

**THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH**
(through web-based video conferencing platform)

IA No.60 of 2021 & IA No.70 of 2021
In
CP(IB) No.122/Chd/HP/2019
(Admitted)

**Under Section 60 (5) of the Insolvency
and Bankruptcy Code, 2016**

In the matter of:-

Central Bank of India

...Financial Creditor

Versus

Luni Power Company Pvt. Ltd.

...Corporate Debtor

And in the matter of:-

Bharat Hydro Power Corporation Limited
Having its registered office at Jail Road, Fancy Bazar,
Guwahati- 781001

IA No.60/2021

...Applicant

Versus

1. Central Bank of India
Having its Central Office at Chandermukhi,
Nariman Point, Mumbai- 400 021
One of its Branch Office at 10, Camac Street, Kolkata- 700 017
And also at Assets Recovery Branch,
Central Bank Building, 3rd Floor, 33 Netaji Subhas Road,
Kolkata- 700 001
2. Mr. Sachin Gopal Jathar, Resolution Professional,
Partner AAA Insolvency Professionals LLP
Having his office at Mousumi Co-operative Housing Society Limited,
15-B, Ballygunge Circular Road, Kolkata- 700 019, West Bengal

...Respondents

And in the matter of:-

Bharat Hydro Power Corporation Limited
Having its registered office at Jail Road, Fancy Bazar,
Guwahati- 781001

IA No.70/2021

...Applicant

Versus

1. Mr. Sachin Gopal Jathar, Resolution Professional,
Partner AAA Insolvency Professionals LLP
Having his office at Mousumi Co-operative Housing Society Limited,
15-B, Ballygunge Circular Road, Kolkata- 700 019, West Bengal

2. Central Bank of India
Having its Central Office at Chandermukhi,
Nariman Point, Mumbai- 400 021
One of its Branch Office at 10, Camac Street, Kolkata- 700 017
And also at Assets Recovery Branch,
Central Bank Building, 3rd Floor, 33 Netaji Subhas Road,
Kolkata- 700 001
3. Kundan Care Products Limited, Resolution Applicant
E-22, Industrial Area, Bhadrabad, Haridwar
Uttarakhand- 249403

...Respondents

Order delivered on 19.04.2022

**Coram: HON'BLE SHRI HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE SHRI SUBRATA KUMAR DASH, MEMBER (TECHNICAL)**

Present through Video Conferencing :-

For Applicant in IA No.60/2021 and IA No.70/2021	:-	Mr. Nitin Kant Setia, Advocate
For Respondent No.1 in IA No.60/2021 and for Respondent No.2 in IA No.70/2021	:-	Mr. R.S. Bhatia, Advocate Mr. H.S. Bhatia, Advocate
For Respondent No.2 in IA No.60/2021 and Respondent No.1 in IA No.70/2021	:-	Mr. Balwinder Singh Kalsi, Advocate Mr. Siddhanth Makkar, Advocate Mr. Shaunak Mitra, Advocate
For Respondent No.3 in IA No.70/2021	:-	Mrs. Munisha Gandhi, Senior Advocate Mr. Keshav Pratap Singh, Advocate Ms. Salina Chalana, Advocate

PER: HARNAM SINGH THAKUR, MEMBER (JUDICIAL)

ORDER

Both these applications i.e. IA No.60/2021 and IA No.70/2021 are taken up together for discussion being interrelated and interconnected with respect to One Time Settlement ('OTS') proposed by the applicant.

IA No.60/2021

The present application has been filed by Bharat Hydro Power Corporation Limited, applicant herein, under Section under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 (for short the '**Code**') seeking, *inter alia*, relief that Application bearing CP(IB) No.122/CHD/HP/2019 be dismissed and/or permanently stayed and all action taken pursuant to admission of the said petition be recalled and/or quashed. Further, till the full payment of the OTS settlement amount is paid or till 31st March, 2021, whichever is later, this application as also the corporate insolvency resolution process of the corporate debtor be kept in abeyance and respondent No.2 be directed not to continue with the CIRP process.

2. It is stated that the applicant is the equity shareholder of M/s Luni Power Company Private Limited (for short the '**Corporate Debtor**') holding about 2.92 % equity shares in the Corporate Debtor and is a stakeholder vitally interested in the corporate debtor.

3. Brief facts necessary for adjudication of the present application are that Central Bank of India ('**financial creditor**') had filed an application under Section 7 of the Code before this Tribunal for initiation of Corporation Insolvency Resolution Process ('**CIRP**') against the corporate debtor. This Tribunal, vide its judgment dated 23.12.2019 admitted the petition filed by the financial creditor and appointed, Mr. Sanjay Kumar Agarwal, as Interim Resolution Professional ('**IRP**'). Thereafter, this Tribunal vide order dated 10.08.2020 appointed Mr. Sachin Gopal Jathar as Resolution Professional.

4. It is further stated that the suspended board of directors and other shareholders of the corporate debtor were in settlement talks with respondent No.1,

Central Bank of India (Financial Creditor) and pursuant to which the shareholder of the corporate debtor, the applicant herein, wrote a letter dated 14.10.2020 proposing One time Settlement (for short '**OTS**') to respondent No.1. In response to the said letter, respondent No.1 replied that they may consider the said OTS offer. Thereafter, on 09.11.2020, the applicant addressed another letter to respondent No.1, reiterating the OTS proposal. For ease of reference, the payment schedule contained in the OTS proposal is as under:-

Schedule for payment of settlement amount		
		Rs. In Crores
Total agreed amount		10.00
To be paid as follows:-		
Fund Available in No Lien Account		0.25
Fund Available in No Lien Account		0.75
	Within 31-Dec-2020	0.10
	Within 31-Jan-2021	0.25
	Within 28-Feb-2021	2.50
	Within 31-Mar-2021	6.15
Total		10.00

It is stated that the above amount shall be paid by the Applicant or any of its nominee and respondent No.1/financial creditor shall keep the same in No Lien Account for adjusting the same on receipt of full amount. Thus, the corporate debtor through the applicant has assured to settle the dues owned to respondent No.1 by 31.03.2021.

5. It is averred that respondent No.1 has considered the OTS proposal made by the applicant and has found the same to be favourable. It is also averred that the OTS proposal shall also revive the corporate debtor in a time bound manner and maximize the value of the assets of the corporate debtor and balance the interest of all stake holders including that of respondent No.1. It is further averred that

acceptance of the OTS proposal was communicated by respondent No.1 to the corporate debtor vide letter dated 16.10.2020 (Annexure F) and in terms of the OTS proposal, an amount of Rs.25 Lac as the first instalment, was paid by the applicant through M/s Subhash Kabini Power Corporation Limited, another shareholder, holding about 48.29% equity shares of the corporate debtor on 23.09.2019. Another shareholder, M/s SPM Engineers Ltd., holding about 21.44% equity share of the corporate debtor has, at the instance of the applicant, also paid the second instalment amount of Rs.75 Lacs on 19.08.2020 and both the amounts have been accepted by respondent No.1. Therefore, it is submitted that the applicant has acted in terms of the OTS proposal made by respondent No.1 and thus, it is urged that respondent No.1 cannot proceed both with debt recovery and corporate insolvency resolution process at the same time.

6. Notice of this application was issued to the respondents on 15.03.2020.

7. In the reply filed on behalf of respondent No.1, it is stated that the corporate debtor approached respondent No.1 for OTS. However, the upfront payment of 10% required for consideration of the OTS was not deposited and the OTS could not be placed before the competent authority, which is competent to consider the OTS only after deposit of the upfront amount. It is also stated that even the corporate debtor was unable to disclose the sources of funds for payment of OTS amount and the effort is only to delay the resolution plan for recovery of the dues of the financial creditor. According to respondent No.1, it never agreed to the OTS proposal and the OTS proposal was never found favourable nor was ever approved by the competent authority and thus, it is prayed by respondent No.1 that applicant is not entitled to any relief and the application be dismissed.

8. Reply on behalf of Resolution Professional, respondent No.2, has been filed vide Diary No.01992/3 dated 12.05.2021, wherein all the averments and pleadings made by the applicant are specifically and vehemently denied. It is also stated that the in absence of any confirmation and finalization from respondent No.1 of the OTS proposal made by the applicant, he has made out his duties as per the Code. Further, the applicant had been requested to complete the modalities under the Code for the OTS and withdrawal, as per Regulation 30A of IBBI (Insolvency Resolution Process for Corporation Persons), Regulations 2016. According to the Resolution Professional, the committee of creditors had given due consideration to OTS proposal from the applicant and the resolution plan submitted by Kundan Care Products Limited and thereafter, the committee of creditors in its commercial acumen has decided to approve the resolution plan submitted by Kundan Care Products Limited. Thus, it is contended that the present application is utterly misconceived, not maintainable and has no merits and relief as prayed for in the instant application, is beyond the scope of the provisions of the Code. Thus, dismissal of the present application has been prayed for.

9. We have heard Mr. Nitin Kant Setia, learned counsel for the applicant; Mr. Balwinder Singh Kalsi, learned counsel for respondent No.1 and Mr. H.S. Bhatia, learned counsel for respondent No.2 and have carefully gone through the record and perused the paper book.

10. It may be noted that the relief sought by the applicant in the present application has rendered infructuous in view of the fact that Corporate Insolvency Resolution Process is already completed and the resolution plan has already been approved by Committee of Creditors in its 8th Meeting held on 03.02.2021 with 100%

votes. Moreso, the applicant subsequently has also filed other application i.e. IA No.70 of 2021, challenging the resolution passed in the 8th meeting of the committee of creditors and declaring the same to be null and void as the Resolution Professional was not competent to consider, discuss and deliberate and approve the resolution plan before discussing the settlement proposal given by the applicant which was prior in time and had been mutually agreed and acted upon by the bank and the applicant. The said IA No.70 of 2021 is also pending consideration before this Bench for today. Therefore, even in the presence of IA No.70 of 2021, the present application i.e. IA No.60 of 2021 is rendered infructuous and disposed of accordingly.

IA No.70/2021

11. The present application has been filed by Bharat Hydro Power Corporation Limited, applicant herein, under Section under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 (for short the '**Code**') read with Rule 11 of the National Company Law Tribunal Rules, 2016, seeking, *inter alia*, reliefs that the resolutions passed in the 8th CoC meeting be declared null and void as the CoC and the Resolution Professional was not competent to consider, discuss, deliberate and approve the resolution plan before discussing the settlement proposal given by the applicant which was prior in time and had been mutually agreed and acted upon by the Bank and the Applicant. Further, that in the meantime, the respondent Nos.1 and 2 be directed to suspend the agendas passed in the 8th CoC meeting dated 03.02.2021 and call another CoC meeting and consider the proposal of the applicant for one time settlement without being influenced by acceptance of resolution plan given by respondent No.3 and further to discuss the process of filing

application under Section 12A for withdrawal from the insolvency proceedings of Luni Power Company Private Limited;

12. It is stated that the applicant being a shareholder of M/s Luni Power Company Private Limited (for short the '**Corporate Debtor**') has filed the present application. Brief facts necessary for adjudication of the present application are that Central Bank of India ('**financial creditor**') had filed an application under Section 7 of the Code before this Tribunal for initiation of Corporation Insolvency Resolution Process ('**CIRP**') against the corporate debtor. This Tribunal, vide its judgment dated 23.12.2019 admitted the petition filed by the financial creditor and appointed, Mr. Sanjay Kumar Agarwal, as Interim Resolution Professional ('**IRP**'). Thereafter, this Tribunal vide order dated 10.08.2020 appointed Mr. Sachin Gopal Jathar as Resolution Professional.

13. It is stated that the applicant is the shareholder of the corporate debtor to the extent of 2.92% and being vitally interested in the affairs of the corporate debtor sought to settle the debts of the corporate debtor with Central Bank of India (Financial Creditor) for One Time Settlement (for short '**OTS**'). It is alleged that the bank agreed to the offer and made a counter-offer for settling the matter for a total amount of Rs.10 Crores as OTS. The counter-offer was accepted by the applicant and the same was communicated to the financial creditor by way of letter dated 14.10.2020 (Annexure A-2). In response to the said letter, respondent No.2/bank replied vide its letter dated 16.10.2020 (Annexure A-3) stating that since the corporate debtor was already admitted into CIRP, if the matter had to be settled the same was to be done by way of filing an application under Section 12A of the Code by respondent No.1-Resolution Professional. It is further alleged that in pursuance

to the talks of settlement and to show its bona fide commitment to settle the dues with respondent No.2-Bank, the applicant herein through two shareholders of the corporate debtor, namely, Subhash Kabini Power Corporation Limited and SPM Engineers Limited, deposited an aggregate amount of Rs.1 Crore in a No-Lien Account, maintained by the financial creditor.

14. It is further stated that it was communicated to the financial creditor by way of letter dated 09.11.2020 (Annexure A-4) that an amount of Rs.1 Crore has been paid and it was also stated therein that a draft of the application under Section 12A of the Code in Form FA, as provided under Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), Regulations, 2016, is under preparation. Further, it is alleged that even though the applicant had submitted a draft application (Annexure A-5) under Section 12A of the Code, yet respondent No.1, for the reasons best known to him, failed and/or ignored to process it in accordance with the law as if it was on his whims and fancies and only on his approval that the settlement was to get through. It is submitted that the Resolution Professional is merely a facilitator and has no adjudicatory functions and the application under Section 12A of the Code does not beg his approval and he was under a statutory obligation to start the process of withdrawal of the CIRP under the regulations governing withdrawal.

15. It is alleged by the applicant that the process for withdrawal under Section 12A of the Code was imperative and respondent No.1 was bound to honour the settlement reached between the respondent No.2/bank and the applicant for withdrawal of the insolvency petition. However, respondent No.1 acting in complete violation of the mandate of law received a resolution plan from respondent No.3-

M/s Kundan Care Products Limited and the act of receiving the resolution plan was in teeth of the in principle settlement arrived at between the parties. Even otherwise, the proposal submitted by the applicant is far more commercially robust than the plan submitted by respondent No.3 offering more outlay.

16. It is submitted that the mandate of the Code is to keep the corporate debtor as a going concern and maximization of assets and value of the corporate debtor and the institution of the resolution professionals has been envisioned and envisaged under the Code as being trained professionals to upkeep the mandate of the Code. Respondent No.1 has failed to steer the corporate debtor in the discretion as contemplated under the Code and has rather acted in a manner completely derogatory to the spirit of the Code. It is further submitted that the applicant had been in regular contact with the financial creditor/respondent No.2 and in fact, even as on 25.01.2021 (Annexure A-6), the applicant had written a letter to respondent No.2 with a copy to respondent No.1, stating that the acts under CIRP might result in huge loss to the corporate debtor and the company might become commercially unsustainable.

17. According to the applicant, it was shocked and surprised when it came to their knowledge that respondent No.1 had circulated a notice and agenda for 8th CoC Meeting on 30.01.2021 (Annexure A-7). Upon coming to the knowledge of the same, on Mr. Amar Chand, Bakliwal, Member of the suspended board of directors issued a letter dated 02.02.2021 (Annexure A-8), wherein he categorically stated that nothing in the agenda for the 8th CoC meeting was particularly disturbing as the respondent No.1 was unilaterally trying to approve the resolution plan submitted by respondent No.3, despite having a better commercial offer from the applicant and

despite the fact that the applicant through two other shareholders of the corporate debtor has arranged for payment aggregating to Rs.1 Crore to the sole member of the CoC. Thereafter, on the 8th CoC meeting held on 03.02.2021 the letter dated 02.02.2021 was placed before the CoC and various modalities of withdrawing the main petition filed by the financial creditor/respondent No.2 under Section 7 of the Code was discussed in the meeting. However, the CoC nevertheless decided to approve the resolution plan submitted by respondent No.3, despite the same being commercially inferior to the proposal of the applicant. Thus, it is averred by the applicant that there was no reason to hastily approve the resolution plan submitted by respondent No.3 especially in view of the fact that another application preferred by the applicant was pending for adjudication and no justifiable reasons were recorded in the 8th CoC meeting for not awaiting the outcome of the application filed by the applicant.

18. It is further averred that as the CoC, wherein only Central Bank of India, respondent No.2 is the member, has accepted the part payment of the amount paid by the shareholder of the corporate debtor in terms of the agreed negotiation to settle the dues and despite the same they have gone ahead and approved the resolution plan submitted by respondent No.3. The act of respondent No.2 in engaging with the applicant from the very outset including but not limited to acceptance of a sum of Rs.1 Crore as part consideration would clearly demonstrate that it was always the intent of respondent No.2, the sole member of the CoC, to act in pursuance of the settlement discussions which had been ensuing from some time. Thus, it is contended that act of respondent No.2 as sole member of the CoC to thereafter renege from all its earlier commitments is mala fide, completely contrary to the object of the Code which provides for the corporate debtor to be rescued and

resuscitated within the parameters provided in Section 12A of the Code. Thus, under the circumstances, the applicant has prayed that the this Adjudicating Authority may pass an order directing respondent No.2 to consider the proposal of the appellant, especially considering that the same is commercially superior to that of the approved plan and respondent No.1 be stopped from taking any further action(s) which would result in further operational losses for the corporate debtor, erosion of the value of the assets of the corporate debtor and be detrimental to the interest of all the stakeholders.

19. Notice of this application was issued to the respondents on 15.03.2020.

20. In the reply filed by Resolution Professional/respondent No.1, wherein it stated that all the averments and pleadings made by the applicant are specifically and vehemently denied. It is also stated that he was not having any information of finalization and confirmation of any OTS settlement of the corporate debtor from the sole financial creditor, respondent No.2 herein. In the said reply, the Resolution Professional has specifically denied and disputed that he has in any way acted according to the whims and fancies and the applicant has only tried to de-rail the CIRP process. It is further submitted that Resolution Professional submits that the talks of settlement were communications between the applicant and respondent No.2. According to respondent No.1, it has keenly acted in accordance with the provisions laid down in the Code. Moreover, the Resolution Professional has also informed the CoC and the applicant of the CIRP timelines and it is submitted that he is under a statutory obligation of Regulation 40A of IBBI (CIRP) Regulations, 2016. The Resolution Professional has also stated that he has neither received any communication from the sole financial creditor/respondent No.2 that any terms of

settlement have been signed and agreed between the financial creditor/respondent No.2 and the applicant. Further, it is contended that the CoC discussed the OTS Proposal from the applicant in line with the provisions of Regulation 30A of IBBI (Insolvency Resolution Process for Corporation Persons), Regulations 2016. According to the Resolution Professional, the committee of creditors in its commercial acumen considered and decided and approved the resolution plan submitted by Kundan Care Products Limited. Thus, it is contended that the present application is utterly misconceived, not maintainable and has no merits and each of the purposed reliefs, as prayed for in the instant application, is beyond the scope of the provisions of the Code. Thus, prayer for dismissal of the present application has been prayed for.

21. In the reply filed on behalf of respondent No.2/financial creditor, it is stated that the respondent No.2-Central Bank of India never approved the OTS proposal, therefore, there was no question of filing any application under Section 12A of the Code and withdrawal of CIRP proceedings. It is submitted on behalf of the respondent No.2/Central Bank of India that resolution plan has been duly considered and approved in the CoC. The allegation with regard payment of any amount accepted by respondent No.2/financial creditor has been denied by respondent No.2 and it is further submitted that the amount is lying in no lien account as no OTS has been approved and the resolution plan has been accepted in accordance with the law. Thus, it is prayed by respondent No.2 that applicant is not entitled to any relief and the application be dismissed.

22. It is seen that no new/additional points have been found in rejoinder except for the reiteration of facts.

23. We have heard Mr. Nitin Kant Setia, learned counsel for the applicant; Mr. Balwinder Singh Kalsi, learned counsel for respondent No.1 and Mr. H.S. Bhatia, learned counsel for respondent No.2 and have carefully gone through the record and perused the paper book.

24. During the course of arguments, it is contended by learned counsel for the applicant that after several rounds of talks with respondent No.2, the applicant wrote letter dated 14.10.2020 (Annexure A-2) to the sole financial creditor capturing the intent of the applicant to settle the dues at an agreed sum of Rs.10 Crores and informed the factum of depositing of Rs.1 Crore to respondent No.2 and requested the latter to initiate the process of withdrawal under Section 12A of the Code. It is submitted by learned counsel for the applicant that reply of the bank to the aforesaid letter contained three ingredients i.e. a) application under Section 12A of the Code to be filed by the corporate debtor only; b) bank would file its response to such application if ordered by this Tribunal; c) bank may consider OTS as per policy, provided full agreed amount is proposed to be paid latest by 31.03.2021.

25. It is further alleged that in response to the reply sent by the respondent-bank, the applicant was ready to deposit the balance amount of Rs.9 Crore before last date of payment i.e. 31.03.2021 and the preparation of the application as mentioned in the letter dated 16.10.2020 had been initiated. The learned counsel for the applicant submits that the application under Section 12A of the Code was prepared and shared with the bank and the resolution professional for completing the formalities of the Code for withdrawal of the CIRP and the payment schedule of the OTS was also given in the said application and there is no denial to the fact of sharing the draft of application under Section 12A with the bank and the resolution

professional. The learned counsel for the applicant further submits that the bank failed to take any further steps in the matter and 5th meeting of the committee of creditors dated 27.11.2020 did not find any reference to the OTS proposal and the progress, the parties had made in the settlement.

26. It is still further alleged by the learned counsel for the applicant that since respondent No.1 and 2 were not moving forward in completing the Section 12A formalities, an application under Section 60(5) of the Code i.e. IA No.60/2021 was filed by the applicant praying for keeping the CIRP in abeyance till full payment of the OTS amount or till 31.03.2021, whichever was later. It is further argued that on 19.01.2021, the 7th meeting of the committee of creditors was conducted which again finds mention about the readiness and willingness of the applicant about the settlement and any mention of the development with regard to settlement, further communications and filing of application i.e. IA No.60 of 2021, were conspicuously missing in the minutes of the meeting. Thereafter, the applicant wrote to the resolution professional/respondent No.1 reiterating that the draft of Section 12A application was shared and due to adamancy of the bank, the applicant had to approach this Bench under Section 60(5) of the Code for staying the CIRP. However, despite that respondent No.1/resolution professional issued notice and agenda of 8th meeting of the committee of creditors which again completely ignore the request of the applicant about settlement with the bank.

27. In the 8th meeting of the committee of creditor, the withdrawal process was discussed and in the end it was concluded that the application is pending before this Bench, but since the matter regarding settlement was yet to be formalized through this Bench, and this Bench was yet to decide the applicant filed by the

applicant, therefore, the committee of creditors felt that the CIRP needs to be continued and proceeded with decision on the resolution plan. The resolution plan provided for Rs.9 Crores and the offer of the applicant was Rs.10Crores to be paid as per the directions of the respondent-bank. Since, the CIRP was to expire on 22.05.2021, therefore, there was no need to act in haste in approving the plan on 03.02.2021, without waiting for the outcome of IA No.60 of 2021 and ultimately, the present application i.e. IA No.70 of 2021 was filed for setting aside the resolution passed in 8th meeting of the committee of creditors and for directing the respondent to constitute another meeting of the committee of creditors and consider the proposal of the applicant for OTS.

28. In support of his arguments, learned counsel for the applicant has placed reliance upon the decision of the Hon'ble Supreme Court in **Swiss Ribbons Pvt. Ltd. Versus Union of India; (2019) 4 SCC 17**, wherein in paragraph 83 it is held that *if the committee of creditors arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT and thereafter, the NCLAT can always set aside such decision under Section 60 of the Code. For all these reasons, we are of the view that Section 12A also passes constitutional muster.*

29. To buttress his arguments, learned counsel for the applicant has further placed reliance upon decision of the Hon'ble Supreme Court in **Brilliant Alloys Private Limited versus MR. S. Rajagopal and Others; Special Leave to Appeal No.31557 of 2018**, wherein it is held that *Regulation 30A states that withdrawal cannot be permitted after issue of invitation for expression of interest. According to the Hon'ble Supreme Court, this Regulation has to be read along with the main provision Section 12A which contains no such stipulation. Accordingly, this*

stipulation can only be construed as directory depending on the facts of each case. Accordingly, the Hon'ble Supreme Court allowed the settlement that had been entered into and annulled the proceedings. Hence, it is submitted by learned counsel for the applicant that the present application be accepted and OTS proposal be referred back to the committee of creditors for reconsideration before the approval of the resolution plan submitted before this Tribunal.

30. On the other hand while repelling the arguments of learned counsel for the applicant, it is contended by learned counsel for respondent No.1/resolution professional that the present application is not maintainable because on the pretext of OTS, the applicant/promoter of the corporate debtor through 2.92% shareholders are attempting to delay and derail the CIRP. The proposed OTS dated 14.10.2020 was a bare and vague offer and no source of fund was indicated. Respondent No.2/bank had specifically highlighted, *inter alia*, such issues in its communication dated 16.10.2020 but despite the same, there was no response from the side of the applicant. The question whether out of OTS offered by the applicant or the resolution plan submitted by the resolution applicant which one is a better offer, is only for the committee of creditors to decide in its commercial wisdom. The OTS offer of the applicant was considered in the 8th meeting of the committee of creditors, but since the matter was pending before this Tribunal and there was no stay in the CIRP proceedings therefore, keeping in view the timelines, the committee of creditors proceeded further to accept the resolution plan.

31. According to respondent No.1/resolution professional, the applicant has not complied with any of the requirements of Section 12A of the Code read with Regulation 30A of the CIRP Regulations. In fact, when the applicant wrote to

respondent No.1/resolution professional on 02.02.2021, the resolution professional immediately placed such letter for consideration before the committee of creditors at its 8th Meeting held on the very next day i.e. 03.02.2021. Deliberations were held on the applicant's purported OTS offer in the meeting of the committee of creditors, but it decided to move ahead with the resolution plan exercising its commercial wisdom which cannot be called into question. In support of his arguments, learned counsel for respondent No.1/resolution professional has placed reliance upon decision of the Hon'ble Supreme Court in **Jaypee Kensington Boulevard versus NBCC; (2022) 1 SCC 401**, wherein it is held that *an OTS offer undoubtedly stands on a lower pedestal than a Resolution Plan and thus, under no circumstances can there be a challenge to the COC's exercise of commercial wisdom. It is nobody's case that the Resolution Plan under consideration is violative of any law or not in accordance with Section 30(2) of the Code.*

32. It is further argued by learned counsel for respondent Nos.1 and 2 that the intention of the applicant appears to be mala fide and in the application there is vague pleading that the purported OTS offer is a better commercial offer is plainly incorrect because firstly it did not indicate the source of funding and also did not provide a turnaround plan for the corporate debtor, which is extremely important. Secondly, the resolution plan under consideration provides for substantial upfront payments and full and final payment within 90 days and crucially provides for Rs.20 Crores minimum capital infusion for the CIRP and for approval of the resolution plan without any delay and lastly, the proposed OTS was never approved by the competent authority. In support of their arguments, learned counsel for respondent Nos.1 and 2 have placed reliance upon a recent judgment dated 27.01.2022 passed by the Hon'ble National Company Law Appellate Tribunal in **Company Appeal (AT)**

(Ins.) No. 370 of 2021; Union Bank of India versus Mr. Kapil Wadhawan and Others, wherein it is held that there is no scope for negotiation for settlement/withdrawal once the COC has approved the resolution plan. In the said decision the Hon'ble NCLAT relied on the decision of the Hon'ble Supreme Court in **Ebix Singapore versus Committee of Creditors of Educomp; (2021) SCC OnLine SC 707** and **Pratap Techocrats versus Monitoring Committee; (2021) SCC OnLine SC 569**, in support of its findings. Thus, it is submitted by learned counsel for the respondents that the application is liable to be dismissed and the resolution plan as approved by the committee of creditors may be approved by this Tribunal.

33. After hearing the learned counsel for the parties and keeping in view the facts and circumstances, we are of the considered view that in the present application which has been filed in continuation of application bearing IA No.60 of 2021, the cardinal point for determination is whether the resolution and action of committee of creditors in its 8th meeting held on 03.02.2021 is arbitrary being prejudicial to the offer of OTS?

34. The answer to this query is in negative because it is pertinent to mention that at the time of conducting the 8th meeting of the committee of creditors held on 03.02.2021, another application bearing IA No.60 of 2021 was pending consideration before this Tribunal and there was no stay on the proceedings of CIRP. It is worthwhile to note that in its 8th Meeting, the committee of creditors had considered the OTS proposal moved by the applicant but keeping in view the fact that IA No.60 of 2021 was pending before this Tribunal, and in absence of any stay, it was decided to proceed further with the consideration on resolution plan instead

of deferring it because the timelines of CIRP were coming to an end in March, 2021. Apart the OTS proposal was never approved by the competent authority to further act upon it by moving an application under Section 12A of the Code. Different reasons have been assigned as discussed above by respondent No.2/bank that no source of fund was disclosed and it did not provide the turnaround plan for the corporate debtor.

35. The other question which arises for determination in the present application is whether the purported OTS was a better commercial offer than the resolution plan offered by the successful resolution applicant? The answer to this question is also in negative. It is contended by learned counsel for the applicant that OTS offered was for an amount of Rs.10 Crores whereas the resolution plan is for Rs.9 Crores but this contention of learned counsel for the applicant is not convincing because as discussed in *Jaypee Kensington* (supra), it is the commercial wisdom of the committee of creditors which cannot be challenged for questioning the adequacy and viability of resolution plan. Apart resolution plan under consideration provides for upfront payments and full payment of Rs.9 Crores within 90 days and further provides for Rs.20 Crores minimum capital infusion to the corporate debtor.

36. The authorities *Swiss Ribbons* (supra) and *Brilliant Alloys* (supra) relied upon by learned counsel for the applicant are not applicable to the facts and circumstances of the case in hand firstly; because the purported OTS was never approved by the competent authority of the respondent No.2/bank. The amount of Rs.1 Crore is lying in the no lien account and the OTS was never rejected by the committee of creditors because IA No.60 of 2021 relating to consideration of OTS was pending before this Tribunal at the time of 8th meeting of the committee of

creditors. Secondly; there was no stay of proceedings in IA No.60 of 2021, therefore, committee of creditors in its commercial acumen proceeded further to approve resolution plan. Lastly, the contention of learned counsel for the applicant that resolution plan is approved in post haste on 03.02.2021 is also devoid of force because there is no evidence present on the record that last date of CIRP was 22.05.2021 as alleged by the applicant. Rather last extension of 90 days was granted vide order dated 11.12.2020 w.e.f 26.11.2020 passed by this Tribunal. In these circumstances, the resolution passed by the committee of creditors in its 8th meeting approving the resolution plan cannot be termed as arbitrary, capricious and prejudicial to the rights of the applicant offering the OTS which was never approved and acted upon by respondent No.2/bank.

Thus, as a sequel to the above discussion and reasons recorded herein before we do not find any merit in the present application and thus, IA No.70 of 2021 stands dismissed without any order of costs.

Sd/-
(Subrata Kumar Dash)
Member (Technical)

April 19, 2022
MK

Sd/-
(Harnam Singh Thakur)
Member (Judicial)