WITHDRAWAL UNDER SECTION 12-A IBC: REMEDIAL MECHANISM IN THE INTEREST OF STAKEHOLDERS

The sole objective of the Insolvency and Bankruptcy Code, 2016(IBC or the Code) is to provide an eloquent manner for revival, reorganisation, and resolution of distressed or bankrupt entities/persons in a time-bound manner. The very contemplation, advancing a time-bound mechanism for the resolution process makes it distinct from the previously existing laws relating to insolvency and bankruptcy. The legislation was brought to consolidate and amend the laws with respect to resolution and insolvency of corporate persons, partnership firms and individuals in a time-bound manner. However, within a period of just 5 years, the Code saw a series of amendments to make it more methodical and market driven. One such instance was the insertion of Section 12-A into the Code vide the IBC Amendment Act of 2018 which paved the way for erstwhile management of the corporate debtor and the creditors to settle the matters without facing the jostle of the court proceedings.

Lokhandwala Kataria Construction (P) Ltd. v. *Nisus Finance and Investment Managers LLP*[4] was the first matter, in which both the parties were permitted by the Supreme Court to settle the matter using its inherent powers under Article 142 of the Constitution of India, which states that in order to serve justice, the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order in any cause or matter pending before it. Furthermore, the Supreme Court set aside the order of the National Company Law Appellate Tribunal (NCLAT), whereby the appellate authority did not exercise its inherent powers under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016. It provides for the "inherent powers" to the tribunals to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of process of the law.

Purpose of Section 12-A

The introduction of Section 12-A in the Code validated the idea of settlements between the creditors and the erstwhile management, accelerating the resolution process of the corporate debtor as there stood no provisions for withdrawal in the Code, prior to the introduction of the abovementioned provision. In pursuance of this, the Insolvency Law Committee made the recommendation of altering the law to allow for withdrawal.

The insertion of the abovementioned section was done through the IBC (Second Amendment) Act, 2018 w.e.f. 6-6-2018. The Code, before the amendment was made, did not provide any provisions for the settlement of debts between the creditors and the erstwhile management. It is noteworthy that neither the National Company Law Tribunal (NCLT) nor NCLAT ever exercised the inherent powers to grant withdrawal of applications that were admitted under Sections 7, 9 or 10 of the Code. Despite the mutual consent of both the parties

even if the applicant, creditors, and erstwhile management/promoters of the corporate debtor agreed to settle the matters outside court, after the admission of the application, the Code did not justify rendering the desired outcomes. Considering the scenario prior to the insertion of Section 12-A to the Code, it is indeed ironic that the inception of the Code was to warrant timely disposal of insolvency matters, but at the same time, it failed to address the prominence of an out-of-court settlement. Aggrieved by the limited remedies left to the creditors as well as the erstwhile management, parties started approaching the Supreme Court for relief. The Supreme Court under Article 142 of the Constitution of India passed orders for allowing the withdrawal of applications against the corporate debtor under the corporate insolvency resolution process (CIRP). In *Uttara Foods & Feeds (P) Ltd* v. *Mona Pharmachem*, the Supreme Court gave directions to the Government to embody a provision under the Code for allowing withdrawal of application after the admission of CIRP, to prevent such applications to be filed before Supreme Court.

Withdrawal of application before the CoC is constituted

If an application is filed for withdrawal under Section 12-A of the Code, before the constitution of committee of creditors (CoC), the interim resolution professional (IRP) is duty-bound to place it directly before the adjudicating authority for its approval. It is pertinent to mention that the approval of the CoC stands invalid in such cases.

In *Anuj Tejpal* v. *Rakesh Yadav*, the NCLAT, Delhi Bench held that:

> *41.* Rule 11 of the NCLAT Rules, 2016 provides that "Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal." The Supreme Court in Swiss Ribbons (P) Ltd. v. Union of India[13] has clearly discussed the stage and has observed that "we make it clear that at any stage where the Committee of Creditors is not yet constituted, a party can approach NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the parties concerned and considering all relevant factors on the facts of each case". It is a well-settled proposition of law that substantive law takes precedence over a regulation and Section 12-A clearly refers to the withdrawal of an application under Sections 7, 9 or 10 after the constitution of the Committee of Creditors, seeking approval of 90% of the voting share of the CoC. Keeping in view the ratio of the Supreme Court in Swiss Ribbons (P) Ltd and the aforenoted reason, we hold that in the facts and circumstances of the attendant case before us, we do not find force in the contention of the proposed intervenor applicants that the application for withdrawal, filed, prior to the constitution of CoC ought to be mandatorily dealt with the provisions under Regulation 30-A(1). We find it just and proper to exercise our inherent powers under Rule 11 in this case.

Withdrawal of application after the CoC is constituted

To move an application under Section 12-A of the Code, the procedure prescribes that the interim resolution professional shall forward the same to the CoC for approval. It is imperative to note that a majority vote of 90% is required for the approval. If the proposal crosses the first hurdle of the majority vote, it is then presented to the adjudicating authority. Further, it is at the discretion of the adjudicating authority to allow or dismiss such applications.

The question that is important to be addressed here is that of the 90% of the majority vote for the withdrawal of the application. It is a well-established fact that if a company goes under CIRP, all creditors of the company are subjected to the threat of financial loss. The idea behind the majority vote being 90% is to discourage individual actions and encourage collective actions and the decision to settle the matter must be unanimously agreed. This was substantiated in Shaji Purushothaman v. Union Bank of India wherein the NCLAT, New Delhi Bench held that:

> *9*. If an application under Section 12-A is filed by the appellant, the "Committee of Creditors" may decide as to whether the proposal given by the appellant for settlement in terms of Section 12-A is better than the "resolution plan" as approved by it and may pass appropriate order. However, as such decision is required to be taken by the "Committee of Creditors", we are not expressing any opinion on the same.

Therefore, the decision of withdrawal shall be taken by the capable creditors who possess an interest to revive the business of the corporate debtor. Further, in Vallal RCK v. Siva Industries and Holdings Ltd. , the Supreme Court categorically held that:

> *23*. As already stated hereinabove, the provisions under Section 12-A IBC have been made more stringent as compared to Section 30(4) IBC. Whereas under Section 30(4) IBC, the voting share of CoC for approving the resolution plan is 66%, the requirement under Section 12-A IBC for withdrawal of CIRP is 90%.
>
> *24*. When 90% and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stakeholders to permit settlement and withdraw CIRP, in our view, the adjudicating authority or the appellate authority cannot sit in an appeal over the commercial wisdom of CoC. The interference would be warranted only when the adjudicating authority or the appellate authority finds the decision of the CoC to be capricious, arbitrary, irrational and dehors the provisions of the statute or the Rules.

Withdrawal of application after Form G is released

One of the very frequently raised doubts pertaining to withdrawal is whether withdrawal can be made after Form G i.e. expression of interest (EOI) is issued. It is relevant to state herein that in *Swiss Ribbons (P) Ltd.* v. *Union of India* the Supreme Court held that:

> *81.*…Regulation 30-A(1) of the CIRP Regulations, 2016 is not mandatory but is directory for the simple reason that on the facts of a given case, an application for

withdrawal may be allowed in exceptional cases even after issue of invitation for expression of interest under Regulation 36-A of the CIRP Regulations, 2016.

The same was reiterated in *Brilliant Alloys (P) Ltd.* v. *S. Rajagopal* wherein the Supreme Court held that an application for withdrawal under Regulation 30-A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (the CIRP Regulations) can also be made after the public invitation for claims was issued. The expression "shall" to be read as "may" and, consequently, the provision was held to only be directory. Further, in *V. Navaneetha Krishnan* v. *Central Bank of India*, the NCLAT, New Delhi Bench, held that the application can be withdrawn only on the condition that it gets majority vote of 90% by the CoC.

Further, in *Satynarayan Malu* v. *SBM Paper Mills Ltd.* the NCLT Mumbai, allowed the withdrawal application after the resolution plan was approved by the CoC, stating that:

> *9*. In the light of the foregoing detailed discussion and on due consideration of the provisions of the statute as also the connected Regulations it is hereby concluded that the proposal of this applicant for one-time settlement is in the benefit of this corporate debtor for its revival along with all the stakeholders. Moreover, it is a practical solution through which Allahabad Bank is also recovering 100% debt amount as affirmed by the bank authorities concerned through an affidavit dated 27-11-2018 conveying their consent for withdrawal of the petition on account of acceptance of one-time settlement. As a result, circumstances of this case demands that permission be granted to allow the withdrawal of application/petition (CP 1362/2018).

Therefore, considering the abovementioned precedents, it is imperative to state herein that under Section 12-A IBC and Regulation 30-A(1) of the CIRP Regulations, 2016 an application filed under Sections 7, 9 or 10 can be withdrawn after the issuance of Form G, provided the proposal gets 90% of the majority vote of the CoC. However, it is also imperative to state herein that Regulation 30-A of CIRP Regulations, 2016 prescribes that where the application is made under clause (*b*) after the issue of invitation for expression of interest under Regulation 36-A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

Withdrawal of application after the initiation of liquidation process

Another bone of contention is withdrawal after the initiation of liquidation process. The answer to this is, yes. An application filed under Sections 7, 9 or 10 can very well be withdrawn after the liquidation process has commenced. It is imperative to state herein that the pivot of the Code is to maximise the assets of the corporate debtor in order to save it from the wrath of liquidation.

In *V. Navaneetha Krishnan* v. *Central Bank of India*, the NCLAT, New Delhi Bench held that:

> *5.* However, in view of Section 12-A even during the liquidation period if any person, not barred under Section 29-A, satisfy the demand of "Committee of Creditors" then such person may move before the adjudicating authority by giving offer which may be considered by the "Committee of Creditors", and if by 90% voting share of the "Committee of Creditors", accept the offer and decide for withdrawal of the application

under Section 7 of the Insolvency and Bankruptcy Code, the observation as made above or the order of liquidation passed by the adjudicating authority will not come in the way of adjudicating authority to pass appropriate order.

Further, in *V.S. Varun* v. *South Indian Bank* the NCLT, Bengaluru Bench, held that:

> *7.* The above-referred provisions pertaining to the withdrawal of the applications filed under Sections 7, 9 or 10 IBC, 2016 provide for filing an application by the applicant in the company petition. In the instant case, the company petition was filed under Section 10 IBC, by the corporate applicant i.e. M/s Aradhya Wire and Ropes Pvt. Ltd. itself. On admission of the company petition the corporate debtor was initially taken over by the RP and after passing of the orders of the liquidation by the Liquidator. The instant application has been filed by the Liquidator on receipt of the application from one of the promoters of the corporate debtor. The NCLAT in *Shweta Vishwanath Shirke* v. *Committee of Creditors* held that the promoters/shareholders are entitled to settle the matter in terms of Section 12-A and in such case, it is always open to the applicant to withdraw the application. Hence, we are of the view that the instant application filed by the liquidator under Section 12-A of the IBC, 2016, is maintainable.

Therefore, an application filed under Sections 7, 9 or 10 of the Code, after the commencement of liquidation process can be withdrawn through the provisions of Section 12-A of the Code read with Regulation 30-A of the CIRP Regulations, 2016. However, the commercial wisdom of the CoC cannot be overlooked in any such scenarios.

Conclusion

In view of the above, it shall be concluded that an application filed under Sections 7, 9 or 10 of the Code can very well be withdrawn vide provisions of Section 12-A IBC, the adjudicating authorities may allow or disallow the withdrawal of such applications. It is pertinent to state herein that the applications can be withdrawn not only after issuing an invitation of EOI but in some cases, even after receiving resolution plans. In recent times, both legislature and the judiciary have strongly advocated for the settlement of cases as it promotes a win-win situation for both parties and also helps unclog the judicial system. The courts of law have, time and again, upheld and focused on the importance of protecting the interests, not only of the creditors but also of the corporate debtor, wherever possible. The adjudicating authorities have always taken a concrete stand, that ordering liquidation must be taken into consideration after all remedies have been exhausted, and hence be treated as a last resort.

Various contentions have also been raised to reflect the pitfalls of this provision and how it might affect the entire idea of the Code. It is imperative to state herein that it can be apprehended that a misuse of this provision might rescind the intent of the Code i.e. revival of the corporate debtor into a mere instrument for recovery and settling private disputes. A few stalwarts of IBC have also questioned about the withdrawal process stating that such actions of allowing withdrawal shall result in wastage of time and effort that has been invested during the whole CIRP period. However, it is pertinent to note herein, that such flexibility may go a long way in protecting the value of the assets of the corporates and various stakeholders. The original promoters with vested interests in the companies are better aware of the nitty-gritty

involved in managing their company and these provisions further uphold the notion with which IBC was enacted, that is, protection of interests of the stakeholders and maximisation of the value of the assets of the corporate debtor. On the other hand, a very vital question arises for consideration i.e. regarding the fate of other creditors. It is pertinent to mention that even though insolvency proceedings are in rem and affect the substantive rights of rest of the creditors, the opinions of the other creditors who had filed their claims have not been considered while withdrawing. Further, considering the scenario mentioned hereinabove it is evident that Section 12-A does not mention about the interest of other creditors at all. Consequently, if the claims of other creditors are not settled, it indeed would lead to agitation of the other creditors and call for another round of litigation as there is a legislative vacuum on this point and suitable modifications may be required in this regard, or else the provision might call for ramifications that would destroy the intent behind bringing in the very provision under the Code. A suggestive measure in order to keep the other creditors in consideration is to inform them about the withdrawal of the main application whereupon the CIRP was initiated in the first place. An announcement informing the public at large, akin to the announcement made by interim resolution professional at the stage of initiation of CIRP, could be one of the ways through which it can be done appropriately.

At this instance, it is essential to note that the judiciary has very well considered the interest of other creditors in many matters and one such order has been very recently passed in *Swamy Traders* v. *SNS Starch Ltd.*, wherein the NCLT Hyderabad Bench, held that,

> *3*. Since the IRP reported that six operational creditors have raised their claims before the IRP, let the IRP inform all such operational creditors/petitioners that they are at liberty to seek recall of the earlier order in view of the order passed in this company petition.

Therefore, the IRP/RP must inform the rest of the creditors about the withdrawal of the application.

Further, in *Anuj Tejpal* v. *Rakesh Yadav* the counsel raised questions on the withdrawal as the rest of the stakeholders' interest are overlooked and they would be the one suffering as the claim made by them would still be unsettled.

Further, in *Jai Kishan Gupta* v. *Green Edge Buildtech LLP*, the NCLAT, New Delhi Bench held that:

> *16.* The question, however, remains that the Supreme Court has in the above para 82 left discretion with the adjudicating authority to allow or disallow an application for withdrawal or settlement. The last sentence of the paragraph states that “this will be decided after hearing of the parties concerned and considering all relevant factors on the facts of each case”. Thus, adjudicating authority has to consider all relevant factors on facts of each case and to take a decision. Para 83 of the judgment in *Swiss Ribbons* has dealt with a decision being taken by CoC under Section 12-A and left the door open that if CoC arbitrarily rejects a just settlement and/or withdrawal claim the NCLT, and thereafter NCLAT can set aside such decisions under Section 60 of the Code.

Further, in *Sushil Ansal* v. *Ashok Tripathi*, the NCLAT New Delhi Bench, held that:

> *12.*…All parties concerned will be required to be heard before allowing withdrawal or settlement. It is also manifestly clear that the exercise of inherent powers is discretionary and invoked only to meet the ends of justice or prevent abuse of process of court. The adjudicating authority or the Appellate Tribunal will have to keep in view interest of various stakeholders and claimants before allowing such withdrawal or settlement. Scuttling of corporate insolvency resolution process cannot be permitted to jeopardise the legitimate interests of other stakeholders, more particularly in a real estate project where fate of innumerable allottees would be hanging in balanced….
>
> *14.* Admittedly, the interim resolution professional has received 283 claims from allottees of different projects, financial creditors, operational creditors, other creditors and employees as detailed in Para 10 of the reply filed by Respondent 3 and the settlement deed does not take care of the interest of claimants other than Respondents 1 and 2. Therefore, allowing of withdrawal of application on the basis of such settlement which is not all-encompassing and being detrimental to the interests of other claimants including the allottees numbering around 300 would not be in consonance with the object of "the I&B Code" and purpose of invoking of Rule 11 of the NCLAT Rules. In a case where interests of the majority of stakeholders are in serious jeopardy, it would be inappropriate to allow settlement with only two creditors which may amount to perpetrating of injustice. Exercise of inherent powers in such cases would be a travesty of justice.

Further, in *Gopal Krishan Bathla* v. *Crown Realtech (P) Ltd.* the NCLAT New Delhi Bench held that:

> *7.* The dictum of the Supreme Court is loud and clear. The National Company Law Tribunal can exercise inherent powers vested in Company Appeal (AT) (Insolvency) No. 28 of 2020 under Rule 11 of the National Company Law Tribunal Rules, 2016 to allow or reject an application for withdrawal or settlement prior to the constitution of the "Committee of Creditors." However, such exercise of power would depend on consideration of all relevant factors in each individual case, after providing an opportunity of hearing to all parties concerned. A similar power is vested in this Appellate Tribunal under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 and it is not disputed that such power can be exercised in appropriate cases on similar consideration as delineated by the Supreme Court. The question that arises for consideration is whether the instant case is a fit one for the exercise of such power.

The intent of Section 12-A IBC is to legislatively recognise post-admission settlement cases, which was introduced based upon the recommendations of the Insolvency Law Committee Report. However, certain changes may be brought in to make it more effective and just.