

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI**

MA/128/2020 in CP/1305/IB/2018

*(Filed under Section 12A of IBC, 2016 r/w Regulation 30A of IBBI
(Insolvency Resolution Process for Corporate Persons) Regulations, 2016)*

In the matter of ***M/s. Resurgent Power Projects Limited***

M/s. ABB India Limited
21st World Trade Center, Brigade Gateway,
No.162/1, Dr. Rajkumar Road,
Malleshwaram West,
Bengaluru – 560 055

*... Applicant / Operational
Creditor*

-Vs-

M/s. Resurgent Power Projects Limited
443, Anna Salai,
Teynampet,
Chennai, Tamil Nadu 600 018

... Corporate Debtor

Present:

For Operational Creditor : Revanth Prem Kumar, Advocate
For Corporate Debtor : I. Mohammed Faizal, Advocate
N. Sundararaman, IRP
For ICICI Bank : Dev Eshwaar J, Advocate
For SBI : K. Chandrasekaran, Advocate

WITH

MA/111/2020 in CP/1305/IB/2018

(Filed under Section 60(5)(c) of IBC, 2016)

In the matter of ***M/s. Resurgent Power Projects Limited***

K. Rajagopal,
Flat No.6, Srivatsam Apartments,
14, Aziz Nagar, First Street,

Kodambakkam,
Chennai – 600 024

.. Applicant

-Vs-

Sundaram Natarajan
IRP for M/s. Resurgent Power Projects Ltd.
Jayashree Apartments, New No.60,
II Main Road, R.A. Puram,
Chennai – 600 028
& 2 others

.. Respondent

Present:

For Applicant : V. Manivannan, Advocate

For Respondent : I. Mohammed Faizal, Counsel for R3
N. Sundararaman, IRP

CORAM :

R. VARADHARAJAN, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

Order Pronounced on 12th March 2020

COMMON ORDER

Per: R. VARADHARAJAN, MEMBER (JUDICIAL)

1. The MA/128/2020 is an Application filed by the Applicant, under Section 12A of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'IBC, 2016') seeking for withdrawal of the Company Petition CP/1305/IB/2018 filed by the Operational Creditor.

2. This Authority vide order dated 04.12.2019 initiated Corporate Insolvency Resolution Process against the Corporate Debtor in CP/1305/IB/2018 and pursuant to the same the Interim Resolution Professional was appointed and issued public announcement as per Form A in two dailies viz. Financial Express and Dinamalar. In the meantime, the shareholder of the Corporate Debtor filed an appeal before the Hon'ble NCLAT on 17.12.2019 in Company Appeal (AT) (Insolvency) No. 1431 of 2019 against the order passed by this Authority and the Appellate Tribunal vide order dated 20.12.2019 recorded the settlement proposal between the Operational Creditor and the Corporate Debtor and accordingly directed the IRP not to constitute the Committee of Creditors and to ensure that the Company remains as a going concern.

3. It is averred in the Application that pursuant to the public announcement being made, the IRP received claims to the tune of Rs.54,38,56,490/- and as per the orders of the Hon'ble NCLAT the IRP did not constitute the Committee of Creditors. In the meantime, the Corporate Debtor has entered into a settlement agreement dated 07.01.2020, with the Operational Creditor for the entire dues payable to them. Further when the matter came up for hearing on 17.01.2020, the Hon'ble NCLAT has passed the following order;

A

"It is represented on behalf of the Appellant as well as on behalf of Respondents, that the matter was settled between the parties and a Settlement Agreement was executed on 07th January 2020 at Chennai.

In view of the aforesaid settlement, the parties are permitted to approach the Adjudicating Authority (NCLT, Chennai Bench) in terms of Section 12A of Insolvency and Bankruptcy Code, 2016 read with Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), Regulations 2016 and to seek appropriate remedy, of course in the manner known to law and in accordance with law, Appeal stands disposed of. No costs.

Before parting with case, it is made quite clear that parties are granted one weeks' time to approach the Learned Adjudicating Authority (NCLT, Chennai Bench) in the subject matter in issue. Till then, the Interim Resolution Professional will not constitute the Committee of Creditors".

4. Based upon the directions issued by the Hon'ble NCLAT, the Applicant has filed the present Application under Section 12 A of IBC, 2016 before this Authority on 23.01.2020. This Authority vide order dated 10.02.2020 passed a detailed order and directed the IRP to issue notice to the Financial Creditor's viz. ICICI Bank and State Bank of India to respond to this Application. It is seen from the record of proceedings dated 18.02.2020, that the ICICI Bank has



not opposed to the Application seeking for withdrawal of the Application as filed by the parties.

5. However in relation to State Bank of India, it has filed a memo dated 17.02.2020, wherein it has been stated that the loans of the Corporate Debtor were classified as NPA on 30.04.2019 and the SBI has also initiated SARFAESI proceedings as against the Corporate Debtor and has also filed OA/780/2019 before the Hon'ble DRT - I, Chennai for recovery of the dues amounting to Rs.20,71,85,545/-. It is also stated in the said memo that the total amount due to the Financial Creditor's i.e. ICICI Bank and State Bank of India, is more than 90% of the total outstanding payable by the Corporate Debtor to all the Financial Creditors and eventhough the Committee of Creditors was not constituted for the Corporate Debtor, the fact remains that there are only two Financial Creditors as on date and as per the calculation SBI has 36.36% voting rights. In all, the SBI has objected for the withdrawal of the Section 12A of IBC, 2016 Application as the Corporate Debtor had defaulted and was not able to pay the dues to the Financial Creditor.

6. In the instant case, it is required to be noted that even before the constitution of the CoC, the present application has been moved



by the Applicant at the instance of a compromise arrived at between the Operational Creditor and the Corporate Debtor. Under the circumstances, it is relevant to refer to the decision of the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No.6 of 2020 dated 29.01.2020 and also subsequent decisions rendered by the Hon'ble NCLAT in relation to exercise of inherent powers under Rule 11 of NCT Rules, 2016/ Section 12A of IBC, 2016 as the case may be, it is seen that the Hon'ble NCLAT had adopted a liberal approach which is demonstrated in the judgements rendered by it in **Dhiraj Prabhu Vs. Rajeev Shetty & Anr. Company Appeal (AT) (Insolvency) 1501 of 2019** which as follows:-

5. In the meantime, in view of the vacation of the interim order, the 'Committee of Creditors' was formally constituted on 4th February, 2020 and was informed on 5th February, 2020 to the Adjudicating Authority and by the aforesaid period, the parties have reached settlement.

6. In the light of the decision of the Hon'ble Supreme Court in "Swiss Ribbons Pvt. Ltd. &Anr. vs. Union of India &Ors.— 2019 SCC OnLine SC 73", this Appellate Tribunal can exercise inherent powers under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 accepting the settlement and thereby to allow the Respondent to withdraw the application under Section 9 as prayed for, but technically constitution of the 'Committee of Creditors' was intimated on the same date i.e. 5th February, 2020, the day the parties reached the settlement.



7. As we find that the parties have been negotiating and almost reached a final settlement and on merit the Appellant has also raised certain issues, taking into consideration that the 'Corporate Debtor' is an Infrastructure Housing Company on which a large number of allottees are dependent and if the 'Corporate Debtor' goes on 'Corporate Insolvency Resolution Process', then it may delay the completion, we in exercise of powers conferred under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 accept the settlement reached between the parties and allow Mr. Rajeev Shetty to withdraw the application under Section 9.

7. In relation to the objection as raised by the SBI, it may be seen that the Committee of Creditors are yet to be constituted and the present Application has been moved by the Applicant under Section 12A r/w Regulation 30A of IBBI (IRPCP) Regulations, 2016, before the constitution of the CoC and in any case the claim is pending admission by the IRP, the Financial Creditor viz. SBI cannot seek to thwart the withdrawal of an application filed under Section 12A of IBC, 2016. Thus, in relation to an yet to be admitted claim and as yet not being part of the CoC, the Financial Creditor viz. SBI cannot seek to oppose the withdrawal of the Application under Section 12A of IBC, 2016. The Financial Creditor is always at liberty to approach this Tribunal with its claim independently if required or to seek recourse elsewhere.



8. In relation to MA/111/2020, the same has been filed by a Workmen of the Corporate Debtor seeking relief as follows;

- a. *To direct the applicant to be impleaded into the withdrawal application of the 2nd Respondent through the 1st Respondent as and when it is filed / numbered / to be heard by the Hon'ble Tribunal;*
- b. *To direct that the claim of the applicant may also be considered along with the withdrawal application of the 2nd Respondent against the Corporate Debtor if the same is admitted; and*
- c. *To pass such other order as it deems fit in the light of the above circumstances and thus render justice.*

9. It is stated that the Applicant in MA/111/2020 has filed his claim in FORM - D before the IRP on 20.12.2019 and pursuant thereto, the IRP didn't respond to the same and did not call upon the Applicant to substantiate his claim under Regulation 10 of IBBI (IRPCP) Regulations, 2016. The Learned Counsel for the Applicant submitted that there is a inherent contradiction between Section 12A of IBC, 2016 and Regulation 30A of IBBI (IRPCP) Regulations, 2016 such that Section 12A provides for withdrawal of an application admitted under Section 9, on an application made by the Applicant with the approval of ninety per cent voting share of the Committee



of Creditors, whereas the Regulation 30A provides for filing an application for withdrawal under Section 12A before the Constitution of the Committee of Creditors, which is *ultra vires* to Section 12A of IBC, 2016.

10. In relation to the same, it is relevant to refer to the decision of the Hon'ble Supreme Court in the matter of **Swiss Ribbons Pvt. Ltd. & Anr -Vs- Union of India & Ors.**, wherein it has held as follows;

52. It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the Adjudicating Authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a committee of creditors is constituted (as per the timelines that are specified, a committee of creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the committee of creditors is not yet constituted, a party can approach the 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 concerned parties and considering all relevant factors on the facts of each case

11. It may be seen that eventhough amendments had been brought forth to Regulation 30A of the IBBI (IRPCP) Regulations 2016 after the much celebrated Judgment of the Supreme Court mentioned *supra*, the proposition that "*at any stage where the committee of creditors is not yet constituted, a party can approach the 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*", has not been disturbed or overruled and the same still holds good and this Tribunal is also bound by the same under Article 141 of the Constitution of India. Thus, it can be safely concluded that this Authority has the powers under Rule 11 of NCLT Rules, 2016 to allow withdrawal of the Application filed by the parties at any stage before the constitution of the CoC. It is needless to mention that Applicant is always at liberty to approach this Tribunal with his claim independently if required or to seek recourse elsewhere. In view of the discussion made *supra*, the Application filed by the Applicant viz. MA/111/2020 stands **dismissed.**



12. Turning back to MA/128/2020, the Form FA has also been filed along with the Application and as the fees and costs of the IRP has been fully provided for to his satisfaction, no specific order is necessary in this regard. In the circumstances the CIRP initiated by this Tribunal vide order dated 04.12.2019 stands withdrawn, the powers of the Board of Directors which stood suspended is restored and the management and affairs of the Corporate Debtor is directed to be handed over to them by the IRP including the possession and control of books and assets of the Corporate Debtor, if any taken during the CIRP period. Accordingly MA/128/2020 stands **allowed**.

-SD-
(ANIL KUMAR B)
MEMBER (TECHNICAL)

-SD-
(R.VARADHARAJAN)
MEMBER (JUDICIAL)

Raymond