

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

IA(IBC)/932(CHE)/2023 in CP(IB)/84/CHE/2021

*filed under Section 12A of Insolvency & Bankruptcy Code, 2016 along with Rule
11 of NCLT Rules*

In the matter of M/s. J.R. Foods Limited

Santhanam Rajashree

Liquidator of M/s. J.R. Foods Limited

Having office at 23, Lake Area,
3rd Cross Street, Nungambakkam,
Chennai – 600 034

... Applicant

Along with

IA(IBC)/1178(CHE)/2023 in CP(IB)/84/CHE/2021

And

IA(IBC)/1176(CHE)/2023 in CP(IB)/84/CHE/2021

*filed under Section 60(5) of Insolvency & Bankruptcy Code, 2016 along with
Rule 11 of NCLT Rules*

In the matter of M/s. J.R. Foods Limited

Dinesh Kothari

Suspended Director of M/s. J.R. Foods Limited

No.50, 4th Cross, Anna Nagar,
Pudhucherry – 605 005

... Applicant

-Vs-

Santhanam Rajashree
Liquidator of M/s. J.R. Foods Limited
Having office at 23, Lake Area,
3rd Cross Street, Nungambakkam,
Chennai – 600 034

... Respondent

Order pronounced on 28th July, 2023

CORAM:

SANJIV JAIN MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)

For Applicant : R. Ramasubramaniam Raja, Advocate
For Suspended Directors : Ravi Rajagopalan, Advocate

ORDER

Per: SANJIV JAIN, MEMBER (JUDICIAL)

IA(IBC)/932(CHE)/2023 has been filed seeking the following

relief: -

“Allow the withdrawal of Application admitted under Section 10 of IBC, 2016 on the Applicant made by M/s. J.R. Foods Limited through its suspended Director Mr. Dinesh Kothari under Section 12A of IBC, 2016.”

2. The CIRP in respect of the Corporate Debtor viz. M/s. J.R. Foods Limited was initiated by this Tribunal on 11.02.2022 based on an

Application filed by the Corporate Debtor themselves under Section 10 of IBC, 2016. The CoC with a majority vote of 99.21% decided to Liquidate the Corporate Debtor and accordingly this Tribunal vide its order dated 11.04.2023 passed in IA(IBC)/274(CHE)/2023 ordered for the Liquidation of the Corporate Debtor.

3. During the Liquidation period, the suspended Directors of the Corporate Debtor approached the Financial Creditor viz. Bank of Baroda with an OTS proposal. It is stated that the Bank of Baroda has accepted the said OTS proposal for a sum of Rs.39 Crores to be paid within 6 months from the date of sanction and the suspended Directors of the Corporate Debtor has submitted Form FA to the Liquidator on 11.05.2023.

4. It is also stated that the Application for withdrawal of the Section 10 Application under Section 12A of IBC, 2016 was approved in the 4th SCC meeting held on 16.05.2023 and the following Resolution was passed with 99.21% voting:-



“RESOLVED THAT pursuant to the receipt of Form FA for withdrawal of CIRP proceedings under 12A of IBC, 2016 received from the Corporate Debtor M/s. J.R. Foods Limited through its suspended Director Mr. Dinesh Kothari along with the proposal for repayment to the Creditors, the consent of the Deemed Stakeholders Consultation Committee consisting of CoC meeting (since SCC is yet to be formed) be and is hereby given to withdraw the CIRP / Liquidation proceedings initiated against M/s. J.R. Foods Limited.”

Under these circumstances, the Liquidator has moved the IA(IBC)/932(CHE)/2023 before this Tribunal.

5. In so far as IA(IBC)/1178(CHE)/2023 is concerned, it is an urgent hearing application of IA(IBC)/1176(CHE)/2023. Since IA(IBC)/1176(CHE)/2023 is listed for hearing and heard along with IA(IBC)/932(CHE)/2023, the cause does not survive. Accordingly, **IA(IBC)/1178(CHE)/2023 stands closed.**

6. In so far as IA(IBC)/1176(CHE)/2023 is concerned, the same has been filed by the suspended Director of the Corporate Debtor under Section 60(5) of IBC, 2016 seeking reliefs as follows;



- a. To take on record the order dated 04-July-2023 passed by Hon'ble NCLAT in Company Appeal (AT)(Chn)(Ins) No. 179 of 2023
- b. Allow this Applicant to intervene in IA.932 of 2023, to file pleadings and make submissions in support of the prayers sought by the Applicant Liquidator therein.
- c. Grant such other incidental reliefs as may be deemed fit and proper by this Hon'ble Adjudicating Authority.

7. It is stated that as against the Order of Liquidation passed by this Tribunal on 11.04.2023, the Applicant / Suspended Director of the Corporate Debtor preferred an Appeal before Hon'ble NCLAT in Company Appeal (AT)(Ins)(Chn) No. 179 of 2023. The said appeal came up for hearing before Hon'ble NCLAT on 04.07.2023 and the following orders were passed:-

It is brought to the fore that a 'Memo' dated 25.06.2023 is filed before the 'Office of the Registry' vide Diary No.1170 dated 26.06.2023 whereby and whereunder a prayer was made before this 'Tribunal' to take on record the 'Settlement' under Section 12(A) of the Insolvency and Bankruptcy Code, 2016, submitted on 11.05.2023 which was approved by the 'Committee of Creditors'/'Stakeholders' with 99.29% vote at 90% of threshold required.

In view of the fact that a 'Settlement' has been arrived at between the parties, as informed by the Learned Counsel for the 'Appellant', the



instant Company Appeal (AT)(CH)(Ins) No. 179 of 2023 is permitted to be withdrawn and accordingly the same is 'Dismissed as Withdrawn'. No costs.

Connected IA No.578 of 2023 is 'Dismissed'.

Before advertng with the case this 'Tribunal' makes it quite lucidly clear that the 'Dismissal' of the 'instant Company Appeal' (AT)(CH)(Ins) No.179 of 2023 will not preclude the 'Appellant' to take recourse before the 'Adjudicating Authority'/'Tribunal' for redressal of grievances in I.A. No.932 of 2023, if he so desires/advised, in accordance with law.

8. Based upon the order passed by Hon'ble NCLAT the Applicant has moved IA(IBC)/1176(CHE)/2023 for redressal of his grievances in IA(IBC)/932(CHE)/2023.

9. The Learned Counsel for the Suspended Director submitted that the Hon'ble NCLAT and Hon'ble NCLTs in various judgments have held that withdrawal under Section 12A of the Code can be done even during the liquidation of the Corporate Debtor. The following cases have been cited by the Applicant.

- i. *Navaneetha Krishnan -Vs- Central Bank of India, Coimbatore & Another (Company Appeal (AT) (Insolvency) Nos. 288 & 289 of 2018).*

- ii. *H.S. Bharana -Vs- Pawan Dhoot Estates (Company Appeal (AT) (Insolvency) Nos. 1481 of 2022).*
- iii. *Shwetha Vishwanath Shrike -Vs- The Committee of Creditors & Anr. (Company Appeal (AT) (Insolvency) Nos. 601 of 2019).*
- iv. *V.S.Varun -vs- South Indian Bank IA/63/2022 in CP(IB)No.366/BB/2019 (NCLT Bengaluru).*

FINDINGS OF THIS TRIBUNAL


10. Heard the submissions made by the Learned Counsel for the Liquidator and the suspended Director.

11. Section 12A of the IBC, 2016 finds place under Chapter – II of IBC, 2016 which deals with “Corporate Insolvency Resolution Process” of the Corporate Debtor. The Liquidation process of the Corporate Debtor is contained under Chapter – III of the IBC, 2016. It is to be noted here that IBC, 2016 treats CIRP and Liquidation as two different parts. All the provisions under Chapter – II of IBC, 2016 which deals with CIRP cannot be made applicable under Chapter – III of IBC, 2016 which deals with Liquidation of the Corporate Debtor.

For instance, the moratorium under Section 14 of IBC, 2016 is lifted

when an order of Liquidation is passed and a fresh moratorium under Section 33(5) is ordered. Further, it is significant to note here that the Regulator viz. IBBI has inserted Regulation 30A under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 with effect from 04.07.2018, which deals with withdrawal of Application under Section 12A of IBC, 2016. The said Regulation 30A deals only with the withdrawal of Application during the CIRP and not during Liquidation. Further, there is no such amendment made in the Liquidation Process Regulation by the Regulator viz. IBBI. In the absence of any express provisions either under the provisions of IBC, 2016 for withdrawal of Applications during Liquidation process or under the Regulations framed by IBBI, an application for withdrawal cannot be permitted during the Liquidation process.

12. As regards the case laws cited by the Learned Counsel for the Applicant, we find it apt to refer to para Nos. 4 and 5 of the Hon'ble NCLAT dated 09.08.2018 in the matter of *Navaneetha Krishnan –Vs-*



*Central Bank of India, Coimbatore & Another (Company Appeal
(AT) (Insolvency) Nos. 288 & 289 of 2018), are reproduced as below:-*

“4. Taking into consideration the fact that the ‘resolution plan’ was submitted on 178th day and on the next day i.e. 179th day the ‘Committee of Creditors’ decided to go for liquidation as 180th day was to be completed and order under Section 31 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the ‘I&B Code’) was required to be passed and in absence of any good reason for extension of time, we are not inclined to grant any relief.

5. However, in view of Section 12A even during the liquidation period if any person, not barred under Section 29A, 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 I&B 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. Both the appeals are dismissed with aforesaid observations. No cost.”

13. From the above, more particularly from para 4 of the aforestated order, it is clear that the Corporate Debtor was under CIRP and the order of Liquidation was passed during the said stage. It is also noted that in the aforestated matter, the Application under Section 12A of IBC, 2016 was never filed during the Liquidation

period and the suspended Director / ex-promoter of the Corporate Debtor had filed an Application under Section 230 of the Companies Act, 2013 to take over the Company by way of Scheme of Compromise. However, in the present case, the Liquidation was ordered on 11.04.2023. Hence the said proposition of *Navaneetha Krishnan (supra)* cannot be made applicable to the facts of the present case.

14. At this juncture, we find it apt, to refer to the Judgment of Hon'ble NCLAT in the matter of **Hemanth Meka Rao -Vs- Asset Reconstruction Company (India) Ltd.** in *Company Appeal (AT)(Ins) No. 696 of 2018*, wherein it has been held as follows;

07.03.2019— This appeal has been preferred by 'Mr. Hemanth Meka Rao', Shareholder of 'M/s. Meka Dredging Company Private Limited'- ('Corporate Debtor') against the impugned order dated 20th September, 2018. By the said order, the Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai, passed order under Section 33(2) of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) and ordered for liquidation in absence of any approved plan.

2. Learned counsel appearing on behalf of the Appellant submits that a sum of Rs. 14 Crores was due and out of which a settlement for Rs. 10.38 Crores has been made. Earlier also two 'Financial Creditors' paid total amount of Rs. 37 Crores to 'Asset Reconstruction Company (India) Ltd.' and Rs. 2.5 Crores to 'L&T Finance', who have given no dues certificate. However, on completion of the 'Resolution Process', we cannot allow any settlement with the promoters and the creditors.

3. Earlier, when the matter was taken up on 28th February, 2019, learned counsel for the Appellant pointed out that the 'Corporate Debtor' (Company) can be saved by passing appropriate order under Section 230 of the Companies Act, 2013.

4. It was in this background, an interim order was passed on 30th January, 2019 prohibiting the liquidator or the Adjudicating Authority to take step to sell or transfer or alienate or make third party encumbrance on the movable or immovable property of the 'Corporate Debtor' (Company).

5. Similar issue fell for consideration before this Appellate Tribunal in "S.C. Sekaran v. Amit Gupta & Ors.— Company Appeal (AT) (Insolvency) Nos. 495 & 496 of 2018".

6. The aforesaid judgment was also reiterated in the case of "Y. Shivram Prasad Vs S. Dhanapal & Ors. — Company Appeal (AT) (Insolvency) No. 224 of 2018 etc." wherein a detailed order has been passed as to how the liquidator should proceed.



7. In the aforesaid background, no order of settlement can be passed by this Appellate Tribunal, even though the Appellant, promoter agrees to pay all the dues. However, we direct the liquidator to proceed in terms of the decision in "Y. Shivram Prasad Vs S. Dhanapal & Ors." (Supra).

8. The appeal stands disposed of with the aforesaid observations and directions. No cost.

(emphasis supplied)

15. The Hon'ble NCLAT in the year 2019 has categorically held that no order of settlement can be passed, eventhough the promoter agrees to pay all the dues. Hence, the exhorted arguments made by the Learned Counsel for the suspended Directors are not valid in the eye of law.

16. As regards the order passed by the coordinate Benches of NCLT, the same has only a persuasive value and cannot have any binding effect. Moreover, IBBI which is the Regulator of IBC, 2016 has still not proposed for withdrawal of cases during the liquidation

process. Law and attended regulations are yet to be notified by the IBBI.

17. It is pertinent to point out here that the CIRP in respect of the Corporate Debtor was initiated by this Tribunal only at the instance of the Corporate Debtor itself under Section 10 of IBC, 2016 and not by any of the Financial Creditor or Operational Creditor under Section 7 or 9 of IBC, 2016. Thus, the promoter had enough opportunities available with him to settle the matter with the Creditors. i.e.

- a. Before filing of the application under Section 10 of IBC, 2016.
- b. Before Order of Admission passed under Section 10 of IBC, 2016.
- c. Before the order of Liquidation under Section 33 of IBC, 2016 is passed by this Tribunal.

18. In so far as invocation of Rule 11 of NCLT Rules, 2016 to order for 12A during Liquidation period is concerned, we find it apt to refer to the Judgment of the Hon'ble NCLAT in the matter of **Kridhan**




Infrastructure Pvt. Ltd. (Now Known as Krish Steel and Trading Private Limited) & Anr. -Vs- Versus Venkatesan Sankaranarayan & Anr. in Company Appeal (AT) (Insolvency) No. 202 of 2020 wherein at Para 77 it was held as follows:-

“It is well settled principle in Law that an ‘inherent power’ cannot be resorted to when there are specific provisions in Law to deal with the situations. In this connection, this Tribunal worth recalls and recollects the decision of Hon’ble Supreme Court in ‘Durgesh Sharma’ V. ‘Jayshree’ reported in Air 2009 Supreme Court at page 285 wherein it is observed and held that the inherent power cannot be exercised in contravention or in conflict or ignoring express provision of Law, since law relating to transfer is contained in Section 22 to Section 25 of the Code and they are exhaustive in nature.”

19. Further, at Para 86 it records as follows;

“this tribunal comes to an inevitable, irresistible and inescapable conclusion that an opportunity to revive the ‘Corporate Debtor’ as per terms of ‘Resolution Plan’ is not to be provided to the Appellant(s)/ ‘Resolution Applicant’ to prevent an aberration of justice and also to better preserve the ‘economic value of assets’ because of the reason that the instant case is not an exceptional or extraordinary one to invoke the ingredients of Rule 11 of ‘NCLAT’ Rules, besides the provisions of ‘I&B’ Code cannot be diluted in any manner whatsoever.”

(emphasis supplied)



20. Thus, it is manifestly made clear that the inherent powers cannot be exercised in contravention or in conflict or ignoring express provision of Law.

21. Be that as it may, this Tribunal already in the matter of **Jayashree Mohan -Vs- Pathukasahasram Raghunathan Raman, Liquidator of RA-NI Precast Private Limited** in IA(IBC)/320(CHE)/2021 vide its order dated 14.10.2022 has held that there is no provision under IBC 2016 to come out of the Liquidation Process once liquidation is ordered.

22. In the present case, if we allow for withdrawal of Applications under Section 12A during the Liquidation process, then every suspended Directors / Promoters or Ex-Promoters will wait till liquidation is ordered for the assets of the Corporate Debtor and wait for the assets to be put in for auction. Only at the last stage, the Promoter will enter into a settlement with the Financial Creditors at a throw away price. This is in stark contrast to the object of IBC, 2016.



Further, as already stated, IBBI has so far not brought out the Regulations for withdrawal of Application during Liquidation proceedings and also Parliament has not modified the existing structure of IBC, 2016.

23. At this juncture, we find it apt to refer to the Judgment of the Hon'ble Supreme Court in the matter of **Arun Kumar Jagatramka - Vs- Jindal Steel and Power Ltd. & Anr., 2021 SCC OnLine SC 220** wherein the Hon'ble Supreme Court, after examining the judicial interventions and innovations made under the provisions of IBC, 2016 by the Adjudicating Authority and also by the Appellate Authority, has held as follows;

103. At this juncture, it is important to remember that the explicit recognition of the schemes under Section 230 into the liquidation process under the IBC was through the judicial intervention of the NCLAT in *Y Shivram Prasad* (supra). Since the efficacy of this arrangement is not challenged before us in this case, we cannot comment on its merits. However, we do take this opportunity to offer a note of caution for the NCLT and NCLAT, functioning as the Adjudicatory Authority and Appellate Authority under the IBC respectively, from judicially interfering in the framework envisaged under the IBC. As we have noted earlier in the judgment, the IBC was introduced in order to

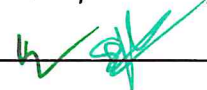
overhaul the insolvency and bankruptcy regime in India. As such, it is a carefully considered and well thought out piece of legislation which sought to shed away the practices of the past. The legislature has also been working hard to ensure that the efficacy of this legislation remains robust by constantly amending it based on its experience. Consequently, the need for judicial intervention or innovation from the NCLT and NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the IBC. This conscious shift in their role has been noted in the report of the Bankruptcy Law Reforms Committee (2015) in the following terms:

“An adjudicating authority ensures adherence to the process

At all points, the adherence to the process and compliance with all applicable laws is controlled by the adjudicating authority. The adjudicating authority gives powers to the insolvency professional to take appropriate action against the directors and management of the entity, with recommendations from the creditors committee. All material actions and events during the process are recorded at the adjudicating authority. The adjudicating authority can assess and penalise frivolous applications. The adjudicator hears allegations of violations and fraud while the process is on. The adjudicating authority will adjudicate on fraud, particularly during the process resolving bankruptcy. Appeals/actions against the behaviour of the insolvency professional are directed to the Regulator/Adjudicator.”

104. Once again, we must clarify that our observations here are not on the merits of the issue, which has not been challenged before us, but only limited to serve as guiding principles to the benches of NCLT and NCLAT adjudicating disputes under the IBC, going forward.

(emphasis supplied)



24. Thus, in view of the reasons stated *supra* and also guided by the principle of Hon'ble Supreme Court in the matter of **Arun Kumar** (*supra*), the present Application filed by the Applicant is not sustainable and liable to be dismissed and accordingly IA(IBC)/932(CHE)/2023 and IA(IBC)/1176(CHE)/2023 stand **dismissed**. No order as to costs.

— Sd —

SAMEER KAKAR
MEMBER (TECHNICAL)

— Sd —

SANJIV JAIN
MEMBER (JUDICIAL)

Raymond