.14 The DC also notes that expense of Rs.16.91 lakhs in juxtaposition to total CIRP cost of Rs.20.78 crores as per the resolution plan has not been substantially higher. However, the emergent nature of visit to the distant site by a chartered flight need to have been undertaken with prior information to CoC.

5. Order

- 5.1 In view of the forgoing discussion, SCN, reply to the SCN, oral and written submission made by Mr. Mahender Kumar Khandelwal and the other materials made available to the DC, the DC finds Mr. Mahender Kumar Khandelwal in contravention of regulation 8(4) of the Investigation Regulations, clause 19, and 27 of the Code of Conduct specified thereunder. However keeping in view required information has been made available in response to SCN a lenient view is being taken. However, the DC hereby strictly warns and cautions Mr. Mahender Kumar Khandelwal to be careful in extending all necessary support to the Investigating Authority during the investigation process.
- 5.2 Since main charge in the complaint relates to substantial increase in insurance premium and issues related to import of graphite from China, the DC refers back the matter to the Board for re-investigation of conduct of Mr. Mahender Kumar Khandelwal in the CIRP of M/s Bhushan Power and Steel Limited in the light of detailed information/documents made available in response to the SCN.

- 5.3 This Order shall come into force immediately.
- 5.4 A copy of this order shall be sent to the CoC/Stakeholders Consultation Committee (SCC) of all the Corporate Debtors in which Mr. Mahender Kumar Khandelwal is providing his services.
- 5.5 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.
- 5.6 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal.
- 5.7 Accordingly, the SCN is disposed of.

-sd/-
(Sudhaker Shukla)
Whole-Time Member, IBBI

Dated: 07 June 2024
Place: New Delhi