

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

**MA/1325/2019 and MA/1326/2019** in  
IBA/222/2019 filed under Section 12 A of  
the Insolvency and Bankruptcy Code,  
2016 r/w Rule 11 of NCLT Rules, 2016

In the matter of *M/s. Dugar Housing Limited*

MA/1325/2019

**Prism Johnson Limited**

Vs.

*Applicant/Operational Creditor*

**Dugar Housing Limited**

....Respondent/Corporate Debtor

MA/1326/2019

**M/s. Sree Sankeshwara Foundation and Investments**

Vs.

....Applicant

**Mr. Velli Paramasivam,  
Interim Resolution Professional & 2 Ors.**

....Respondents

**Coram:**

**R. VARADHARAJAN,  
Hon'ble Member (Judicial)**

**ANIL KUMAR B,  
Hon'ble Member (Technical)**

MA/1325/2019

*PCS for Applicant* : *Gouri Shanker Mishra*  
*Sr. Advocate for Respondent* : *Arvind Pandian for*  
*K. V. Bhaghyam*  
*Mr. Velli Paramasivam* : *IRP in person*

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MA/1326/2019

<i>PCS for Petitioner</i>	<i>: K.Gaurav Kumar</i>
<i>IRP in person (R1)</i>	<i>: Velli Paramasivam</i>
<i>Sr. Advocate for R2</i>	<i>: Arvind Pandian for</i> <i>K. V. Bhaghyam</i>
<i>PCS for R3</i>	<i>: Gouri Shanker Mishra</i>

**ORDER**

Per: Mr. R. VARADHARAJAN, MEMBER (JUDICIAL)

*Order pronounced on 11<sup>th</sup> of December, 2019*

1. The Miscellaneous Application in MA/1325/2019 has been filed by the Applicant/Operational Creditor at whose instance the Corporate Insolvency and Resolution Process (CIR Process) was initiated against the Respondent/Corporate Debtor vide Order of this Authority dated 13.11.2019.

2. In the instant Miscellaneous Application seeking for withdrawal, it is averred that subsequent to the initiation of the CIR Process as against the Respondent/Corporate Debtor, the parties have arrived at for settlement, whereby the Respondent/Corporate Debtor has agreed to

pay the amounts due to the Applicant/Operational Creditor in three installments and that liberty should be given to the Applicant/Operational Creditor to revive the Application or file a fresh Application for initiation of CIR Process in case of failure on the part of the Respondent/Corporate Debtor to act in terms of the Settlement Deed.

3. It is also brought to the notice of this Authority that as per the information provided to the Applicant/Operational Creditor, the Interim Resolution Professional appointed by this Authority is yet to constitute the Committee of Creditors (CoC) and that No Objection Certificate has also been obtained by the Respondent/Corporate Debtor from the Interim Resolution Professional in this regard.

4. In view of above facts and circumstances, the following prayers have been sought for by the Applicant/Operational Creditor in MA/1325/2019:-

- i) To allow withdrawal of admitted application admitted under Section 9 of Insolvency and Bankruptcy Code, 2016;
- ii) To grant liberty to file fresh application under Section 9 of Insolvency and Bankruptcy Code, 2016 in case of default in payment as per settlement term ; and
- iii) Such further order or orders and/or directions as this Hon'ble Tribunal may deem fit and proper.

5. Both MA/1325/2019 and MA/1326/2019 were listed before this Tribunal today. We have heard the Learned Authorized Representatives, Learned Senior



Counsel for the Corporate Debtor and the Learned Interim Resolution Professional.

6. The Learned Senior Counsel appearing for the Corporate Debtor persuaded this Tribunal that in the absence of the CoC having been constituted as such, the parties, namely, the Operational Creditor and the Corporate Debtor can enter into a settlement as brought about in the Miscellaneous Application in MA/1325/2019 and that the said Application is also in order, having been filed under Rule 11 of the NCLT Rules, 2016 seeking to invoke the inherent powers vested with this Tribunal. In this connection, the Learned Senior Counsel for the Corporate Debtor has also pointed out the decision of Hon'ble Supreme Court rendered in **Swiss Ribbons Pvt. Ltd. & Ors. vs Union Of India & Ors.**, (2019 SCC Online SC 73), and drawn particular attention to paragraph 52 of the said judgement and lays emphasis that where the CoC is yet to be constituted, the parties are entitled to approach the NCLT directly and this Tribunal has got



inherent power under Rule 11 of the NCLT Rules, either to allow or disallow an Application seeking for withdrawal or settlement, after hearing the concerned parties and considering all relevant factors on the facts of the case.

7. Thus, in the instant case, in the absence of the CoC having been constituted, it is represented by the Learned Senior Counsel for the Corporate Debtor that it will be appropriate for this Tribunal to exercise its inherent power and thereby do justice to the interest of the Corporate Debtor as well as the Home Buyers who are primarily 400 in numbers.

8. It is further represented by the Learned Senior Counsel for the Corporate Debtor that none of these Home Buyers have filed any claim before Interim Resolution Professional despite newspaper publications were effected calling for the claims. The Learned Senior Counsel for the Corporate Debtor also seeks to rely on the Order passed by one us while sitting in the NCLT New

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Delhi Bench in IB-687/ND/2019 in the matter of *Alyanaa Ventures (P) Ltd. Vs. Inox FMCG (P) Ltd.*, wherein it was held that the appropriate provision to be invoked in view of the CoC having been not constituted, will be Rule 11 of NCLT Rules, 2016 and not Section 12 A of I&B Code, 2016. Further reliance is also placed upon the Order passed by Hon'ble Supreme Court in SLP No.31557/2018 dated 14.12.2018 in the case of **Brilliant Alloys Private Limited Vs. Mr. S. Rajagopal & Ors.**

9. To ascertain the progress which has been made subsequent to the initiation of CIR Process by this Tribunal on 15.11.2019, a query was posed to the Learned Interim Resolution Professional who was present in person, and in this connection the Learned Interim Resolution Professional represented that a No Objection Certificate has been issued by him to the Respondent/Corporate Debtor in relation to the receipt of fees and towards the costs of the CIR Process as it has been received in full. The said No Objection Certificate

also contains the facts in relation to the paper publication in Form-A in two editions one in English namely the 'Business Standard' and another in vernacular 'Malai Malar' effected on 18.11.2019 and 16.11.2019 respectively and it is also brought to the notice of this Tribunal that by virtue of No Objection Certificate, the claim Applications that are being received from Creditors are in process as per I&B Code,2016, and that the last date for submissions of the Claim Forms by the Creditors is 29.11.2019 and that the CoC will be constituted consequent to that.

10. The Learned Counsel for the Interim Resolution Professional has also produced the list of creditors who have submitted their claims as on 02.12.2019, from which it is seen that totally 6 creditors have lodged their claims before the Interim Resolution Professional for total claim amount of Rs.13,19,57,014/-. Out of the above claims, a sum of Rs.5,07,25,980/- is sought to be claimed by one Shree Sankeshwara Foundation and



Investments, Chennai – 600 079, as Financial Creditor, who has incidentally filed an Application before this Tribunal in MA/1326/2019 objecting to the settlement as between the Operational Creditor and the Corporate Debtor and opposing the instant Application seeking for withdrawal filed under Rule 11 of the NCLT Rules.

11. The Learned Senior Counsel appearing for the Corporate Debtor, in relation to the claim as lodged by the above said Financial Creditor namely M/s. Sree Sankeshwara Foundation and Investments, seeks to bring to the notice of this Tribunal the Order passed in IBA/236/2019 by the Division Bench-II, NCLT, Chennai as between the said M/s. Sree Sankeshwara Foundation and Investments and the Corporate Debtor and draws particular attention to paragraphs 4 and 5 of the said Order, dismissing the Application as has been filed by M/s. Sree Sankeshwara Foundation and Investments stating that there is no “creditor-debtor” relationship between the parties based on the Joint Development

Agreement for which the claim was preferred and as well as, in view of lack of any acknowledgement on the part of the Corporate Debtor, the claim is otherwise is also barred by limitation and chosen to dismiss the said Application filed in IBA/236/2019.

12. It is also submitted by the Learned Senior Counsel for the Corporate Debtor that consequent to the dismissal of IBA/236/2019, an O.P. No.168/2019 was filed before Hon'ble High Court of Madras and the Hon'ble High Court has chosen to appoint an Arbitrator to refer all the disputes arising between the parties by naming in the order itself passed on 04.07.2018, and taking into consideration that since there is dispute in relation to the claim as between the Corporate Debtor and M/s. Sree Sankeshwara Foundations & Investments, the objection Application in MA/1326/2019 should not be considered by this Tribunal and the same is liable to be dismissed.



13. We have carefully considered respective pleas of the parties namely the Learned Authorised Representative for the Applicant/Operational Creditor, Learned Senior Counsel for the Corporate Debtor, Learned Authorised Representative for the Objector and Learned Interim Resolution Professional as well.

14. In relation to the orders as sought to be relied on being passed by one of us in IB-687/ND/2019 while sitting in New Delhi Bench, it is to be seen that it can be distinguished on facts as in the said case, despite publication, no claims had been received which has basically prevented the Interim Resolution Professional to constitute the CoC as is required under the provisions of I&B Code, 2016. Further reliance placed upon the case of **Brilliant Alloys Private Limited Vs. Mr. S. Rajagopal & Ors.**, as rendered by Hon'ble Supreme Court may not also be apposite as the said judgement was delivered in construing Regulation 30 A of IBBI (IRP for Corporate Persons) Regulations, 2016, wherein it was held that the



same is only directory and cannot override Section 12 A of I&B Code, 2016 in its application. In the instant case, it is seen that this Application has not been preferred under Section 12 A of I&B Code, 2016 nor Regulation 30A of IBBI (IRP for Corporate Persons) Regulations, 2016 to be construed by this Tribunal.

15. Now coming to the decision rendered by Hon'ble Supreme Court in **Swiss Ribbons Pvt. Ltd. vs Union Of India**, (2019 SCC Online SC 73), no doubt the Hon'ble Supreme Court has stated that in the absence of CoC being constituted, at any stage, prior to that, the parties are entitled to approach this Tribunal and that this Tribunal can consider **on hearing of all the concerned parties and all relevant factors** to allow or disallow an Application seeking for withdrawal. "*All the concerned parties*" in relation to the CIR Process can mean not only the Creditor who initiated the proceedings before this Tribunal and concerned Corporate Debtor, but also the parties who might have responded to the paper



publication and lodging their claims with Interim Resolution Professional responding to the paper publication effected by the Interim Resolution Professional, as the proceedings initiated by a Creditor, be it a Financial Creditor or an Operational Creditor or for that matter even a Corporate Debtor as a Corporate Applicant are for the general body of creditors and the proceedings are essentially a proceeding *in rem*.

16. In the instant case, the Interim Resolution Professional has produced tabulation wherein six (6) claims have been submitted. Even though the Interim Resolution Professional has expressed his no objection, in so far as his fees and costs to be defrayed are concerned, however, the Applicant/Operational Creditor herein had not chosen to implead the other claimants before this Tribunal as parties/Respondents at the least, so that notice could have been given to the concerned parties seeking no objection in relation to the settlement as



between the Corporate Debtor and the Operational Creditor and for the Application emanating therefrom.

17. Thus, in the absence of any claimants being impleaded as party/Respondents to this Application, as it is not the case that no claims have been lodged in this Application and as rightly pointed out by the Objectors to the judgement of Hon'ble NCLAT rendered in Company Appeal (AT) (Insolvency) No.1002/2019 in the matter of **Rajiv Dhamija Vs. Alliance Broadband Services**, wherein under similar set of facts and circumstances, the Hon'ble NCLAT has chosen to come to the conclusion as follows:-

*“In the facts and circumstances, we are not inclined to allow the Appellant to settle the matter with only one of the ‘Financial Creditor’ – ‘Alliance Broadband Services Private Limited’ but give liberty to the Appellant to move before the ‘Resolution Professional’ by filing an application for settlement under Section 12A of the ‘I&B Code’. The ‘Interim Resolution Professional’ will constitute ‘Committee of Creditors’ and if the Appellant files the application*

*under Section 12A, place the same before the 'Committee of Creditors' to consider accepting the same with 90% voting share and thereby enable the 'Alliance Broadband Services Private Limited' to withdraw the application. The 'Committee of Creditors' will consider the same before considering any 'resolution plan'.*

*It is expected that all this procedure will be completed within 30 days. If the proposal under Section 12A is not with 90% voting share, the 'Committee of Creditors' will take up the 'resolution plans' for consideration.*

*The appeal stands disposed of with aforesaid liberty / observations and directions."*

18. Taking into consideration the above Order of Hon'ble NCLAT, being persuaded by it, at an appropriate stage, if the CoC deciding with 90% vote share, the necessary Application under Section 12 A can be moved. However, this Order should not in any way be construed by the Objector that the claim which have been lodged before the Interim Resolution Professional by it is beyond challenge by any person aggrieved by it.



