

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

(Disciplinary Committee)

No. IBBI/DC/101/2022

20th May 2022

ORDER

In the matter of Mr. Dhinal Shah, Insolvency Professional under section 220 of the Insolvency and Bankruptcy Code, 2016 read with regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 and regulation 13 of IBBI (Inspection and Investigation) Regulations, 2017.

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/MON/2018/38/6295/155 dated 27th November 2019, issued to Mr. Dhinal Shah who is a Professional Member of the Indian Institute of Insolvency Professional of ICAI (IPA) and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-001/IP-P00073/2017-18/10190.

1. Background

- 1.1 The SCN has been issued to Mr. Dhinal Shah, IP, in respect of his role as Interim Resolution Professional (IRP) / Resolution Professional (RP) while conducting the corporate insolvency resolution process (CIRP) in the matter of M/s Bharati Defence and Infrastructure Ltd. (CD). The Hon'ble National Company Law Tribunal, Mumbai Bench (Adjudicating Authority) admitted an application for CIRP under Section 7 of the Code for CIRP of CD vide Order of the dated 06.06.2017 and appointed Mr. Dhinal Shah as IRP. Further, the Committee of Creditors (CoC) in its 1st meeting dated 05.07.2017 confirmed Mr. Dhinal Shah as the RP.
- 1.2 The IBBI in exercise of its power under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017, appointed an Inspecting Authority (IA) to conduct the inspection of the IP vide Order dated 08.02.2019 on having reasonable grounds to believe that Mr. Shah had contravened provisions of the Code, Regulations, and directions issued thereunder. The IA submitted the Inspection Report to IBBI on 10.04.2019.
- 1.3 The IBBI issued the SCN dated 27.11.2019 to Mr. Dhinal Shah, based on the findings in the inspection report in respect of his role as an IRP and RP in the CIRP of M/s Bharati Defence and Infrastructure Ltd (CD). Mr. Dhinal Shah replied to the SCN vide letter dated 03.01.2020.
- 1.4 The IBBI referred the SCN, response of Mr. Dhinal Shah to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder. Mr. Dhinal Shah availed an opportunity of personal hearing before the DC on 18.06.2021. Thereafter, Mr. Shah

submitted further additional documents vide email dated 24.06.2021 in support of his submissions made during the course of the hearing.

- 1.5 Thereafter, due to the completion of the term of Dr. Mukulita Vijayawargiya who constituted earlier Disciplinary Committee, new Disciplinary Committee was constituted to dispose of the aforesaid show cause notice which granted another opportunity of personal hearing to Mr. Shah on 28.04.2022. The DC heard the oral submissions of Mr. Shah on 28.04.2022. The DC has considered the SCN, the reply to SCN, oral submissions of Mr. Shah, written notes of arguments, other material available on record and proceeds to dispose of the SCN.

2 Alleged Contraventions and Submissions

- 2.1 The contraventions alleged in the SCN and Mr. Dhinal Shah's written and oral submissions thereof are summarized as therein as follows.

3 Contravention I

- 3.1 It has been observed that the notices for the 1st, 2nd and 3rd meeting of the CoC were sent by Mr. Rahul Saxena in contravention to section 24 (3) of the Code which states that IP shall give notice of each meeting of the CoC to its members. Mr. Shah's actions indicate that he attempted to misrepresent the stakeholders. Therefore, the IBBI is of prima face view that he has violated sections 24 (3), 208 (2) (a) and (e) of the Code and regulation 7(2) (a) and 7(2)(h) of the IP Regulations read with clauses 2, 10, 12 and 14 of the Code of Conduct of the said IP Regulations.

Submission

- 3.2 Mr. Shah submitted that mail issued by Mr. Rahul Saxena was in his capacity as a member of RP's Team and that at no point of time has it been alleged that Mr. Saxena has represented himself as the IRP or RP. The CD was among the very first few cases under the Code. Since the inception of the Code in December 2016, till date, the understanding and interpretation of provisions of the Code has evolved significantly not only through various amendments but also through landmark judgements passed by the Hon'ble Supreme Court, National Company Law Appellate Tribunal and the National Company Law Tribunal. An inadvertent error cannot be construed as Mr. Shah having acted in a *mala fide* or negligent manner. The IBBI is requested to consider Mr. Shah's conduct during the entire process instead of basing *mala fide* intent on Mr. Shah's part on a single incident which was later rectified which can be evidenced from the fact that subsequent CoC Meeting notices were sent from the authorised e-mail ID. It is also to be noted here that the IBBI issued a circular dated 03.01.2018 with an observation that "*..insolvency professionals are using different addresses and emails while communicating with the stakeholders..*" The said circular which was issued on 03.01.2018, however, the notice of the first CoC meeting was sent on 29.06.2017. This clearly signifies that Code was still evolving and *bona fide* mistakes were being observed in various CIRP cases.

Analysis and Findings

- 3.3 It is observed that that the e-mail notices for the 1st, 2nd and 3rd CoC Meeting of the CD dated 29.06.2017, 24.07.2017 and 07.08.2017 respectively was forwarded by Mr. Rahul Saxena and not the IRP/RP himself. However, Mr. Shah has submitted that he has committed this inadvertent error as the CIRP of the CD was initiated in the early stages of the insolvency regime when he did not have the benefit of the evolved jurisprudence and he had acted in good faith. It is further noted that the CIRP was admitted on 06.06.2017 when the insolvency regime was in its inception stage. The afore-said notices were sent prior to the IBBI Circular No. IP/001/2018 dated 03.01.2018 on “*Insolvency professional to use Registration Number and Registered Address in all his communications*” wherein IBBI clarified as to the address and E-mail ID to be used for communications with the stakeholders. However, as the issue is procedural in nature and does not affect the CIRP of the CD adversely, the submission of Mr. Shah is accepted.

4 Contravention II

- 4.1 An agreement dated 21.02.2018 (effective from 06.08.2017) was entered between Mr. Shah and EY LLP through which EY LLP was appointed for providing advisory services to Mr. Shah in this matter. However, it is stated in that agreement that EY LLP is appointed as a RP by Mr. Shah. This is in violation of section 25(2)(d) of the Code which provides that an IP may appoint other professionals but nowhere stipulates that he can appoint another RP for the process. The IBBI has also issued a press release on 15.06.2017 clarifying that no person is to function as an IP without Certificate of Registration. Therefore, the IBBI is of the *prima facie* view that Mr. Shah has violated Section 20(2)(a), 208(2)(a) and (e) of the Code and Regulation 7(2)(a) and (h) of the IP Regulations read with clauses 2, 10, 12 and 14 of the Code of Conduct.

Submission

- 4.2 Mr. Shah has submitted that he was appointed as IRP by the AA vide its order dated 06.06.2017. Subsequently he was confirmed as RP by the CoC by an overwhelming majority of 92.3%. Mr. Shah sought the approval of the CoC for the appointment of EY LLP to support RP as an external consultant which can be observed from the minutes of the 1st CoC Meeting dated 05.07.2017 under voting matters which explicitly states the approval of the CoC with 92.3% voting share. Further, the engagement agreement specifically states that EY LLP is appointed to render professional services for supporting the IP in fulfilling duties as RP under Section 20(1) of the Code. The scope of the services in the agreement clearly reflects “*Assistance to the Resolution Professional*”. Further, the agreement also reflects that “*Our work shall be in the capacity of advisor only. We shall at no point assume responsibilities of RP as per the provisions of the IBC, 2016*”. Mr. Shah further submitted that EY LLP as an IP is an inadvertent error in the engagement letter and the same cannot be read in isolation but has to be read harmoniously with complete documents such as minutes of the CoC Meeting, voting items, disclosure to IPA, additional engagement clauses between Mr. Shah and EY LLP.

Analysis and Findings

- 4.3 The Code provides that an IRP/RP may appoint accountants, legal or other professionals, however, there exists no provision in the Code which allows the RP to appoint another RP during the CIRP. It is noted that the Mr. Shah entered into an engagement agreement with EY LLP on 21.02.2018 with the subject '*Advisory Services to the Resolution Professional during the Corporate Insolvency Resolution Process*'. The statement of work describing the scope of service also clearly mentions that the service is in the nature of providing assistance in the capacity of advisor in activities pertaining to responsibilities of the IRP/RP under the CIRP. Hence, on a holistic reading of the agreement it can be made out that the EY LLP has not been appointed as RP by Mr. Shah and at only one occasion it has been inadvertently mentioned that EY LLP is appointed as RP, and there is no further reference to the same.
- 4.4 The DC also observes that in the minutes of the 1st CoC meeting dated 05.07.2017 that the agenda regarding '*Appointment of Mr. Dhinal Shah, Interim resolution professional (IRP) as a Resolution Professional (RP) and Ernst & Young LLP to support the RP as an external consultant*' was put to vote and the same was approved by the CoC with 92.3% voting share. Further, it is also noted that in the Form III of Cost Disclosures by Mr. Shah submitted to the IPA it has also been disclosed that EY LLP has been appointed by Mr. Shah as advisory support to IRP/RP. The DC accepts the submission of Mr. Shah.

5 Contravention III

- 5.1 It has been observed from the relationship disclosure submitted by Mr. Shah that he failed to disclose that EY LLP was appointed not only as advisor to support Mr. Shah but also as M&A advisor. It has also been noted that Mr. Shah provided the IPA with a different set of disclosures, wherein Mr. Shah disclosed that EY LLP was appointed by him in dual capacity. But Mr. Shah provided a single date 21.02.2018 for both appointments even though on the said date he had only entered as agreement with EY LLP for providing advisory services. The scope of that agreement did not provide that EY LLP will also act as a M&A Advisor separately. This action of Mr. Shah indicates his attempt to mislead the stakeholders including the IBBI. Therefore, the IBBI is of the *prima facie* view that the conduct of Mr. Shah has violated sections 208(2)(a) and (e) of the Code and Regulation 7(2)(a) and (h) of the IP Regulations read with clauses 1, 2, 10, 12 and 14 of the Code of Conduct.

Submissions

- 5.2 Mr. Shah submitted that EY LLP as external advisors/ consultant has been appointed by the CoC in its 1st Meeting dated 05.07.2017 by a voting majority of 92.3%. Approval of CoC was sought for appointment of EY LLP as Lead Advisory team for the M&A advisor/ Investment banking mandate was approved by the CoC in its 6th Meeting by a majority of 98%. This appointment was made after due process of reaching out to multiple external agencies for eliciting an offer for a potential M&A mandate for resolution of the CD.
- 5.3 The IBBI circular titled *Disclosures by Insolvency Professionals and other Professionals*

appointed by Insolvency Professionals conducting Resolution Processes was released on 16.01.2018 and accordingly relevant disclosures were submitted to the IBBI on 31.01.2018. The said Disclosure provides that EY LLP had been appointed to provide M&A Advisory in the CIRP of CD. In fact, the disclosure also refers to taking support from EY LLP for day to day on ground operations and as M&A advisory.

- 5.4 Subsequently, the said disclosure was appropriately updated with IPA in the interest of transparency and full disclosure, which explicitly states that EY LLP was appointed to provide both advisory services to the RP and also as an M&A Advisor. The said disclosure was uploaded on the website of IPA and is available in the public domain i.e. open for the IBBI to refer as well. Hence the same cannot be regarded as misleading. Merely due to an error a single date has been provided for the dual appointment of EY LLP cannot be a ground to allege that the RP has withheld or mislead or concealed information. Further, it may be noted that no fees/payment has been made to EY LLP for M&A Advisory mandate which clearly establishes that there was neither an intention to deceive any stakeholder nor misrepresentation to the IBBI.

Analysis and Findings

- 5.5 As per Circular No. IP/005/2018 dated 16.01.2018 titled *Disclosures by Insolvency Professionals and other Professionals appointed by Insolvency Professionals conducting Resolution Processes*, the IP is required to make disclosures of the relationship of other Professional(s) engaged by IP with himself, CD, Financial creditors etc. with an objective of maintaining transparency in the resolution process.
- 5.6 The DC observes in the present matter that the CoC in its 1st Meeting dated 05.07.2017, had approved the appointment of EY LLP to support RP as an Advisor with 92.3% voting share. Thereafter, CoC in its 6th Meeting dated 27.09.2017 had appointed EY LLP as the Advisory for M&A/Investment Banking mandate with with 98% voting share. However, in the relationship disclosure submitted by Mr. Shah dated 31.01.2018, it is observed that EY has been indicated as both M&A advisor as well as support service but in the column for mentioning date Mr. Shah had indicated 21.02.2018 as the date of appointment for both the positions. Even though on the aforesaid date EY LLP was only engaged for its advisory service. It appears that Mr. Shah had not included in the disclosure for the date of engagement of EY LLP as M&A Advisor.
- 5.7 Keeping in view that the CIRP was admitted on 06.06.2017 prior to the Circular being issued by IBBI on 16.01.2018. The DC notes that Mr. Shah had immediately submitted the relationship disclosure on 31.01.2018 but a technical error of missing the date of engagement of EY LLP as M&A Advisor was made. Mr. Shah has further submitted that no fee has been paid to EY LLP for the M&A services. In the present case, DC notes that process of conducting CIRP and making disclosures were still evolving. Taking into consideration that the Code was at a nascent stage, the DC takes a lenient view of the technical error of mentioning one date of appointment of EY LLP as advisor to IP and M&A advisor.

6 Contravention IV

6.1 Mr. Shah appointed EY LLP, wherein he is a Partner, vide an engagement letter dated 21.02.2018 for providing advisory services to IRP/RP in this matter. As per the fee disclosure submitted by Mr. Shah to the IPA in Form III (as per IBBI circular dated 16.01.2018), the running process cost for this matter was Rs. 13.69 Crore. Out of this cost, it is noted that almost half of the amount i.e. Rs. 6.69 Crore, was paid to EY LLP. This is a clear case of conflict of interest as Mr. Shah used his position as an IP to derive huge benefits to the firm in which he is a partner. Therefore, the IBBI is of the *prima facie* view that he has violated section 208 (2)(a) & (e) of the Code and regulation 7(2)(a) & 7(2)(h) of the IP Regulations read with clauses 3, 5, 14, 25 and 27 of the Code of Conduct.

Submissions

6.2 Mr. Shah submitted that the CIRP Cost for running the CD as a going concern for a cumulative period of 19 months from 6.06.2017 (insolvency commencement date) till 14.01.2019 (Order of Liquidation) is Rs. 72 Crore and not Rs. 13.69 Crore. Of the Rs. 72 Crore, Rs. 28 Crore were dues of the workmen and employees, payment towards utilities amounting to about Rs. 2.2 Crore, payment towards security personnel amounting to about Rs. 3.64 Crore, payment towards valuers and auditors amounting to about Rs. 1 Crore and other operations related expenses amounting to Rs. 10 Crore, repayment of interim finance along with interest amounts to about Rs. 12 Crore. The expenses are duly reflected in the Form III of the disclosure made to the IPA. The total cost incurred by Mr. Shah and the EY providing support services to the RP from June 2017 to January 2019 (19 months) amounts to Rs. 55 Lacs and Rs. 6.29 Crore respectively out of total CIRP of Rs.72 Crore incurred during a period of 19 months (Average – Rs. 35 Lacs per month including both RP and RP advisors fees). The amount of fees having regard to the total CIRP cost does not raise any issue of conflict of interest as the appointment and the payments were approved by the CoC.

6.3 Mr. Shah detailed 13 factors indicating that all remunerations of the RP and EY LLP were charged in a transparent manner and are a reasonable reflection of the work incurred during the CIRP:

- “(i) Total amount of claims admitted in BDI amounts to more than INR 11,000 crores.*
- (ii) BDIL’s yard are spread across various parts of India – Maharashtra, Goa, Kolkata and Karnataka.*
- (iii) The CIRP period has extended for 19 months and the RP and his team of 7-8 people from EY LLP have been running the CD as a going concern.*
- (iv) Approx. INR 50 lacs were available in BDIL’s operating bank account at the time of initiation of CIRP;*
- (v) Electricity at BDIL’s major yard at Dabhol was disconnected for non-payment of dues prior to initiation of CIRP;*
- (vi) Employees/ workmen salaries were unpaid for a period of about 12 months prior to initiation of the CIRP;*
- (vii) Key suppliers with large outstanding dues were reluctant to provide any support during the CIRP for continuation of BDIL’s operations as a going concern;*

- (viii) Various yards of the corporate debtor including Mangalore, Dabhol, Ratnagiri, Goa and Kolkata, which were shut before the commencement of CIRP, were restarted due to efforts of Mr. Shah and his team;
- (ix) The promoters of the CD were highly uncooperative and adversarial and actively impeded the orderly conduct of the CIRP. In-fact, the resolution professional had filed Application No. 602/2017 which was in relation to promoters non-cooperation.
- (x) Ensured that BDIL's employees/workers were paid their salaries, statutory bonus and medical allowances from June 2017 till about November 2018;
- (xi) The Resolution Professional personally liaised with Ministry of Defence officials to give them confidence about completion of defence contracts and ensured BG commitments were honored;
- (xii) The RP and his team delivered 2 interceptor boards to the Coast Guard during the CIRP and generated about INR 10 crores from the same;
- (xiii) Recovered about INR 43 crores of BDIL's margin monies lying with banks through legal recourse."

Analysis and Findings

- 6.4 In the present case, Mr. Shah conducted the CIRP as IRP/RP and appointed EY LLP as advisor to him. The fee charged as per the Fees disclosure submitted by Mr. Shah for the period of 06.06.2017 to 14.01.2019 is about Rs. 55 Lac for services rendered by Mr. Shah and about Rs. 6 crores for services rendered by EY LLP. The DC notes that Mr. Shah and his team undertook number of activities and steps to run the CD as a going concern. From the minutes of the 1st CoC Meeting dated 05.07.2017 the CoC had approved the appointment of EY LLP to support RP as an Advisor with 92.3% voting share. The DC is of the opinion that since the CoC in exercise of its commercial wisdom has already approved the fees of Mr. Shah and EY LLP, no further intervention is required. The DC accepts the submission of Mr. Shah.

7 Contravention V

- 7.1 It is noted from the minutes of the 1st CoC meeting dated 05.07.2017 that Mr. Shah appointed two professionals for validating the claims of creditors i.e. EY LLP on the one hand and Damania & Varaiya Chartered Accountants on the other hand. Mr. Shah's actions indicate his casualness in handling this CIRP. Therefore, the IBBI is of the *prima facie* view that Mr. Shah have violated section 208(2)(a) & (e) of the Code and regulation 7(2)(a) and (h) of the IP Regulations read with clauses 3, 14 and 25 of the Code of Conduct of the said IP Regulations.

Submissions

- 7.2 Mr. Shah has submitted that despite the approval given by CoC in its 4th meeting by a majority of 82.5% for engagement of Damania & Varaiya Chartered Accountants, they were not engaged to validate operational and employee claims and hence no unnecessary cost has been incurred for this service by the RP. Further, it is submitted that the appointment of professionals was required for reconciling operational claims since the agency could suitably follow the paper trail which is time consuming. The act of Mr. Shah in taking approval of the CoC demonstrated that there was complete openness of discussion and

deliberation and there was no suddenness of decision, no impulsive caprice or arbitrariness in reaching the said decision. Hence, the manner of appointment is clearly indicative that it was neither mala fide nor negligent. Mr. Shah submitted that large no. of operational claims received by the RP amounting to approx. 500 and draws attention to the minutes of meeting of 1st to 4th CoC where Mr. Shah highlighted the challenges faced by him in getting the past data from the CD and the erstwhile management in verifying claims. Despite the aforesaid, Mr. Shah verified all the claims received and have uploaded the same on the website of the CD.

Analysis and Findings

- 7.3 The DC observes that the approach of the IP should be to incur least possible cost with maximum results so that the burden upon the CD is minimal. In the 4th CoC meeting dated 24.08.2017 it is mentioned that “*Vouching of Claims ...I. RP team also suggested the hiring of an external vouching agency for reconciling of operational claims since the agency can suitably follow the paper trail which is time consuming ...II. RP team also informed the CoC that it is considering Damania and Varia for vouching of claims.*”
- 7.4 The DC notes that matter of appointment of CA firm to validate operational and employee claims by Damania & Varaiya Chartered Accountants for a quote of Rs. 1.7 Lacs (excl. OPE and Taxes) was approved with 82.5% voting share. As submitted by Mr. Shah that the Damania & Varaiya Chartered Accountants was not engaged to validate operational and employee claims and no unnecessary cost was incurred, the DC accepts the submission of Mr. Shah.

8 Contravention VI

- 8.1 As per regulation 34 of the CIRP regulations, fee of RP needs to be fixed by all the CoC members. However, it is noted from the minutes of the 1st CoC meeting dated 05.07.2017 that Mr. Shah’s fee as RP was fixed by a single CoC member (Edelweiss Asset Reconstruction Company (EARC) and not by all the CoC members in violation of this regulation. Mr. Shah’s actions question his integrity as a professional. Therefore, the IBBI is of the *prima facie* view that Mr. Shah has violated section 208(2)(a) and (e) of the Code and regulation 7(2)(a) and (h) of the IP Regulations read with clauses 1, 2, 10 and 14 of the Code of Conduct of the said IP Regulations and regulation 34 of the CIRP regulations.

Submissions

- 8.2 Mr. Shah has also submitted that the Minutes of the 1st CoC Meeting reflect that Rs. 55 Lacs per month was originally proposed for the CIRP period and subsequently Mr. Shah and his advisor’s appointment was approved by the CoC by majority of 92.3%. He further submits that the decision of CoC to authorise EARC to decide was in fact the collective decision of the CoC and cannot be attributed to Mr. Shah.
- 8.3 Furthermore, the voting results clearly demonstrate that the CIRP expenses in the first month have been ratified by the CoC by a vote of 91.1%. Mr. Shah has drawn attention to the

Minutes of 2nd CoC Meeting wherein it is stated that “*Mr. Vijay then discussed the fee proposal for the RP. He informed the CoC that IRP fee of INR 20 lacs for June 17 was ratified by the CoC in its last meeting. Further, INR 35 lacs per month from July 17 was agreed between Edelweiss and the RP....*” Hence, the fee of RP was approved by the entire CoC and CoC itself unanimously agreed that fees for RP will be agreed between Edelweiss and the IRP. Thus, the entire CoC voted for the approval of the fees of Mr. Shah.

Analysis and Findings

- 8.4 The DC notes that in the first CoC meeting held on 05.07.2017 the CoC has unanimously decided that the fees of the RP will be agreed between E-ARC and Mr. Shah. The DC further observes that as per the discussion deck to the 1st CoC Meeting, Edelweiss was the lead financial creditor with voting share of 82.5%. The fees of the RP was approved by the all CoC members with 91.1% voting share. The DC accepts the submission of Mr. Shah.

9 Contravention VII

- 9.1 IBBI circular dated 16.01.2018 (relating to fees) states that all the professionals who are appointed by the IP should raise invoices on their own name and the fee should be deposited in their respective account. Prior to this circular, Mr. Shah and EY LLP were taking a consolidated fee. Though Mr. Shah amended the fee structure for himself as well as for EY LLP post this circular but this new arrangement was only mentioned to the CoC members during the 12th CoC meeting dated 27.02.2018. However, Mr. Shah failed to get this new fee arrangement ratified by the CoC which is in violation of regulation 34 of the CIRP Regulations which states that CoC shall fix the expenses incurred by the RP. Therefore, the IBBI is of the *prima facie* view that Mr. Shah has violated section 208 (2)(a) and (e) of the Code and regulation 7(2)(a) and (h) of the IP Regulations read with clauses 10 and 14 of the Code of Conduct of the said IP Regulations and regulation 34 of the CIRP Regulations.

Submissions

- 9.2 Mr. Shah submitted that minutes of 12th CoC Meeting dated 27.02.2018 clearly reflects that the RP team informed CoC of IBBI circular dated 16.01.2018 on the fees payable to the IP and to other professionals appointed by the IP. The Minutes in clear terms also provides and the same has been accepted by the Board in the SCN that the fee structure was amended as Rs. 30 Lacs was to be billed by and paid to Mr. Shah as fee for rendering services as a RP and Rs. 32.86 lac per month for 7 months to be billed by and paid to EY LLP as fee for rendering professional services for supporting the RP in fulfilling his duties under section 20(1) of the Code. The CoC in the 12th CoC Meeting unanimously agreed to the changed fee structure and requested the RP bring out the necessary changes in the billing mechanism. This establishes that detailed deliberations were conducted with the CoC members. Mr. Shah further submitted that the minutes of the 12th Meeting of CoC were approved in the 13th Meeting of CoC and therefore, the revised arrangement was duly approved by CoC. He further submits that the previous billing arrangement was rectified in due compliance of the IBBI's Circular relating to fees.

Analysis and Findings

- 9.3 The DC notes that to maintain transparency, the IP is required to raise bills for his services as IP on his/ her name. Similarly, the professionals appointed by the IP are required to raise bills on their own names. The fee to be paid is directly deposited in their respective accounts. Regulation 34 of the CIRP Regulations read with the Circular dated 16.01.2018 makes this requirement amply clear. The DC notes that the bills being raised Mr. Shah and EY LLP was consolidated and no separate bills were raised. However, once the Circular dated 16.01.2018 was issued the fee structure was changed for Mr. Shah as well as for EY LLP. It is observed that the Circular dated 16.01.2018 was informed by Mr. Shah to the CoC in the 12th CoC meeting held on 27.02.2018 and the CoC members unanimously agreed to the proposed the fee and billing arrangement between Mr. Shah and EY LLP. The DC accepts the submission of Mr. Shah.

10 Contravention VIII

- 10.1 Mr. Shah appointed valuers (RBSA and Duff & Phelps) in his tenure as an IRP, their fees should have been ratified by the CoC members. However, it has been observed from the minutes of the 1st CoC meeting dated 05.07.2017 that instead of getting their fees ratified by the CoC members, Mr. Shah merely informed the CoC members about their appointment. Mr. Shah's actions indicate his misunderstanding of the law. Therefore, the IBBI is of the *prima facie* view that Mr. Shah has violated section 208 (2)(a) and (e) of the Code and regulation 7(2)(a) and (h) of the IP Regulations read with clauses 10, 14 and 27 of the Code of Conduct of the said IP Regulations and regulation 33 of the CIRP Regulations.

Submissions

- 10.2 Mr. Shah submitted that the appointment of valuer does not require approval of the members of CoC and the appointment is made by the IRP in accordance with the provisions of the Code. He further submitted that the erstwhile CIRP Regulations as applicable during the relevant period of time stipulates that the IRP was required to appoint two registered valuers to determine liquidation value of the CD. Accordingly, the cost incurred for appointment of valuers was included in the CIRP cost. Mr. Shah further submitted that the voting matters as reflected in minutes of the 1st meeting of CoC state that the IRP had proposed the ratification of CIRP expenses in the first month of Rs. 1,22,33,845/-. In the item wise breakup, the fee for valuer 1 and valuer 2 namely RBSA and Duff & Phelps has been mentioned and were approved by the CoC.

Analysis and Findings

- 10.3 The DC observes that the fees of the two registered valuers RBSA and Duff & Phelps were included in the CIRP cost for approval of the CoC in its 1st Meeting. Further, the same was approved with voting share of 91.1% voting. Therefore, the DC is of the opinion that Mr. Shah has complied with the requirements of regulation 33(3) of the CIRP Regulations and placed the cost incurred by him as CIRP before the CoC which was ratified by the CoC in its 1st meeting. The DC accepts the submission of Mr. Shah.

11 **Contravention IX**

11.1 It is noted from the minutes of 1st CoC meeting dated 05.07.2017 that Mr. Shah appointed a technical expert during his tenure as a RP. Mr. Shah failed to get its fee approved by the CoC members in contravention to the said regulation. Therefore, the IBBI is of the *prima facie* view that Mr. Shah has violated section 208 (2)(a) and (e) of the Code and regulation 7(2)(a) and (h) of the IP Regulations read with clauses 10, 14 and 27 of the Code of Conduct of the said IP Regulations and regulation 34 of the CIRP regulations.

Submission

11.2 Mr. Shah has submitted that although an approval was sought for appointment of the technical expert in terms of Sec. 25(2) of the Code, the said Expert was not engaged in the 1st CoC meeting. The intention behind appointing a technical expert was that there was no regular CEO in the CD's team at the insolvency commencement and considering the complexity of the business, it was necessary to have professionals to run the operations of the CD. Subsequently, the minutes of the 3rd CoC meeting record the discussions which were initiated for the appointment of the Technical Expert. The Discussion Deck in this regard as presented before the CoC and also records that the expected compensation for engagement of the Technical Expert (COO) was Rs 3.5 lakh per month exclusive of expenses. In furtherance thereof, Mr. Shah proceeded with taking in-principle approval of the CoC for appointment of the COO as technical expert and necessary disclosures were also made to the IPA. It may be noted that the technical expert who was a retired DIG in the Indian Coast Guard was appointed after CoC approval in its 3rd meeting dated 08.08.2017 whose support was critical for the RP and CD to deliver two vessels during the CIRP period.

Analysis and Findings

11.3 The CIRP cost is an added financial stress on a CD. Therefore, it becomes crucial to monitor the expenses incurred by the RP to ensure that a CD, who is already entangled in a web of unsustainable liabilities is not further over-burdened with exorbitantly high CIRP cost. Therefore, it is an imperative under the Code that the CoC is to ratify the expenses that are incurred by RP. On perusal of the documents provided by RP, it is observed that in the 1st CoC Meeting dated 05.07.2017 it was discussed regarding the appointment of Technical Expert. Further, in the 3rd CoC Meeting dated 8.08.2017 the issue of appointment of Technical Expert was again taken up by RP and the CoC was presented with the profile of COO/ Business Head - DIG (Retd.) Narendra Kumar with the expected compensation for engagement of the Technical Expert (COO) which was Rs. 3-3.5 lakh per month exclusive of expenses.

11.4 It is also noted that the CoC approved the in principle the appointment of an external Chief Operating Office with 91.7% votes. Accordingly, Mr. Shah made the appointment of DIG (Retd.) Narendra Kumar, external Chief Operating Office on 21.08.2017 for a monthly retainer fee of Rs. 3,50,000/-. Hence, Mr. Shah has provided documents to the satisfaction of the DC and no contravention could be made out.

12 **Contravention X**

12.1 It has been observed that Mr. Shah appointed AZB Partners as Legal advisors vide an agreement dated 12.07.2017 wherein EY LLP was also made one of the parties to this agreement. Moreover, EY LLP was also given the authority to terminate this agreement. This is in violation of section 25 (2)(d) of the Code which specifically provides that, it is the duty of the IP (as an RP) to appoint accountants, legal or other professionals. Accordingly, EY LLP should not have been involved in any manner in appointing any professionals during the CIRP. Mr. Shah's actions indicate carelessness towards the profession of IP. Therefore, the IBBI is of the *prima facie* view that Mr. Shah has violated sections 25 (2)(d), 208 (2)(a) and (e) of the Code and regulation 7(2)(a) and (h) of the IP Regulations read with clauses 1, 2, 10, 12 and 14 of the Code of Conduct of the said IP Regulations.

Submission

12.2 Mr. Shah submits that the agreement to engage AZB Partners was executed where EY was also one of the parties in the agreement. The said engagement letter has been duly signed by the RP. Merely because EY LLP also signed it does not render it as an appointment made by EY LLP when the RP himself signed the appointment letter. Further the appointment of AZB Partners as legal counsel was approved by the CoC during its 3rd Meeting by 91.7% majority. The same clearly indicates that the appointment of AZB was done by the RP with the approval of the CoC in exercise of the powers under section 25(2)(d) of the Code. Since EY was supporting the RP in conducting the process, the agreement with AZB was additionally signed by representative of EY LLP. From the above it is clearly evident that the appointment of AZB as legal counsel was made by RP along with his signature (after approval from CoC) and EY LLP as advisor to IP only additionally signed the agreement. This does not have any adverse implication under the Code.

Analysis and Findings

13 The DC observes from the 3rd CoC Meeting dated 8.08.2017 that the appointment of AZB as legal counsel was listed for approval by voting and as per the voting results of the 3rd CoC Meeting the appointment was approved by 91.7% voting share. It is observed that the due approval was taken for the appointment of the legal counsel. In the agreement letter of AZB legal counsel dated 12.07.2017 it is observed that the acceptance has been signed by the RP and the representative of EY LLP. Further, from the language of the Engagement Agreement the right to terminate has been given to the parties which include EY LLP being a signatory. As per the section 25 of the Code it is the duty of the RP to appoint the professionals for the CIRP but in the present case EY LLP had also been given the authority to terminate appointment agreement of AZB & Partners. The DC observes that this act of Mr. Shah is not in consonance of the provisions of the Code read with regulations made thereunder. This contravention appears to be a procedural lapse and has not affected the resolution process.

14 **Contraventions XI and XII**

- 14.1 Mr. Shah issued a power of attorney (POA) dated 18.07.2017 in favour of Mr. Dinkar Venkatasubramanian. In other words, certain tasks were delegated to him by the RP for this CIRP including appointment of advocates and consultants in relation to legal proceedings, executing and filing applications before the appropriate authorities etc. As per section 28(1)(h) of the Code, RP shall take prior approval from the CoC members for delegating its authority to any other person. However, it has been observed in the minutes of the 3rd CoC meeting that Mr. Shah took the approval from the CoC members only on 08.08.2017 i.e, after executing the POA in violation of section 28(1)(h) of the Code. Therefore, the IBBI is of the *prima facie* view that Mr. Shah has violated sections RP has violated section 28(1)(h), 208(2)(a) and (e) of the Code and regulation 7(2)(a) and 7(2)(h) of the IP Regulations read with clauses 1, 2, 10, 12 and 14 of the Code of Conduct of the said IP Regulations.
- 14.2 A letter dated 08.09.2017 was issued by Mr. Venkatasubramanian on behalf of Mr. Shah to Mr. Vijay Kumar (ex-managing director of CD) conveying some directions to him under the POA dated 18.07.2019. As no prior approval was taken by you from the CoC members before issuing the POA as per section 28(1)(h) of the Code, the said POA stood invalid. Therefore, Mr. Shah allowed Mr. Venkatasubramanian to issue the said letter even though he was not authorized to do so. Therefore, the IBBI is of the *prima facie* view that the aforesaid actions have violated section 208(2)(a) and (e) of the Code and regulation 7(2)(a) and (h) of the IP Regulations read with clauses 1, 2, 12 and 14 of the Code of Conduct of the said IP Regulations.

Submissions

- 14.3 At the outset, Mr. Shah has submitted that the RP has not delegated his duties, powers or functions under the Code to Mr. Venkatasubramanian. The object behind granting the POA was for operational convenience in giving effect to the decisions made by the RP/CoC. A perusal of the POA as executed indicates that the authority was limited to *inter alia*, appointment of advocates and consultants in relation to legal proceeding execution and filing application before the appropriate authorities and such other necessary actions. It may be noted that scope of this POA was limited and in no manner can be construed as delegation of duties of the RP. This 'authority' given to the RP under section 17 of the Code can be delegated as is clear from section 28(1)(f) and therefore, the POA was executed strictly in accordance with the Code.
- 14.4 It is to be noted that all appointments of advocates, consultants, and decisions to file before the competent authorities were made by the RP in consultation with the CoC as evidenced from the minutes of the meeting of CoC pursuant to discussions, and the subsequent voting results. Thus, the power exercised by Mr. Venkatasubramanian was only to facilitate communication of decisions made by the RP/CoC and no independent decision was taken by Mr. Venkatasubramanian on behalf of the RP. The POA was issued to Mr. Venkatasubramanian on 18.07.2017 which was ratified by CoC on 24.08.2017. The letter issued by Mr. Venkatasubramanian to Mr. Vijay Kumar conveying directions to him is dated

08.09.2017, is subsequent to the CoC approval meeting. The aforesaid chronology of events makes it abundantly clear that no unauthorised power was exercised by Mr. Venkatasubramanian. Mr. Shah has also shared a letter from Mr. Venkatasubramanian in this regard specifying that he has not exercised any power given to him (except in one instance) during the period from 18.07.2017 to 24.08.2017.

Analysis and Findings

- 14.5 On perusal on the documents submitted by RP, it is observed that the POA was executed on 18.07.2017 appointing Mr. Venkatasubramanian to appoint advocates and consultants in relation to legal proceeding execution and filing application before the appropriate authorities and such other necessary actions on behalf of the CD. Further, it is also observed that the resolution for delegation of authority to Mr. Venkatasubramanian was passed with 92.2% approval from the CoC in 3rd CoC Meeting dated 08.08.2017. The letter issued by Mr. Venkatasubramanian to Mr. Vijay Kumar conveying directions to him is dated 08.09.2017 which is subsequent to the CoC approval meeting.
- 14.6 Mr. Shah should not have executed POA without prior approval of CoC. Since, Mr. Shah has submitted that Mr. Venkatasubramanian has not exercised any power given to him (except in one instance) during the period from 18.07.2017 to 24.08.2017, the DC accepts the submission of Mr. Shah.

15 Contravention XIII

- 15.1 It has been observed in the minutes of the 8th CoC meeting dated 13.12.2017 that Mr. Shah took instructions from the CoC members as to what should be the relevant period for conducting the special audit even though the Code specifically provides for the same under section(s) 43-51 of the Code. Mr. Shah's actions indicate his misunderstanding of the law. Therefore, the IBBI is of the *prima facie* view that Mr. Shah has violated section(s) 43-51, 208 (2)(a) and (e) of the Code and regulation 7(2)(a) and (h) of the IP Regulations read with clauses 3, 10, 13 and 14 of the Code of Conduct of the IP Regulations.

Submissions

- 15.2 Mr. Shah submitted that the minutes of the 8th Meeting of the CoC clearly reflect that Mr. Shah informed the CoC that a Transaction Audit was required to be conducted in accordance with the provisions of regulation 39(2) of the CIRP Regulations. After due deliberations, a member of the CoC suggested that the scope of such audit may be increased, in order to get a clear visibility on the impact of such transactions under the Code. The members of the CoC were in agreement with the same and accordingly the scope of such a transaction audit was increased to 5 years. It may please be appreciated that the coverage of such transactions beyond the prescribed period does not amount non-compliance of a Code and that the subsequent forensic report and the application filed by Mr. Shah in this regard in fact suggests that there were various transactions covered under sections 43, 45, 50 and 66 which fell before the prescribed period and that the increased period was effective in unearthing irregularities. The aforesaid clearly indicates that the increase in scope of such a transaction

and it was recommended by the CoC to ascertain the impact of such transactions. RP as a representative of the stakeholders of the CD was duty bound to take all such actions as necessary for the benefit of the stakeholders of this CIRP process. Furthermore, the substantial public money involved casts a duty on Mr. Shah, as the RP, to bring to the AA's notice all irregular transactions that came to his knowledge without limiting them mechanically to the prescribed look-back period.

Analysis and Findings

- 15.3 The DC notes that in the 8th CoC meeting dated 13.12.2017 the discussion on the relevant time period for conducting Transaction Audit was held. The CoC members merely requested the RP to expand the time period from preceding 2 years to 5 years to include transactions for getting a clear visibility on impact of such transactions and no specific directions were issued on the basis of a resolution passed in voting. The RP based on the discussion was satisfied to extend the time period for transactions. This action of Mr. Shah not just helped in identifying avoidance transactions but also helped maximize the value for the stakeholders of CD. Therefore, the DC accepts the submission of Mr. Shah.

16 Contravention XIV

- 16.1 Mr. Shah appointed EY LLP as M&A Advisor. However, he failed to provide any evidence to establish that the appointment of M&A Advisor was necessary to achieve this objective of the Code. Therefore, the IBBI is of the *prima facie* view that Mr. Shah has violated section 25(1), 208 (2)(a) and (e) of the Code and regulation 7(2)(a) and (h) of the IP Regulations read with clauses 3 and 10 of the Code of Conduct of the IP Regulations.

Submissions

- 16.2 Mr. Shah submitted that considering the nature of business of the CD having a Defence Warship Manufacturing License, and fact that the asset is of great national importance and the CD provides employment to more than 800 people and has been building ships for the Indian Coast Guard & Ministry of Defence the engagement of a process advisor was essential to ensure that appropriate interest is generated and prospective resolution applicants are approached to enable them to submit a resolution plan for the CD.
- 16.3 More than 60 national and international parties were approached either through the Investment Banking advisors / Process Advisors or through the RP Team's contacts, for which active discussions were underway for submission of a resolution plan with various parties, including with reputed companies. The details were provided in the CoC and recorded in the minutes of the meeting. As a result of efforts made by the Process Advisor and the RP, resolution plans were received from 18 prospective resolution applicants of which 5 submitted resolution plans which were duly considered. Further, during the CIRP of the CD, established and statutory procedures regarding the Request for Resolution Plans were not in place.
- 16.4 The minutes of the 4th meeting of the CoC clearly specify that the RP reached out to multiple

external agencies for eliciting an offer for a potential Investment banking mandate for the resolution of the CD which are KPMG, Morgan Stanley, JP Morgan Chase, DBS, Ernst & Young, Deutsche Bank and Edelweiss Investment Banking.

- 16.5 The minutes further record that the lenders opined that the final mandate to appoint an M&A Advisor / Process Advisor would not be given only on the basis of commercials and the CoC would also like to understand the approach which shall be proposed by each contender as part of the proposed M&A mandate. It is to be noted that out of the parties approached, 3 parties submitted their quotation and they were called initially to present their proposal to Core Committee comprising of representatives of Edelweiss ARC, PNB, DBS and SICOM after which their proposals were placed before the CoC for voting. Accordingly, the CoC in its next meeting by a vote of 98% resolved to appoint the EY M&A team for the Investment Banking mandate as evidenced from the voting result of the 6th Meeting of the CoC. It may also be noted that even after the efforts put in by EY M&A advisor, no fees has been paid for this services as per terms of engagement and therefore there is no impact on the finances of the CD.

Analysis and Findings

- 16.6 Under the Code, the IP has been entrusted with the responsibility to appoint various professionals such accountants, legal or other professionals, as may be necessary in accordance with the provisions of the Code to assist him in conducting the business and management of the CD, however, the appointment of such professional should be within requirement and should not be an unnecessary cost to the already ailing CD. Thus, it is the duty of an IP, under the Code, to take reasonable care and diligence while performing his duties, including incurring expenses. The IP is required to balance the interests of CD as well as the creditors and to ensure that the fees payable to the professionals are not exorbitant which may further cripple the CD. In the minutes of the 3rd CoC meeting held on 08.08.2017 the requirement for a process advisor to find potential buyer was discussed. Further, in the 4th CoC meeting held on 24.08.2017, it was informed that the various agencies were reached out. Considering the business of CD is in a specialized sector and industry experts are required to approach the potential buyer and submission of Mr. Shah that no fees has been paid for this service as per terms of engagement to EY M&A Advisor, the DC accepts the submission of Mr. Shah.

17 Contravention XV

- 17.1 Section 28(1)(a) of the Code states that an IP shall take prior approval of the CoC before raising any interim finance in excess of the amount which has been decided by the CoC. This means that all the CoC members shall have final call as to what amount, whether initial or additional, may be raised as an interim finance. However, in this matter it has been observed from the minutes of the 6th CoC meeting dated 27.09.2017 that a binding term sheet for an interim finance of Rs. 10 crores was provided by EARC and CoC was only informed of the same. Mr. Shah subsequently made an inquiry to other CoC members in response to this. Thereafter, Mr Shah got the said term binding sheet approved from the CoC

members where incidentally EARC itself had the major voting share i.e. it gave approval to its own proposal. Therefore, the IBBI is of the *prima facie* view that Mr. Shah violated Section 28(1)(a), Section 208(2)(a) and (e) of the Code and Regulation 7(2)(a) and 7(2)(h) read with Clauses 10, 12 and 14 of the Code of Conduct of the IP Regulations.

Submissions

- 17.2 Mr. Shah submitted that the requirement of interim finance was explained in the 1st CoC meeting dated 05.07.2017 but no resolution was passed in this regard. In the 2nd CoC meeting dated 25.07.2017, the requirement of interim finance and the month-on-month cash position of the CD was placed before the CoC. In the 3rd CoC meeting dated 08.08.2017, Mr. Shah was to evaluate raising interim finance from parties other than CoC members. In the 5th CoC Meeting dated 13.09.2017, detailed discussion regarding raising interim finance, deliberations with NBFCs and other parties for raising interim finance, squeezing of requirements to the minimum from Rs. 75 crores to Rs. 25 crores was made. It is observed that in the 6th CoC meeting dated raising interim finance from EARC was discussed. The resolution for interim finance for an amount of Rs. 10 crores being raised from Edelweiss Asset Reconstruction Company Ltd @ 18%p.a was approved with 91% voting share.
- 17.3 Hence, the minutes of meeting of CoC indicate that the requirement of interim finance was brought to the attention of the members of the CoC from the 1st meeting of CoC till the time interim finance was raised. The members of the CoC were alive to the need of interim finance by the RP to run the CD as a going concern. He had exhausted all avenues for raising interim finance after approaching multiple parties. Mr. Shah submitted that the interim finance was finally availed from EARC and the same was approved by the CoC by a majority of 91% as reflected in the voting results of the minutes of 6th meeting of CoC in furtherance of Section 25(2)(c) read with Section 28(1)(a) of the Code which provides for approval of the CoC to raise interim finance in excess of the amount as may be decided by the CoC.

Analysis and Findings

- 17.4 From the reading of the minutes of the 1st, 2nd, 3rd, 5th and 6th CoC meetings, it is evident that the requirement of interim finance has been placed, discussed and deliberated before the CoC and action was taken accordingly. The DC finds that various steps have been taken by Mr. Shah time and again to discuss the requirement of interim finance with the CoC so as to maintain the CD as a going concern. The DC observes that in the 6th CoC meeting the Edelweiss ARC had provided the term binding sheet outlying the key terms and condition which was put up for voting and the same was approved from the CoC with 91% majority. The DC also notes that there is no provisions under the Code which bars a Financial Creditor holding major voting share from advancing interim finance. Hence, interim finance being availed from Edelweiss ARC and the same has been approved by the CoC with Edelweiss does not contravene any provision of the Code. It is difficult to find financiers for a concern which is under CIRP and to maintain the CD as a going concern, there is likelihood that one of the Financial Creditors (who is member of the CoC) may extend interim finance and such

opportunities may not be denied. The DC, therefore, does not hold Mr. Shah in contravention of the provisions of the Code.

18 ORDER

- 18.1 In view of the above, the DC, in exercise of the powers conferred under Section 220 (2) of the Code read with sub-regulations (7), (8), (9) and (10) of regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017, disposes of the SCN with a warning to Mr. Dhinal Shah to be extremely careful and ensure full compliance with the provisions of the Code and Regulations made thereunder in future assignments.
- 18.2 The Order shall come into force with immediate effect in view of para 18.1.
- 18.3 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Dhinal Shah is enrolled as a member.
- 18.4 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, New Delhi, for information.
- 18.5 Accordingly, the show cause notice is disposed of.

Dated: 20th May 2022
Place: New Delhi

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(Ravi Mital)
Chairperson, IBBI