

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH
(Vacation Bench)**

**MA 3357/2019, MA 4086/2019
& MA 3258/2019**

in

C.P. (IB) 4752/(MB)/2018

*(Under section 12A of the IBC, 2016
read with rule 11 of the NCLT Rules, 2016)*

In the matter of

Vikas Shuttering Store Private Limited

...

Operational Creditor

Versus

Supreme Infrastructure India Limited

...

Corporate Debtor

MA 3357/2019

Prashant Jain

...

Applicant/
Interim Resolution Professional

MA 4086/2019

Bhavani Shankar Sharma

...

Applicant/
Director of the Corporate Debtor
(BoD under suspension)

**Order reserved on : 27.12.2019
Order pronounced on : 30.12.2019**

Coram:

Shri Rajasekhar V.K. : Hon'ble Member (Judicial)

Appearances:

For the Applicant : Mr Chetan Kapadia Mr
Rahul Sarda and Vinay
Taliwal, i/b Mr Tushar
Goradia, and Mr Ashish
Pyasi i/b Mr Waquar
Ahmad, Advocates
(in MA No.4086/2019)

Mr Prashant Jain, IRP in
person, and Ms Rubina
Khan, i/b Fortis India
Law, Advocates for the
IRP

(in MA No.3357/2019)

For Operational Creditor : Mr. Abhay Wadhwa i/b
Mr Ranit Basu

For IDBI Bank : Mr. Nishit Dhruva a/w
Mr. Darshit Dave, i/b
MDP Partners

For SBI : Mr. Pratik Seksaria a/w
Ishita Advani i/b Desai &
Diwanji for SBI.

ORDER

Per: Rajasekhar V.K. Member (Judicial)

MA 3258/2019

1. This MA has already been disposed of as infructuous by the Order dated 11.11.2019.

MA 4086/2019 & MA 3357/2019

2. MA No.4086/2019 has been filed by Shri Bhavani Shankar Sharma Suspended Director of the Corporate Debtor praying that the Order dated 30.09.2019 passed by this Tribunal admitting the main CP No.4752/2018 be treated as withdrawn and to take on record the consent terms executed between the Corporate Debtor and the Operational Creditor. Consequential direction has also been sought for withdrawal of the Corporate insolvency Resolution Process (**CIRP**), against the Corporate Debtor.
3. MA No.3357/2019 has been filed by the IRP seeking withdrawal of the CIRP with respect to the Corporate Debtor pursuant to the settlement arrived at between the Operational Creditor and the Corporate Debtor.

4. Both these MAs, *viz.*, MA 3357/2019 & MA 4086/2019 contains substantially the same prayers, *i.e.* withdrawal of the CIRP initiated against the Corporate Debtor initiated *vide* Order dated 30.09.2019. They are, therefore, taken up for disposal by a common order.
5. Learned Counsel for the Applicant in MA 4086/2019 opened the arguments by detailing in brief the course of the present proceedings. He submitted that following the admission of the main company petition bearing CP (IB) No.4752/2018 *vide* order dated 30.09.2019, the parties had arrived at settlement and consent terms were entered into.
6. MA 3357/2019 came to be filed by the IRP appointed in respect of the Corporate Debtor. This matter was taken up for hearing on 17.10.2019, when the matter was posted to 22.10.2019. On 22.10.2019 it was adjourned to 24.10.2019. On 24.10.2019, owing to the paucity of time, the matter was posted to 07.11.2019.
7. Meanwhile, aggrieved by the Order dated 11.10.2019, the applicant in MA 4086/2019 filed an appeal before the Hon'ble National Company Law Appellate Tribunal (NCLAT). The

Order dated 25.10.2019 of the Hon'ble NCLAT records in para 2 that the IRP has also filed an application to allow Operational Creditor to withdraw the CIRP initiated against the Corporate Debtor. When the impugned order came to be passed on 11.10.2019, the Committee of Creditors (**CoC**) had not yet been constituted.

8. In para 3 of the said order dated 25.10.2019, it has been recorded that the CoC has been constituted on 22.10.2019, which has been brought to the notice of the Adjudicating Authority.
9. Para 4 of the said Order dated 25.10.2019 records the submission made by the Ld. Counsel for the Operational Creditor to the effect that the parties had reached the terms of settlement prior to the constitution of the CoC on 11.10.2019. The matter was thereafter posted for orders on 14.11.2019 by the Hon'ble NCLAT. It was also ordered that the CoC will not function but the IRP will ensure that the Company remains as a going concern.

10. On 14.11.2019, the Hon'ble NCLAT directed that the assets and records of the Corporate Debtor be handed over to the IRP by 16.11.2019 and posted the matter for Orders on 19.11.2019.
11. On 19.11.2019, Hon'ble NCLAT gave an opportunity to the Appellant *i.e.* (Shri Bhavani Shankar Sharma, member of the Board of Directors of the Corporate Debtor and the Applicant in MA No.4086/2019 herein) to make settlement with all the claimants/creditors. It also ordered that if such settlement is reached with all the Operational and Financial Creditors including those who have filed other applications before the Adjudicating Authority, the Appellate Tribunal may pass appropriate Orders in terms of the settlement.
12. This Order of the Hon'ble NCLAT was challenged in Civil Appeal No.9072/2019 before the Hon'ble Supreme Court.
13. On 29.11.2019, Hon'ble Supreme Court disposed of said Civil appeal, holding as follows: -

“The interim order dated 19.11.2019 passed by the NCLAT has been questioned in this appeal. The order as to settlement is not binding upon the appellant in case the appellant is not willing to comply with it. However, the matter not to be precipitated due to failure to enter with settlement on the basis of the aforesaid order, before the NCLT.”

“We request the NCLAT to decide the appeal at an early date. In view of the above appeal is disposed of.”

14. On 13.12.2019, the Hon’ble NCLAT recorded as follows: -

“In the circumstances, we adjourn the matter and allow the Appellant and Respondents to move before the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench for passing appropriate order on the application for withdrawal under Rule 11 of the NCLT Rules, 2016. The Adjudicating Authority will consider the same and pass appropriate order in accordance with law immediately, uninfluenced by any order passed by this Appellate Tribunal or pendency of this Appeal. Post the matter ‘for orders’ on 09th January, 2020. Parties will inform the development on the next date.”

15. Following this, on 18.12.2019, MA No.4086/2019 bearing Diary No.8880/2019 came to be filed before this Adjudicating Authority. It was listed for hearing before the Regular Court (Court No. 1) on 19.12.2019. On that day, the court ordered that the matter be listed “high on board” on the following day, *i.e.*, on 20.12.2019. On 20.12.2019, MA No. 4086/2019 was taken up for hearing, when the court passed the following Order: -

“One of the main creditors of the Corporate Debtor i.e. State Bank of India on the last occasion submitted that they shall try to produce the letter of No Objection for the application filed. However, on this day of

hearing no such letter has been produced and apart from that IDBI bank is also raising an objection for this application. This is the last working day and the matter has been moved only yesterday. The requested document for just and proper adjudication of matters is not made available to us, as a result of which we are not in a position to adjudicate the same today.

“In the meanwhile, if parties are successful in getting necessary documents from the financial institutions that may be submitted and they are at liberty to move the same during the vacation of court with the necessary documents if they want to.

“List the matter for further consideration on 06.01.2020.”

16. Mr. Pratik Seksaria, Ld. Counsel appearing for the SBI submitted a copy of email dated 20.12.2019 from SBI wherein it has been recorded as follows: -

“The Financial Creditors, except ICICI Bank, whose share is 3.86% in the consortium, entered into an Inter-Creditor Agreement (ICA) dated 28th July 2019 (sic 28 June 2019), in terms of RBI Circular dated 7th June 2019, to resolve the debt of Supreme Infrastructure Limited (sic Supreme Infrastructure India Limited)

In terms of the aforesaid ICA, SBI has been appointed as the lead bank. As per standstill clause of the ICA, lenders have agreed not to initiate/pursue any proceedings before the Hon’ble NCLT, till such time the ICA remains in force.”

17. The Inter-Creditor Agreement (ICA) dated 20.06.2019 which is signed by fourteen out of fifteen lenders in respect of the Corporate Debtor, has been placed on record by counsel for SBI.

18. Counsel for the Applicant in MA No.4086/2019 has relied on RBI's circular bearing **DBR No. BP. BC. 45/21.04.048/2018-19** dated 07.06.2019 whereby it had issued Prudential Framework for Resolution of Stressed Assets Directions, 2019. **(RBI Directions)**. In particular, he relied on para 10 at page 3 of the said Directions wherein it has been stated that where Resolution Plan is to be implemented by lenders they shall enter into an Inter Creditor Agreement from the above said review period to prepare for ground rules for finalisation and implementation of the Resolution Plan in respect of the borrowers with credit facilities for more than one lender the ICA shall also provide that any decision agreed by lenders representing 75% by value of total outstanding credit facilities (fund as well as non-fund based) and 60% of lenders by number shall be binding upon all the lenders.

19. The ICA dated 20.06.2019 has been entered into by the Lenders' Consortium pursuant to the said direction dated 07.06.2019. The agreement has not been signed by ICICI Bank Limited, which has an exposure to the extent of 3.86%.
20. Learned Counsel for the Applicant in MA No.4086/2019, was at pains to stress that in terms of the clause 15 of the RBI's Directions, the Resolution plan which does not involve restructuring/ change in ownership shall be deemed to be implemented only if the borrower has not defaulted with any of the lenders as on 180th day from the end of the Review Period.
21. In terms of the Clause 12 of the RBI Directions, Reviews Period in respect of Corporate Debtor commenced from the date of direction, i.e. on 07.06.2019. Therefore, Counsel for the Applicant submits that in case the Corporate Debtor continues to be under CIRP as on 06.01.2019 then the Resolution Plan in terms of the RBI's Directions cannot be considered. He therefore sought that the prayers made in MA No. 4086/2019 be allowed expeditiously.
22. Counsel for the SBI submitted that in terms of clause 7.3(i) of the Inter Creditor Agreement), the Resolution Plan approved by

the majority lenders shall be final and binding on all the lenders as well as on each lender, including the dissenting lenders and they are bound by the approved Resolution Plan. Further in terms of the clause 7.3(ii) thereof, during the Resolution Process and the implementation as approved by the majority lenders each of the lenders (including dissenting lenders) agrees that it shall not initiate any legal action or proceedings including proceedings under IBC against the borrower or any other person that may jeopardise the successful implementation of the Resolution Plan.

23. Counsel for the SBI, therefore, stressed that the agreement reached in terms of the ICA is binding on all constituents. Even without the approval of ICICI Bank Limited, the Plan to resolve the debt of the Corporate Debtor has the approval of 96.58% of the CoC in practical terms under the aegis of the ICA. Consequently, even though the CoC cannot function in terms of the Hon'ble NCLAT's Order dated 25.10.2019, this approval in terms of the ICA translates into approval by the CoC by more than the prescribed threshold of ninety percent under section 12A of the IBC.

24. Mr. Nishit Dhruva, Learned Counsel appearing for the IDBI, submitted that IDBI Bank Limited is a member of the CoC, having 0.73% voting share. It is not a part of the ICA. Learned Counsel submits that they were ready to file a Miscellaneous Application to challenge the present MAs 3357/2019 and 4086/2019 seeking to withdraw the CIRP against the Corporate Debtor.
25. The Miscellaneous Application has not been filed and is therefore not on record. However, in the interest of justice, I have heard the Learned Counsel for IDBI Bank Limited before deciding the present application.
26. IDBI Bank Limited opposes the present applications for withdrawal of the CIRP in respect of the Corporate Debtor, mainly on the following grounds: -
- (i) There is no urgency in filing the present petition before the Vacation Bench when the same reliefs were sought before the Regular Court (Court No. 1);
 - (ii) As on 20.12.2019, there were at least eleven cases which were dismissed by the Adjudicating Authority on the ground that they had become infructuous in view of the initiation of

the CIRP against the Corporate Debtor *vide* order dated 30.09.2019. The fate of these applicants hangs in the balance;

- (iii) An amount of Rs.4320 Crore was owed by the Corporate Debtor to the Financial Creditors;
- (iv) The CoC has already been constituted on 22.10.2019. CoC has not been suspended either by the Hon'ble NCLAT or the Hon'ble Supreme Court. Further, its constitution been set has also not been set aside; and
- (v) Nothing prevented the applicant from getting approval letters from members constituting CoC. He relied on para 53 of the judgment of the Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd. & Anr vs Union of India & Ors*** [Writ Petition (Civil) No.99/2018] decided on 25.01.2019 *which reads as follows: -*

“53. The main thrust against the provision of Section 12A is the fact that ninety percent of the committee of creditors has to allow withdrawal. This high threshold has been explained in the ILC Report as all financial creditors have to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, to be entered into. This explains why ninety percent, which is substantially all the financial

creditors, have to grant their approval to an individual withdrawal or settlement. In any case, the figure of ninety percent, in the absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy, which has been explained by the Report (Supra). Also, it is clear that under Section 60 of the Code, the committee of creditors d not have the last word on the subject. 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 12 A also passes constitutional muster.”

27. Counsel for the IRP and the IRP himself were present in person. Counsel for the IRP has submitted a chart containing a list of twenty-five entities who are the Financial Creditors constituting the CoC, along with the amount claimed by them and their respective voting share in the CoC. Additionally, the said chart also indicates the total claim of the lenders and the percentage of the claim *qua* the CoC and *qua* the ICA. It is noted therefrom that with the voting share of the objector-IDBI Bank is 0.73 % in so far as CoC is concerned. IDBI Bank is not a part of ICA. The IRP has also filed a list containing all the cases which were dismissed as infructuous in view of the initiation of CIRP against the Corporate Debtor. In terms of

this it is seen that eighteen applications were dismissed as infructuous with the direction to file their claims before the IRP. A further eight applications are pending for disposal before the Adjudicating Authority.

28. We have heard the Ld. Counsel appearing for the parties and perused the records.

29. The issues arising for consideration in the present MA No. 4086/2019 and MA No. 3357/2019 are as follows.

(1) Whether the present MAs, *i.e.* MA No. 4086/2019 and MA No. 3357/2019 should be allowed whereby CIRP against the Corporate Debtor would be withdrawn and the Board of Directors would be restored to its original position in view of the settlement agreement dated NIL arrived at between the Operational Creditor and Corporate Debtor;

(2) In case this Adjudicating Authority decides to pass the order of withdrawal of CIRP in view of the settlement, what would happen to all those petitions which have been dismissed as infructuous on the ground of initiation of CIRP against the Corporate Debtor; and

(3) Whether the concerns of the lenders' consortium have been adequately addressed before this Adjudicating Authority decides to allow MA No. 4086/2019 and MA No. 3357/2019.

The issues are examined and answered *ad seriatim* in the following paragraphs.

Issue No. 1:

“Whether the present MAs, i.e. MA No. 4086/2019 and MA No. 3357/2019 should be allowed whereby CIRP against the Corporate Debtor would be withdrawn and the Board of Directors would be restored to its original position in view of the settlement agreement dated NIL arrived at between the Operational Creditor and Corporate Debtor.”

30. It is seen that the consent terms entered into between the Corporate Debtor and the Operational Creditor are undated. However, Form FA submitted by the IRP is dated 09.10.2019 therefore there is a reasonable cause for presumption that the consent terms have been entered into on or before 09.10.2019. It is a position admitted by all the parties during the course of the submission that the CoC was constituted only on 11.10.2019, *i.e.*, after the terms of settlement were arrived at between the parties. Ld. Counsel for the Applicant in MA 4086/2019 submits that in such a case, the process prescribed

under regulation 30A(1)(a) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 should be followed and not the procedure prescribed under regulation 30A(1)(b) thereof, since the application for withdrawal of CIRP was filed prior to the constitution of the CoC.

31. Learned Counsel for the Objector-IDBI Bank Limited submits that irrespective of the date of filing of the application, the fact remains that the CoC today stand constituted. Even if it cannot function in terms of the Hon'ble NCLAT's Order dated 25.10.2019, approval of the Members Constituting the CoC ought to have been taken by the Applicant herein in order to fulfil the spirit of the mandate. Countering this submission, Ld. Counsel for the applicant for MA No. 4086/2019 submits as the CoC was not constituted at the time of filing of the MA No. 3357/2019 filed by the IRP approval from CoC could not have been obtained. Even subsequently it could not have been obtained because of the Hon'ble NCLAT order restraining the CoC from functioning. Ld. Counsel relies on the Doctrine of Relation Back explained by the Hon'ble Supreme Court in **Prithi Pal Singh & another V/s. Amrik Singh & Others [(2013) 9 SCC 576]** in support of his contention that the

position prevailing at the time of filing of the MA should be considered and not subsequent development. Counsel for the IRP supports this contention.

32. In view of the fact that as on date the voting share of IDBI in the CoC is only 0.73% and that there is no other objector before this Adjudicating Authority, I do not find that any material difference would be made in obtaining individual letters of No-Objection from the members constituting the CoC. This is especially true when viewed from the prism of the ICA dated 28.06.2019, wherein in clause 7.3 it has been agreed that the Resolution plan approved by the majority lenders shall be final and binding on all the lenders and on each lender including dissenting lenders.
33. The obtaining of individual letters from members of the CoC would only have been a ministerial act. This Adjudicating Authority, in deciding the present application before it, should be guided primarily by the principles of natural justice and should not, in my humble opinion, be bogged down in procedural niceties which would have the effect of prolonging a denouement in the matter.

34. In view of this, there is no impediment in allowing the MA's i.e. MA No. 4086/2019 and MA No. 3357/2019 for withdrawal of CIRP initiated against the Corporate Debtor *vide* order dated 30.09.2019.

Issue No. 2:

“In case this authority decides to pass the order of withdrawal of CIRP in view of the settlement then what would happened to the petition which have been dismissed as infructuous on the ground of initiation of CIRP against the Corporate Debtor”?

35. As already stated, the list filed by the IRP indicates that there are total of eighteen applications against the Corporate Debtor which were dismissed as infructuous with the direction to file claims before the IRP, with a further eight applications which are deemed to be pending for final disposal.

36. Counsel for the applicant in MA No. 4086/2019 has made a submission across the bar that the directors of the Corporate Debtor have arrived at a broad understanding of settlement of the claim of each of them. He has further submitted that the Resolution Plan being considered in respect of the Corporate Debtor has provisions to take care of the claims of such creditors. In any case, he has stated that as soon as orders

permitting withdrawal of CIRP are passed by this Adjudicating Authority, the Corporate Debtor would enter into settlement agreements with such Operational Creditors. This statement is recorded. However, in case there are any other petitions with similarly placed creditors whose petitions were dismissed on grounds of being infructuous, their cases shall also be treated in the same manner. Such settlement agreements shall be entered into within a period of thirty days from today, in default of which such creditors shall be at liberty to file Appropriate Application before this Adjudicating Authority for restoration of their petitions to file.

Issue No. 3: -

“Whether the concerns of the lenders’ consortium have been adequately addressed before this Adjudicating Authority decides to allow MA No. 4086/2019 and MA No. 3357/2019.”

37. In the email dated 20.12.2019 from SBI, it has been specifically mentioned that under the ICA dated 28.06.2019, SBI has been appointed as the lead bank of the consortium. Further in terms of the standstill clause No. 13 at pages 18-19 of the ICA, the lenders had agreed and undertaken not to commence any civil action or proceedings under the IBC against the Borrower. In

the event that the Lenders decide on implementation of a Resolution Plan as the resolution strategy in accordance with the Regulatory Framework, then the standstill provision shall extend during the implementation of the Resolution Plan which is currently one hundred and eighty days from the end of the Review Period or such other period as may be prescribed for implementation of Resolution Plan under the Regulatory Framework.

38. There is no other objector other than IDBI Bank Limited in so far as withdrawal of the CIRP is concerned. IDBI Bank Limited constitutes only 0.73% of the CoC. The ICA adequately address the concern of the consortium of lenders especially when seen in the context of the submission made by various parties that the Resolution Plan is being considered and it is only the order dated 30.09.2019 commencing CIRP against the Corporate Debtor that is standing in the way at this stage.
39. In view of this it appears that the concerns of the lenders have been adequately taken care of.

ORDER

- A. In view of the above findings this Adjudicating Authority allows MA No. 4086/2019 and MA No. 3357/2019 permitting withdrawal of the CIRP commenced vide Order dated 30.09.2019 against the Corporate Debtor;
- B. The Board of directors of the Corporate Debtor is restored to its position;
- C. Mr. Prashant Jain, IRP is discharged from his responsibilities and he is directed to hand over the possession of all the records and assets of the Corporate Debtor back to its Board of Directors;
- D. The costs of CIRP shall be paid in full by the Corporate Debtor;
- E. A cost of Rs.5,00,000/- (Rupees Five Lakh only) is imposed on the Corporate Debtor, which shall be paid into the account of Prime Minister's National Relief Fund within a period of ten days from today;
- F. Compliance Affidavit along with proof of payment in respect of the order at (D) & (E) above shall be submitted before this Adjudicating Authority;

- G. The Registry is directed to communicate a copy of this Order to the Operational Creditor, Interim Resolution Professional, Corporate Debtor and to the IDBI Bank Limited-objector to the present proceedings.
- H. A copy of this Order be also communicated to ROC, Mumbai for updating the Master data of the Corporate Debtor.

Ordered accordingly.

Sd/-
Rajasekhar V.K
Member (Judicial)
30.12.2019

Vedant Kedare - Steno