

IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 1

ITEM No 40

IA 18 (AHM)/2021 in CP (IB) 759 (AHM) 2019 With
Inv. P. 1 (AHM)/2021 in IA 18/2021

Order under Section 60(5) r.w Rule 11 of NCLT,2016

IN THE MATTER OF:

Sintex Plastics Technology Ltd
V/s
Zielem Industries Pvt Ltd & Anr

.....Applicant

.....Respondent

Order delivered on ..29/06/2021

Coram:

Madan B. Gosavi, Hon'ble Member(J)
Virendra Kumar Gupta, Hon'ble Member(T)

PRESENTS:

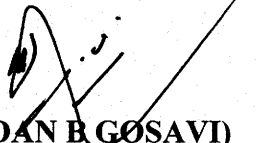
For the Applicant :
For the IRP/RP :
For the Respondent :

COMMON ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.


(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)


(MADAN B GOSAVI)
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1**

**IA 18 (AHM)/2021 in CP (IB) 759 (AHM) 2019 With
Inv. P. 1 (AHM)/2021 in IA 18/2021**

In the matter of:

In IA 18(AHM)/2021 in CP (IB) 759 (AHM) 2019

[An application under Section 12A of IBC, 2016 seeking withdrawal of
CIRP of the Corporate Debtor]

In the matter between:

1. M/s. Sintex Plastics Technology Limited
Having address at:
Near Seven Garnala Kalol
Gandhinagar, Gujarat-382721,
e-mail: smt.mishra@sintex.co.in

....Applicant

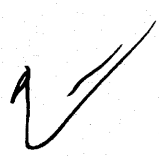

V/s.

1. M/s. Zielen Industries Private Limited
Having address at:
Survey No.459, At Post Tajpur (Oran)
Nr. Majara Chokdi, Ta: Prantij,
District: Sabarkantha,
e-mail: zip_crb@yahoo.co.in
2. M/s. Sintex BAPL Limited
Having address at:
R.S. Patel & Company Chartered Accountants,
801, Popular, House, Nr. Income Tax Circle,
Ashram Road, Ahmeabad,
Gujarat-380009
ketul@rspatelca.com

....Respondents

In the matter of:

In Inv.P. 1/(AHM)/2021 in IA 18(AHM)/2021



[An application under Section 60(5) of IBC, 2016 r.w. Rule 11 of NCLT Rules, 2016 seeking impleadment of Applicant]

1. Ms/ DSP Investment Managers Private Limited

Having address at:

Mafatlal Centre, 10th Floor,
Nariman Point, Mumbai-400021,
Maharashtra

....Applicant/Intervenor

In the matter between:

M/s. Sintex Plastic Technology Ltd

....(Applicant)

V/s

M/s. Zielem Industries Pvt. Ltd & Anr.

....(Respondents)

Order Reserved on 14th day of June, 2021
Order pronounced on 29th day of June, 2021.

Coram: MADAN B. GOSAVI, MEMBER (J)
VIRENDRA KUMAR GUPTA, MEMBER (T)

Appearance:

Learned Senior Counsel Mr. Gopal Jain appeared for KKR India Financial Services.

Learned Senior Counsel Mr. Saurabh Soparkar appeared for IRP.

Learned Counsel Mr. Shubhabrata Chakraborti appeared for Intervener.

Learned Counsel Mr. Arjun Sheth appeared for Respondent.

Learned Counsel Mr. Raheel Patel appeared. Learned Counsel Mr. Ankur Jain appeared. Learned Counsel Kazvin Kapadia appeared. IRP Mr. Ketul Patel also appeared.

ORDER

[Per: VIRENDRA KUMAR GUPTA, MEMBER (T)]

1. This application has been filed by M/s Sintex Plastics Technology Limited for withdrawal of Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") under Rule 11 of NCLT Rules, 2016

r.w. Section 60(5) of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "**IBC, 2016**").

2. This application has been filed for setting aside the order of CIRP passed by this Adjudicating Authority on 18.12.2020 by a shareholder of the Corporate Debtor on the basis of the settlement between the Original Operational Creditor and Respondent no. 2 whereby dues of Operational Creditor have been paid and settled. There are two Intervenor who are opposing this application. One Intervenor is M/s. KKR India Financial Services and another Intervenor is M/s DSP Investment Managers Pvt. Ltd. who are the Financial Creditors and have got exposure to the tune of Rs. 435 crores and Rs.134 crores approximately.

3. Learned Counsel for the applicant appeared. After narrating the brief background of the case, firstly, he referred to the order of Hon'ble NCLAT dated 04.01.2021 in the case of Corporate Debtor against order of this Adjudicating Authority admitting the Corporate Debtor into CIRP. In the said order the Hon'ble NCLAT directed the applicant to approach this Adjudicating Authority for seeking exit from CIRP. It was also pleaded that the Hon'ble NCLAT had also directed that Committee of Creditors (hereinafter referred to as "**COC**") shall not be constituted for one week from the date of its order. Learned Counsel, thereafter, submitted that this Adjudicating Authority further stayed the constitution of COC from time to time in view of the fact that there were settlement talks between the Intervenor and the Corporate Debtor.

However, IRP was directed to continue with the running affairs of the Corporate Debtor as a going concern so that interests of all stakeholders would be protected.

4. Learned Counsel, thereafter, started legal submissions. The submissions made by the applicant are reproduced as under:

1. That the present application is filed subsequent to admission order dt. 18.12.2020 (pg. 10 of the IA) passed in a s. 9 application by an OC (Zielen) for a claim of approx. Rs. 40 lakhs.
2. That pursuant to said admission order, immediately by MOU dt. 26.12.2020 (pg. 26 of the IA), the claim of the said OC in the said s. 9 application came to be settled with the Applicant herein who is promoter shareholder of the CD. That the CD is the WOS of the Applicant herein.
3. That the settlement amount under the said MOU presently stands fully paid.
4. That appeal being Comp. Appeal (AT) (INS) no. 1135 of 2020 came to be filed by the Applicant herein before the Hon'ble NCLAT, which came to be disposed of by order dt. 04.01.2021 (pg 15 of the rebuttal affidavit of the Applicant) with liberty to approach AA, Ahmedabad for closure of CIRP and in the meanwhile was pleased to stay the formation of COC.
5. The following portion of the said order dt. 04.01.2020 is relevant:

"IRP admits that COC has not been constituted till date. In view of this factual position and keeping in view the dictum of the Hon'ble Apex Court in "Swiss Ribbons and Ors. v. Union of India and others, the Corporate Debtor may avail the opportunity of seeking exit from corporate insolvency resolution process at the stage of pre-constitution of COC ... It would, therefore, be appropriate for the appellant to approach the Adjudicating Authority to seek exit from CIRP by filing the terms of settlement and the Adjudicating Authority will have to pass the appropriate order.

...

Liberty is granted to the respondent to oppose such motion if permissible in law."

6. Pursuant to the aforesaid order of NCLAT, the Applicant herein has filed the present application before this Hon'ble Adjudicating Authority, where such Hon'ble Adjudicating Authority, keeping in view the ratio laid down by the Hon'ble Supreme Court in the case of Swiss Ribbons, is required to consider whether exit may be given

to the Corporate Debtor from the CIRP process at the stage of the Constitution of COC.

7. That the relevant ratio of the Hon'ble Supreme Court in the case of Swiss Ribbons (pg 36 of the application), speaks of party being permitted to approach NCLT under Rule 11 of NCLT Rules, 2016 for withdrawal/settlement at the stage of prior to Constitution of COC.
8. That section 12A of the IB code provides for a situation only post formation of COC, and section 12A of the IB code reads as follows:

"The Adjudicating Authority allow the withdrawal of application admitted under section 7 of the section 9 of section 10, and an application made by the Applicant with the approval of 90 per cent, voting share of the committee of creditors, in such manner as may be prescribed."

9. Hence, section 12A of the IB code cannot have any application for seeking exit from CIRP prior to formation of COC.
10. That the other side sought to place reliance on regulation 30A of the CIRP Regulations, where regulation 30 A contemplates a situation for withdrawal prior to Constitution of COC, and such application be made through the interim resolution professional.
11. It is respectfully submitted that the regulation cannot expand the scope of the Act itself, and the same is a settled position of law.
12. Reliance is placed on the following judgment of the Apex Court.
Global Energy Ltd. and Ors. v. Central Electricity Regulatory Commission, AIR 2009 SC 3194, (2009) 15 SCC 570 (copy enclosed)
(paras 18 and 19)

"18. It is now a well settled principle of law that the rule making power "for carrying out the purpose of the Act" is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the regulation making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act.

We may, in this connection refer to a decision of this Court in Kunj Behari Lal Butail and Ors. v. State of H.P. and Ors. MANU/SC/0111/2000 : [2000] 1SCR1054 , wherein a Three Judge Bench of this Court held as under:

14. We are also of the opinion that a delegated power to legislate by making rules "for carrying out the purposes of the Act" is a general delegation without laying down any guidelines; it cannot be so exercised as to bring into existence substantive rights or

obligations or disabilities not contemplated by the provisions of the Act itself. (See also State of Kerala and Ors. v. Unni and Anr. MANU/SC/8737/2006 : AIR2007SC819 ;A.P. Electricity Regulatory Commission v. R.V.K. Energy Pvt. Ltd. and Anr. MANU/SC/2615/2008 : 2008(9)SCALE529)

19. The power of the regulation making authority, thus, must be interpreted keeping in view the provisions of the Act.

13. That attention of the Hon'ble Adjudicating Authority is drawn to the unamended regulation 30A of CIRP Regulations, wherein the language was such that a withdrawal application under section 12A of the IB code could take place only before the issuance of invitation for expression of interest. The unamended regulation 30A of CIRP Regulations reads as follows:

"An application for withdrawal under section 12A shall be submitted to the interim resolution professional or the resolution professional, as the case may be, in Form FA of the schedule before the issue of invitation for expression of interest under regulation 36A."

14. The Hon'ble Supreme Court in the order dated 14/12/2018 in the case of Brilliant Alloys Private Limited v. S. Rajagopal & Ors. SLP no. 31557 of 2018, lays down the following:

"The only reason why the withdrawal was not allowed, though agreed to by the Corporate Debtor as well as the financial creditor State bank of India and the operational creditor – respondent no. 3, is because regulation 30A states that withdrawals cannot be permitted after issue of invitation for expression of interest.

According to us, this regulation has to be read along with the main provision of section 12A which contains no such stipulation.

Accordingly, this stipulation can only be construed as directory depending on the facts of each case.

Accordingly, we allow the settlement that has been entered into and annul the proceedings. The Special Leave Petition is disposed of accordingly."

Hereto enclosed is a copy of the order dated 14/12/2018 in the case of Brilliant Alloys Private Limited v. S. Rajagopal & Ors. SLP no. 31557 of 2018.

15. Hence, in light of the above it can be seen that the regulation sought to do, which the Act itself did not provide for, and hence accordingly the stipulation set out in the regulation was to be treated as merely directory in nature.
16. Hence, it is submitted that the requirement to file the present withdrawal application through an interim resolution professional, at best can be treated as directory nature and not otherwise, because section 12A on a plain reading itself contemplates only a scenario post formation of COC.
17. That the amendment to regulation 30A on 25.07.2019, did not have an impact on settlement under Rule 11, as on page 43 of the IA, the Applicant has placed on record judgement dated 07/02/2020 passed by the Hon'ble NCLAT, wherein the CIRP proceedings have been closed pursuant to the reliance upon rule 11 of the NCLT rules.
18. It is further submitted that at page 45 of the IA, the copy of the entire settlement agreement therein has been reproduced in the order of Hon'ble NCLAT for closing CIRP proceedings, and in the same it can be seen that CIRP proceedings have been closed pursuant to reliance upon rule 11 of the NCLT rules where the IRP is not party to such settlement agreement.
19. At page 43 and 50 of the IA, it can be seen that applications for the closure of CIRP have been filed by shareholders of the Corporate Debtor, and the same have been permitted by Hon'ble NCLAT, and hence the present application is very much maintainable.

No third party financial creditor is required to be heard during closure of CIRP proceedings on account of bipartite settlement

20. That the Applicant places reliance upon judgement dated 12/02/2019 passed by Hon'ble NCLAT in the case of Jogendra Kumar Arora v. Dharmendra Sharma & Ors. placed on record at page 17 of the rebuttal affidavit of the Applicant, wherein the following is stated by the Hon'ble NCLAT:

"4 . Mr. A.M. Ranjan Kumar, Advocate wanted to intervene on behalf of the Eight Financial Creditors to oppose the prayer. He submitted that the Eight Financial Creditors have already submitted their claim before the 'Resolution Professional'. However, parties having settled the matter prior to constitution of 'Committee of Creditors', we are not inclined to entertain any application for creditors.

5 Further in view of the decision of the 'Swiss Ribbons Pvt. Ltd. & Anr.', and in exercise our inherent powers under Rule 11 of the NCLAT Rules, 2016, allow the

prayer made by Mr. Dharmender Sharma for withdrawal of the application in view of the settlement already reached. We accordingly set aside the impugned order dated 10th January, 2019 and dismiss the C.P. (IB) No. 158/Chd/Hry/2018 as withdrawn.

...

7. Taking into consideration the fact that we have closed the proceedings, we direct the 'Corporate Debtor' to pay the total sum of Rs. 14.5 Lakhs towards fee and cost incurred by Mr. Sandeep Chandna, (Resolution Professional) within two weeks. So far as the 'Financial Creditors' who wanted to intervene and other 'Operational Creditors' who applied pursuant to the advertisement, this order will not come in their way to take recourse in accordance with law."

21. It is submitted that the Hon'ble NCLAT after taking into consideration the judgement of Swiss Ribbons, does not listen to the intervention of any financial creditors, and permits them to avail the recourse available to them under law.
22. In light of the aforesaid, it is submitted that no intervening financial creditors (including KKR and DSP) have a locus to be heard in the present application for closing CIRP proceedings.

Malafides of KKR

23. In light of the above, it is submitted that KKR's intervention is not permissible under law, and the motive of KKR is merely to seek recovery by arm twisting, which is not the purpose of the IB code, and now is a settled position of law.
24. That on perusing certain averments of the affidavit of KKR, their motive of recovery is quite glaring:

"4. ... I say that by way of the withdrawal application, SPTL is making an attempt to hoodwink the due process of law and create delays in the recovery process of the debts owed by the Corporate Debtor to its various stakeholders."

...

10. I state and submit that the intervenor along with other creditors would be greatly prejudice if the withdrawal application if allowed, as this continuation of CIR Process would defeat the scheme in purpose of the IBC, and as such cause prejudice and immense delay in recovering large amount of public money.."

25. Hence, the motive of KKR is quite evident, which is that of recovery and not resolution of debts of the CD.

26. Further at page 21 of the affidavit of KKR, under the category of Modus Operandi, KKR for purported fraud account is attempting to prejudice this Hon'ble Adjudicating Authority against the Corporate Debtor by placing reliance upon the purported forensic audit report dated April, 2020, which has been prohibited to be used and/or relied upon by the Hon'ble Delhi High Court vide orders dated 20/08/2020 and 07/09/2020 placed on record in the rebuttal affidavit of the Applicant from page 21 onwards.
27. That the orders of the Hon'ble Delhi High Court have been suppressed by KKR before this Hon'ble court.
28. That the reliance on such forensic report tantamount to contempt of Delhi High Court orders.

Other IB petitions pending against the CD

29. that the list of pending insolvency petitions against the Corporate Debtor is set out at pages 8 and 9 of the affidavit of KKR.
30. It is stated that of the 13 petitions set out, 12 of them are filed by operational creditors, and there is only one financial creditor petition being that of KKR itself.
31. That the total dues of the said 12 operational creditor petitions is only approximately Rs. 19 crores (page 9 paragraph 41 of the rebuttal affidavit of the Applicant).
32. It is submitted that there are serious disputes with such operational creditors qua the subject matter of their respective section 9 petitions.
33. It is submitted that in the event the Corporate Debtor wanted to pay off said Rs. 19 crores, it could very easily have done the same, since the Corporate Debtor has cash of approximately Rs. 700 crores lying in its bank accounts (page 19 of the rebuttal affidavit of the Applicant).
34. It is further submitted that in the event the claim of KKR is taken into consideration which is purportedly approximately Rs. 450 crores, in the event the Corporate Debtor wish to pay it out, the Corporate Debtor has additionally approximately Rs. 3700 crores worth of assets, and it is very easy for the Corporate Debtor to liquidate any such assets and/or use the funds lying in the bank account to pay off KKR.
35. However, the Corporate Debtor strongly believes that there is no debt that is due and payable in the section 7 petition filed by KKR and there is no financial default whatsoever.
36. Further looking to the affidavit filed by KKR, not a single document has been placed on record by KKR to substantiate any kind of facility it has given to the Corporate Debtor.
37. In light of the above, it is submitted that, in the facts and circumstances of the present case, it is a fit case that the present application for closure of CIRP be allowed

and accepted, permitting the Corporate Debtor to deal with the respective insolvency petitions on its own merits as and when they are heard.

38. In the event simply pendency of other insolvency petitions would have a bearing on not permitting closure of CIRP proceedings, then the same would encourage inscrupulous litigants to file multiple frivolous insolvency petitions against a particular Corporate Debtor, thereby putting illegal pressure for admission of CIRP proceedings against a particular Corporate Debtor without even examining each such petition on its own strength.

Functioning by IRP in a manner unknown to IB Code

39. That the IB code is an exhaustive and complete code itself, is now a settled position. Hence, what is not permitted under the IB code is deemed to be prohibited.
40. However the IRP is functioning in a manner unknown to the IB code. On perusing the affidavit of KKR, the following shocks the conscience in the manner in which the IRP is functioning.

"8.11 The IRP, supported by the lenders have also authorised the disbursement of salaries of the employees of the Corporate Debtor as well as procurement of raw material required for the continuation of operations."

41. That affidavit dated 21/01/2021 of the IRP may be seen.

11. I state that the officers of the Corporate Debtor have requested for procurement of some material from 2 related party vendors. The said items to be procured antibacterial antimicrobial master batches and leads of banks which are necessary for continued and unimpeded production of your range of water storage tanks which are the company's flagship product. All plants are running uncritically low volumes of these items and failure to procurement cause production stoppages. As per management, these parties a single source supplier and creation of alternative windows will be a time taking exercise due to specialise nature of products sourced.

12. I state that under section 28 of the code, approval of the COC is required for related party transactions. However, since there is presently deferment of formation of COC as per the direction of the Hon'ble a plate authority which is extended by this Hon'ble Tribunal, no payments have been sanctioned to the related parties. The officers of the Corporate Debtor have raised concerns of shortage of material and in absence of procurement of materials may lead to stoppage of production in very important segment of product line which will impact the top line as well bottom line of the Corporate Debtor and main pack the status of the Corporate Debtor as a going concern.

42. It is submitted that it becomes clear that the lenders are interfering and affecting the status of the Corporate Debtor as a going concern.
43. That the present is not the first case scenario where formation of COC has come to be stayed.
44. That in other matters where COC has come to be stayed the Hon'ble NCLAT has been pleased to pass direction that the interim resolution professional take the assistance of the suspended Board of Directors and officers/directors and employees of the Corporate Debtor to ensure that CD remains as a going concern. One such order dated 23/11/2020 of NCLAT Company Appeal (AT) (INS) no. 1012 of 2020 is placed on record in the rebuttal affidavit of the Applicant at page 32.
45. In light of the aforesaid, it is submitted that in the event CIRP is continued, it is sure to bring the death of the Corporate Debtor.

Exit be permitted for the sake of employees

46. It is submitted that the Corporate Debtor employs approximately 4500 employees, and they reside within the premises of the Corporate Debtor itself along with their entire families, and all of their livelihood is at stake in the event the Corporate Debtor continues to remain in CIRP. Details are set out at page 20 of the rebuttal affidavit of the Applicant.
47. In light of the aforesaid, it is humbly prayed that this Hon'ble Adjudicating Authority be pleased to allow the present application and close the CIRP proceedings qua the Corporate Debtor herein.

5. From the contentions raised by the applicant, following points emerge:

- (i) As per applicant, the application requires consideration and disposal under Rule 11 of NCLT Rules, 2016 and not under Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 r.w. Form-FA which is not consistent with the provisions of Section 12A of IBC, 2016.
- (ii) In the background of facts and circumstances of the case, both the Intervenor have got no locus nor any prejudice would be caused to them if the application is allowed by this Adjudicating

Authority as they can approach this Adjudicating Authority under Section 7 of IBC, 2016 if they so wish. The applicant has placed reliance on various decisions of the Hon'ble NCLAT in support of its claim that this kind of Intervenor had no locus in such cases.

- (iii) The plea taken by the Intervenor that impugned applications under Section 9 of IBC, 2016 are also pending does not stand in law as in most of the cases, the Corporate Debtor has got strong case on merits and the amount involved in these applications can be paid based upon the negotiations which may take place between the Corporate Debtor and such Operational Creditors as the funds available with the Corporate Debtor were more than sufficient to settle such Operational Creditors. It is also contended that such applications are already before this Adjudicating Authority and allowing withdrawal of CIRP under Section 12A of IBC, 2016 r.w. Rule 11 of NCLT Rules, 2016 would not prejudice the cause of action or merit of the applications filed under Section 9 of IBC, 2016.
- (iv) Applicant has placed reliance on various judicial decisions to support his case.

6. On the other hand, the plea taken by both Intervenor is that specific Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 exists and Form-FA has also been prescribed for the purpose of withdrawal or setting aside of CIRP after admission of a Corporate Debtor into CIRP and in the present case,

application has not been filed in the specified manner therein, hence, the same needs to be dismissed. Secondly, it has been pleaded that after admission of a Corporate Debtor into CIRP, the proceedings become in *rem* and interests of all stakeholders have to be taken into consideration while disposing of an application filed under Section 12A of IBC, 2016. They have also placed reliance on the decision of Hon'ble Supreme Court in the case of Swiss Ribbons for their contentions.

7. On behalf of Interim Resolution Professional (hereinafter referred to as “IRP”), Learned Senior Counsel appeared from time to time and narrated about the status of the Corporate Debtor. Learned Senior Counsel also made submissions on the scope and applicability of Rule 11 of NCLT Rules, 2016. It was also submitted that the provisions of Section 12A of IBC, 2016 as well as Regulation 30A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 were of directory nature. The Learned Senior Counsel also submitted that, in case, the application under Section 12A of IBC, 2016 would be dismissed, then, period from 18.12.2020 till disposal of this application need to be excluded from the period of CIRP.

8. We have considered the submissions made by both the sides and material on record. It is an admitted fact that subsequent to admission of Corporate Debtor into CIRP by the order of this Adjudicating Authority, the amount due to the concerned Operational Creditor has been paid and settled. It is also an admitted position that COC has not

been formed as yet, though, IRP has been appointed and IRP is running the affairs of the Corporate Debtor as a going concern and also conducting CIRP in a limited manner. It is also to be noted that Corporate Debtor was admitted into CIRP by an order of this Adjudicating Authority on 18.12.2020 and, thereafter, multiple hearings have taken place. It is also a matter of record that on earlier occasions M/s KKR India Financial Services was opposing this application and simultaneously they also submitted before this Adjudicating Authority that settlement talks were also going on with the Corporate Debtor. On a few occasions adjournments were given on the basis of understanding that a settlement could be worked out between M/s KKR India Financial Services and Corporate Debtor. It is also to be noted that only one more party has approached this Authority opposing this application who is also a Financial Creditor, though, there are other financial lenders as well. It is also an admitted position that none of the Operational Creditors has filed the application under Section 9 of IBC, 2016 opposing this application.

9. Now, having discussed the factual background, the first question which arises for our consideration is that under which provision of law, the impugned application needs to be dealt with? The question of non-applicability of Regulation 30A of IBBI (Corporate Insolvency Resolution Process for Corporate Persons) Regulation, 2016, being an instance of not being in terms with the provisions of Section 12A of IBC, 2016 has been raised by the applicant and it has also been contended that Rule

11 of NCLT Rules, 2016 was applicable whereas Intervenor has pleaded that this application needs to be considered in accordance with the provisions of said Regulation. In this regard, we would have to look into the legislative history relating to the provisions of Section 12A of IBC, 2016 and Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 r.w. Form-FA of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as applicable from time to time and inter play between such provisions. Further, we may also be required to look into the scope of our jurisdiction under Rule 11 of NCLT Rules, 2016 and whether such rule can be put into operation for disposing of the present application. As far as the applicability of Rule 11 of NCLT Rules, 2016 is concerned, prior to decision of Hon'ble Supreme Court in the case of *Swiss Ribbons Pvt. Ltd vs Union of India*, there was some cloud on the applicability of Rule 11 of NCLT Rules, 2016 for allowing withdrawal of CIRP, however, now this issue does not require any deliberation as the Hon'ble Supreme Court in the case of *Swiss Ribbons Pvt. Ltd vs. Union of India* has categorically stated that in a situation not covered under Section 12A of IBC, 2016, the Rule 11 of NCLT Rules, 2016 can be invoked.

10. On the aspect whether provisions of Section 12A of IBC, 2016 or Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and Form-FA were applicable in this kind of a situation, this Authority in the case of *Huthamaki PPL Ltd vs. Manpasand Beverages Limited in IA 196 of 2020 in CP (IB) 503 of 2019*

held that Rule 11 of NCLT Rules, 2016 was applicable and not the Regulation 30A of IBBI (CIRP) Regulations, 2016. The relevant findings are reproduced as under:

20. Now, we shall discuss the legal regime governing such applications. This legal regime can be divided into the following states: (i) Pre-Section 12A stage (ii) Post 12A r.w. Regulation 30A of CIRP Regulations, 2016 as applicable from 03.07.2018 (iii) Section 12A r.w. amended Regulation 30A of CIRP Regulations, 2016 made effective from 25.07.2019.

Before we go stage wise, we consider it pertinent to reproduce the findings of the Hon'ble Supreme Court relating to Section 12a issue, in the case of Swiss Ribbos (Supra) in para 49,50,52,53 as under:

49 .Section 12A was inserted by the Insolvency and Bankruptcy (Second Amendment) Act, 2018 with retrospective effect from 06.06.2018. It reads as follows:

12-A. Withdrawal of application admitted Under Section 7, 9 or 10.—

The Adjudicating Authority may allow the withdrawal of application admitted Under Section 7 or Section 9 or Section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified.

50. The ILC Report of March 2018, which led to the insertion of Section 12A, stated as follows:

29.1 Under Rule 8 of the CIRP Rules, the NCLT may permit withdrawal of the application on a request by the applicant before its admission. However, there is no provision in the Code or the CIRP Rules in relation to permissibility of withdrawal post admission of a CIRP application. It was observed by the Committee that there have been instances where on account of settlement between the applicant creditor and the corporate debtor, judicial permission for withdrawal of CIRP was granted [Lokhandwala Kataria Construction Pvt. Ltd. v. Ninus Finance & Investment Manager LLP, Civil Appeal No. 9279 of 2017; Mothers Pride Dairy India Private Limited v. Portrait Advertising and Marketing Private Limited, Civil Appeal No. 9286/2017; Uttara Foods and Feeds Private Limited v. Mona Pharmace, Civil Appeal No. 18520/2017]. **This practice was deliberated in light of the objective of the Code as encapsulated in the BLRC Report, that the design of the Code is based on ensuring that "all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution." Thus, it was agreed that once the CIRP is initiated, it is no longer a proceeding only between the applicant creditor and the corporate debtor but is envisaged to be a proceeding involving all creditors of the debtor. The intent of the Code is to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors.**

29.2 On a review of the multiple NCLT and NCLAT judgments in this regard, the consistent pattern that emerged was that a settlement may be reached amongst all creditors and the debtor, for the purpose of a withdrawal to be granted, and not only the applicant creditor and the debtor. On this basis read with the intent of the Code, the Committee unanimously agreed that the relevant Rules may be amended to provide for withdrawal post admission if the CoC approves of such action by a voting share of ninety per cent. It was specifically discussed that Rule 11 of the National Company Law Tribunal Rules, 2016 may not be adopted for this aspect of CIRP at this stage (as observed by the Hon'ble Supreme Court in the case of Uttara Foods and Feeds Private Limited v. Mona Pharmacem, Civil Appeal No. 18520/2017) and even otherwise, as the issue can be specifically addressed by amending Rule 8 of the CIRP Rules.

52. It is clear that once the Code gets triggered by admission of a creditor's petition Under Sections 7 to 9, the proceeding that is before the Adjudicating Authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a committee of creditors is constituted (as per the timelines that are specified, a committee of creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). **We make it clear that at any stage where the committee of creditors is not yet constituted, a party can approach the NCLT directly, which Tribunal may, in exercise of its inherent powers Under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case.**

53. The main thrust against the provision of Section 12A 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, 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 12A also passes constitutional muster.

- 21.** From the perusal of above observations, we can see that the Hon'ble Supreme Court has extracted the views expressed, in this regard, in the report of Insolvency Law Committee March, 2018. In the said report, as reproduced here-in-before, it has been clearly mentioned that once CIRP is initiated, it is no longer proceeding only between the applicant creditor

and the corporate debtor but it is envisaged to be a proceeding involving all creditors of the debtor. It is specifically mentioned in this report that the intent of the CODE is to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors. Having regard to this view of the Government, the Hon'ble Supreme Court has also observed that hearing of all concerned parties and considering relevant factors on the facts of each case was necessary. These observations also apply not only when this Authority is exercising jurisdiction under Section Rule 11 of NCLT, Rules, 2016 but also apply to situation covered under Section 12A because the effect of proceedings under both these provisions is same ultimately.

Now, we move to judicial review of legal provisions, in this regard, being in operation at different points of time.

22. **(i) Pre-Section 12A stage-** Originally, only Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 provided for a situation where during the pendency of the application prior to its admission, if the parties arrived at a settlement between them, an application could be allowed to be withdrawn. However, if an application was admitted then there existed no provision in the CODE under which an order passed for admitting the corporate debtor into CIRP could be set aside. In that situation, considering the objects and preamble of IBC, 2016, the Adjudicating Authority or the Appellate Authority, exercised their inherent jurisdiction as contained in Rule 11 of NCLT Rules, 2016 and NCLAT Rules, 2016. While allowing applications for withdrawal of CIRP, the Benches took various factors into consideration based upon the facts of each case before allowing or rejecting such applications. However, as noted in ILC report, March 2018, even then both NCLT and NCLAT preferred settlement being reached amongst all creditors and the debtor, for the purpose of withdrawal to be granted, and not only the application creditor and the debtor. Thus, consideration of interest all creditors including of those creditors whose applications were already pending or who objected to such withdrawal, has been a fundamental consideration while setting aside the CIRP. The other mechanism which was adopted in the absence of any specific provisions in the CODE, Rules and Regulations was that the Hon'ble Supreme Court was approached under Article 136 to the Constitution of India for setting aside the order of CIRP on account of settlement. When such instances became quite frequent, the Hon'ble Supreme Court in the case of *Ultra Foods and Feeds Private Limited vs. Mona Pharmachem* observed that the some specific provisions were the necessity of the hour so that a mechanism was provided in the law itself whereby such applications or situations could be handled by the Adjudicating Authority without burdening either the Appellate Authority or the Hon'ble Supreme Court. The committee was appointed for review of various provisions of the CODE. The committee submitted its report which

lead to insertion of Section 12A and Regulation 30A r.w. Form-FA in CIRP Regulations, 2016.

Now, we arrive at second stage.

Section 12A was introduced w.e.f. 06.06.2018 which is reproduced as under:

12A. Withdrawal of application admitted under section 7, 9 or 10.

The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be prescribed.

Regulation 30A was introduced w.e.f. 04.07.2018 which is reproduced as under:

30A. Withdrawal of application.

- (1) An application for withdrawal under section 12A shall be submitted to the interim resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule before issue of invitation for expression of interest under regulation 36A.
- (2) The application in sub-regulation (1) shall be accompanied by a bank guarantee towards estimated cost incurred for purposes of clauses (c) and (d) of regulation 31 till the date of application.
- (3) The committee shall consider the application made under sub-regulation (1) within seven days of its constitution or seven days of receipt of the application, whichever is later.
- (4) Where the application is approved by the committee with ninety percent voting share, the resolution professional shall submit the application under sub-regulation (1) to the Adjudicating Authority on behalf of the applicant, within three days of such approval.
- (5) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (4)."

Form-FA as effective from 04.07.2018 is reproduced as under:

FORM FA

APPLICATION FOR WITHDRAWAL OF CORPORATE INSOLVENCY PRESOLUTION PROCESS

(Under Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)

[Date]

To

The Adjudicating Authority

[Through the Interim Resolution Professional / Resolution Professional] [name of corporate debtor]

Subject: Withdrawal of Application admitted for corporate insolvency resolution process of [name of corporate debtor]

I, [name of applicant], had filed an application bearing [particulars of application, i.e, diary number/ case number] on [Date of filing] before the Adjudicating Authority under [Section 7 / Section 9/ Section 10] of the Insolvency and Bankruptcy Code, 2016. The said application was admitted by the Adjudicating Authority on [date] bearing [case number].

2. I hereby withdraw the application bearing [particulars of application i.e, diary number/ case number] filed by me before the Adjudicating Authority under [Section 7 / Section 9/ Section 10] of the Insolvency and Bankruptcy Code, 2016.

3. I request the Committee of Creditors to approve my application for withdrawal.

4. I authorize the resolution professional to file this application of withdrawal with the Adjudicating Authority on my behalf, if it is approved by the Committee of Creditors with ninety percent voting power.

5. I attach the required bank guarantee towards estimated cost incurred for purposes of regulation 31(c) and (d) till the date of application.

(Signature of the applicant)

Date:

Place:

[Note: In the case of company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary/designated partner and in the case of other entities, an officer authorized for the purpose by the entity]]

23. From the perusal of substantive provisions as well as subordinate legislation i.e. Regulation 30A and Form -FA it is observed that both were in sync with each other and such Regulation 30A provided the procedure for the implementation or execution of provisions of Section 12A of IBC, 2016. Such situation remained in operation for certain period. In the meanwhile, the Hon'ble Supreme Court considered the constitutional validity of various amendments which included the constitutional validity of Section 12A of the CODE as well. These issues have been dealt with by the Hon'ble Supreme Court in the celebrated case of Swiss Ribbons. This order was pronounced on 25.01.2019. In para 52 of the said order, a situation of non-applicability of Section 12A for pre-COC stage was posed before the Hon'ble Supreme Court because Section 12A dealt with a situation post constitution of COC only. The Hon'ble Supreme Court while answering this issue held that such situation could still be considered by NCLT or NCLAT under Rule 11 of Rules applicable to them which provided for exercise of inherent jurisdiction by such Institutions/Forums. Thus, the Hon'ble Supreme Court after acknowledging the fact of lacuna existing in the provisions of law provided a way out or a mechanism which was already prevalent and adopted prior to insertion of Section 12A. The Adjudicating Authority or the Hon'ble NCLAT were found to be competent to decide the issues after considering the interests of all stakeholders as well as relevant factors each case. This situation also remained in operation for a certain period.

Now, we reach to III stage.

24. Thereafter, w.e.f. 25.07.2019 along with an amendment ordinance was passed by Government thereby several amendments were made to the provisions of IBC, 2016. However, Section 12 A was not amended and it stands in the same format as introduced originally. The IBBI also formulated new regulations and amended some already existing Regulations. Regulation 30A was amended by inserting Clause (a) in sub-regulation 1 of Regulation 30A

which provided for withdrawal of application before constitution of COC by application through Interim Resolution Professional. Consequential amendments have been made in subsequent sub-regulations. In sub-regulation 6, it is provided that the Adjudicating Authority may approve the withdrawal application submitted either in case of pre-constitution stage of COC or post constitution of COC. There are some other sub-regulations have been added to facilitate the process without any hassle. Form FA has also been amended in conformity with amended Regulation 30A. Revised Regulation 30A and Form FA dated 25.07.2019 are reproduced as under :

"30A. 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 Schedule 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). Page 2 of 6
- (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 subregulation (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. ”

Form FA dated 25.07.2019 are reproduced as under :

FORM FA
APPLICATION FOR WITHDRAWAL OF CORPORATE INSOLVENCY RESOLUTION PROCESS

]Under Regulation 30A of the Insolvency and Bankruptcy Board of India)Insolvency Resolution Process for Corporate Persons (Regulations, 2016[

]Date[

To
The Adjudicating Authority

*]Through the Interim Resolution Professional /Resolution Professional/[
]name of corporate debtor[*

Subject :Withdrawal of Application admitted for corporate insolvency resolution process of]name of corporate debtor[

I,]Name of applicant], had filed an application bearing]particulars of application, i.e, diary number/ case number] on]Date of filing] before the Adjudicating Authority under]Section 7 / Section 9/ Section 10] of the Insolvency and Bankruptcy Code, 2016. The said application was admitted by the Adjudicating Authority on]date] bearing]case number].

2. I hereby withdraw the application bearing]particulars of application, i.e, diary number/ case number] filed by me before the Adjudicating Authority under]Section 7 / Section 9/ Section 10] of the Insolvency and Bankruptcy Code, 2016.

3. I attach the required bank guarantee as per sub-regulation (2) of regulation 30A.

)Signature of the applicant(

Date :

Place:

]Note :In the case of company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary/designated partner and in the case of other entities, an officer authorised for the purpose by the entity[

25. *When we compare the provisions of Regulation 30A which were inserted in the CIRP regulations after the insertion of Section 12A and amended regulation 30A as effective from 25.07.2019, it is noted that stage of pre-constitution of COC is now being covered in Clause (a) of Regulation 30 A(1). It may be recalled that the Hon'ble Supreme Court, in the case of Swiss Ribbons, had dealt with this gap as such situation was not covered under Section 12A of*

the CODE. At this stage, we consider it pertinent to mention that power to make regulations is given to IBBI. However, Section 240(1) specifically mentions that IBBI can make regulations **consistent with this CODE and the rules made there-under to carry out the provisions of the CODE.** Thus, such power of making regulations is for limited purpose i.e. to carry out the provisions of CODE. Accordingly, in our view, any regulation, so made, if inconsistent with the CODE and Rules made there-under then it would amount to violation of provisions of Section 240(1) of the CODE. Apart from that Section 240(2) provides various specific situations apart from general power as mentioned in Section 240(1). From the perusal of various clauses of Section 240(2), it is noted that these clauses cover the situation starting from Section 3 of the CODE to Section 222 of the CODE. However, it is noticeable that Section 12A is not covered therein either w.e.f. 03.07.2018 or 25.07.2019, hence, Regulation 30A has been framed under general power give to IBBI under Section 240(1) of the Code.

26. Having stated so, it is further noted that the Central Government under Section 239 of the CODE is authorized to make rules for carrying out the provisions of the CODE. In exercise of such power, the Central Government has framed (Insolvency and Bankruptcy application to Adjudication Authority) Rules, 2016. We may also take reference of the term "prescribed" as defined in Section 5(26) which refers to rules made by the Central Government. Whereas Section 5(28) provides the definition of term "regulations" which means regulation made by IBBI and if it is read with Section 5(32) then we notice that regulations specify certain process for carrying out the provisions of the CODE. As noted earlier, such regulations are inferior to both provisions of CODE and Rules made by Central Government. Two questions arise for our consideration: (i) when various amendments were made by an ordinance, we do not find any reason as to why provisions of Section 12A could not be amended itself and consequently, an amendment made in regulation 30A would have been in parity if the required amendment in Section 12A would have been carried out firstly. Such approach of the legislature, in fact, leads to an inference that legislature thought it fit to leave disposal of such cases to the discretion of Adjudicating Authority /NCLAT under Rule 11 of respective Rules. (ii) Second question which is critical and important from the aspect of constitutional propriety is whether the route of delegated legislation/subordinate legislation can be resorted to in such manner particularly when that exercise results into a manifest inconsistency between the substantive provision of law and such subordinate legislation. It may not be out of place to mention that Hon'ble Supreme Court in the absence of provision at the nature of Section 12A authorized the Adjudicating Authority to give the necessary relief by applying the provisions Rule 11 of NCLT Rules, 2016. In view of above position of law, we are of the view that in view of specific provisions of Section 240(1), such regulation being inconsistent to the main provisions of the CODE, this part of regulation 30A is not binding on us. Having said so, we are further of the view that in view of the inherent power of this Adjudicating Authority, being NCLT, and the observations of Hon'ble Supreme Court, still we can consider application of this nature under Rule 11 of NCLT Rules, 2016 and in that situation considerations which apply to exercise of such discretionary power in the interests of justice or to prevent misuse of the provisions of law,

those considerations need to be given due weightage by this Authority. Accordingly, we hold that in this kind of situation which is now present before us, there is no force in the contention of the applicant that provision of law is clear and we should decide the application in terms of provisions of regulation 30A. Accordingly, we need to consider the application filed by objectors before arriving at the final conclusion exercising our power under Rule 11 of NCLT Rules, 2016.

27. Our views as regard to nature and scope of Regulations made by IBBI further find support from the decision of Hon'ble NCLAT in the case of *Neelkanth Township and Construction Private Limited vs. Urban Infrastructure Prestige Limited in Company Appeal (AT)(Insolvency) No. 44 of 2017 order dated 11.08.2017 reported in MANU/NL/0063/2017*. The relevant paragraphs are as under:

18. *It is well settled that rules of procedure are to be construed not to frustrate or obstruct the process of adjudication under the substantive provisions of law. A procedural provision cannot override or affect the substantive obligation of the adjudicating authority to deal with applications under Section 7 merely on the ground that Board has not stipulated or framed Regulations with regard to sub-section 3(a) of Section 7. The language of Section 240, whereby Board have been empowered to frame regulations is clear that the said regulation should be consistent with the 'I & B' Code and the rules made thereunder by the Central Government.*

19. In exercise of power conferred by Section 239 read with Sections 7, 8, 9 and 10 of the 'I & B code', the Central Government framed the rules known as "Insolvency 85 Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as Adjudicating Authority Rules, 2016). As per Rule 41, a 'Financial Creditor' required to apply itself or jointly in an application under Section 7 in terms of Form-1 attached thereto. Part V of Form-1 deals with particulars of 'Financial Debt' (documents, record and evidence of default), as quoted below:-

PART V

PARTICULARS OF FINANCIAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]

- 1 .PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR. ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)**
- 2 .PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)**
- 3 .RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)**
- 4. DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSION ACT, 1925 (10 OF 1925) (ATTACH A COPY)**

5. THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH A COPY)
- 6 .A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY (ATTACH A COPY)
7. COPIES OF ENTRIES IN A BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOKS EVIDENCE ACT, 1891 (18 OF 1891)
8. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT"

20 .The rules framed by the Central Government under Section 239 having prescribed the documents, record and evidence of default as noticed above, we hold that in absence of regulation framed by the Board relating to record of default recorded with the information utility or other record of evidence of default specified, "the documents", 'record' and 'evidence of default' prescribed at Part V of Form-1, of the Adjudicatory Rules 2016 will hold good to decide the default of debt for the purpose of Section 7 of the 'I & B Code'.

21. We further hold that the 'Regulations framed by the Board' being subject to the provisions of 'I & B Code' and rules framed by the Central Government under Section 239, 'Part V of Form - 1' of Adjudicating Authority Rules, 2016 framed by Central Government relating to 'documents', 'record' and 'evidence of default', will override the regulations, if framed by the Board and if inconsistent with the Rule. However, it is always open to Board to prescribe additional records in support of default of debt, such as records of default recorded with the information utility or such other record or evidence of default in addition to the records as mentioned in Part V of Form-I.

28. Before leaving the aspect of validity of inconsistent Regulations, we consider it necessary to point out that similar situation is noticeable from the amendment of Regulation 38(1A) as regard to disclosure of or quantification of CIRP costs in the resolution plan and which requirement has been modified form time to time ultimately it has been deleted whereas Section 30(2)(a) still provides for payment of insolvency resolution process costs in a manner specified by the IBBI in priority to the payment of other debts of the corporate debtor. Such amendment of Regulation 38(1A) leads to a situation where as of now no manner remains specified by IBBI and this lacuna leads to litigation as regard to what cost were considered as CIRP costs and what was the quantum of such costs in the resolution plan. Another situation which can be noted is in relation to an application filed before this Authority for non-implementation of resolution plan approved. Section 33(3) provides that any person, other than the corporate debtor, whose interests are prejudicially affected by an act of contravention of resolution plan by the successful resolution applicant, such person can file an application to the Adjudicating Authority for passing of a liquidation order. In Regulation 39(9), it is provided that a creditor who is aggrieved by non-implementation of resolution plan approved under sub-section 1 of Section 31 may apply to the Adjudicating Authority for directions. Such regulation does not specify as to what directions can be given on happening of event

of non-implementation of an approved resolution plan other than the order of liquidation under Section 33(3) of the CODE. This sub-regulation has been brought on CIRP Regulation w.e.f. 24.01.2019 and it is in an apparent conflict that the specific provisions of Section 33(3) of the CODE as it creates a situation of different options to different category of the people even though the creditor would certainly be an aggrieved party but an aggrieved party as mentioned in Section 33(3) can be a person other than the creditor as well subject to locus of such party to intervene in the matter of non-implementation of an approved resolution plan.

It is also noteworthy that before amending the Regulation 30A of CIRP Regulations, IBBI published a discussion paper thereon along with draft regulation dated 08.05.2019. IBBI, in this discussion paper, took note of various rulings which, *inter alia*, covered the aspect that Regulation 30A could not override the substantive provisions of Section 12A of IBC, 2016, CIRP could be withdrawn even after issue of EOI in exceptional cases as Regulation 30A (1) was not mandatory but directory. The Note of ruling of Hon'ble Supreme Court in the case of Swiss Ribbons was also taken wherein the Hon'ble Supreme Court had held that Rule 11 of NCLT Rules, 2016 can be invoked prior to constitution of COC. Accordingly, the amendment was proposed for correcting the course of action in view of above judicial rulings. The draft proposed Regulation 30A in such note stood as under:

Withdrawal of application.

30A. (1) An application for withdrawal of an application filed under section 7, 9 or 10 of the Code may be made,- (a) before the constitution of the committee, by the applicant through the interim resolution professional; or (b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule, to the Adjudicating Authority: Provided that where the application is submitted to the resolution professional under clause (b) after the issue of expression of interest under regulation 36A, the applicant shall state in writing any special circumstance that necessitates withdrawal of application.....
Not relevant, hence, not reproduced.

It is interesting to note that draft Regulation 30A(1) did not have any reference to Section 12A of the Code where as actually substituted Regulation 30A reads as “an application for withdrawal under Section 12A of IBC, 2016 may be made” to the Adjudicating Authority. Thus, even IBBI recognized its limitation in view of scope of powers delegated to IBBI by enabling Section 240 of IBC, 2016 that it could not make a Regulation independent of Section 12A of IBC, 2016 for the reason that power to make Regulation 30A is itself derived therefrom as Section 12A provides “as in such manner as may be specified”. The term “specified” has been defined in Section 3(32) of the Code, it means that specified by Regulations made by IBBI under this Code.

11. Thus, on the basis of above legal analysis, it can be safely concluded that in a situation where COC is not formed after admission of Corporate Debtor into CIRP, Rule 11 of NCLT Rules, 2016 would be applicable and not the Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as pleaded by the Intervenors. Although, substantial aspects in respect of this issue have already been considered in the aforesaid case, as reproduced here-in-before which are sufficient to dispose of the matter by exercising inherent powers of Rule 11 of NCLT Rules, 2016, however, a specific plea has also been raised on behalf of applicant that Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is beyond the scope of powers given to IBBI to make secondary legislation or delegated legislation under Section 240 of IBC, 2016,

hence, for this reason also it is null and void to the extent, it is inconsistent with Section 12A of IBC, 2016. Hence, we consider it appropriate to look into this aspect a little only with respect to conflict between the Code and Regulations, being a Quasi-Judicial Tribunal, we cannot decide the constitutionality of provision of law. The practice of delegated legislation is established across all jurisdictions. The scope of delegated legislation essentially depends upon the power given by the parent legislature. There could be an instance where some wide powers are given by legislature by providing policy guidelines in a specific manner and there could be a situation where the legislature may give power of delegated legislation in a restricted manner. To put it differently, in some cases, the executive may even be empowered to frame Rules which may cover a situation not provided in the substantive legislation. This would be of course subject to scrutiny/approval of parliament/legislature at some stage. To further explain this position of law, we need to consider two different statutes and power given to Central Government to make Rules there-under. Incidentally, both these statutes are inter-connected and relevant for our purposes. One is the Companies Act, 2013 and other is Insolvency and Bankruptcy Code, 2016 itself. For this purpose, we reproduce Section 239, Section 240(1), Section 240(2) and Section 241 of IBC, 2016 as under:

239. Power to make rules. -

(1) *The Central Government may, by notification, make rules for carrying out the provisions of this Code.*

(2) *Without prejudice to the generality of the provisions of sub-section (1), the Central Government may make rules for any of the following matters, namely: —*
Not relevant, hence, not reproduced.

240. Power to make regulations. -

- (1) *The Board may, by notification, make regulations consistent with this Code and the rules made thereunder, to carry out the provisions of this Code.*
- (2) *In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely: —*
- Not relevant, hence, not reproduced.

241. Rules and Regulations to be laid before Parliament. -

Every rule and every regulation made under this Code shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

12. From the perusal of Section 239 and Section 240 of IBC, 2016, it is apparent that a general power of making Rules and Regulations for carrying out the provisions of this Code has been given to both Central Government and IBBI. It is noteworthy that under Section 240(1) of IBC, 2016, an obligation has further been cast upon IBBI to make Regulations consistent not only with the Code but also with the Rules made by the Central Government there-under. Thus, the power of the IBBI is further restricted as compared to the powers given to the Central Government. Both Section 239(2) and Section 240(2) of IBC, 2016 provide instances where Rules/Regulations can be made for matters specified therein. Section 241 provides that such Rules and Regulations will have to be laid before parliament within the specified period and the parliament may approve or modify or annul the same, however, that will not affect the validity of anything previously done under that Rule or Regulation. Power under Section 239 or Section 240 of IBC, 2016 is an instance of a limited delegated legislative power given both to Central Government and IBBI as both Central Government and IBBI can make

Rules/Regulations only to execute provisions of the Code and cannot provide independent solution where no provision exists or expand the scope of any specific provision. Even Section 241 of IBC, 2016 provides only for legislative concurrence on the Rules/Regulations made under Section 239 and Section 240 of IBC, 2016. The Parliament has reserved the power with itself to modify or annul any Rules/Regulations and, in our view, such power unless the provisions of Section 239 or Section 240 of IBC, 2016 are amended, cannot give any power to either to Central Government or IBBI to act beyond the scope of delegation of powers under Section 239 and Section 240 of IBC, 2016. If it is to be interpreted in a manner otherwise, then, in that event provisions of Section 239 or Section 240 of IBC, 2016 would become redundant to this extent and which cannot be the legislative policy.

13. Now, to validate this view, we need to consider the provisions of Section 469 of Companies Act, 2013 which read as under:

469. Power of Central Government to make rules.— (1) *The Central Government may, by notification, make rules for carrying out the provisions of this Act.*

(2) *Without prejudice to the generality of the provisions of sub-section (1), the Central Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provision is to be or may be made by rules.*

(3) *Any rule made under sub-section (1) may provide that a contravention thereof shall be punishable with fine which may extend to five thousand rupees and where the contravention is a continuing one, with a further fine which may extend to five hundred rupees for every day after the first during which such contravention continues.*

(4) *Every rule made under this section and every regulation made by Securities and Exchange Board under this Act, shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any*

modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

14. On the face of it, provisions of provisions of Section 469(2) of Companies Act, 2013 give much wider powers to Central Government in a sense that Central Government could also make Rules for situations not covered by substantive legislation as compared to Section 239(2) and Section 240(2) of IBC, 2016 wherein specific situations would have to be covered by the parliament at the first instance and, only thereafter, Rules/Regulations can be made for those situations. To further understand the wider scope of Section 469(2) of Companies Act, 2013, we may also compare the same with provisions of Section 642 of Companies Act, 1956 which read as under:

642. POWER OF CENTRAL GOVERNMENT TO MAKE RULES

(1) In addition to the powers conferred by section 641, the Central Government may, by notification in the Official Gazette, make rules –
(a) for all or any of the matters which by this Act are to be, or may be, prescribed by the Central Government ; and
(b) generally to carry out the purposes of this Act.

(2) Any rule made under sub-section (1) may provide that a contravention thereof shall be punishable with fine which may extend to 1 [five thousand] rupees and where the contravention is a continuing one, with a further fine which may extend to 2 [five hundred] rupees for every day after the first during which such contravention continues.

(3) Every rule made by the Central Government under sub-section (1) shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

3 [(4) Every regulation made by the Securities and Exchange Board of India as under this Act shall be laid, soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be

comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.]

15. Before, proceed with comparative analysis of provisions of Section 469 of Companies Act, 2013 and Section 642 of Companies Act, 1956, it is pertinent to mention that Section 426 was introduced by an amendment in 2002 which was almost analogous to Section 469 as it exists today. Section 642(1), as noted, had two clauses (a) & (b) which have been merged in Section 469(1) of the Companies Act, 2013. The provision contained in Section 469(2) did not exist, hence, this is a material departure. Further, Section 469(2) can be split in two parts for proper understanding.

First part-without prejudice to the generally of provision of sub clause (1), Central Government may make rules for all or any of the matters which by this Act are required to be, or may be prescribed.

Second part – without prejudice to the generally of provision of sub clause (1), Central Government may make rules for all or any of the matters in respect of which provision is to be made or may be made by rules.

As far as first part is concerned, it denotes standard legislative practice to give general power to the executive to make delegated legislation without seeking specific approval by way of amendment every time to achieve the purposes of Act. One condition which remains is that after any rules and regulations is made, the same is to be laid before parliament before specified time and such provision is given in Section 469(4) of the Companies Act, 2013. In 1956 Act, Clause-b of Section

642(1) used the words “generally to carry out purposes to this Act” whereas in Section 469(1), the words are more specific as the words “for carry out the provision of this Act” have been used. One may say that the scope of rule making power has been somewhat curtailed as rules should be consistent with the provisions of the Act. There may not be any quarrel with this view. However, fact remains that substantive rule making power has been given to the Central Government by virtue of second part of Section 469(2) as from the plain reading of such second part, it is apparent that rules can be made not only in respect of all the matters for which rules are or may be stated to be prescribed but also **for making enabling provisions, distinct from mandatory substantive provision.** Thus, ambit and reach of delegated legislation has been significantly expanded. The reason for such expanded rule making power could be found from the relevant comments of 57th report of the Standing Committee on the Company Bill, 2011 which is reproduced as under:

“There are many matters which would be prescribed under the Rules. There is a need to strike balance between flexibility and certainty of law to face the challenges of increasing globalization. There is every possibility that the requirements may be changed frequently, by way of changing rules. It is suggested that all draft rules should be kept open for public debate for sixty days.”

16. From the perusal of the above comments of Standing Committee, it is evident that a conscious decision has been taken by parliament to give wider powers to the Central Government under Section 469(2) of Companies Act, 2013 which has not been so in the case of Section 239 and Section 240 of IBC, 2016 and, in our view, rightly so considering

the fact that IBC, 2016 is a new legislation. Following this, we have looked into the validity of Regulation 30A of IBBI (CIRP) Regulations, 2016 made in terms of Section 240(1) of IBC, 2016 to a limited extent that such provision, being inconsistent to the provisions of the Code, cannot be applied in the facts and circumstances of the case in view of provisions of Section 240 of IBC, 2016.

17. Admittedly, NCLT is the Adjudicating Authority in terms of provisions of Section 5(1) of IBC, 2016. The Hon'ble Supreme Court, in the case of *B.K. Educational Society*, has also held that provisions of NCLT Rules, 2016 would be applicable while discharging of the functions by NCLT as Adjudicating Authority under IBC, 2016. Thus, having regard to provisions of Section 469(2) of Companies Act, 2013, NCLT can exercise its inherent jurisdiction under Rule 11 of NCLT Rules, 2016 for a situation not specifically covered under any provisions of IBC, 2016. It is needless to mention that NCLT Rules, 2016 are also applicable to IBC proceedings where no specific Rules/Regulations have been prescribed under IBC, 2016 for that situation. It has also been held that Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 cannot be applied to this situation since this Regulation is inconsistent with the provisions of Section 12A of IBC, 2016. Further, this Regulation is interwoven with the Section 12A of IBC, 2016 as its source is Section 12A of IBC, 2016 only, hence, a situation which is not covered under Section 12A cannot be covered by Regulation 30A of IBBI (Insolvency Resolution Process for Corporate

Persons) Regulations, 2016 as well. Now, we have to look into the scheme, structure and object of provision of IBC, 2016 to find out whether inherent jurisdiction under Rule 11 of NCLT Rules, 2016 can be invoked in the facts of the case. It is also relevant to mention that neither under Section 12A of IBC, 2016, Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 there is no specific bar for application against invocation of Rule 11 of NCLT Rules, 2016 nor any other provisions exists under IBC, 2016 which covers a situation that prior to constitution of Committee of Creditors, if there happens a settlement and application for withdrawal of CIRP is filed, what can be done. Thus, considering all legal aspects, exercise of jurisdiction under Rule 11 of NCLT Rules, 2016 to the fact situation cannot be doubted in any manner.

18. Having obtained the jurisdiction under Rule 11 of NCLT Rules, 2016, now, we have to see that what aspects we need to consider while exercising such jurisdiction. One of the aspects is that we cannot grant a relief by exercising inherent jurisdiction which is against the object and scheme of IBC, 2016. Another aspect is that relief also cannot contravene any specific provisions of law. Third aspect is that who can approach this Authority for appropriate relief under Rule 11 of NCLT Rules, 2016. Where Regulation 30A of IBBI (CIRP) Regulations, 2016 applies, the Regulation provides as to who can file an application in Form-FA and procedure therefor. In case of Rule 11 of NCLT Rules, 2016 locus of party is to be seen with regard to its interests in the

subject matter. The Hon'ble Supreme Court has also stated in its order that a party may approach, hence, having regard to settled judicial legal principle that a person who is aggrieved or whose interests are going to be prejudiced would *prima facie* have a locus to file an application as a stranger to the proceedings cannot approach. In the present case, this application has been filed by a joint shareholder and it has not been the case of Intervenor that such joint shareholder is not having any interest in the subject matter. Therefore, the *prima facie* locus of the applicant gets established. In this regard, we may further add that various stakeholders are involved and having regard to preamble of IBC, 2016, an interested stakeholder can approach this Authority with the request to exercise its inherent jurisdiction under Rule 11 of NCLT Rules, 2016 in respect of proceedings of this nature subject to compliance of other legal requirements. In this view of the matter and after holding that Regulation 30A of IBBI (CIRP) Regulations, 2016 is not applicable, we reject the contention of the Intervenor that application must be filed by IRP at the instance of concerned Operational Creditor. Fourth aspect, whether facts of the case justify the exercise of inherent jurisdiction at all or not? As far as first two aspects are concerned, we have already discussed the legal position and are aware of such limitations. Now, coming to the third aspect, it is worthwhile to mention that inherent jurisdiction is equity jurisdiction which is exercised to meet the ends of substantial justice, hence, person seeking relief must come with clean hands. In the present case, the Corporate Debtor has not contravened the provisions of Section 14 of IBC, 2016 since

imposition of moratorium there-under after admission of the Corporate Debtor into CIRP. Further, no other act of forgery or fraud or violation of any other provision of IBC, 2016 has been brought to our notice. Thus, the conduct of the Corporate Debtors or its management during such period cannot be doubted. Having said so, M/s KKR India Financial Services in its application have referred to some allegations of siphoning off funds on the basis of order of Hon'ble Delhi High Court. The applicant has clarified that subject order of Hon'ble Delhi High Court is pending for consideration before Hon'ble Supreme Court, hence, the same also cannot be a constraint to dispose of this application on merits. It is further claimed that matter before Hon'ble High Court, Intervenor was not a party. Hence, applicant clears first hurdle.

19. The other aspect which has been highlighted on behalf of the Intervenor is that once the Corporate Debtor is admitted into CIRP, proceedings become in *rem*. There is no doubt about it. Even the Hon'ble Supreme Court in the case of Swiss Ribbons has also held so. It has also been held by Hon'ble Supreme Court in that case that Adjudicating Authority while considering an application for setting aside the order of CIRP under Rule 11 of NCLT Rules, 2016 must take into consideration all relevant factors and after hearing concerned parties, may allow or reject an application filed for withdrawal of CIRP. One more important aspect which needs to be kept in mind while granting opportunity of hearing to all stakeholders is that there is no provision either in the Code or Regulations made there-under to issue notice of hearing to such

stakeholders even if they have not approached this Authority in opposing the application for withdrawal of CIRP. Similarly, there is no provision to give opportunity of hearing mandatorily to creditors who have filed their claims under Section 15 r.w Section 18 of IBC, 2016 after issuance of public advertisement to file their claims during the CIRP process or to such creditors whose applications under Section 7 or 9 of IBC, 2016 are pending though they have not opposed the application filed for withdrawal of CIRP. Thus, an opportunity of hearing can be given only to those creditors/stakeholders who come before this Adjudicating Authority during consideration of the application filed either under Section 12A of IBC, 2016 or Rule 11 of NCLT Rules, 2016 for setting aside an order of admission of a Corporate Debtor into CIRP. This is also so because if all the claimants have to be given opportunity even if they have not approached this Adjudicating Authority in the withdrawal of CIRP proceedings, that by-itself would make the process of withdrawal redundant as timelines are sacrosanct under IBC, 2016 and giving opportunity to all such stakeholders would defeat the very purpose of bringing Section 12A of IBC, 2016 on statute. Similar position applies to proceedings under Rule 11 of NCLT Rules, 2016 as the basic object of IBC, 2016 cannot be defeated even when the inherent jurisdiction under Rule 11 is exercised. In the present case, after the admission of a Corporate Debtor into CIRP, various applications filed under Section 9 of IBC, 2016 were disposed of in view of the admission of the Corporate Debtor into CIRP and such creditors were directed to approach IRP. However, based upon the records, no such creditors have

approached this Authority opposing the withdrawal of CIRP. Further, other applications under Section 9 of IBC, 2016 are pending for disposal and such creditors have also not approached this Authority in these proceedings. As far as Section 7 of IBC, 2016 proceedings are concerned, one of the Intervenor M/s. DSP Investment Managers Pvt. Ltd has not filed any application under Section 7 of IBC, 2016 and there appears to be no legal limitation attached to filing of such application, hence, their interests cannot be prejudiced in any manner, if this application is allowed. In case of M/s. KKR India Financial Services Ltd, application filed under Section 7 of IBC, 2016 is already pending for disposal and their rights can be enforced in that application as per law, hence, withdrawal of CIRP of this application would also not affect their rights in any adverse manner. Thus, considering the above facts, legal position and following the decision of Hon'ble Supreme Court in the case of Swiss Ribbons, due opportunity of hearing has been given to the Intervenor, though, it has been vehemently argued that Intervenor have got no locus to be heard. Following the ratio of these decisions of Hon'ble NCLAT, we hold that if this application is allowed, no prejudice of whatsoever nature would be caused to the interests of both Intervenor. In fact, M/s. KKR India Financial Services has sought adjournment on hearing of this application on the ground that there was possibility of settlement between the two. Further, they have not filed application under Section 7 of IBC, 2016 independently nor it is their case that such application cannot be filed for any legal limitations attached thereto. Similar is the case with the other Intervenor. As far as

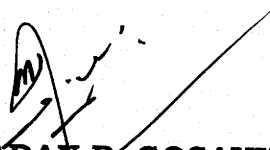
the litigation under Section 9 of IBC, 2016 being pending, the same principle applies and their interests would not be harmed if this application is allowed. Apart from the Operational Creditors and Financial Creditors there are other stakeholders such as large number of retail shareholders as Corporate Debtor is a listed company whose interests are to be considered also. In this category, other major stakeholders are employees/workmen whose families depend on the functioning and running of the Corporate Debtor as a going concern. Other categories of stakeholders are Financial Creditors and Operational Creditors or other creditors and the society as a whole who benefit from the economic activity being undertaken by Corporate Debtor. Further, considering the structure of IBC, 2016, it would be in the interests of all stakeholders including secured Financial Creditors and Operational Creditors to ensure the Corporate Debtor is not put into CIRP to the extent possible, otherwise, there may be a situation of substantial hair-cuts for all categories of stakeholders and in that process Operational Creditors being unsecured creditors including Government would be the main sufferers as they may even not get anything either in resolution or liquidation of the Corporate Debtor. Even otherwise, in the facts of the present case, having regard to the amount claimed by various Operational Creditors and financial resources available with the Corporate Debtor to meet such liabilities leads to a conclusion that Corporate Debtor can meet such obligations in the case of Operational Creditors where there is no dispute raised by Corporate Debtor and,

hence, such Operational Creditors stand to recover their undisputed amount in full through this process.

20. The applicant has also claimed that IRP was taking instructions from lenders instead of suspended management which was not in the interests of the Corporate Debtor as this amounted to interference in the going concern status of the Corporate Debtor. We do not find any merit in this contention of the applicant as no material has been brought on record to substantiate the same. Further, financial lenders eventually constitute COC, hence, during the period where there is stay on the constitution of COC, instructions can be taken from such lenders as in some cases on constitution of COC, its approval may be required under relevant provisions of IBC, 2016. It is further to be pointed out that the applicant has also not brought any material on record as to how the assistance of the suspended Board of Directors or its employees was required which was not obtained by the IRP. It is to be noted that in the present case IRP is discharging its functions only to carry on the Corporate Debtor as a going concern and no other party such as employees or Operational Creditors or lenders have shown only grievance against the conduct of the IRP. Thus, for these reasons, this plea of the Corporate Debtor is rejected.
21. Thus, considering the all legal aspects and applying the same to the facts and circumstances of the case, we are of the view that interests of all stakeholders will remain intact, if this application is allowed.

22. Accordingly, this application is allowed and the Corporate Debtor is released from all rigours of CIRP. The Corporate Debtor is directed to pay fee and all expenses incurred by the IRP since commencement of CIRP till date. The IRP is also directed to hand over all records and documents of the Corporate Debtor to the management of the Corporate Debtor forthwith. The IRP is further directed to hand over the possession of the Corporate Debtor to its management forthwith. However, in view of pending applications under Section 7 and 9 of IBC, 2016, we make it clear that the Suspended Management will not act against the interests of the Corporate Debtor or such creditors by siphoning off funds or otherwise.
23. Application filed under Rule 11 of NCLT Rules, 2016 stands allowed and disposed of in terms indicated above. Inv. P. 1 (AHM)/2021 in IA 18 of 2021 stands rejected.
24. Urgent certified copy of this order, if applied for, be issued upon compliance with all requisite formalities.


(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)


(MADAN B. GOSAVI)
MEMBER (JUDICIAL)

Dated this the 29th day of June, 2021

Rajeev K Sen/Stenographer