

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1481 of 2022

(Arising out of Order dated 23.11.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench (Court-II), in IA-5694/2022 in (IB)-71(ND)2019)

IN THE MATTER OF:

Hem Singh Bharana
C-146, 1st Floor,
Sarvodaya Enclave, Malviya Nagar,
New Delhi-110017.

.... Appellant

Vs

1. M/s Pawan Doot Estate Private Limited
Through Sh. Darshan Singh
(Resolution Professional),
Sumedha Management Solutions Pvt. Ltd.
B-1/12, 2nd Floor, Safdarjung Enclave,
New Delhi-110029.
2. Sh. Darshan Singh
Resolution Professional,
Sumedha Management Solutions Pvt. Ltd.
B-1/12, 2nd Floor, Safdarjung Enclave,
New Delhi-110029.
3. Edelweiss Asset Reconstruction Company Limited
Edelweiss House,
Off CST Road, Kalina,
Near Mumbai University,
Mumbai-400098.
4. Canara Bank
2nd Main, Sampige Road,
Malleswaram, Bengaluru-560 003.
5. Bank of India,
Star House, 'C-5, 'G' Block,'
Bandra Kurla Complex, Mumbai – 400051. ... Respondents

Present:

For Appellant:

**Mr. Arun Kathpalia, Sr. Advocate with Mr.
Abhijeet Sinha and Mr. Manav Goyal,
Advocates.**

For Respondents: Mr. Krishnendu Datta, Sr. Advocate, Mr. IPS Oberoi, Ms. Neha Agarwal, Advocates for SRA

Mr. Sanjay Bhatt, Ms. Renuka Iyer and Mr. Aditya Vashisth, Ms. Himanshi Rajput, Advocates for R-3.

Mr. Ashish Rana, Mr. Anurag Singh, Debasmita Goswami, Mr. Nilesh Mudhil, Advocates for R-5

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by an Ex-Promoter of the Corporate Debtor has been filed challenging the order dated 23.11.2022 passed by National Company Law Tribunal, New Delhi Bench, Court-II, dismissing IA No.5694 of 2022 filed by the Appellant – Ex-Promoter with prayer to keep in abeyance the hearing and decision on the application filed by Resolution Professional for approval of Resolution Plan.

2. Brief facts of the case necessary to be noticed for deciding this Appeal are:

- (i) On 10.05.2019, Corporate Insolvency Resolution Process (“CIRP”) was initiated against the Corporate Debtor - Pawan Doot Estate Pvt. Ltd. by an order passed by the Adjudicating Authority. On 13.07.2019, advertisement was issued inviting Expression of Interest. Only one Resolution Plan was received, which was presented by Resolution Professional (“**RP**”) in the 10th Meeting of Committee of Creditors (“**CoC**”) dated 06.01.2020. On 17.01.2020, the CoC by 100% voting

approved the Resolution Plan. On 18.01.2020, Letter of Intent was issued by the RP to the Successful Resolution Applicant – M/s Mehar Footwear Private Limited. The Letter of Intent was unconditionally accepted by the Successful Resolution Applicant and Performance Bank Guarantee amount was deposited on 02.02.2020.

- (ii) An IA No.1077 of 2020 was filed by the RP before the Adjudicating Authority under Section 30, sub-section (6) of the Code for approval of the Resolution Plan.
- (iii) IA No.5694 of 2022 was filed by the Appellant – Ex-Promoter on 25.09.2022, praying for hearing in IA No.1077 of 2020 be kept in abeyance. The Application filed by the Appellant was rejected by the Adjudicating Authority on 23.11.2022.
- (iv) IA No.1077 of 2020 for approval of the Resolution Plan was heard by the Adjudicating Authority on 02.12.2022 and order was reserved.
- (v) Aggrieved by the order dated 23.11.2022, rejecting the IA No.5694 of 2022, the Appellant has come up in this Appeal.

3. We have heard Shri Arun Kathpalia, learned Senior Counsel for the Appellant with Shri Abhijeet Sinha; Shri Krishnendu Datta, learned Senior counsel has appeared for Successful Resolution Applicant. We have also heard learned Counsel for the RP as well as learned Counsel appearing for Financial Creditors, i.e., Respondent Nos.3 and 5.

4. Shri Arun Kathpalia, learned Senior Counsel for the Appellant submits that Appellant has submitted Settlement Proposal dated 11.08.2022 addressed to Financial Creditor, titled as Revised Settlement Proposal under Section 12A for Corporate Debtor. Shri Kathpalia submits that the said Settlement Proposal has the approval of Edelweiss Asset Reconstruction Company Limited – Respondent No.3 and Canara Bank – Respondent No.4, who constitute more than 84% of vote shares. Bank of India has sought time to obtain approval due to there being no Executive Director. The Revised Settlement Proposal was submitted in pursuance of discussion held in Joint Lender Meeting dated 18.07.2022. The Adjudicating Authority committed error in rejecting IA No.5694 of 2022 filed by the Appellant for keeping in abeyance the hearing in Application for approval of Resolution Plan. It is submitted that the mere fact that Resolution Plan has been approved by the CoC, is no impediment in CoC accepting the Settlement Proposal under Section 12A. The commercial wisdom of the CoC is paramount and the CoC in its commercial wisdom can accept the Settlement Proposal under Section 12A, which is a better financial proposal as compared to the approved Resolution Plan. Under Section 33, sub-section (2) of the Code, the CoC has the power, even after approving the Resolution Plan, but before the approval of the Resolution Plan by the Adjudicating Authority, to approve the liquidation of the Corporate Debtor. Hence, the CoC can certainly approve a Settlement Proposal under Section 12A. It is submitted that 100% CoC Members having given preapproval, the Adjudicating Authority ought to have kept in

abeyance the hearing in IA No.1077 of 2020. The RP has erred in not submitting the proposal submitted by the Appellant under Section 12A for consideration and voting before the CoC. The Adjudicating Authority has full power to direct the CoC to consider the Revised Settlement Proposal, even at the stage when decision approving the Resolution Plan is pending consideration.

5. The learned Counsel for the RP, refuting the submissions of the learned Counsel for the Appellant submits that Resolution Plan having been approved by the CoC, as early as on 17.01.2020 and the Application to approve the Plan having been filed on 04.02.2020, there is no occasion to entertain any Settlement Proposal submitted by the Ex-Promoter. After Resolution Plan has been approved, no Settlement Proposal can be entertained. It is submitted that approved Resolution Plan also binds the CoC and the CoC itself cannot take any decision in this regard.

6. The learned Senior Counsel for the Successful Resolution Applicant Shri Krishnendu Datta submits that in view of the law laid down by the Hon'ble Supreme Court in ***Ebix Singapore Pvt. Ltd. vs. Committee of Creditors of Educomp Solutions Limited and Anr. – Civil Appeal No.3224 of 2020***, the approval of Resolution Plan by CoC binds the Successful Resolution Applicant as well as the CoC. The CoC cannot be permitted to take any different stand at the instance of the Promoter as is sought to be taken in the present case. It is further submitted that no Application under Section 12A can be entertained after the Plan has been approved by the CoC. It is submitted that more than two years ago the

Resolution Plan was approved on 17.01.2020 and the Settlement Proposal sought to be filed after two and a half years by the Promoter, cannot be entertained. The Code provides for strict timelines, which cannot be permitted to be violated as is sought to be done by the Appellant in the present case. No Form FA has yet been submitted to the RP to enable him to place before the Adjudicating Authority for approval.

7. The learned Counsel appearing for Respondent Nos.3 and 5 submit that CoC is entitled to accept a better proposal, which has been submitted by the Appellant and the Settlement Proposal submitted by the Appellant is in preapproval of the CoC, hence, the CoC was entitled to vote on the 12A proposal.

8. The learned Counsel for the parties have relied on various judgments of Hon'ble Supreme Court and this Tribunal, which shall be referred to while considering the submission in detail.

9. From the submissions, which have been made by the learned Counsel for the parties and the material on record, following question arise for consideration:

- (I) Whether after approval of the Resolution Plan by Committee of Creditors under Section 30, sub-section (4) and filing an Application before the Adjudicating Authority for its approval, any Settlement Proposal under Section 12A (filed by Ex-Promoter) can be entertained deferring consideration of approval of Resolution Plan by the Adjudicating Authority?

10. Before we enter into the rival submission of learned Counsel for the parties, we need to notice the statutory Scheme under the Code and the relevant Regulations framed thereunder.

11. Section 30 provides for 'submission of resolution plan'. Under Section 30, sub-section (2), Resolution Professional is obliged to examine the Resolution Plan to find out whether it conform to provisions as laid down in Section 30, sub-section (2). Under Section 30, sub-section (3), the Resolution Professional, if satisfied himself that Plan is in accordance with the provisions, shall present the Plan to the Committee of Creditors for approval. Section 30, sub-section (4) provides that Committee of Creditors may approve the Resolution Plan by vote of not less than 60% of the voting share of the Corporate Debtors after considering its feasibility and viability and other factors. Under Section 30, sub-section (6), the Resolution Professional is to submit a Resolution Plan as approved by the Committee of Creditors to the Adjudicating Authority.

12. In the present case, the CoC have approved the Resolution Plan by voting share of 100% in voting held on 17.01.2020. The RP has submitted the Application before the Adjudicating Authority for approval of the Resolution Plan on 04.02.2020. The Settlement Proposal by the Ex-Promoter was submitted before the Financial Creditors by letter dated 11.08.2022. It is a case of the Appellant that in the Joint Lenders Meeting held on 18.07.2022, discussion was held regarding submission of Settlement Proposal. It is submitted that all Financial Creditors have given

and communicated their approval. The approval of Bank of India is awaited, since there was no Executive Director at the relevant time.

13. We may notice now the Regulations framed to give effect the provisions of Section 12A. The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**"CIRP Regulations"**). Regulation 30A provides for manner and procedure of withdrawal of application. Regulation 30A is as follows:

"30 A. Withdrawal of application - (1) An application for withdrawal under section 12A may be made to the Adjudicating Authority –

(a) before the constitution of the committee, by the applicant through the interim resolution professional;

(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:

Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

(2) The application under sub-regulation (1) shall be made in Form FA of the 68[Schedule-I] accompanied by a bank guarantee-

(a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application under clause (a) of sub-regulation (1);
or

- (b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of regulation 31, till the date of filing of the application under clause (b) of sub-regulation (1).*
- (3) Where an application for withdrawal is under clause (a) of sub-regulation (1), the interim resolution professional shall submit the application to the Adjudicating Authority on behalf of the applicant, within three days of its receipt.*
- (4) Where an application for withdrawal is under clause (b) of sub-regulation (1), the committee shall consider the application, within seven days of its receipt.*
- (5) Where the application referred to in sub-regulation (4) is approved by the committee with ninety percent voting share, the resolution professional shall submit such application along with the approval of the committee, to the Adjudicating Authority on behalf of the applicant, within three days of such approval.*
- (6) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (3) or (5).*
- (7) Where the application is approved under sub-regulation (6), the applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, as determined by the interim resolution professional or resolution professional, as the case may be, within three days of such approval, in the bank account of the corporate debtor, failing which the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code.”*

14. Regulation 30A has been substituted by Notification dated 25th July, 2019 to give effect to the provisions of Section 12A, which was inserted in the Code by Act No.26 of 2018. Regulation 30A(1) (b) proviso provides:

“Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.”

15. The intendment of the proviso is that there has to be special reason for making Application under Section 30A(1)(b), when it is filed after publication of invitation for Expression of Interest. The Regulation clearly indicate that when ‘Expression of Interest’ is issued inviting Resolution Plan, there has to be sufficient reason justifying withdrawal.

16. Regulation making Authority was well aware about the entire process under the Code, including approval of the Plan by the CoC and filing of the Application before the Adjudicating Authority for approval of the Resolution Plan. Had it intended that 12A Application can be entertained even after Resolution Plan is approved by the CoC, the proviso would not have confined to issue invitation for Expression of Interest, rather, it could have been conveniently mentioned that after approval of Resolution Plan Applicant should justify withdrawal. It was never intended that after approval of Resolution Plan by CoC, Application under Section 12A can be entertained. Hence, the Regulation is framed in that manner.

17. Regulation 30(2) provides that Application shall be made in Form FA and accompanied by a bank guarantee towards estimated expenses

incurred on or by the IRP for the purpose of Regulation 33, till the date of filing of the Application under clause (1) of sub-regulation (1). Regulation 33 deals with the costs of the IRP, whereas Regulation 34 deals with RP costs. Regulations 33 and 34 are as follows:

“33. Costs of the interim resolution professional.--

(1) The applicant shall fix the expenses to be incurred on or by the interim resolution professional.

(2) The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses under sub-regulation (1).

(3) The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies.

(4) The amount of expenses ratified by the committee shall be treated as insolvency resolution process costs.

Explanation. - *For the purposes of this regulation, “expenses” include the fee to be paid to the interim resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the interim resolution professional.*

34. Resolution professional costs. -- *The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.*

Explanation. - *For the purposes of this regulation, “expenses” include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional.”*

18. In event Section 12A, Application was contemplated to be filed even after approval of the Resolution Plan by the CoC, Regulation 30A, sub-regulation (2), (a) and (b) ought to have included the expenses both under Regulations 33 and 34. Non-mention of Resolution Professional costs in Regulation 30A, sub-regulation (2) also give support to the contention that Scheme under the Regulation does not contemplate filing of Section 12A Application after approval of Resolution Plan by the CoC.

19. The learned Counsel for the Appellant has relied on the judgment of this Tribunal in ***Shaji Purushothaman vs. Union Bank of India & Ors. – Company Appeal (AT) (Insolvency) No.921 of 2019***. In the above case, Section 7 Application was admitted on 01.11.2018 and challenge to said order was made before this Appellate Tribunal and thereafter before the Hon'ble Supreme Court. Before the Hon'ble Supreme Court, the Appellant took the plea that he is ready and willing to clear the outstanding of the Union Bank of India within 15 days. The Hon'ble Supreme Court by order dated 14.06.2019 granted liberty to move application within two weeks before the Adjudicating Authority. The Appellant had moved the Application before the Adjudicating Authority to set aside the admission order, which was rejected on 29.07.2019, where the Adjudicating Authority observed that admission order cannot be set aside, except where an application under Section 12A is filed. Challenging the order dated 29.07.2019, an Appeal was filed in this Tribunal. At the time of hearing of the Appeal, it was pointed out by the Union Bank of India that Resolution

Plan has already been approved by the CoC. Noticing the aforesaid, this Tribunal in paragraph 8 and 9 made following observations:

“8. In the circumstances, while we are not inclined to issue any specific direction, give liberty to the Appellant to move an application u/s 12A for settling the claims of all the Creditors including the guarantors.

9. If an application u/s 12A is filed by the Appellant, the ‘Committee of Creditors’ may decide as to whether the proposal given by the Appellant for settlement in terms of Section 12A is better than the ‘Resolution Plan’ as approved by it, and may pass appropriate order. However, as such decision is required to be taken by the ‘Committee of Creditors’, we are not expressing any opinion on the same. The appeal stands disposed of. No costs.”

20. The above observations were in the facts of the said case. This Tribunal did not lay down any ratio that after approval of the Plan, Application under Section 12A can be entertained. Only liberty was granted and in paragraph 9, this Tribunal observed that *“However, as such decision is required to be taken by the ‘Committee of Creditors’, we are not expressing any opinion on the same”*.

21. We may now notice the judgment of Hon’ble Supreme Court in ***Ebix Singapore Pvt. Ltd.*** (supra), which has been much relied by learned Counsel for the Respondent. The Adjudicating Authority in the above case had allowed the withdrawal application filed by Ebix under Section 60(5) to withdraw its Resolution Plan, which order was set aside by this Appellate Tribunal holding that Adjudicating Authority has no jurisdiction to permit

such withdrawal. The order of this Tribunal was challenged before the Hon'ble Supreme Court. The Hon'ble Supreme Court considered the Scheme of the Code and held that Resolution Plan even prior to the approval of the Adjudicating Authority is binding *inter se* the CoC and the Successful Resolution Applicant. Following observations have been made by the Hon'ble Supreme Court in paragraphs 112, 113 and 125:

“112 While the above observations were made in the context of a scheme that has been sanctioned by the Court, the Resolution Plan even prior to the approval of the Adjudicating Authority is binding inter se the CoC and the successful Resolution Applicant. The Resolution Plan cannot be construed purely as a ‘contract’ governed by the Contract Act, in the period intervening its acceptance by the CoC and the approval of the Adjudicating Authority. Even at that stage, its binding effects are produced by the IBC framework. The BLRC Report mentions that “[w]hen 75% of the creditors agree on a revival plan, this plan would be binding on all the remaining creditors”. The BLRC Report also mentions that, “the RP submits a binding agreement to the Adjudicator before the default maximum date”. We have further discussed the statutory scheme of the IBC in Sections I and J of this judgement to establish that a Resolution Plan is binding inter se the CoC and the successful Resolution Applicant. Thus, the ability of the Resolution Plan to bind those who have not consented to it, by way a statutory procedure, indicates that it is not a typical contract.

113. The BLRC Report, which furnished the first draft of the IBC and elaborated on the aims behind the overhaul of the insolvency regime, refers to a CoC approved Resolution

Plan as a 'binding contract' in one instance and refers to it as a 'binding agreement' in other instances. The report also refers to a CoC-approved Resolution Plan as a 'financial arrangement', 'revival plan' or a 'solution'. The interchangeability of the terms – 'agreement', 'contract', 'financial arrangement', 'revival plan' and 'solution' indicates that there is no clear intention of the BLRC in characterizing the nature of the Resolution Plan as a contract. The binding effect of the Resolution Plan has the consequence of preventing the CoC or the Resolution Applicant to renege from its terms after the plan has been approved by the CoC through a voting mechanism. The fleeting mention of a 'binding contract' on one occasion in the BLRC Report (which was a prelegislative text that underwent subsequent modifications by the Legislature) to indicate the binding nature of the Resolution Plan and the finality of negotiations once it is approved by the CoC, does not establish the legal nature of the document, especially when it is not complemented by the text and design of the IBC.

125 The absence of any specific provision in the IBC or the regulations referring to a CoC-approved Resolution Plan as a contract and the lack of clarity in the BLRC report regarding the nature of such a Resolution Plan, constrains us from arriving at the conclusion that CoC-approved Resolution Plans will be governed by the Contract Act and common law principles governing contracts, save and except for the specific prohibitions and deeming fictions under the IBC. Regulation 39(3) of CIRP regulations, as it stood before the IBBI (CIRP) (Fourth Amendment) Regulations 2020 and applicable to the three appellants before us, enabled a framework where a draft Resolution

Plan would involve several rounds of negotiations and revisions between the Resolution Applicant and the CoC, before it is approved by the latter and submitted to the Adjudicating Authority. However, this statutorily-enabled room for commercial negotiation is not enough to over-power the other elements of regulation that detract from the view that CoC-approved Resolution Plans are contracts. CoC-approved Resolution Plans, before the approval of the Adjudicating Authority under Section 31, are a function and product of the IBC's mechanisms. Their validity, nature, legal force and content is regulated by the procedure laid down under the IBC, and not the Contract Act. The voting by the CoC also occurs only after the RP has verified the contents of the Resolution Plan and confirmed that it meets the conditions of the IBC and the regulations therein. The amended Regulation 39(3) further regulates the conduct of the CoC on voting on Resolution Plans and has introduced the requirement of simultaneous voting. The IBBI's Discussion Paper issued on 27 August 2021 has invited comments on regulating the process on revisions that can be made to resolution plans submitted to the CoC. These developments bolster the conclusion that the mechanism prior to submission of a CoC-approved resolution plan is subject to continuous procedural scrutiny by the IBC and cannot be considered as a simple contractual negotiation between two parties. Section J below details how a common law remedies of withdrawal or modification on account of frustration or force majeure are not applicable to CoC approved Resolution Plans owing to the nature of the IBC.....”

22. The law laid down by the Hon'ble Supreme Court as indicated in the above paragraphs is clear that the approval by the CoC of a Resolution Plan is not in the realm of contract, but is insulated by the Scheme under the Code and this bind both the Successful Resolution Applicant as well as CoC. The Hon'ble Supreme Court in the Ebix itself has laid down timelines provided in the Code have to be adhered to. In event, the submission of the Appellant is accepted that even after the approval of the Plan by the CoC, the CoC be given power to entertain a Settlement Proposal by the Ex-Promoter, the timelines for the different process and its finality shall be breached. Approval by the CoC of a Resolution Plan has to be in accordance with its commercial wisdom and when CoC approves a Plan and the Resolution Applicant is prohibited to modify or withdraw from the Plan, same embargo has to be accepted on CoC also from changing its stand. The judgment of the Hon'ble Supreme Court in Ebix Singapore lays down that after approval by the CoC of a Resolution Plan, CoC itself is bound by its decision and cannot be allowed to go back from its decision and pass any other resolution. This has to be accepted to give finality on different steps of the IBC and for timely conclusion of the resolution process.

23. The Appellant has also placed reliance on the judgment of Hon'ble Supreme Court in **Civil Appeal Nos.1811-1812 – Vallal Rick vs. M/s Siva Industries and Holdings Limited and Ors.** In the above judgment, no Resolution Plan having been received, the Adjudicating Authority directed for initiation of liquidation proceedings in respect of the Corporate

Debtor. An Application under Section 33(1)(a) seeking initiation of liquidation process was filed by the RP. The Promoter of the Corporate Debtor filed a Settlement Application before the Adjudicating Authority seeking a direction to CoC to consider the terms of settlement as proposed by him. The Settlement Plan was approved by the CoC by 90% voting share. The RP filed an Application before the NCLT seeking withdrawal of the CIRP. The Adjudicating Authority rejected the Application against which an Appeal was filed, that too, was dismissed and the matter was taken before the Hon'ble Supreme Court. The Hon'ble Supreme Court in the above case referring to Section 12A and Regulation 30A, laid down following in paragraphs 18, 19, 20, 21 and 24:

“18. *A perusal of the said Regulation would reveal that where an application for withdrawal under Section 12A of the IBC is made after the constitution of the Committee, the same has to be made through the interim resolution professional or the resolution professional, as the case may be. The application has to be made in Form-FA. It further provides that when an application is made after the issue of invitation for expression of interest under Regulation 36A, the applicant is required to state the reasons justifying withdrawal of the same. The RP is required to place such an application for consideration before the Committee. Only after such an application is approved by the Committee with 90% voting share, the RP shall submit the same along with the approval of the Committee to the adjudicating authority. It could thus be seen that a detailed procedure is prescribed under Regulation 30A of the 2016 Regulations as well.*

19. *In the case of Swiss Ribbons Privated Limited and*

Another v. Union of India and Others, one of the challenges made was with regard to validity of Section 12A of the IBC. It was argued that the figure of 90% voting share was arbitrary. It was the contention that though the withdrawal was just and proper, the CoC could exercise the power arbitrarily to reject such a settlement. While rejecting the said contention, this Court observed thus:

“83. The main thrust against the provision of Section 12-A is the fact that ninety per cent 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 per cent, 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 per cent, 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 do not have the last word on the subject. If the Committee of Creditors arbitrarily rejects a just settlement and/or withdrawal claim, NCLT, and thereafter, 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.”

20. *It could thus be seen that this Court has found that if the CoC arbitrarily rejects a just settlement and/or*

withdrawal claim, the learned NCLT and thereafter the learned NCLAT can always set aside such decision under the provisions of the IBC.

21. *This Court has consistently held that the commercial wisdom of the CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the IBC. It has been held that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. A reference in this respect could be made to the judgments of this Court in the cases of **K. Sashidhar v. Indian Overseas Bank and Others, Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta and Others, Maharashtra Seamless Limited v. Padmanabhan Venkatesh and Others, Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another, and Jaypee Kensington Boulevard Apartments Welfare Association and Others v. NBCC (India) Limited and Others.***

24. *When 90% and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stake-holders to permit settlement and withdraw CIRP, in our view, the adjudicating authority or the appellate authority cannot sit in an appeal over the commercial wisdom of CoC. The interference would be warranted only when the adjudicating authority or the appellate authority finds the decision of the CoC to be wholly capricious, arbitrary, irrational and de hors the provisions of the statute or the Rules.”*

24. The Hon’ble Supreme Court in the above case set aside the order passed by the Adjudicating Authority and allowed the Application filed by the RP for withdrawal. The distinguishing feature with the present case is that in the present case, the CoC has already approved the Resolution Plan on 17.01.2020, which Resolution Plan is pending approval before the Adjudicating Authority. The case before the Hon’ble Supreme Court was a case where no Plan could be approved and Application was filed to initiate

the liquidation process, during which period an application was filed by Promoters offering settlement. Rejection of said Application was set aside by the Hon'ble Supreme Court. The above judgment of the Hon'ble Supreme Court can be said to clearly lay down that in event no Resolution Plan is approved and an application for liquidation is pending, 12A can be resorted to. From the above judgment of the Hon'ble Supreme Court, we are unable to find any ratio that even if a Resolution Plan is approved by the CoC and the Application is pending consideration for approval, the Promoters are entitled to file Settlement Proposal.

25. To the same effect is the judgment of this Tribunal in ***Company Appeal (AT) (Insolvency) Nos.288 & 289 of 2018 in V. Navaneetha Krishnan vs. Central Bank of India, Coimbatore & Anr.*** This Appellate Tribunal held that even during the liquidation period, if any person, not barred under Section 29A, satisfy the demand of Committee of Creditors, giving offer, which may be considered by the CoC by 90% voting share, the offer can be accepted.

26. The learned Counsel has also relied on the judgment of the Hon'ble Supreme Court in ***Committee of Creditors of Essar Steel India Limited through Authorised Signatory vs. Satish Kumar Gupta & Ors. – Civil Appeal No.8766-67 of 2019*** as well as the judgment of the Hon'ble Supreme Court in ***Maharashtra Seamless Limited vs. Padmanabhan Venkatesh & Ors. – Civil Appeal Nos.4242 of 2019 (with Civil Appeal Nos.4967-4968 of 2019)***. In ***Committee of Creditors of Essar Steel India Limited***, the Hon'ble Supreme Court laid down that there is no

residual equity jurisdiction in the Adjudicating Authority or the Appellate Tribunal to interfere in the merits of the business decision taken by the requisite majority of the Committee of Creditors. In paragraph 81, following has been laid down:

“81. As has been held in this judgment, it is clear that Explanation 1 has only been inserted in order that the Adjudicating Authority and the Appellate Tribunal cannot enter into the merits of a business decision of the requisite majority of the Committee of Creditors. As has also been held in this judgment, there is no residual equity jurisdiction in the Adjudicating Authority or the Appellate Tribunal to interfere in the merits of a business decision taken by the requisite majority of the Committee of Creditors, provided that it is otherwise in conformity with the provisions of the Code and the Regulations, as has been laid down by this judgment.”

27. There cannot be any dispute to the proposition laid down by the Hon’ble Supreme Court in the above case. In the present case, decision of the CoC to approve the Resolution Plan on 17.01.2020 was taken in its commercial wisdom. Whether the CoC can rescind from its decision and accept Settlement Proposal of Ex-Promoter submitted after two and a half years of approval of Resolution Plan, is a question which has arisen in the present case. The present is not a case where the Adjudicating Authority has interfered with any decision of the CoC.

28. In ***Maharashtra Seamless Limited***, the Hon’ble Supreme Court in paragraph 17 has noted following question, which arose for consideration:

“17.The second question we shall deal with is as to whether Section 12-A is the applicable route through which a successful Resolution Applicant can retreat. Before we proceed to answer these two questions, we must indicate that before the Appellate Authority substantial argument was advanced over failure on the part of the Adjudicating Authority to maintain parity between the financial creditors and operational creditors on the aspect of clearing dues.”

29. In paragraph 29, ultimately the Hon’ble Supreme Court has held that exit route prescribed under Section 12A is not applicable to a Resolution Applicant. The judgment in ***Maharashtra Seamless Limited*** was on different facts and circumstances and there is no ratio in the said judgment that after approval of Resolution Plan, Ex-Promoters are entitled to submit a Settlement Proposal.

30. There is one more aspect of the case, which need to be noticed. When the invitation was issued inviting Expression of Interest, it was open for all who were eligible to submit the Resolution Plan under Section 29A. Whether the Promoter, who has now submitted Settlement Proposal was eligible or not under Section 29A, is also a relevant question and after approval of Resolution Plan, these enquiries cannot be entertained and embarked upon to find out the eligibility of the Applicant.

31. The learned Counsel for the Appellant lastly submitted that no reason has been given by the Adjudicating Authority in rejecting the Application filed by the Appellant for keeping in abeyance the proceedings for approval of Resolution Plan. The Adjudicating Authority being in seize

of Application for approval of Resolution Plan, there had to be strong reason to keep the Application in abeyance. The Adjudicating Authority being not satisfied that there is adequate reason to accept the prayer of the Appellant, no error has been committed by the Adjudicating Authority in rejecting the Application.

32. We, thus, do not find any merit in this Appeal. The Appeal is dismissed. No costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

NEW DELHI

5th January, 2023

Ashwani