

# **Critical Analysis of Section 12A of the Insolvency and Bankruptcy Code 2016**

## ***Introduction:***

The Dictionary meaning of the word "withdrawal" means "the act or process of taking something away so that it is no longer available, or of someone stopping being involved in an activity" whereas the word "settlement is also an arrangement, often with payment of money, to end a legal disagreement without taking it to court".

Without prejudice and without contradicting to any of the judgements of the Hon'ble Supreme Court read with verdicts of Hon'ble NCLAT and various Learned benches of NCLT, It could be simply stated that the word " withdrawal" signifies a voluntary action whereas " settlement" means an arrangement between two or more persons which need not be voluntary.

## ***Analysis :***

The IBC Code provides for withdrawal of Application Under Section 12A of the Code :

### **Section 12 A : Withdrawal of application admitted under section 7, 9 or 10. –**

*The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified.*

Further as per rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, The Adjudicating Authority may permit withdrawal of the application made under rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission.

### **Now to proceed further the next question that comes to the mind is that when does Section 12A comes into picture ?**

According to the provisions Contained in the Code, a Corporate Debtor who has committed a default, as defined under sub section (12) of section 3 of the Insolvency and Bankruptcy Code, 2016, to settle or come to a settlement with the Financial Creditor or Operational Creditor who has applied before the Adjudicating Authority for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor before the same is admitted by the said Adjudicating Authority.

Section 12A comes in to play if the Corporate Debtor is admitted to CIRP and the IRP has formed the Committee of Creditors.

### **Regulation 30A Withdrawal of application.**

*(1) An application for withdrawal under section 12A may be made to the Adjudicating Authority –*

*(a) before the constitution of the committee, by the applicant through the interim resolution professional.*

*(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:*

*Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.*

*(2) The application under sub-regulation (1) shall be made in Form FA of the Schedule accompanied by a bank guarantee-*

*(a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application under clause (a) of sub- regulation (1); or*

*(b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of regulation 31, till the date of filing of the application under clause (b) of sub-regulation (1).*

*(3) Where an application for withdrawal is under clause (a) of sub-regulation (1), the interim resolution professional shall submit the application to the Adjudicating Authority on behalf of the applicant, within three days of its receipt.*

*(4) Where an application for withdrawal is under clause (b) of sub-regulation (1), the committee shall consider the application, within seven days of its receipt.*

*(5) Where the application referred to in sub-regulation (4) is approved by the committee with ninety percent voting share, the resolution professional shall submit such application along with the approval of the committee, to the Adjudicating Authority on behalf of the applicant, within three days of such approval.*

*(6) The Adjudicating Authority may, by order, approve the application submitted under sub- regulation (3) or (5).*

*(7) Where the application is approved under sub-regulation (6), the applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, as determined by the interim resolution professional or resolution professional, as the case may be, within three days of such approval, in the bank account of the corporate debt or, failing which the*

*bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code.*

However, even before IRP would form the Committee of Creditors, an application for initiation of CIRP against a Corporate Debtor can be withdrawn under Rule 11 of The National Company Law Tribunal Rules, 2016.

### **Rule 11 of The National Company Law Tribunal Rules, 2016.**

***Inherent Powers.***- *Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.*

We need to understand as to how did section 12A come in to being for which it is necessary to look in to Hon'ble Supreme Court judgement in the matter of Lokhandwala Kataria Construction Private Limited Vs. Nisus Finance and Investment Managers LLP, Civil Appeal No. 9279 of 2017.

In this case, NCLAT held that “before admission of an application under Section 7, it is open to the Financial Creditor to withdraw the application but once it is admitted, it cannot be withdrawn. Even the Financial Creditor cannot be allowed to withdraw the application once admitted, and matter cannot be closed till claim of all the creditors are satisfied by the corporate debtor.” The NCLAT also rejected the submission of the appellant for invocation of inherent powers under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 as the said Rule 11 of the NCLAT Rules has not been adopted for the purpose of the Code and only Rules 20 to 26 have been adopted in absence of any specific inherent power and where there is no merit, the question of exercising inherent power did not arise.

### **Supreme Court Verdict:**

In view of Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the National Company Law Appellate Tribunal (NCLAT) could not utilize the inherent power recognized by Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 to allow a compromise before it by the parties after admission of the matter.

However, since all the parties were before the Apex Court it utilized powers under Article 142 of the Constitution of India to put a quietus to the matter. The Honorable Court took the Consent Terms dated 28.06.2017 and 12.07.2017 entered into between the parties on record and also record the undertaking of the appellant to abide by the Consent Terms in toto. The appellant also had undertaken to pay the sums due on or before the dates mentioned in the aforesaid Consent Terms.

**Lokhandwala Kataria Construction Private Limited** case set a precedent and thus, many matters relating to withdrawal of application that had been declined by NCLT and/or NCLAT, went to Hon'ble Supreme Court and the Hon'ble Apex Court allowed such withdrawals by utilizing powers under Article 142 of the Constitution of India.

The other instances where on account of Settlement between parties, the judicial permission of withdrawal of CIRP was allowed by the Supreme Court by Utilizing the powers under Section 142 of the Constitution are as follows :

- Mothers pride diary India (P) Limited Vs. Portrait advertisement and Marketing(p) Ltd.
- M/s SAL Steel Limited Vs. Besto Tradelink Private Limited
- Uttara Foods And Feeds Private Limited Vs. Mona Pharmachem
- Sequel Alloys and Wires Private Ltd. Vs. Vedanta Limited.
- Pearson Drums And Barrels (P) Ltd Vs. Maldar Barrels (P) Ltd
- Gaurav Saran & Anr. Vs. M/S Lakshmi Steels & Anr.

### ***Conclusion :***

Following the amendment to the Code, section 12A of the Code read with Regulation 30A provides the manner in which the insolvency resolution process can be withdrawn. Since the insolvency resolution process is a proceeding in rem, typically the approval of nearly the entire committee of creditors is required. However, where the committee of creditors is not in existence, an application may be made to the Adjudicating Authority for its directions. Even where the committee of creditors approves the withdrawal of the corporate insolvency resolution process, the Adjudicating Authority may intervene in the case of an illegality or abuse of process.