

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/229/2024

15th July, 2024

Order

This Order disposes of the Show Cause Notice (SCN) No. COMP-11015/47/2023-IBBI/844/120 dated 06.03.2024 issued to Mr. Narender Kumar Sharma, who is an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (IBBI) with registration No. IBBI/IPA-002/IP-N00125/2017-2018/10294 and a professional member of the ICSI Institute of Insolvency Professionals (ICSI-IIP) having residing at D-1/2, Welcome Group CGHS, Plot No. 6, Sector-3, Dwarka, South west, NCT of Delhi- 110078.

1. Background

- 1.1. The Hon'ble NCLT, New Delhi Principal Bench (AA) *vide* order dated 22.08.2019 admitted the application under section 7 of the Insolvency and Bankruptcy Code, 2016 (Code), initiated by Diamond Traexim Private Limited (FC) for Corporate Insolvency Resolution Process (CIRP) with respect to M/s Indirapuram Habitat Centre Private Limited (Corporate Debtor/CD) and appointed Mr. Pawan Kumar Goyal as Interim Resolution Professional (IRP). Later, Mr. Narender Kumar Sharma was appointed as Resolution Professional (RP) of CD on 06.11.2019. The Committee of Creditors (CoC) approved the resolution which is pending for approval before the AA.
- 1.2. The Board received a complaint dated 25.08.2023 against Mr. Narender Kumar Sharma in respect of the CD. The Board, in exercise of its powers under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017 (Investigation Regulations) appointed an Investigating Authority (IA) to conduct the investigation on the complaint against Mr. Narender Kumar Sharma.
- 1.3. Accordingly, a notice under Regulation 8(1) of the Investigation Regulations was issued to Mr. Narender Kumar Sharma on 05.09.2023 with a request to provide clarifications/ reply along with relevant documents. He submitted his reply to the investigation notice *vide* email dated 14.09.2023. Further clarification was sought from Mr. Narender Kumar Sharma *vide* email dated 28.12.2023 and 01.01.2024, to which he provided response through email dated 29.12.2023 and 02.01.2024 respectively.
- 1.4. On perusal of the investigation report, IBBI formed a *prima facie* opinion and issued the SCN to Mr. Narender Kumar Sharma on 06.03.2024. Mr. Narender Kumar Sharma submitted his reply to the SCN on 18.03.2024. The IBBI referred the SCN and reply to the SCN by Mr. Narender Kumar Sharma to the Disciplinary Committee (DC) for disposal of the SCN in

accordance with the Code and Regulations made thereunder. Mr. Narender Kumar Sharma availed opportunity of personal hearing through virtual mode before the DC on 31.05.2024. He further submitted additional documents *vide* email dated 31.05.2024

- 1.5. The DC has considered the SCN, the reply to SCN, submissions of Mr. Narender Kumar Sharma, and proceeds to dispose of the SCN.

2. Alleged Contraventions, Submissions, Analysis and Findings

The contravention alleged in the SCN and Mr. Narender Kumar Sharma's written and oral submissions thereof are summarized as follows.

Contravention.

2.1. Non-filing of Avoidance Application before the Adjudicating Authority (AA).

- 2.1.1 Taneja Buildcon Private Limited (hereinafter referred to as TBPL) had entered into an agreement with the CD *vide* Article of Agreement (hereinafter referred to as 'AOA') dated 02.09.2018, wherein the CD agreed to allot shop No. 121 and 09 studio apartments to TBPL for a total consideration of Rs. 2,40,00,000/-. This consideration was secured by post-dated cheques of the value of the same amount.
- 2.1.2 It is noted that para 9 of the said agreement stated that the CD had a right to buy back the said property from TBPL after the expiry of two years from the date of execution of the agreement and TBPL was bound to sell the said property to the CD. The date of execution of the said AOA was 02.09.2018 and the two years period would have expired on 01.09.2020.
- 2.1.3 However, as noted from reply of Mr. Narender Kumar Sharma to IA dated 02.01.2024 that on 13.08.2019, much before the two years period would have ended and just nine (9) days before the initiation of ICD (i.e. 22.08.2019), shop no. 121 was registered in the name of Mr. Sanjay Mathur and Mrs. Archana Mathur. Further, in para 2 of the Article of Agreement, it was stated that the CD, did not enter into any type of transaction of sale or rent for any of the aforementioned unit area with any third party. However, in his reply to the IA dated 02.01.2024, Mr. Narender Kumar Sharma mentioned that Mr. Sanjay Mathur and Mrs. Archana Mathur were allotted shop No. 121 on 22.07.2016 itself. Accordingly, the said registration of shop No. 121 in the name of Mr. Mathur and Mrs. Mathur took place in contravention of clauses (2) and (9) of the agreement dated 02.09.2018 entered in to between CD and TBPL.
- 2.1.4 Given the aforementioned facts, it was noted that the transaction between CD and Mr. & Mrs. Mathur seemed to be *prima facie* a fraudulent transaction in nature. However, Mr. Narender Kumar Sharma failed to file any avoidance application against the said transaction as can be

observed from his reply dated 02.01.2024 wherein he specifically confirmed the non-filing of avoidance application.

2.1.5 In view of the above, the Board held the *prima facie* view that Mr. Narender Kumar Sharma has contravened the provision of sections 66(1), 208(2)(a) and 208(2)(e) of the Code, regulation 7(2)(h) of the IBBI (Insolvency Professional) Regulations, 2016 (IP Regulations) read with clause 14 of the Code of Conduct under IP Regulations.

2.2 Submissions by Mr. Narender Kumar Sharma.

2.2.1 Mr. Narender Kumar Sharma submitted that as per the book of accounts of the CD, an amount of Rs. 1,92,00,000/- was received from TBPL in contrast to the incorrect receipt of Rs. 2,40,00,000/- as stated in the complaint. The amount of Rs. 30,00,000/- was paid in cash by the complainant to the CD. Thereafter, TBPL entered into an AOA dated 02.09.2018 from which following facts emerged:

- (i) This AOA supersedes the earlier AOA dated 02.04.2014 or any other such document.
- (ii) As per clause No. 5 of the said AOA, the consideration amount of Rs. 2,40,00,000/- (including Rs. 30,00,000/- by way of cash), is with respect to shop No. 121 only and TBPL relinquished 9 club suits;
- (iii) This is purely profile funding arrangement and there was no intention of the CD to allot the commercial space to the complainant, due to the following reasons:
 - a. There are no details of allotment, and the name of the complainant does not reflect in the Customer Relationship Management (CRM) software/data of the CD *qua* Shop No. 121;
 - b. There is no allotment letter in favour of the complainant having been issued by the CD, having Customer unique ID *qua* shop no. 121;
 - c. The mode of payment Rs. 30,00,000/- is deliberately not mentioned in the AOA dated 02.08.2019, giving an indication that the amount was paid in cash or payment to bank account of the promoter / suspended director of the CD;
 - d. As per the record of the CD, there was no RTGS payment of Rs. 1,50,00,000/- on 03.04.2014 and Rs. 60,00,000/- on 02.04.2014;
 - e. In so far as the balancing figure Rs. 60,00,000/-, the word (Net) as mentioned in the AOA dated 02.08.2019 means after adjustment of the total amount payable by the CD to TBPL, as well as space under consideration - shop No. 121 only, as security to secure the funding made by TBPL;
 - f. TBPL has a first right to sell the property in case of failure to repay the amount of Rs. 2.40 crores, after two years i.e. on 02.09.2020 and TBPL can't exercise this right prior to this date;

- g. Clause No. 9 of the AOA is a clear “Buy Back Arrangement” and there was no intention of the CD to allot the shop No. 121 and/or the 9 studio apartments;
- h. No where in the documents executed by the CD with TBPL, the specific studio number has not been mentioned whereas studios have been constructed on the 4th floor to 18th floor (except No. 13) and having 25 Nos. Studio on each and every floor and each studio have been given a specific number.

2.2.2 Mr. Narender Kumar Sharma submitted that TBPL correctly submitted its claim in FORM C as a FC of the CD and not under FORM CA

Principal amount received by CD:	Rs. 1,92,00,000/-
Assured Return @ 35% from 02-09-2018 to 21-08-2019:	Rs. 1,06,93,699/-
Total Amount admitted as Financial Creditor:	Rs. 2,98,93,699/-

2.2.3 He submitted that as per the CRM data and books of CD, shop no. 121 was allotted by the CD in the name of Mr. Sanjay Mathur and Mrs. Archana Mathur, on 22.07.2016, having customer ID No. IHC - 001110 and pursuant to the same, 100% payment towards the shop no. 121 was received from Mr. Sanjay Mathur and Mrs. Archana Mathur and hence, the registration was also done on 13.09.2019. He submitted that based on the above facts, it is clear that TBPL inducted funds in CD as a “Speculative Investor” and not as “Allottee”. Accordingly, the claim of TBPL, was admitted at Rs. 2,57,39,355.00 under the category- FC-Collateral. Also, it is reiterated that the complainant itself, submitted its claim under Form C instead of Form CA.

2.2.4 Mr. Narender Kumar Sharma submitted that the intent of section 66 of the Code is that, in case the business of the CD has been carried out with the intent to defraud the creditors of the CD or for any other fraudulent purpose, the RP may file an application for avoidance of such fraudulent transactions seeking a directions against any persons who were knowingly carrying on the business in such manner and the AA may pass an order making such persons liable to make such contributions to the assets of the CD. The intention of the legislature behind the section 66, is to get such contribution back to the CD, which has been fraudulently siphoned off by the erstwhile management of the CD with an intent to defraud the creditors. However, it is a case, where money has been received in the account of the CD. The fraud has been played between the complainant and the registered allottees of the said shop No. 121 and therefore, no loss or fraud has been played on the CD, hence section 66 is not attracted. Thus, the provisions of said section 66 does not attract in the facts of the present matter. To support his contentions, he has also relied on judgment of Hon'ble Supreme Court in the case of *Anjali Rathi Vs. Today Homes & Infrastructure Private Limited & Ors., SLP (Civil) No. 12150 of 2019* and in *Ansal Crown Heights Flat Buyers Association (Regd) v. M/s Ansal Crown Infrabuild Pvt. Ltd. & Ors., Civil Appeal No. 4480-4481 of 2023*.

- 2.2.5 Mr. Narender Kumar Sharma has further submitted that the RP is duty bound to file application under section 66 only if loss to the CD has been caused by the action of the promoters of the company. However, in the present case, because of the action of the CD in making multiple allotments for the same unit, excess money has been received by CD. For such an illegal action, the person so aggrieved is entitled to maintain action. Further, in so far as the RP is concerned, the RP has already filed an application on 30.03.2021 bearing No. IA 1727 of 2021 seeking clawback of more than Rs. 127 Crores from the ex-promoters wherein notice has been issued to them and the same is pending adjudication before AA.
- 2.2.6 Furthermore, without prejudice to the merits of the claim made by the complainant, he submitted that the CD has received 100% payment towards the shop No. 121 from Mr. and Mrs. Mathur and as per the claim of the complainant, an amount of Rs. 1,92,00,000/- was also made by the complainant toward the allotment of shop No. 121. Therefore, the CD has received the amount in excess of the actual value of shop No. 121 i.e., firstly, from the complainant (as alleged) and secondly from Mr. and Mrs. Mathur. However, as per the records of the CD, the shop No. 121 was allotted and registered only in favour of Mr. Sanjay Mathur and Mrs. Archana Mathur and not in favour of the complainant.
- 2.2.7 Mr. Narender Kumar Sharma submitted that the above case does not fall under the ambit of section 66 of the Code as the CD received money in excess of the amount than what the CD could have rightfully and legally obtained from the Allottees. Under section 66 of the Code, the AA can only pass an order against such persons who were knowingly parties to the carrying on of the business in fraudulent manner and shall be liable to make such contributions to the assets of the CD as the AA may deem fit. However, controverting to the facts of the present case, no party can be held liable to make contributions to the assets of the CD since the amounts qua the Shop No. 121 have already been received in excess of the actual value of the said unit, hence, no contributions can be made by any party in order to avoid such transaction.
- 2.2.8 He submitted that without prejudice to the merits of the allegations made by the complainant, the present case may be a fit case of fraud committed by the CD against the complainant and Mr. Sanjay Mathur and Mrs. Archana Mathur, however, in the process, such a fraud does not have a bearing on the assets of the CD since the Shop No. 121 has already been registered in favour of Mr. Sanjay Mathur and Mrs. Archana Mathur and the CD has received payment over and above the actual amount of the said Unit. He submitted that if such shop would have been transferred in favour of a third party, without actually receiving any payments from the third party for the same, together with an intent to defraud the complainant, then the same would have been a fit case of a fraudulent and an undervalued transaction under the scheme of the Code. However, admittedly, the above-stated illustration is not in consonance with the

facts and circumstances of the present case and hence, he was of the opinion that no application qua the said transaction could be made under section 66 of the Code.

2.2.9 He submitted that the CD made various multiple allotments *qua* a single unit in the project in the name of various creditors, however, there being a finite number of units, the RP could not reasonably accept the claims of all such creditors as allottees since the actual allotment of each unit can only be made in the name of a single person. Thus, RP has verified all the claim with utmost diligence, and categorised the name of only such persons as allottees /homebuyers who had an executed allotment letter/registration in their favour and their names has been reflecting in the CRM data of the CD.

2.2.10 Further, since money was reflecting in the records of the CD from other persons *qua* the same unit as well, for the claims of such persons who did not fulfil either one or all of the abovementioned criteria, they were categorised under the head of ‘Collateral’ i.e., their claims were verified and admitted only as a FC of the CD and not as an Allottee /homebuyer. Also, various FCs under the category of ‘Collateral’ and not under the category of ‘Allottee /homebuyer’ approached the AA by way of various applications whereby, relying on the submission made by the RP with respect to the non-grant of allotment letters / non-reflection of the names in the CRM data / discrepancies in the documents executed qua their units, the AA vide its order(s) dated 21.11.2023, 19.12.2023 and 17.01.2024 was pleased to dismiss all such applications and affirmed the opinion of the RP with respect to the categorisation of such claims of FCs as collateral.

2.2.11 He further submitted that the complainant till date has also not filed any application before the AA, being fully aware that various applications seeking similar reliefs have been filed before the Ld. Adjudicating Authority. He submitted that the complainant has filed a complaint under section 156(3) of the CrPC and also approached the Board rather than filing an appropriate application before an appropriate forum.

2.2.12 He submitted that certain FCs whose applications were dismissed by the AA as mentioned in the preceding paragraphs, have also approached the Hon’ble Appellate Authority under Appeal assailing such Order(s), and as on the date of submission of this reply, the said issue is pending adjudication before the Appellate Authority.

2.2.13 He submitted that there was no reason for filing an avoidance application under section 66 of the Code in the instant matter, as the said shop was already allotted to Mr. Sanjay Mathur and Mrs. Archana Mathur. Furthermore, the transaction between TBPL and the CD was merely of a speculative investment having 35% interest element and due to the same, even the complainant has submitted his claim under Form C as a FC and not under Form CA i.e. as a Financial Creditor-in-class.

2.3 Analysis and Findings.

- 2.3.1 The DC notes that the minutes of 10th CoC Meeting dated 31.10.2020 shows that Mr. Narender Kumar Sharma, had discussed with the CoC about the following findings/observations on affairs of the CD in the forensic audit report.

*“(j) Potential suspicious transactions resulting from booking of 47 units to different allottees;
(k) Same units being given as collateral to different investors and / or allotted to different allottees;”*

Consequently, he filed an application bearing No. IA 1727 of 2021 on 30.03.2021 seeking action against ex-promoters which is pending adjudication before AA. However, while doing so he made a distinction that fraud inflicted by CD to investors is beyond the scope of fraudulent transaction under Section 66(1) of the Code. In his submissions he has categorically mentioned that the fraud has been played between the complainant and the registered allottees of the said shop No. 121 and therefore, no loss or fraud has been played on the CD, hence section 66 is not attracted. Thus, the provisions of said section 66 does not attract in the facts of the present matter.

- 2.3.2 Mr. Narender Kumar Sharma was aware that the CD undertook activities seemingly to defraud the stakeholders. He filed an application for recovery of money from suspended directors for money received in cash by them. However, the issue of multiple allotment of same unit was not raised by Mr. Narender Kumar Sharma before the AA by way of application under section 66 of the Code. This issue was needed to be part of the application of avoidance transaction filed against the suspended directors of the CD. Therefore contravention as detailed in IA's Report stands.

3. Order

- 3.1. The regulation 35A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 bestow with great responsibility to RP to, *inter alia*, form an opinion and determine the fraudulent activity and file application before the AA within a stipulated time frame. Therefore for filling the application, forming an opinion and determination is necessary precondition. After being of the opinion that such activity was of fraudulent nature, it not being constituted as part of the application with AA, defy logic. Analysis to draw fine distinction in terms whether any monetary loss has been inflicted on CD or not was not necessary. At this stage, it is appropriate to examine that whether section 66(1) is restricted for being invoked only in cases where fraud against the CD comes to notice and whether it explicitly bars RP from filling the application under section 66 in cases where other

stakeholders have been defrauded without any monetary impact on the CD. For its threadbare understanding section 66(1) of the Code is reproduced below:

“66. Fraudulent trading or wrongful trading

*(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor **or for any fraudulent purpose** (emphasis supplied) the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.”*

- 3.2. Reading of the section as reproduced above clearly enunciates that “any fraudulent action”, if any, are also needed to be covered in the application to be filled before the AA’s order. Moreover, section 66 of the Code did not have any look back period which further expands its horizon to cover transactions. Mr. Narender Kumar Sharma clearly erred in his judgement in not including such cases where multiple allocations have been made on same units.
- 3.3. In view of the forgoing discussion, SCN, reply to the SCN, oral and written submission made by Mr. Narender Kumar Sharma, the DC finds Mr. Narender Kumar Sharma in contravention of sections 66(1), 208(2)(a) and 208(2)(e) of the Code, regulation 7(2)(h) of the IP Regulations read with clause 14 of the Code of Conduct.
- 3.4. In view of the foregoing discussion, the DC, in exercise of the powers conferred under section 220 of the Code hereby warns and cautions Mr. Narender Kumar Sharma to be careful in dealing with Code related matters as authority to interpret the provision rests with judiciary. Any doubt on intent of provision as contained in Section 66 (1) needed to be got clarified through intervention of AA. In many real estate cases, siphoning of money through multiple and benami allotments is being reported, to term them as not effecting monetarily to CD is misplaced as such activities bring disrepute to CD apart from the fraud being inflicted on the stakeholders. Thus, leaving such mistake with word of caution alone will not act as deterrent, therefore, DC imposes a penalty of Rupees Two Lakhs (Rs.2,00,000) on Mr. Narender Kumar Sharma for his failure to file application on fraudulent transaction in relation to transaction highlighted in the IA’s report and directs him to deposit the penalty amount directly to the Consolidated Fund of India (CFI) under the head of “penalty imposed by IBBI” on <https://bharatkosh.gov.in> within 45 days from the date of issue of this order and submit a copy of the transaction receipt to IBBI,
- 3.5. This Order shall come into force with immediate effect.

- 3.6. A copy of this order shall be sent to the CoC/Stakeholders Consultation Committee (SCC) of all the corporate debtors in which Mr. Narender Kumar Sharma is providing his services, and the respective CoC/SCC.
- 3.7. A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Narender Kumar Sharma is enrolled as a member.
- 3.8. A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal.
- 3.9. Accordingly, the show cause notice is disposed of.

-sd/-

(Sudhaker Shukla)
Whole-Time Member, IBBI

Dated: 15th July, 2024

Place: New Delhi